

## The Laws of Others: A Jurisprudential Reflection on *The Lives of Others*

By Kristen Hutchens, Jessica Nelson, Elizabeth Plachta, Jonathan Rosamond, Nick Scannavino, Vimi Shad and Russell Miller\*

### A. Introduction

The movie *The Lives of Others* is not simply a voyage back in time.<sup>1</sup> For many, it is an introduction to an entirely new world, albeit a world with troubling resonance for the so-called “War on Terror.”<sup>2</sup> Director Florian Henckel von Donnersmarck peels back the iron curtain to expose the day-to-day lives of an unlikely assemblage of artists, spies and Apparatchiks in East Germany right before the regime fell. Several themes are presented: the emptiness of power perverts an ideology and those who should wield the public’s trust; the goodwill of a cold-hearted, intrusive spy becomes the salvation of a reluctant revolutionary; a neighbor’s desire for self-preservation costs a lover her life. This widely acclaimed movie underscores the fragility and insecurity of normal life in East Germany and invites movie-watchers to reflect on the fragile quality of their present-day business, personal and social relationships.<sup>3</sup>

The Oscar-winning portrayal of ordinary people in extraordinary times evokes respect and sensitivity. In fact, *The Lives of Others* challenges lawyers to reconsider what should be done, after the fact, about choices made in complicated times. Some call this “transitional justice.” Inga Markovits, focusing on German reunification, has written eloquently to criticize the instrumentalization of transitional justice for the construction of a preferred articulation of history. “In public memory,” she explains, “the present rules over the past. . . . Official history

---

\* Spring 2008 Transnational Law Seminar (German Law Journal) at Washington & Lee University School of Law. Email: plachtae@wlu.edu.

<sup>1</sup> THE LIVES OF OTHERS (Buena Vista International 2006).

<sup>2</sup> Zbigniew Brzezinski, *Terrorized by ‘War on Terror’*, WASHINGTON POST, Mar. 25, 2007, at B1.

<sup>3</sup> See, e.g., *Seven Awards to German Stasi Film*, BBC, May 13, 2006.

is chosen as much as it is inherited. . . . Law seems a likely candidate to help in this selection process.”<sup>4</sup>

The film also raises questions about transitional justice because, at least in this film, those responsible for the destruction of the lives of others are left to grapple with their guilt by themselves. There are no sensational trials, like those in Nuremberg, which played an important, symbolic role in post-World War II Germany.<sup>5</sup> Thus, after the emotions stirred by the film subsided, we were compelled to ask: How would the law respond to the remorseless government officials who authored the film’s tragic events through their self-indulgent violations of others’ dignity? How would the law respond to the former Stasi agent at the center of the film, who is redeemed but certainly still guilty of significant affronts to human dignity? How would the law respond to the almost pathetic cooperation dragged out of an insecure and drug addled actress?

In this note we consider the answers given to similar questions by the German Federal Constitutional Court. We argue that, where Markovits finds cause to be critical of the statutory regime implemented in the face of reunification, the Court’s jurisprudence was more sympathetic and nuanced. As so often has been the case throughout its nearly 60 years of service, the Federal Constitutional Court managed to speak reason and restraint to passion, to strike a healing tone. It is our view that the Court, like *The Lives of Others*, understood Richard Schröder’s admonition:

It is precisely here in the Stasi problem that Westerners lack something unrecoverable: they didn’t experience it all themselves. . . . They have to let us tell them how it was, and at least listen, even if it’s hard. And after this turbulent [reunification] year, we Easterners have to make the effort to remember correctly how we lived and thought before this year, before revelations broke over us.<sup>6</sup>

---

<sup>4</sup> Inga Markovits, *Selective Memory: How the Law Affects What We Remember and Forget about the Past – The Case of East Germany*, 35 LAW & SOCIETY REVIEW 513-14 (2001).

<sup>5</sup> See ROBERT E. CONOT, JUSTICE AT NUREMBERG (1993); JUDGMENT AT NUREMBERG (United Artists 1961).

<sup>6</sup> Richard Schröder, FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), Jan. 2, 1991 (quoted in JÜRGEN HABERMAS, *The Normative Deficits of Unification*, in THE PAST AS FUTURE 33, 50 (Michael Haller ed., Max Pensky trans., 1994)).

Still, would the Court's sensitivity be enough to deliver the kind of justice von Donnersmarck's fine film does?

## B. Reunification and Transitional Justice

Since the unification of East and West Germany, the reunified German polity - policymakers and courts - have considered a range of matters dealing with "transitional justice." As A. James McAdams chronicled in his excellent survey entitled *Judging the Past in Unified Germany*,<sup>7</sup> these efforts included a rare handful of criminal prosecutions, disputes over the return of, or restitution for, expropriated property, and the documentation and public dissemination of information about the East German regime's abuses. However, of the many ways in which reunified Germany grappled with the East German past, we were most interested in what McAdams called "Disqualifying Justice: The Search for Stasi Collaborators."<sup>8</sup> Claus Offe also adopted the term "disqualification" in describing this facet of Germany's transitional justice regime:

Disqualification (or proscription) refers to acts, mandated by law, designed to deprive categories of perpetrators, be they natural or legal persons, of (some measure of) their material possessions and civic status, which are deemed to have been either unrightfully obtained under the old regime or acquired due to the function they performed under (and in active support of) the old regime, in which case they are not liable to criminal prosecution.<sup>9</sup>

In the context of German unification, disqualification primarily took the form of treaty provisions (later codified as statutes) that permitted employers to vet former East German citizens who were retained in their former positions or who applied for new positions in reunified Germany. The aim of this scrutiny was to disqualify for new positions or terminate the on-going employment of Stasi and high-ranking Socialist Unity Party leaders (East Germany's all-pervasive and all-powerful communist party).<sup>10</sup> Under the Unification Treaty, disqualification was justified "if

---

<sup>7</sup> A. JAMES MCADAMS, *JUDGING THE PAST IN UNIFIED GERMANY* (2001).

<sup>8</sup> *Id.* at 55-87.

<sup>9</sup> CLAUD OFFE, *VARIETIES OF TRANSITION* 88 (1996).

<sup>10</sup> Disqualification was extended to pension rights by the statutory regime, but the Federal Constitutional Court ruled these statutory provisions unconstitutional.

an employee taken over from the German Democratic Republic worked for the former Ministry for State Security/Office of National Security and in consequence the employer cannot reasonably be expected to continue the employment relationship.”<sup>11</sup> Besides the overarching aim of condemning East Germany’s Stasi and other elites, the disqualification regime pursued these two goals: (1) removing from public service in reunified Germany those East Germans whose past raised significant doubts about their aptitude because their commitment to transparent, democratic institutions could be questioned; and (2) preserving the reputation of and public trust in the reunified public institutions for which they might have worked, which otherwise could have suffered as a result of their association with tainted East Germans.

Disqualification drew our special attention for a number of reasons. First, *The Lives of Others* presented little opportunity to consider the other approaches to transitional justice. Criminal prosecutions of East Germans were very rare, limited to only the most highly-placed government officials or targeting only those who participated in the worst of the regime’s abuses. These cases came to be dominated by a few trials concerned with the murder of East Germans while they fled across the border to West Germany, many of whom were shot while scaling the Berlin Wall.<sup>12</sup> It seems to us that neither the seniority of the film’s characters nor their abuses would have merited criminal prosecutions under such a limited implementation of that form of transitional justice. After all, the film is not about leading figures in the Socialist Unity Party (SED) or members of the “secretive National Defense Counsel.”<sup>13</sup> And, while the Stasi actions portrayed in the film involve an unnerving degree of disregard for human dignity, no one is implicated in murder. Additionally, the issue of expropriated property does not feature in the film. Finally, while the film briefly (and for dramatic import) touches upon Germany’s efforts to document and publicize the abuses of the East German regime, the question of the necessity and efficacy of the so-called Gauck Agency’s efforts in this regard is not central to the film’s moral and emotional claims.

Instead, we thought the film’s characters would be most likely to come into contact with Germany’s transitional justice regime under McAdams’ and Offe’s rubric:

---

<sup>11</sup> See Fink Case, BVerfGE 96, 189, translated in 3 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, QUESTIONS OF LAW ARISING FROM GERMAN UNIFICATION, 418 (2005); Treaty Between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, August 31, 1990, BGBl. II:885, Art. 20 (1) and Annex I, Chapter XIX, Subject Area A, part III, no. 1, subsection 5, no. 2.

<sup>12</sup> See Wall Shooting Case, BVerfGE 95, 96.

<sup>13</sup> MCADAMS, *supra* note 7, at 35.

“disqualifying justice.”<sup>14</sup> The film, after all, is about the Stasi and it begs the question of the impact of this facet of Germany’s transitional justice by giving us a glimpse of the (surviving) characters as they go about their post-reunification lives. Thus, our inquiry became: would the film’s characters be disqualified for employment or dismissed from positions based on the Stasi associations or activities attributed to them in the film?

We considered two landmark Federal Constitutional Court cases in this area.

The first case, decided in 1997, is known as the *Fink Case*.<sup>15</sup> In *Fink*, the German Federal Constitutional Court found that the termination of the Rector of Berlin’s Humboldt University did not constitute a violation of the Rector’s constitutionally protected interests in dignity,<sup>16</sup> personality,<sup>17</sup> equality,<sup>18</sup> or occupational freedom.<sup>19</sup> After reunification it was revealed that Rector Heinrich Fink had been a paid *inoffizielle Mitarbeiter* (IM or unofficial informant) for the Stasi for over 20 years, at one point receiving a commendation for his service.<sup>20</sup> The Court was satisfied that the statutes that provided for the disqualification of former Stasi were constitutionally sound on their face and that they had been constitutionally interpreted and applied in Fink’s case. The sensitive edge to a case that nonetheless upheld Fink’s termination can be found in the language used by the Court and the standard it applied in reaching its conclusions. While recognizing that termination is constitutionally permissible, even if terminated employees “are usually hit hard by the loss of their place of work,”<sup>21</sup> the Court demanded that disqualification be viewed as an exceptional measure undertaken only after careful individual assessment.<sup>22</sup> As if conscious of Markovits’ critique, and deploying a degree of understanding similar to von Donnersmarck’s, the Court insisted that the Basic

---

<sup>14</sup> McAdams, Offe and Markovits remark that only a small number of East Germans were ultimately affected by the disqualification regime. Market forces proved far more debilitating. See MCADAMS, *supra* note 7; OFFE, *supra* note 9; Markovits, *supra* note 4.

<sup>15</sup> See, *Fink Case*, BVerfGE 96, 189.

<sup>16</sup> *Id.* at 426.

<sup>17</sup> *Id.* at 421.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 422.

<sup>20</sup> *Id.* at 420.

<sup>21</sup> *Id.* at 423.

<sup>22</sup> *Id.* at 423-24.

Law's protections precluded any resort to formalisms or tropes. Thus, in finding that the ordinary courts' handling of Fink's case presented no constitutional violations, the Court found that the courts had not relied on the formal basis of Fink's proven Stasi affiliation alone.<sup>23</sup> The ordinary courts, as the constitution required, had engaged in an individual consideration of Fink's case, with regard to the nature of his Stasi affiliation and the character of the job from which he was being terminated. The Court was particularly satisfied that the ordinary courts had duly considered the mitigation proffered by Fink: that his lengthy service had been passive (the Stasi extracted information, or "milked" him for information); that there was no evidence of concrete harm resulting from his service; and that his current colleagues at the university overwhelmingly supported his continuing employment.<sup>24</sup> These points, the Court concluded, had been fairly weighed, and been found insufficient to overcome the fact that Fink's "knowing collaboration" with the Stasi strongly called into question his integrity. This was aggravated by the prominence and institutional significance of his position as Rector of the university.

The second case, also decided in 1997, is known as the *Stasi Questionnaire Case*.<sup>25</sup> *Questionnaire*, involving three distinct cases of disqualification, established the general constitutionality of examining former East German civil servants, via questionnaires, about their association with the Stasi or the SED in order to assess their employability as civil servants in reunified Germany.<sup>26</sup> However, in another display of sensitivity and restraint that would appeal to both Markovits and von Donnersmarck, the Court found the disqualifications in all three cases to constitute a violation of the complainants' constitutionally protected occupational freedom.<sup>27</sup> Again insisting that disqualification proceed on the basis of individual considerations rather than formalisms and generalizations, the Court found that mitigating circumstances in the cases should have counseled against termination. The first of the three cases grouped under the Court's *Questionnaire* decision involved an East German special education teacher who had been retained for employment in reunified Germany but subsequently was fired for "lying" about

---

<sup>23</sup> *Id.* at 425-26.

<sup>24</sup> *Id.* at 420.

<sup>25</sup> See *Stasi Questionnaire Case* BVerfGE 96, 171, translated in 3 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, QUESTIONS OF LAW ARISING FROM GERMAN UNIFICATION, 1973-2004 358 (2005).

<sup>26</sup> *Id.* at 367.

<sup>27</sup> See *id.* at 368. For the second and third cases grouped as part of the Court's *Questionnaire* decision, the Court found a violation of both Article 2 (1) and Article 12 (1) of the Basic Law.

her involvement with the SED when being questioned about her past. When asked about her party affiliation the teacher said she had been a member of the party's "leadership," but she failed to specify that she served as an honorary party secretary from 1985-1989. The Court found disqualification on the basis of this "lie" to violate the complainant's constitutional right to occupational freedom. The Court accepted that the half-truth was relevant to the teacher's credibility and, thus, her aptitude for public service, particularly as a teacher. But the Court was persuaded that the decision regarding disqualification had been reached "without making a final assessment of the special circumstances of the individual case."<sup>28</sup> An individual assessment, the Court explained, would have credited the facts that the teacher had not sought seriously to conceal her party affiliation and that, in spite of the lie, the employer easily could (and did) discover the teacher's actual role in the party. Ultimately, the fact of the teacher's party affiliation would constitutionally justify disqualification, but not her failure to be thoroughly forthcoming in response to the questionnaire.<sup>29</sup>

The Court also found the lack of individual consideration in the two other cases grouped under the *Questionnaire* decision to be constitutionally fatal. In both cases the individual consideration required by the right to personality and occupational freedom would have credited the disqualified employees for the fact that their affiliation with the Stasi occurred over a brief period nearly three decades prior to the collapse of the East German regime. In one case, in response to the questionnaire, an East German motor-pool employee who had retained his position in reunified Germany disclaimed service as a Stasi IM but instead admitted "consulting" with the Stasi on minor statistical matters associated with his job. The records, however, revealed that the complainant had been a rather inconsequential and ineffective Stasi IM for only two months in 1965. When confronted with this information the complainant explained that his earlier resistance to Stasi overtures had cost him his place as a student at the university and that he agreed to serve as an IM only because he hoped it would better position him to flee East Germany. The second of the two related cases involved a warehouse employee in the East German Army who also disclaimed any affiliation with the Stasi when responding to the questionnaire. It was later revealed that he entered into collaboration with the Stasi for little over a year, from March 1965 through May 1966. His service with the Stasi, like that of the motor-pool employee, involved only minimal and inconsequential contacts.

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

The Court struck a very accommodating tone in response to these cases. The valid role of inquiring into East Germans' past, the Court explained, must be accompanied by individual assessment, including a consideration of the impact and burden of disqualification on the disqualified employee.<sup>30</sup> Most problematic for the Court was the remoteness of the collaborations. The individual assessment required by the constitution, the Court explained, required that employers and administrators take the "time factor" into account.<sup>31</sup> The Court concluded that, as the vetting of East Germans sought to make reliable conclusions as to their present attitudes,<sup>32</sup> Stasi activities that preceded 1970 should have no or only extremely slight importance.<sup>33</sup> The Court conceded, however, that extremely serious Stasi activity that took place prior to 1970 could be given its due weight in the required independent assessment.<sup>34</sup>

In the *Fink* and *Questionnaire* cases, the Federal Constitutional Court demonstrated considerable sympathy for the fate of former East Germans trying to make their way in reunified Germany. At the very least, the Court's interpretation of the constitution ensured that disqualification would not be allowed on the basis of simple contacts with the Stasi or SED. But, in insisting on individual assessment of each case, the Court only selectively engaged with or credited the mitigation presented by the former East Germans. On one hand, the Court implied that the degree of the teacher's lie was relevant and the Court made much of the many unblemished years that had lapsed since the Stasi affiliation proven in the other *Questionnaire* cases. On the other hand, the Court mentioned but did not explicitly credit the harmlessness of the Stasi activities in these cases. The Court flatly dismissed similar mitigation in the *Fink* case while also disregarding the strong contemporary support shown for Fink by his colleagues. And, while the Court voiced concern about the impact of disqualification on the employees, the awareness of the burden placed on the disqualified employees does not play a determinative role in the individual assessment the Court proscribes.

As we turn now to a consideration of how the film's characters would fare in the face of this jurisprudence, we are both hopeful and anxious about the law's ability to provide as much justice as the film.

---

<sup>30</sup> *Id.* at 369.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 370.

<sup>34</sup> *Id.*

### C. Character Analysis

We applied the principles of the *Fink* and *Questionnaire* cases to three characters from *The Lives of Others* to determine their fate at the hands of the law, should they to be subject to the disqualification regime described above.

Notably, we do not consider the film's central character Georg Dreyman. It is our impression that Dreyman could not be accused of any degree of cooperation with the Stasi. Certainly, Dreyman understood that the GDR authorities firmly regulated and frequently censored the arts. And the film does not make clear the degree to which his professional success within those constraints was the result of a lack of dissenting courage, a sincere embrace of the regime's socialist ideology, or the sheer power of its artistry. All of these possibilities are given their due in the course of the film. Still, we were persuaded that Dreyman would be exonerated of any, even minimal involvement with the Stasi and, thus, would be able to offer his innocence as a defense against any effort to disqualify or dismiss him from employment.

Other characters in the film, each having some greater or lesser degree of association with the Stasi, present more interesting cases.

#### *I. Minister Bruno Hempf and Obersleutnant Anton Grubitz*

Minster Bruno Hempf and Lieutenant Colonel Anton Grubitz were quintessential examples of highly-placed members of the Socialist Unity Party of Germany (SED) and active Stasi agents. Hempf was the head of the Culture Department at the Ministry for State Security. Grubitz supervised Stasi agents as they collected intelligence on their fellow East Germans. The characters' roles in the Stasi regime are exemplified in the actions they took against Dreyman. While attending the premier of Dreyman's new play, Hempf informed Grubitz of his doubts about Dreyman's political loyalty to the SED, and implied that he would support the surveillance of Dreyman. Despite his claims of suspected political opposition, Hempf's true motivation for the surveillance operation stemmed from his infatuation with Christa-Maria Sieland, Dreyman's girlfriend and the leading actress in the play. In fact, Hempf abused his power by essentially forcing Sieland to have an affair with him or risk losing her acting career. Grubitz was driven to cooperate by an equally base and personal motive: his desire to advance his career.

Thankfully, the Federal Constitutional Court's insistence on an individual assessment in disqualification decisions leaves little room for hope for Hempf and Grubitz. For these thoroughly corrupt and compromised East Germans

disqualification from employment in unified Germany is none too harsh a penalty. They deserve worse. They held significant positions with the Stasi through the desperate last months of the East German regime. They reveled in the use – and abuse – of their power. The film’s portrayal of these characters points up very little mitigation that might overcome this significant taint. We recall the emphasis the Court placed on the depth of Fink’s Stasi involvement in its decision to find his disqualification constitutionally acceptable.<sup>35</sup> We are also reminded of the Court’s admonition, in *Questionnaire*, that serious Stasi affiliation be given significant weight in a disqualification decision even if it took place decades ago.<sup>36</sup>

Unfortunately, however, Hempf and Grubitz might have escaped the hardship of disqualification. McAdams reports that the exact number of disqualifications is not known, but he estimates slightly more than 42,000 civil service dismissals.<sup>37</sup> This stands in stark contrast to the total number of Stasi agents and collaborators, estimated at more than half a million over the 40 year history of the GDR.<sup>38</sup> In total, less than half of those found to have Stasi or SED affiliations were eventually disqualified for or dismissed from public sector positions.<sup>39</sup> Furthermore, McAdams reports that “private industry was less inclined to dismiss employees for [Stasi] activity.”<sup>40</sup> He estimates a mere 12,000 disqualifications from the private sector.<sup>41</sup> The odds seem good that Hempf and Grubitz might have avoided the burdens of disqualification and gone on to enjoy unhindered lives in reunified

---

<sup>35</sup> See Fink Case, BVerfGE 96, 189.

<sup>36</sup> See Stasi Questionnaire Case, BVerfGE 96, 171.

<sup>37</sup> MCADAMS, *supra* note 7, at 73.

<sup>38</sup> MCADAMS, *supra* note 7, at 70. This is a large number, no doubt. McAdams compares it to the much smaller degree of Gestapo penetration into German society during the Nazi era. *Id.* But it is considerably smaller than is often assumed. Where some suggest that as many as a third of all East Germans were in some way affiliated with the Stasi, McAdams reaches a much smaller figure at the time of the GDR’s collapse: “at most, about 2.5 percent, or 265,200 persons out of 10,520,000 citizens between the ages of 18 and 65.” *Id.*

<sup>39</sup> *Id.* at 73.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* McAdams notes that “there can be little doubt that the scores of new companies and businesses that sprang up throughout the former GDR in the first half of the 1990s had the wherewithal to undertake sweeping review of their ranks to match the most aggressive [public sector] campaigns. . . . However, as long as skilled labor was in short supply in the East, private employers were apparently more inclined to value the technical abilities and training of those who worked for them than to concern themselves with ancient history. As a consequence, as late as mid-1994, private firms had submitted only about 10,000 requests for background checks to the [Gauck Agency] in marked contrast to the well over 1.2 million inquiries filed by public agencies over the same period.” *Id.* at 76 (citations omitted).

Germany. Thus, the tense meeting between Dreyman and an unreformed, unrepentant and prospering Hempf near the film's end is entirely plausible.<sup>42</sup>

## II. *Hauptmann Gerd Wiesler*

Gerd Wiesler is an idealistic supporter of the socialist regime and a dedicated Stasi agent. At the start of the film he is shown interrogating a prisoner who is believed to be an accomplice to someone who fled to the West. A recording of that interrogation is then used in a class he is teaching on Stasi interrogation techniques. As an indication of Wiesler's commitment to the Stasi cause and his comfort with the abusive methods he is teaching, when one of the students points out that the interrogation is inhumane Wiesler surreptitiously makes note of the student who made the comment, presumably to exclude the student from the training program. Wiesler is asked to lead the surveillance of Dreyman, of whom he has already expressed suspicions. He is told the reason for the surveillance is Dreyman's suspected Western sympathies. However, Wiesler discovers that the real reason for the surveillance is to find a way to eliminate Dreyman as Hempf's competitor for Christa-Maria. The resulting disillusionment, combined with the beauty and truth he discovers in Dreyman's life during his surveillance (especially when juxtaposed with his own, soulless existence), weighs heavily on Wiesler. Fueled by these doubts Wiesler abandons his role as pursuer and begins to protect Dreyman by changing his surveillance notes to remove any basis for suspicion. Wiesler pays a high professional price for his conversion. Near the end of the film we see him hunched over a small desk opening mail (presumably for surveillance and censorship purposes) in a decaying basement. But the courage of Wiesler's convictions is eventually revealed to Dreyman who offers him poignant absolution in the film's heartbreaking final scene.

Two facets distinguish Wiesler's case from the straightforward cases of Hempf and Grubitz. All three are equally implicated in Stasi abuses as active Stasi agents. But von Donnersmarck carefully establishes a range of convincing mitigation for Wiesler that is altogether lacking in the Hempf and Grubitz characters. First, Wiesler participates in the Stasi mission out of his sincerely held political convictions and not out of self-interest ("we are the shield and sword of the Party," he approvingly notes). Second, Wiesler's conversion casts his character in a redemptive and highly sympathetic light. Furthermore, Wiesler's conversion is not merely passive, but leads him to risk severe consequences by acting to protect Dreyman. Third, Wiesler's vulnerabilities are repeatedly exposed throughout the

---

<sup>42</sup> See also SIMON BURNETT, *GHOST STRASSE - GERMANY'S EAST TRAPPED BETWEEN PAST AND PRESENT* 127-140 (2007) (describing a meeting of former Stasi officers at which one of the attendees is quoted as saying "there is no need for regrets' about the past." Burnett reports that this "won him sustained applause.").

film, and are made more poignant by his harsh appearance and stolid existence. Wiesler is arguably the most profound of all the film's characters.

Sadly, the disqualification regime, despite the accommodating tone struck by the Federal Constitutional Court, lacks the capacity to credit Wiesler for any of this mitigation. His Stasi credentials are unimpeachable and he doesn't have the advantage of the limited forms of mitigation the Court considered in *Fink* and *Questionnaire*. His Stasi activity was most certainly of grave consequence for many victims.<sup>43</sup> There was not a lapse of several decades between a brief stint as a Stasi collaborator in the 1960s and reunification at the beginning of the 1990s.<sup>44</sup> If the Court could find no constitutional infirmity in Fink's disqualification, even with residual doubt about the nature and extent of Fink's Stasi activity and the support of many of Fink's post-unification colleagues, there can be little reason to hope that Wiesler would have a different fate.<sup>45</sup>

Wiesler's case magnifies the essential difficulties that confront transitional justice. He is guilty and he deserves our sympathy. Perhaps we can be satisfied with a world in which the law holds him to account while art, like von Donnersmarck's film, redeems him.

## II. *Christa-Maria Sieland*

At the beginning of the film, Christa-Maria Sieland is toasted as "the loveliest pearl of the GDR." Almost in spite of herself, Sieland lives up to this high praise. Throughout the movie she is pursued and practically mauled by Hempf. Sieland eventually gives into his advances for the sake of her acting career. She later cuts off the relationship when Wiesler, inspired by the intimate portrait of Dreyman and Sieland he has acquired through his surveillance, acts like a mere anonymous theater-goer to convince Sieland in a brief encounter that she does not need the stage to pursue her art. Angered by Sieland's rebuff, Hempf has her arrested for buying illegal prescription drugs, to which she is addicted. It is implied that Hempf had facilitated that addiction during their affair. Rather than face punishment, Sieland easily succumbs to interrogation and informs the Stasi of where Dreyman has hidden evidence of his disloyalty to the East German regime. In a tragic flourish, when she realizes what she has done, Sieland commits suicide by dashing into traffic to be hit by a car.

---

<sup>43</sup> See Stasi Questionnaire Case, BVerfGE 96, 171.

<sup>44</sup> *Id.*

<sup>45</sup> Of course, Wiesler is just as likely to benefit from the holes in the disqualification regime discussed in relation to Hempf and Grbuitz.

Ironically, had Sieland survived the film, she might have evaded disqualification. Certainly, her chances of doing so would have been greater than Wiesler's. Speaking for this possibility are two mitigating factors. First, like some of the cases grouped under the Court's *Questionnaire* decision, she could point to the brief and inconsequential nature of her Stasi collaboration. The only recorded example of her affiliation with the Stasi would have been the IM agreement she signed in the moments before the Stasi unsuccessfully (thanks to Wiesler's intervention) sought to definitively incriminate Dreyman. We cannot know if her insecurities and addictions would have fueled a prolonged and more effective collaboration (she pleads with the Stasi following her arrest by suggesting that she could inform on the many artists with whom she associates). But, with nothing more than the brief and ineffectual collaboration revealed in the film, she might have hoped for understanding under the Court's mandated individual assessment of her taint.

The Court proved less interested, in the *Questionnaire* case, in crediting as mitigation claims that collaboration with the Stasi was the result of duress, like that faced by Sieland.<sup>46</sup> In *Fink* the Court concluded that collaborators themselves were responsible for "[t]he blemish on their character,...."<sup>47</sup> On this basis it seems likely that neither Sieland's natural proclivity for succumbing to duress nor the real threats visited upon her by the Stasi would have counted to her benefit in an individual assessment of her taint were she to face disqualification scrutiny in unified Germany.

#### D. Conclusion

We remain impressed with the considerate interpretation the Federal Constitutional Court gave the constitutional provisions implicated by the reunification disqualification regime, even as it seems unlikely that Sieland and Wiesler would benefit much from the narrow scope of the consideration the Court ultimately practiced in *Fink* and *Questionnaire*. The law is the law, after all, and collaboration with a great evil like the Stasi should not go unremarked. But, we are thankful that the Court signaled its understanding that the paths to such collaboration are contingent, complex, cloudy. None of the Court's justices had lived the lives of the others across the wall and they seem to appreciate that fact. Certainly, von Donnersmarck knows this.

---

<sup>46</sup> See Stasi Questionnaire Case, BVerfGE 96, 171.

<sup>47</sup> See Fink Case, BVerfGE 96, 189.

