

CHAPTER 1

Practices of Restitution in the Aftermath

An Introduction

IT IS OVER EIGHTY YEARS SINCE 8 MAY 1945, which was the official end of the Second World War in Europe. On the anniversary of this day in Berlin in 2020, Germany's leaders sat at the *Central Memorial of the Federal Republic of Germany to the Victims of War and Tyranny* (known as the *Neue Wache*) whilst the Bundespräsident Frank-Walter Steinmeier gave a speech. Throughout the speech, Steinmeier contends the Germans have taken on a sense of 'historic responsibility':

It is only because we Germans look our past in the face and because we accept our historic responsibility that the peoples of the world have come to trust our country once more. [...] But what does our historic responsibility mean today, three-quarters of a century after the fact?¹

This book does not attempt to answer Steinmeier's rhetorical question regarding the meaning of 'historic responsibility' regarding the NS regime and the Holocaust in present-day Germany.² However, I engage with different forms of restitution and *Wiedergutmachung* (the German term for restitution) as an attempt to show what sort of practices may be

¹ Frank-Walter Steinmeier, 'Speech – 75 Anniversary of Liberation from National Socialism and End of WWII in Europe' (Neue Wache, Berlin, 8 May 2020).

² I use the term 'NS regime' to cover the period of time when Germany was ruled by the National Socialist Party from 1933 to the end of the Second World War in 1945 (commonly known in English as the Nazi Party). I use the term 'Holocaust' to describe the programmes of systematic murder, predominately of Jewish people, in mass executions, ghettos and death camps which were undertaken by the NS regime.

possible within different genres, and to demonstrate how some lawyers, writers and artists have responded to those events through their craft and artistic work.

As such, this book argues for a new understanding of restitutive practices. Both *Wiedergutmachung* and restitution are commonly recognised as being part of state and private law. However, I offer a different approach, describing how restitutive practices have also been taken up by texts and objects from other genres in the aftermath of the Second World War. Specifically, I am interested in how the material practices involved in the ‘making’ of these texts and objects can be an additional way of taking responsibility for restitution. I use the phrase ‘making-good-again’ – the literal translation of *Wiedergutmachung* – to describe this mode of material responsibility.³ My examples range across four genres: legal writing in the form of a gloss, literature, visual art and memorial art. Even though most of these accounts of making-good-again are from aesthetic genres, I argue they move alongside law, offering us insights from other disciplines into the making and telling of jurisprudence.

To begin, I contextualise my use of the phrase ‘making-good-again’, setting it against the terms *Wiedergutmachung* and restitution, and situating my approach to responsibility alongside some of the histories of responsibility the aftermath. In part two of this introduction, I outline my approach to jurisprudence and the methods I use in this book.

1.1 WIEDERGUTMACHUNG, RESTITUTION AND RESPONSIBILITY

1.1.1 WIEDERGUTMACHUNG. *Wiedergutmachung* and restitution are not static terms. In Germany, the legal meanings of *Wiedergutmachung* have shifted over time.⁴ After the First World War, *Wiedergutmachung* was

³ The exact word-by-word translation is: ‘again-good-making’ but this doesn’t make practical sense. Unless otherwise cited, all translations from the German are my own.

⁴ According to the Grimm’s Dictionary, the conjoined verb *gutmachen* in the sense of ‘replace’ and ‘pay’ was in use since the early seventeenth century, and the expression *wieder gutmachen* in the sense of ‘restore a wrong’ and ‘compensate’ since the eighteenth century. Jacob Grimm and Wilhelm Grimm, *Deutsches Wörterbuch* ‘gutmachen’

primarily a legal term used to denote ‘reparations’,⁵ then its meaning shifted to ‘compensation’⁶ and it gradually became an overall umbrella term covering legislation enabling restitution and compensation payments to victims. *Wiedergutmachung* was in use throughout the different periods of legislative amendments in the 1950s and 1960s, but its use slowed in the 1970s, matching the lack of political and social interest in the restitution process in West Germany.⁷ It is on the same level as the similarly controversial phrase used to describe German responses to the NS regime and the Holocaust – *Vergangenheitsbewältigung* – which means overcoming, mastering or coming to terms with the past, and has a sense of violence and confrontation implied within it.⁸ It is also similar to the phrase *Aufarbeitung der Vergangenheit* (working through the past), often

1469 [Vol. 9]. See also ‘gutmachung’ as ‘compensation’ in the seventeenth century: Jacob Grimm and Wilhelm Grimm, *Deutsches Wörterbuch* ‘gutmachung’ 1470 [Vol. 9].

⁵ Adolf Hitler railed against the term in *Mein Kampf* in 1927 [Vol. 2], calling it ‘insolent as well as monstrous’. Cited in: Constantin Goscler, *Schuld und Schulden: die Politik der Wiedergutmachung für NS-Verfolgte seit 1945* (Wallstein, 2005) 14.

⁶ See for a comprehensive overview of the term: Thorsten Eitz and Georg Stötzel, ‘Wiedergutmachung’ in *Wörterbuch der ‘Vergangenheitsbewältigung’* [Vol. 1] (Olms, 2007) 677. German historian Hans Günter Hockerts contends that as a collective term, *Wiedergutmachung* has at least six parts, including: restitution for property; compensation for the lack of life chances, freedom, health, job prospects; special rulings, especially in the public service and social insurance areas; legal rehabilitation to set aside wrongful judgments; and as a group of treaties between nation-states. His final interpretation of *Wiedergutmachung*, however, is the most relevant to the way I am using it in this book: ‘the term can be understood in even broader way, if one takes it out of the areas of politics and law and opens it up to the great variety of forms of social initiatives and the philosophical and memorial-cultural working through of the histories of persecutors and persecuted’. Hans Günter Hockerts, ‘Wiedergutmachung in Deutschland. Eine historische Bilanz 1945–2000’ (2001) 49(2) *Vierteljahrshefte für Zeitgeschichte* 167, 169.

⁷ See, for example, Constantin Goscler, ‘Disputed Victims: The West German Discourse on Restitution for the Victims of Nazism’ in Manfred Berg and Bernd Schäfer (eds), *Historical Justice in International Perspective: How Societies Are Trying to Right the Wrongs of the Past* (German Historical Institute; Cambridge University Press, 2009).

⁸ Some scholars would order the practices of ‘making-good-again’ (as I describe them in this book) under the broader umbrella terminology of *Vergangenheitsbewältigung*. For instance, in their almost 500-page lexicon of *Vergangenheitsbewältigung*, Fischer and Lorenz bring together examples from ‘politics, justice, society, art, media and scholarship’. This includes a section on ‘Wiedergutmachung’ which is understood as a legislative process. Torben Fischer and Matthias N. Lorenz, *Lexikon der ‘Vergangenheitsbewältigung’ in Deutschland: Debatten- und Diskursgeschichte des Nationalsozialismus nach 1945* (transcript Verlag, 2015) 9.

known in English due to Adorno's essay *Was bedeutet: Aufarbeitung der Vergangenheit*, which was translated as 'The Meaning of Working through the Past'.⁹ This essay from 1959 gives an insight into contemporaneous criticisms of these processes and is sceptical of this 'highly suspect' term.¹⁰ Adorno writes 'its intention is to close the books on the past, and, if possible, even remove it from memory'.¹¹ Here, Pickford's translation uses a metaphor 'close the books on the past' to translate the original wording *Schlußstrich darunter ziehen* (which literally translated means 'to draw a final line').¹² Perhaps proving Adorno's point, similar wording was used six years later in the Bundestag regarding amendments to the legislation regarding restitution, with the term *Schlussgesetz* (Final Law) being added to the title. In that same year in the Bundestag, Chancellor Ludwig Erhard announced 'the end of the post-war era' in his inaugural speech, marking an overt political attempt to move on.¹³ The debates in West Germany from 1980 onwards regarding the insufficiency of payments (and groups which had been excluded) meant the term became more prominent again, but it was used critically, often written in quotation marks or described as the 'so-called' *Wiedergutmachung*. In current usage, in law, *Wiedergutmachung* most often describes an application for the return of property, usually an art work.¹⁴

1.1.2 RESTITUTION. I use the term 'restitution' as the English counterpart for *Wiedergutmachung*. I do so with reservations, as 'restitution'

⁹ Theodor W. Adorno, 'The Meaning of Working through the Past' in *Critical Models: Interventions and Catchwords*, Henry W. Pickford (trans) (Columbia University Press, 1998) 89.

¹⁰ Ibid.

¹¹ Ibid.

¹² On the metaphor of the book in the South African constitutional context, see Mark Antaki, 'From the Bridge to the Book: An Examination of South Africa's Transformative Constitutionalism's Neglected Metaphor' in Karin van Marle and Stewart Motha (eds) *Genres of Critique: Law, Aesthetics and Liminality* (Sun Press, 2013) 49. See also Carrol Clarkson's book, *Drawing the Line: Toward an Aesthetics of Transitional Justice* (Fordham University Press, 2014).

¹³ Goschler, 'Disputed Victims' 102.

¹⁴ German law professor Sophie Schönberger writes: 'if today in Germany one would speak about the unfinished *Wiedergutmachung* for NS injustices, then one would be speaking about the restitution of art works'. Sophie Schönberger, *Was heilt Kunst? Die späte Rückgabe von NS-Raubkunst als Mittel der Vergangenheitspolitik* (Wallstein, 2019) 143.

in English has a varied legal and social history. However, the impetus to do so comes from the exhortation by the German author, W. G. Sebald, that ‘only in literature [...] can there be a form of restitution’ – a challenge which forms the basis of my analysis in Chapter 3.¹⁵ In making these remarks, Sebald chose to use the term *Restitution* (which in German has an exclusively legal meaning) and not the more general and politicised *Wiedergutmachung*.

Using the term ‘restitution’ in English, however, comes with other legal and intellectual histories. The etymology of restitution is the ‘action of giving back’ (thirteenth century); ‘restoration to a former state’ (fourteenth century); ‘tendency to resume a previous position’ (seventeenth century).¹⁶ Note the way in which the phrase ‘tendency to resume a previous position’ refers to a movement – a change in positions, a shift. More pronounced is the etymology of redress, which refers to ‘set upright again’; ‘restore, amend, remedy’ from (fourteenth century) and amongst the meanings from *redresser* linked to dress: ‘make or put straight or right’ (fourteenth century).¹⁷

I deploy some of these meanings at different points in the book. For instance, the sense of movement implied in a change of positions – a restitutive shift – is explored particularly in Chapter 5 relating to postures of restitution, following the movement of the upright walker through the streets of Berlin. Similarly, my analysis of Anselm Kiefer and Gerhard Richter’s artistic works shows how these artists demonstrate the impossibility of making or putting something ‘straight’ or ‘right’. Generally, however, I follow the thread of restitution from the thirteenth century as an ‘action of giving back’ – at least, I hold on to the sense of a gesture in this phrase as I follow the *acts of making* by writers and artists. Of course, however, the important and compensatory gesture of ‘giving back’ to a victim or their descendants is never completed here. The crucial movement between subject – object – subject is

¹⁵ W. G. Sebald, ‘An Attempt at Restitution’ in Sven Meyer (ed), *Campo Santo*, Anthea Bell (trans) (Hamish Hamilton, 2005) 206, 215.

¹⁶ *The Concise Oxford Dictionary of English Etymology* (Oxford University Press, 2003) ‘restitution’.

¹⁷ *The Concise Oxford Dictionary of English Etymology* (Oxford University Press, 2003) ‘redress’.

different, and the objects take on a different valence.¹⁸ The conceptual restitutive return to a position *before the event* (here: the Second World War and the Holocaust) cannot and does not happen.

In the context of international politics and transitional justice, restitution has also taken on a broader, rhetorical power in the sense of an ideal of justice, following on from the Holocaust litigation in the US in the 1980s.¹⁹ From Aristotle onwards, therefore, the principle is the same: restitution has been seen as a form of corrective justice, a remedy for an imbalance.²⁰ Viewing restitution as a ‘political practice’, Magdalena Zolkos contends that it ‘interweaves three disparate impulses: reparative action; the undoing of wrongs; and the return of the *status quo ante*’.²¹ Zolkos follows the way restitution relies upon ‘diverse and often competing ideas of return’ and contends that, within formal legal and political concepts, there is an ‘interweaving of imaginaries and fantasies of undoing and repair’.²² Zolkos draws out how there is an envisioning at work here – a process of ‘imaginatively calling into being’ a different kind of society after atrocity.²³

Building on Zolkos’s understanding of the role of imagination, my orientation is more in line with Elazar Barkan’s ‘mosaic of recognition’.²⁴ Barkan contends that restitution, reparations and apologies are similar, but they have ‘different levels of acknowledgment that together create a mosaic of recognition by perpetrators for the need to

¹⁸ On the slippages between subject–object relations in theorising restitution, see Magdalena Zolkos, *Restitution and the Politics of Repair: Tropes, Imaginaries, Theory* (Edinburgh University Press, 2022).

¹⁹ See, for example, Michael J. Bazyler and Roger P. Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (New York University Press, 2006). Michael Marrus uses the term restitution ‘because it is very widely used and because it is probably better suited than any other to refer to the broad spectrum of issues at stake’. Michael R. Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (University of Wisconsin Press, 2009) 5.

²⁰ Graham Virgo, *The Principles of the Law of Restitution*, 3rd ed (Oxford University Press, 2015) 5.

²¹ Zolkos, *Restitution*, 3.

²² *Ibid* 3.

²³ *Ibid* 4–5.

²⁴ Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (W. W. Norton, 2000) xix.

amend past injustices. *Restitution* refers to the integrated picture that this mosaic creates and is thus not only a legal category but a cultural concept'.²⁵ I start from the premise that legal and aesthetic practices contribute to this 'mosaic of recognition' in the aftermath, and my analysis rests in the interstice of the parallel workings of different approaches.²⁶ This is not an argument relating to how legal or artistic genres 'should or should not respond' to the Holocaust.²⁷ Rather, I contend that we can see examples of people imagining how to grapple with questions of *Wiedergutmachung* and restitution across all different domains, institutions and genres. I ask the question: how do particular people at different moments try to respond to the NS regime or the Holocaust – how do they imagine and attempt to practice restitution in their legal and aesthetic work?

1.1.3 MAKING-GOOD-AGAIN. In this book, I argue for a new understanding of *Wiedergutmachung* and restitution as 'making-good-again', my translation of *Wiedergutmachung* into English. My use of making-good-again attends to (but does not follow) the histories of meaning which attach to both *Wiedergutmachung* and restitution, demarcating my area of focus. In addition, it also captures a key point about the way these accounts operate. Using making-good-again means *Wiedergutmachung* and restitution are approached in this book as having something to do with 'making' – 'making' is written into the description, held within the term. My argument is that the question of restitution attaches to this 'making' – to the material practices – which are involved

²⁵ Ibid. See also the use of reparations as a philosophical concept in: Jon Miller and Rahul Kumar (eds), *Reparations: Interdisciplinary Inquiries* (Oxford University Press, 2009). On the relationship between visual culture and reparations, see the special issue: Adrienne Huard and Gabrielle Moser, 'Editorial Introduction: Reparation and Visual Culture' (2022) 21(1) *Journal of Visual Culture* 3.

²⁶ In the field of transitional justice, there has been growing recognition of the role that aesthetics play in processes of transition after atrocity. See, for example, Clarkson, *Drawing the Line*; Lizelle Bisschoff and Stefanie Van de Peer (eds), *Art and Trauma in Africa: Representations of Reconciliation in Music, Visual Arts, Literature and Film* (I. B. Tauris, 2013); Peter D. Rush and Olivera Simic, *The Arts of Transitional Justice: Culture, Activism, and Memory after Atrocity* (Springer, 2014).

²⁷ This follows the approach to writing art history set out by Mark Godfrey in his book: *Abstraction and the Holocaust* (Yale University Press, 2007) 9.

in writing and creating and responding, emphasising ‘the centrality of crafting as a way of making sense of the world and the place of law [...] within it’.²⁸ I suggest restitutive practice can be seen within the moments of people working with and responding to texts and objects – it is in the doing, the action, the movements – and tied to things: to journals, to books, to paintings, to sculptures in the street.

But a book or a piece of art is not finished even if it has been published or has left the studio; it continues to work.²⁹ Audiences are involved in the ‘making’ of literary and art works through their reception and experience of them. Therefore, I acknowledge the dynamic nature of ‘making’ and expand out the question of restitution to different personae who are in different places.³⁰ In this book, it is not only the writer or artist, but also the reader, the beholder or the walker who is *implicated* – to use Michael Rothberg’s terminology – in giving an account of making-good-again, wherever they encounter the work.³¹

What emerges is a description of the works of a jurist (Dr Walter Schwarz), three writers (W. G. Sebald, Alexander Kluge and Heimrad Bäcker) and two visual artists (Anselm Kiefer and Gerhard Richter). I also look at how the city of Berlin engages with restitution through memorial art. I call the works attempts at ‘making-good-again’. In contrast to *Wiedergutmachung* or restitution, focusing on these responses – and the responsibilities they open up – means the conversation around conducting restitution becomes ontological, textural and personal. This is not intended to deny the importance or significance of state, legalistic and institutional responses to atrocity, nor is it a statement regarding the (in)adequacy of these modes. However, it is a deliberate move to

²⁸ Gary Watt, *The Making Sense of Politics, Media, and Law: Rhetorical Performance as Invention, Creation, Production* (Cambridge University Press, 2023) 4.

²⁹ On the ‘work’ of art, see Andrew Benjamin, *Art’s Philosophical Work* (Rowman & Littlefield, 2015).

³⁰ I use ‘persona’ as it has resonances across law and philosophy. In all jurisdictions, the concept of having a ‘legal personality’ (even if it is a fiction) is crucial to the possession of legal capacities, see *Australian Law Dictionary*. See further: Connal Parsley, ‘The Mask and Agamben: The Transitional Juridical Technics of Legal Relation’ (2010) 14 *Law Text Culture* 12.

³¹ Michael Rothberg, *The Implicated Subject: Beyond Victims and Perpetrators* (Stanford University Press, 2019).

widen the depth of field to focus on creativity and audience as another way to think about restitutive practice.

Unfolding throughout the book are accounts which imagine how one could take responsibility for restitution through material practice. I use ‘imagine’ here again as I frame the concept of restitution as something always incomplete: its conceptual promise of a return to wholeness (in aesthetics or in law) necessarily fails.³² These are practices of failure. For this reason, I do not use the past tense ‘made-good-again’ to suggest something (a work/practice/action) that is finished, scales all level. Rather, I use the active verb form ‘*making-good-again*’, teetering in the present, holding actions to people, to moments and to places.

As a result, my account of responsibility is not historic – however Steinmeier may interpret that phrase – but it is partial, situated and ongoing. I am also concerned about the dynamics of responsibility ‘to’ and responsibility ‘for’ restitution. Working under the persona of an author or an artist does not mean one has a moral obligation ‘to’ undertake any form of restitution in the aftermath.³³ Rather, I argue that through practising their craft, one can see examples of how one could practice responsibility ‘for’ restitution in a particular genre, be it within the confines of a novel, a photograph or a memorial designed to be placed in the street. I also recognise that in order to open up responses, often literature and

³² The impossibility of restitution has a conceptual parallel to the aporia held within Holocaust testimony, described by Hirsch and Spitzer as: ‘the contradiction between the necessity, on the one hand, but also the impossibility of fully bearing witness to this particular traumatic past’. Marianne Hirsch and Leo Spitzer, ‘The Witness in the Archive: Holocaust Studies/Memory Studies’ (2009) 2(2) *Memory Studies* 151, 152. This impossibility was also noted by the German Constitutional Court: ‘The state organs of the Federal Republic of Germany cannot undo the facts which were created by the unjust measures of the National Socialists.’ *Bundesverfassungsgericht* [German Constitutional Court], 2 BvR 842/77, 15 April 1980, reported in (1980) 54 BVerfGE 47–53, § 52.

³³ For example, writing on the election of Donald Trump as US President in 2016, Margaret Atwood contends regarding the role of art: ‘There’s nothing inherently sacred about films and pictures and writers and books. Mein Kampf was a book. Plenty of creative people in the past have rolled over for the powerful. [...] (Artists are always being lectured on their moral duty, a fate other professionals – dentists, for example – generally avoid.)’ Margaret Atwood, ‘What Art Under Trump?’ (18 January 2017) (February 6–13, 2017 Issue) *The Nation* <www.thenation.com/article/archive/what-art-under-trump/>.

art's value lies in its place as being 'irresponsible' – not beholden or obliged – but occupying an open and explicitly anti-normative space.³⁴ For this reason, I present these attempts at restitution through material practice as something more like an offering – an 'address'.³⁵ Texts and objects may not find their audience or they may even land on a different shore, opening up different responses and responsibilities.

The concept of practice therefore takes on various functions. I use the term 'practice' to ground my descriptions in the concrete – what has been done and what happens – in specific times and places.³⁶ 'Practice' is also a way to try to hold on to the nature of the 'work' of literature, art and law in matters of restitution. It orients attention towards the incomplete, the in-progress and the way texts, objects and material things – dust, paint, typed marks on a page – can be relational with people and their bodies, creating a 'dynamic material exchange'.³⁷ More than this, approaching restitution through practice – 'making' – means I am focusing on the situated and practical nature of what it means to work responsibly with the question of restitution for each persona and in each genre. It turns the intangible question of restitution into one which is to do with works, forms, places and people – and means it becomes ultimately a question of conduct in the aftermath.

³⁴ As Spivak reminds us from the post-colonialist perspective, sometimes '[r]esponsibility annuls the call to which it seeks to respond'. Gayatri Chakravorty Spivak, 'Responsibility' (1994) 21(3) *boundary 2* 19, 19. Artists however are developing their own versions of responsibility, making it 'destabilizing and transgressive'. See Tom Holert, 'Burden of Proof' (2013) 51(7) *Artforum International* 250, 254.

³⁵ As Carol Clarkson writes: 'in its precipitation towards a future meaning, towards potential sites of reception, a work of art is primarily an *address*, even if that address is inflected by risk and uncertainty, by temporal and spatial drift'. Clarkson, *Drawing the Line 75* [emphasis in original]. See also Alison Young, *Judging the Image: Art, Value, Law* (Routledge, 2005) 14.

³⁶ On practice, see, for example, Aristotle's divisions of *praxis*, *poesis* and *technē*. Richard Pary, 'Epistēmē and Technē' in Edward N. Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Spring 2024) <<https://plato.stanford.edu/archives/spr2024/entries/episteme-technē/>>. For analysis of 'practice' from a sociological perspective, see Michel de Certeau, *The Practice of Everyday Life* (Vol. 1), Steven Rendall (trans) (University of California Press, 1988); Pierre Bourdieu, *Outline of a Theory of Practice*, Richard Nice (trans) (Cambridge University Press, 1977).

³⁷ Barbara Bolt, *Art Beyond Representation: The Performative Power of the Image* (I. B. Tauris, 2004) 8.

1.1.4 HISTORIES OF RESPONSIBILITIES IN THE AFTERMATH.

The task of imagining restitution, however, needs to be contextualised within different understandings of responsibility in the aftermath.³⁸

The term ‘aftermath’ is commonly used to denote something which comes after, but its etymology is agricultural: it means ‘aftergrass’, which is a second crop of grass grown on the same land after the first one. As a concept, therefore, ‘aftermath’ connects experience to a time and a place, naming a process of regrowth in a shadow, oriented to the future.³⁹

In the immediate aftermath of the Second World War, German philosopher Karl Jaspers published *Die Schuldfrage* (The Question of German Guilt)⁴⁰ – a work, he later recalled, that was written when the crimes of the NS regime became ‘apparent to the entire population’.⁴¹ He is referring, here, to the posters displayed in Germany by the Allies showing photographs of the atrocities of Buchenwald that also contained a finger pointing out at the viewer, with the text: ‘You are guilty’. The book is based on his lectures delivered in 1946, once Jaspers had been restored to his position of professor of philosophy in Heidelberg – a post he was forced to resign from in 1937, due to his wife being Jewish. Despite staying in Germany, Jaspers was anti-Nazi; he remained passive and did not support the regime. He calls his

³⁸ My terminology (for instance, modes of ‘address’; ‘response’; ‘encounter’) at times overlaps with prominent theorists on responsibility and my approach carries their resonances. See, for example, the analysis on Judith Butler and Emmanuel Levinas on responsibility by Annika Thiem, *Unbecoming Subjects: Judith Butler, Moral Philosophy, and Critical Responsibility* (Fordham University Press, 2008). I also do not invoke Jill Stauffer’s work directly but implicitly take on her appeal to think carefully about harm and responsibility, looking beyond legalism as a mode of repair: Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015).

³⁹ Steven Howe and Laura Petersen, ‘Foreword: Law and Art in the Aftermath’ (2022) 16(2) *Pólemos* 199.

⁴⁰ Karl Jaspers, *The Question of German Guilt*, E. B. Ashton (trans) (Fordham University Press, 2000 [1947]).

⁴¹ Karl Jaspers, ‘Nachwort 1962 Über meine “Schuldfrage”’ in *Die Schuldfrage* (Piper Verlag, 1965) 84, cited in: Anson Rabinbach, ‘Karl Jaspers and the Question of German Guilt’ (1996) 75 *Radical Philosophy* 15, 15. However, there is only limited reference to some of the atrocities in his work, and it is unclear how much he knew at the time of writing *Die Schuldfrage*.

approach in a letter to Hannah Arendt ‘my silence under Nazism’.⁴² Jasper’s work in the context of a University and a student body coming to terms with twelve years of the teaching of propaganda is striking – the preface addresses this distrust, appealing to the students ‘to keep an open mind for the possibility that now it may be different’⁴³ and hoping ‘to return to the way of thinking as a critical movement’.⁴⁴

Jaspers says it is an obligation, based on human dignity, that Germans need ‘to understand clearly the question of our guilt, and to draw the conclusions’.⁴⁵ To do this, Jaspers outlined a schemata with four concepts of guilt (criminal, political, moral and metaphysical) – each concept has a different jurisdiction and different consequences – in an early acknowledgement that the involvement of the German population in the Holocaust cannot be ignored, and needs to be contemplated in a nuanced way. This complexity is ‘to preserve us from the superficiality of talk about guilt that flattens everything out on a single plane’⁴⁶ which has strong resonances with Arendt’s phrasing that she used on several occasions, which is to emphasise ‘where all are guilty, no one is’.⁴⁷ Jaspers is asking for not only scrutinisation, but action – as Berel Lang identifies, the form of his writing takes up the genre of the ‘meditation’, which is ‘a genre written not only or even primarily for an audience to read but for its readers to *do*’.⁴⁸ This is ‘a twofold task, to address the future as well as the past’.⁴⁹ His lectures are important as one of the first works, despite a careful attempt at empathy with the general suffering after the devastation of war, to make clear that ‘the

⁴² Letter from Karl Jaspers to Hannah Arendt, May 16, 1947, in: *Hannah Arendt/Karl Jaspers Correspondence, 1926–1969*, Lotte Köhler and Hans Saner (eds), Robert Kimber and Rita Kimber (trans) (Harcourt Brace Jovanovich, 1992) 88.

⁴³ Jaspers, *The Question of German Guilt*, 1.

⁴⁴ *Ibid* 2.

⁴⁵ *Ibid* 22.

⁴⁶ *Ibid* 27.

⁴⁷ Hannah Arendt, ‘Personal Responsibility Under a Dictatorship’ in *Responsibility and Judgment* (Knopf Doubleday, [1964] 2009) 17, 21; see also: Hannah Arendt, ‘Collective Responsibility’ in S. J. James and W. Bernauer (eds), *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt* (Springer, [1968] 1987) 43, 43.

⁴⁸ Berel Lang, “‘Die Schuldfrage’ Sixty Years After” (2006) 60(1) *The Review of Metaphysics* 101, 105.

⁴⁹ Lang, ‘Die Schuldfrage’ 105.

public addressed cannot, if ethics means anything at all, avoid looking at themselves as agents of that regime and not as its victims'.⁵⁰

Likewise, across various published works, Hannah Arendt was also acutely attuned to the problems of personal and political responsibility in the aftermath of the Second World War. Arendt had written her dissertation at the University of Heidelberg under the supervision of Jaspers, and after the end of the Second World War, they began to correspond, with Arendt (who had left Germany in 1933) living in New York. Travelling back through Germany, Arendt in a report from 1950 condemned the indifference she perceived in the public: 'But nowhere is this nightmare of destruction and horror less felt and less talked about than in Germany itself. A lack of response is evident everywhere, and it is difficult to say whether this signifies a half-conscious refusal to yield to grief or a genuine inability to feel.'⁵¹ She condemned the 'You are guilty' posters as 'the gravest single error in the American denazification policy' as it enabled the German populace to dismiss them and the evidence of the crimes – 'How could they feel guilty if they had not even known?'⁵² – despite everyone being aware in some sense of the brutality of the regime. As Arendt writes:

For while the German people were not informed of all Nazi crimes and were even deliberately kept ignorant of their exact nature, the Nazis had seen to it that every German knew some horrible story to be true, and he did not need a detailed knowledge of all the horrors committed in his name to realize that he had been made accomplice to unspeakable crimes.⁵³

Like Jaspers, she did not use the term collective guilt, and distinguishes personal responsibility from political responsibility, 'which every government assumes for the deeds and misdeeds of its predecessor and every nation for the deeds and misdeeds of the past'.⁵⁴ This means,

⁵⁰ Lang, 'Die Schuldfrage' 115.

⁵¹ Hannah Arendt, 'The Aftermath of Nazi Rule: Report from Germany' [1950] (10) *Commentary* 342, 342.

⁵² Arendt, 'Aftermath', 348–349.

⁵³ *Ibid* 349.

⁵⁴ Arendt, 'Personal Responsibility' 27.

for Arendt, that by being a member of the political community, one becomes responsible and can inherit responsibilities. Arendt's approach, therefore, leads her to an understanding of 'vicarious responsibility' and the political nature of humans living in relations of responsibility with each other:

This vicarious responsibility for things we have not done, this taking upon ourselves the consequences for things we are entirely innocent of, is the price we pay for the fact that we live our lives not by ourselves but among our fellow men, and that the faculty of action, which, after all, is the political faculty par excellence, can be actualized only in one of the many and manifold forms of human community.⁵⁵

The question of how and whether this vicarious responsibility holds up across time – and noticing the ways in which the authors and artists I discuss could be seen as 'taking upon themselves' this inheritance in their work – is a central concern in this book.

More recently, Michael Rothberg takes up the figure of the 'implicated subject' to thematise ongoing responsibilities for historical injustices and acts that were committed in the past. Rothberg's understanding of implication is that one 'is neither a victim nor a perpetrator, but rather a participant in histories and social formations that generate the positions of victim and perpetrator, and yet in which most people do not occupy such clear-cut roles'.⁵⁶ Rothberg's 'implicated subject' helps clarify the intergenerational sense of different 'modes of implication' and 'entanglement',⁵⁷ which I examine in this book. For Rothberg, this is a 'category of historical responsibility [...] that describes the implication of people in events that are temporally and/or spatially distant and in which they have not played or do not play a direct role as perpetrators or victims'.⁵⁸ To be clear, I am not contending this category *should* apply to the authors and artists under discussion, rather I use it as a way to understand their positioning through

⁵⁵ Arendt, 'Collective Responsibility' 50.

⁵⁶ Rothberg, *The Implicated Subject* 1.

⁵⁷ Ibid 2.

⁵⁸ Ibid 60.

the subject matter of their work, their public statements as well as their generational connection to their political communities.

Further, I follow how the ‘implicated subject’ could be a productive way to also think about the ‘work’ of literature, art work and memorials, which, in turn, also implicate their reader, beholder and walker, and therefore further disrupt fixed temporal or spatial understandings of restitution and responsibility.⁵⁹ Bringing together these ideas of implicated subjects and responses towards the past, the terminology of ‘practice’ therefore is useful to think about the different forms of responsibility for restitution. Responsibility, as Scott Veitch writes, can be understood as ‘a cluster of notions that exist as so many “responsibility practices”’.⁶⁰ Following the ‘social and historical contingency’⁶¹ of the term, and the importance of contextuality, in this book, each chapter gives an account of how writers and artists working in a particular genre – legal writing, literature, visual art, or memorial art – take up a responsibility for restitution through their practice, their attempts at ‘making-good-again’, in particular times and places.

1.1.5 OVERVIEW OF CHAPTERS. This book therefore offers a series of engagements with restitution through material practices. Alongside the general approach of focusing on conduct, form and technique, each chapter offers a situated methodology for its genre at the beginning of each chapter. The structure of the book takes its cue from the Jewish poet Paul Celan’s imperatives of ‘Stop reading – look! Stop looking – go!’ in his poem ‘*Engführung*’.⁶² To begin, ‘read’ – there are two chapters on literary jurisprudence, where I outline my approach

⁵⁹ Building on Rothberg’s work, Jennifer Noji discusses the figure of the implied and ‘implicated reader’ – a way of thinking through the ‘embodied affect’ of implication: Jennifer Noji, “‘Hooked by the Mouth’: The Implicated Reader’s Response to Kincaid’s *A Small Place*” (2023) 29(4) *Parallax* 494. See also Hanna Meretoja, ‘On Implicated Readers and Spectators: A Response Piece’ (2023) 29(4) *Parallax* 516.

⁶⁰ Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge, 2007) 37, using terminology from Peter Cane, *Responsibility in Law and Morality* (Hart, 2002) 25.

⁶¹ Veitch, *Law and Irresponsibility* 37.

⁶² ‘Lies nicht mehr – schau! / Schau nicht mehr – geh!’ From: *Engführung* (1958), in Paul Celan, *Gedichte in zwei Bänden* (Vol. 1) (Suhrkamp, 1983) 197.

to the role of the jurist and the reader, the form of the gloss, case and transcript to begin (Chapters 2 and 3). Next, ‘look’ – I thematise artistic jurisprudence and the role of the beholder (Chapter 4). Finally, ‘go’ – the book concludes with my theoretical approach to the role of memorials and walking as a jurisprudential technique (Chapter 5). I mention the parallel with Celan’s imperatives as he, as a poet and a Holocaust survivor, often questions the disjointed way one can respond, and the problems of address; as Chase Berggrun writes about this poem: ‘A question and an accusation – “who?” – perennially indicts the self, the reader, and the violent impulse to bury the past.’⁶³ Embedding Celan’s agitated imperatives within the structure of this book is a way to frame – within the form – questions of address, of how to take action in the aftermath and of the way we engage with language, texts and objects.

The texts and objects in this book are mainly by high-profile German authors and artists, with a few notable exceptions. One exception is at the beginning, in Chapter 2, which focuses on a relatively unknown German/Jewish jurist, Dr Walter Schwarz. Schwarz returned to Berlin in the 1950s and practised as a restitution lawyer. He was one of only a few Jewish lawyers working in Berlin at this time. Schwarz set up a legal journal, where he also published ‘glosses’ under pseudonyms. Found in a library in Berlin, I translate and analyse a selection of these glosses written by Schwarz for the first time into English. Going beyond the legal representation he could offer to his clients, I contend the writing of the glosses is a different method for Schwarz to take responsibility for the conduct of the restitution programme.

Chapter 3 also contends that writing is a practice of taking responsibility for restitution. I focus on works by W. G. Sebald, Alexander Kluge and Heimrad Bäcker. It is over twenty years since the death of W. G. Sebald, but the reception of his literary oeuvre in English and German is continuously expanding. As I mentioned earlier, in his last speech before his death, Sebald stated ‘only in literature [...] can

⁶³ Chase Berggrun, ‘Mostly His Apocalyptic Star Glitters Wondrously: On Paul Celan’s Life-Saving Poetry’ (20 November 2020) *Poetry* <<http://bit.ly/4oDpF03>>.

there be a form of restitution'.⁶⁴ I look at the way two of his novels, *The Emigrants* (1992) and *Austerlitz* (2001), are literally put together and examine how they correspond to this restitutive obligation of literature. Likewise, Alexander Kluge is famous in Germany as a public intellectual, mainly due to his film and television work. But I focus on his short stories from 1962 and 2013 and the form of their response to the NS regime. In contrast, the works of the third author, the poet Heimrad Bäcker, who died in 2003, are not particularly well-known outside of his native Vienna. Involved with the Nazi party in his youth, Bäcker's concrete poetry in his work *transcript* (1986) demonstrates a writing practice of fragmentation and citation in its confrontation with the NS legal archives. I chose these works in this chapter as they span three different literary genres (novels, short stories and poetry) and all show a struggle with the persona of the author and the practice of writing – its possibilities and its responsibilities – in the aftermath of the NS regime and the Holocaust.

The material practices of responsibility through visual and memorial art are the focus of Chapters 4 and 5. Chapter 4 also involves two male artists.⁶⁵ Anselm Kiefer and Gerhard Richter are perhaps the two most famous German contemporary artists working today. I analyse the way two of their art works resist or collaborate with their processes of creation and places of viewing. For instance, I contend that beholding an Anselm Kiefer sculpture (*Sternenfall*) in MONA in Tasmania in Australia opens up the art work to a reassessment of what it might mean to take responsibility for restitution in Australia. I argue that beholding a copy of a Gerhard Richter painting (*Birkenau*) in

⁶⁴ W. G. Sebald, 'An Attempt at Restitution' in Sven Meyer (ed), Anthea Bell (trans), *Campo Santo* (Hamish Hamilton, 2005) 206, 215.

⁶⁵ I note the gender disparity in the writers and artists in this book, who, apart from Renata Stih (who co-designed the *Places of Remembrance* memorial), are all male. My choice of texts and objects was primarily due to the nature of their engagement with the NS regime and the Holocaust. However, my argument about responsibility, conduct and persona was also enhanced by choosing authors and artists who have roles as public intellectuals. I did not find any prominent female authors and artists who engage with these themes who had the same visibility in the public eye in Germany (or beyond). However, I am aware that by not including their work, I am also contributing to the further marginalisation of women authors and artists working in this space.

the Reichstag in Berlin means taking responsibility for restitution is staged as an (unintended) spectacle on the threshold to the German Parliament.

I chose these art works as they make us consistently question the possibility of one's stance. By this I mean they evoke the question of conduct as it pertains to the artist and the beholder of their works, but also how the framings of these art works in cultural, legal and institutional settings add layers of complexity to the responsibilities of viewing. For instance, with Richter's art work, the layers of paint ask a question of how painting can respond to the image of atrocity. I ask the question of how we can see images of the Holocaust through these material frames of the present.

Chapter 5 continues this staging of moments of individual viewing of art, imposing the structure of a walking tour of Berlin's memorial art onto the text. My argument about the material practices of taking responsibility for restitution is turned into a grounded methodology: a shoe-on-the-footpath mode of writing. Beginning in Bebelplatz – the site of the Humboldt University's law faculty – I pay attention to recent responses to the past as they are represented in memorial art in different areas of Berlin, including the national *Memorial for the Murdered Jews of Europe*. I visit Schöneberg where the *Places of Remembrance* memorial consists of signs of law from the NS regime mounted in the streetscape. I also analyse Gunter Demnig's *Stolpersteine* (Stumbling-stones), which are small memorial stones set into the footpath in Berlin (and now throughout Europe). This chapter should be read as a plaidoyer for paying attention to the way we craft and take responsibility for our legal landscapes through our conduct – our movement and posture – resulting from our interaction with objects.

1.1.6 ANSWERING TO THIS WORLD OR ANSWERING FOR IT? The book therefore offers a series of fragments which describe how different people in different roles and through their legal, literary and artistic practices give accounts of how to conduct restitution. My approach to conduct makes visible the way responsibility can be a material practice which is connected to persona and affected by place and institution. In this way, the responsibility for restitution emerges as something which is

taken up within the texts and objects asking the question of restitution and also from those who feel addressed by the works. To summarise my approach, I follow Jean-Luc Nancy's statement: 'Art, today, has the task of answering to this world or of answering for it.'⁶⁶ The inflections of 'to' and 'for' are important, capturing the way one's work and one's place in the world affect the exercise of responsibility in different ways.

For instance, the dynamic of answering *to* is played out in each chapter of this book. In Chapters 2–4 on writing and artistic restitution (as well as Gunter Demnig in Chapter 5), I contend each individual answers *to* their profession and to their craft. This is expressed explicitly in the way they push the boundaries: of what it means to be a jurisperdent or a writer using the practice of writing, or an installation artist cementing decay or a painter engaging with the limits of paint. In addition, the chapter on memorial art complicates the idea of answering *to*, turning it away from a question of craft and into a question of community and neighbourhood on the streets of Berlin.

To whom are writers and artists answerable is also a theme in Chapter 3 on literary restitution. Writers and readers, writers who are readers, writers and record-keepers – I raise provenance questions regarding Sebald and Kluge's work, but these go deeper than problems of attribution and interpolation. Rather they relate to ownership and origin: where do these stories come from? Who is telling them? For my reading of literary jurisprudence, the question of how to respond – the mode of taking on responsibility for restitution – remains a question of conduct, but in a different way. It is about the role of the writer and their responsibility to their craft, embedded within the question of how to tell a story in the aftermath.

In addition, even though I do not engage directly with all of the imperatives surrounding the work of 'Holocaust literature' or 'Holocaust art', I do thematise the movement of responsibility that may emerge through the moment of reading or the sites of display.⁶⁷ I focus

⁶⁶ Jean-Luc Nancy, *The Muses* (Stanford University Press, 1996) 93.

⁶⁷ Katherine Biber states, for instance: 'At the centre of all Holocaust discourse is the duty to be responsible; *responsibility* is the hard kernel at the heart of all Holocaust representation.' Katherine Biber, 'Bad Holocaust Art' (2009) 13 *Law Text Culture* 227.

especially in the chapters on visual and memorial art on the different sites of institutional and non-institutional display and modes of responsibility which emerge out of the encounter between the artist and the materials, but also the audience and the art work through time.

The obligation of responsibility ‘to’ and ‘for’ law also permeates this book. In Chapter 2, Walter Schwarz (as a jurist) has a responsibility *to* law. However, through the glosses, he takes up a responsibility *for* law: for publishing case notes in a different form, for promoting an ethos of conduct towards restitutive processes. Also, my analysis in Chapter 5 shows the memorial art in Schöneberg is a direct call for responsibility *for* law in the present. In the rest of the book, however, there are individuals who are also crafting accounts of jurisprudence: through working with legal forms or materials, working with or displaying their work in legal sites and being the audience: reading, beholding, walking and participating in all the strata of living and thinking with law.⁶⁸ If all of this work is commentary on law, if we view these texts, objects and interactions as also telling stories about how to approach jurisprudence, then these are all different ways of taking responsibility *for* law as well.

The effect of this – of my approach as responsibility ‘to’ and ‘for’ – is to enact a jurisprudence of displacement. It is to literalise the practices of law and humanities scholars who extend the place of jurisprudence; it is to look at how different forms of responsibility work within, outside and alongside cultural, political and legal institutions. It is to understand that artists and their audiences, writers and their readers and walkers in their own neighbourhoods are all crafting and making and experiencing responses and taking on responsibilities for restitution, and this could be seen as jurisprudential. I am exploring the way we are all crafting our own stories of jurisprudence, all the time. This is a recognition of the way law and aesthetics both cause a

⁶⁸ This approach is similar to Greta Olson’s term ‘legality’: see Greta Olson, *From Law and Literature to Legality and Affect* (Oxford University Press, 2022) 6–7. Olson also uses Eugen Ehrlich’s term ‘living law’, which she paraphrases as ‘the codes of behavior and rules for ordering conflicts that precede and extend beyond book law’: Olson, *From Law and Literature*, 6; Eugen Ehrlich, *Gesetz und lebendes Recht: Vermischte kleinere Schriften* Manfred Rehinder (ed) (Duncker & Humblot, 1986).

productive friction and are always in the making – on the streets, by different people, at different moments: to and for their craft, but perhaps also to and for law.

There is a key omission here, however, which haunts the book – the question of whether these texts and objects answer *to* the victims, their descendants and others who were affected. In Berlin in 2020 in his speech, Steinmeier states that Germans do ‘accept responsibility’.⁶⁹ My book describes different accounts of attempting restitution in different genres. But if accepting responsibility is the answering of a call – then to whom does one answer? Almost eighty years on, the numbers remain overwhelming; as Steinmeier states: ‘Germany’s past is a fractured past – with responsibility for the murdering of millions and the suffering of millions.’⁷⁰ Naming and recognising the individuality of people’s lives, fates and families is another – important – dimension of restitution which is taken up, for instance, by some of the restitutive practices under discussion (such as the *Stolpersteine* memorial art). Apart from Chapter 2 where I focus on Walter Schwarz, the Jewish-German jurist, my three other substantive chapters (Chapters 3–5) only look at selected examples of ‘making-good-again’. I do not directly focus on the people who were affected – the victims, the survivors, their families – they are left as the ‘millions’ in the background of this book even though their murder, torture, suffering and experiences are the beginning and impetus for everything which follows. Because I do not address it in any detail, images of the horror of what occurred remain unseen but present at the centre of this project. This, in itself, mirrors some of the methods of ‘making-good-again’, where a reader or beholder is invited to only confront the horror obliquely, or not to look, but to just imagine.

I am also aware that being and feeling ‘implicated’ and ‘interpolated’ through some of these restitutive practices – encouraging identification at times with the victims – could be a problematic and unwelcome shift,

⁶⁹ Frank-Walter Steinmeier, ‘Speech – 75 Anniversary of Liberation from National Socialism and End of WWII in Europe’ (Neue Wache, Berlin, 8 May 2020).

⁷⁰ Ibid.

and I attempt to address this question at the relevant points in the book. I remain unclear as to whether this is enough. Apart from the chapter on Walter Schwarz, I do not consider how restitution may be characterised from different Jewish perspectives.

1.2 JURISPRUDENCE AND METHOD

I write this book from the position of an Australian scholar, working within the Australian traditions of law and humanities and jurisprudence. Thinking about restitution through material practices means I anchor my approach to the question of restitution within existing jurisprudential traditions concerned with conduct, craft and the responsibilities of persona; I bring these concerns across to law and humanities research. Nevertheless, in order to reinforce the location of my analysis, I emphasise the role of place through drawing attention to the myriad ways law is emplotted and emplaced by different personae. I also explicitly include the description of some of my research stays in Germany which demonstrate some of the complex institutional, material and place-based dimensions of jurisprudential writing.

In addition, there is a distinctive focus to current German and European law and humanities scholarship. Greta Olson outlines the way the German tradition connects to the Grimms, Savigny and the *Dichterjuristen* (Poet-Jurists), such as Goethe and Kleist.⁷¹ Olson offers a reminder, however, that the current manifestations emerged in particular times and places and cannot be simply imported across; she encourages reflection on one's own legal and intellectual inheritances.⁷² From the Netherlands, Jeanne Gaakeer follows a historical path to outline the long-standing relationship between law and literature in Europe, beginning in the High Middle Ages and with the

⁷¹ Greta Olson, 'De-Americanizing Law and Literature Narratives: Opening up the Story' (2010) 22(2) *Law & Literature* 338, 353–355.

⁷² Olson writes: 'the peculiarities of our own legal systems and legal histories need to be kept in mind as we contest law with the aesthetic and use law to query the literary'. Ibid 361.

advent of the gloss as a way to systematise law.⁷³ Fittingly, this book also begins with the genre of the gloss in Chapter 2, where the focus is on Schwarz's legal-literary glosses and his persona as the glossator. Gaakeer emphasises that 'what today is heralded as contextualisation and interdisciplinarity has a long tradition that has undeservedly been neglected'.⁷⁴ She asserts: 'Given the European historical development, one might argue that the current move to look upon law as a *cultural practice* [...] is a return to the diversity of old.'⁷⁵ Gaakeer is acutely attuned to the way law is 'a praxis, a way of doing things',⁷⁶ arguing this needs more attention as part of the 'broad project of cultural inquiry',⁷⁷ which should be the direction of future law and humanities scholarship. For both Olson and Gaakeer, therefore, an awareness of tradition, reflexivity regarding one's standpoint and a concern for the ways in which things are done emerge as the central starting points for scholarship in this field.

As a result, the focus in this book on disciplinary histories, standpoints and cultural practices – in law and in aesthetics – continues their vision for European law and humanities scholarship, even as I expressly reflect upon and continue the method of work done in other countries, such as Australia. In particular, recent Australian jurisprudential scholarship has placed emphasis on 'technique, practice and conduct',⁷⁸ drawing out the importance of 'prudence'⁷⁹ and 'materiality'.⁸⁰

Specifically, I draw upon the work of Australian scholars Ann Genovese and Shaun McVeigh. Genovese carefully articulates the way

⁷³ Jeanne Gaakeer, 'European Law and Literature: Forever Young. The Nomad Concur' in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities* (De Gruyter, 2012) 44, 49.

⁷⁴ Ibid 51.

⁷⁵ Ibid 55.

⁷⁶ Ibid 64 Fn 36.

⁷⁷ Ibid 70.

⁷⁸ Olivia Barr, 'Walking with Empire: History, Law, Space and Time' (2013) 38(1) *Australian Feminist Law Journal* 59, 60.

⁷⁹ See, for example, scholarly positionings on 'prudence' collated by Leiboff: Marett Leiboff, *Towards a Theatrical Jurisprudence* (Routledge, 2019) 63–64. I follow a similar approach to 'prudence' and technique as exemplified by: James E. K. Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford University Press, 2015) 38–40.

⁸⁰ On materiality in law, see Margaret Davies, *Law Unlimited* (Routledge, 2017) 56ff.

her practice of writing shapes her persona and affects the positioning which takes place through the work of a scholar – whether it be as a feminist, a historian or a jurist (or all three). Genovese is concerned with the way taking up a persona can be a way of training the self (and others) to take up specific tasks and duties of their personae, and for her work, this is intricately tied to the practice of writing.⁸¹ Genovese elucidates the way taking up a persona can mean taking up a way of writing which is temporally and physically embodied – it is to acknowledge that one is living in relation with others within a certain time and place – but also ‘experienced’.⁸² She surmises: ‘This matter of experience, what it means to live in relation to one’s duties – is often more difficult to see. This is because it involves rethinking and reimagining the manner in which specific disciplinary duties might be performed’.⁸³

Genovese’s description of the way writing is a form of training connects with what I am trying to make visible through this book: how the practice of a craft situates oneself in the world and in relation with others, and therefore carries ‘disciplinary duties’, which I refer to as ‘responsibilities’. Beyond this, as the chapters develop, like Genovese, I pay attention to how one can actively shape a persona through practice – through writing and artistic practices – but also what it means to experience the role of a tourist in the Reichstag or a walker through the streets of Berlin. I show how attempts at making-good-again become a public struggle of what Genovese describes as ‘living with’ one’s duties – I describe how these texts and objects show us how to ‘rethink’ and ‘reimagine’ what it might mean to perform and take on responsibilities for restitution.

In addition, bringing these concerns explicitly across to jurisprudence, together with Peter Rush and Shaun McVeigh, Genovese situates the role of the jurist within this philosophical tradition of thinking about conduct, arguing that ‘jurisprudence [...] can be treated as

⁸¹ Ann Genovese, ‘About Libraries: A Jurisographer’s Notes on Lives Lived with Law (in London and Sydney)’ (2016) 20 *Law Text Culture* 33, 35.

⁸² Ibid.

⁸³ Ibid.

a training in *persona* and office'.⁸⁴ In particular, McVeigh's scholarship meticulously examines the responsibilities (and limits) which attach to the traditions of taking up 'offices' by certain people in certain times and places.⁸⁵ My attention to the active, material and relational dimensions of jurisprudence – how and who and with whom, and the corresponding responsibilities one has when one is 'thinking with law'⁸⁶ – follows on from Rush, McVeigh and Genovese's work. Like their approach, I consider the work of jurisprudence to be the 'care for the lived experience of lawful relations',⁸⁷ which means I pay attention to the way jurisprudence is situated, conducted and crafted.⁸⁸

In this book, therefore, the central question of how to take responsibility for restitution runs parallel to the question of how to take responsibility for jurisprudence. I read the texts and objects as if they were giving out lessons in prudence – orienting our attention towards what might matter when one thinks about conduct in the aftermath – and I argue this has value for how we could think with law. I describe engagements with forms and techniques that have legal reverberations, listening to the resonances of the legal inside and outside different institutions. My method is to focus on how my selected texts and objects are put together: how they are in the 'making' – how they do their work – in order to draw out the sense of responsibility held within them. I describe their form, their structure and their techniques. My focus is not on content or its representation. I am not writing about the ethics (or not) of representations of the Holocaust nor am I solely describing the representations of law which are woven

⁸⁴ Ann Genovese, Shaun McVeigh and Peter D. Rush, 'Lives Lived with Law: An Introduction' (2017) 20 *Law Text Culture* 1, 2.

⁸⁵ See Shaun McVeigh, 'Obligations of Office' in Daniel Matthews and Scott Veitch (eds), *Law, Obligation, Community* (Routledge, 2018) 234; Shaun McVeigh, 'Office and Persona of the Critical Jurist: Peripheral Legal Thought (Australia)' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 386.

⁸⁶ For Shaunnagh Dorsett and Shaun McVeigh, jurisprudence is 'a way of thinking with law': *Jurisdiction* (Routledge, 2012) 16.

⁸⁷ Ann Genovese, Shaun McVeigh and Peter D. Rush, 'Lives Lived with Law: An Introduction' (2017) 20 *Law Text Culture* 1, 2.

⁸⁸ See also Ann Genovese and Shaun McVeigh, 'Nineteen Eighty Three: A Jurisographic Report on *Commonwealth v Tasmania*' (2015) 24(1) *Griffith Law Review* 68.

into these aesthetic works. What I am doing is describing the writing and the artistic and the beholding practices which are enacted within these accounts.⁸⁹ My approach enables me to notice the different ‘seepages’⁹⁰ of legal forms and techniques into the aesthetic (and vice versa) in different genres.

To think about form is to give the formal, stylistic dimensions of the text the attention they deserve. Desmond Manderson, renowned for law and humanities scholarship attuned to questions of form, reminds us that:

[c]entral to the aesthetic dimension is the idea that the form of something is part of its meaning. Formal design or structure – whether of a poem or a statute – is not just the medium through which ideas are expressed but is itself an aspect of meaning. Form and style are not, then, just the receptacles into which abstract propositions of law are bundled but part of what the law says to us.⁹¹

In a similar vein, for each chapter, I follow the ‘expressive capacities’ of genre, not only viewing them as ‘frameworks for constructing meaning and value in one or another medium’⁹² but also as a way to think about *how* these moments of judgment, expectations and framing operate. In this book, all the writers and artists I analyse think across genres, switch genres or play consciously within their texts with the fixity of a genre designation. This occurs to such a degree it is tempting to see a pattern – a rebellion against certain designated frameworks to discuss the Holocaust – which is a conscious striving for hybridity, a common thread of disunity and fragmentation across generations. I view it as a choice of method designed

⁸⁹ This is similar to the approach to ‘encounter’ in cultural legal studies where ‘attention is paid to the form or process of each encounter itself’. Thomas Giddens, Karen Crawley and Timothy D. Peters, ‘Cultural Legal Studies: Methodologies of Reflexive Attunement’ in Karen Crawley, Thomas Giddens and Timothy D. Peters (eds), *The Routledge Handbook of Cultural Legal Studies* (Routledge, 2024) 1, 4.

⁹⁰ On the related idea of literature and justice creating a ‘landscape of seepages’, see Ravit Reichman, *The Affective Life of Law: Legal Modernism and the Literary Imagination* (Stanford Law Books, 2009) 128.

⁹¹ Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000), 33.

⁹² John Frow, *Genre*, 2nd ed (Routledge, 2015) 79.

to evoke, attempt and re-iterate an approximation of restitution – but always already denying such coherence within their form.

Apart from its genre, each chapter is also explicitly seeped in its own time and place. Situated in the ‘aftermath’ – a term which grounds experience to a place and a time – this book follows texts which were created in the immediate post-war period in the 1950s (Schwarz’s glosses) and continues right up to texts and objects created in the 2010s (*Birkenau* by Richter, short stories by Alexander Kluge, the *Memorial for the Sinti and Roma* in Berlin). Apart from moving throughout time, I make it clear that practices of responsibility for restitution – mirroring the practices of a jurispudent – shift according to location.

In particular, the two chapters on visual art and memorial art argue for an experiential and postural mode of thinking about restitution which is grounded in a place-based method. This is a way to focus on the restitutive responsibilities taken on by the artist, the place of display and the person who is walking and beholding the art work or memorial art. In contrast, my chapters on Schwarz’s glossatorial writings and on the literary texts use form and persona (of the writer, but also of the reader and audience) as a method to think about how responsibility for restitution might be taken up through the practice of writing.

The result of using form as my method is that I notice the compulsion of iteration in these texts and objects. In this way, the ‘again’ part of ‘making-good-again’ becomes visible and important. Often, I point out a movement of return: a mark, a re-presentation. It emerges that most of the literary texts I examine demonstrate techniques which rely on material modes of literally ‘making-again’: copying and citing and going back to the source as a way of writing or making poetry. With the visual and memorial art works in Chapters 4 and 5, I also pay attention to the dynamic of ‘making-again’ in these works. ‘Again’ can be seen as a movement like ‘repeat’ and is found in techniques of layering and accumulation. This does not appear to be a form of ‘again’ which signifies trauma. Rather, I view it as being the ‘again’ of the rehearsal – a mode of ‘fail again’ towards the ‘good’.⁹³ In a meld of form and content,

⁹³ See the phrase from Samuel Beckett: ‘Ever Tried. Ever Failed. No Matter. Try Again. Fail Again. Fail Better.’ *Worstward Ho* (J. Calder, 1983). This could be seen as a modernist

‘making-again’ therefore becomes a material practice found within some of the accounts of making-good-again in this book.

Similarly, my argument about responsibility is intricately tied to and reflected in my own method. Like Genovese, I reflect upon the process of my own writing as the crafting of a form of scholarship – a commentary on the commentaries – as a way of taking responsibility for my work and what it is attempting to do. Written into the structure and argument of this book, therefore, is a concern for the importance of genre: a gesture to acknowledge and take responsibility for where things come from (and how one meets and shapes them). Another way to describe this concern for responsibility and tradition is using the term ‘provenance’. Originally from art history, the practice of identifying the provenance of an object – ‘the documented chronology of the ownership, custody, and location’⁹⁴ – is the first step that enables a property restitution claim to go ahead. Thinking about origins, inheritances and provenances involves having an archaeological eye that can identify layering and sedimentation: it is to name the archive which shadows the present. However, I do not directly invoke ‘provenance’ as a method in this book. Rather I practice a form of descriptive writing which draws attention to the inheritance of a persona and craft; questions of origins of form, mediums and genres; and the way one takes up scholarly responsibilities through disciplinary norms and locations.

As part of this, I explicitly write some of my research interludes into the text as I weave my way through and alongside research, legal and artistic institutions in Berlin, Munich and Hobart. For the purposes of this book, institution can mean a literal, material building – the library, the art gallery or the Parliament – and I explore some of these key architectural places in this book. But, for me, institution is also shorthand for a collation of practices, norms and authorities which run through legal and artistic traditions, including forms and styles of language.

and post-modernist way of operating, and one could categorise all the texts and objects which I examine into these realms. On the Holocaust and the suitability of the postmodern, see Robert Eaglestone, *The Holocaust and the Postmodern* (Oxford University Press, 2004).

⁹⁴ Michael E. Jones, *Art Law: A Concise Guide for Artists, Curators, and Art Educators* (Rowman & Littlefield, 2016) 80.

Therefore, there are different dimensions to my thinking about institution in this book. In Chapter 2, I am concerned with the language of institutional *Wiedergutmachung* from the German state as reflected and subverted by Walter Schwarz in his glossatorial writings as well as the conduct of the German bureaucracy in administering restitution payments. In Chapter 3, the work of Heimrad Bäcker and Alexander Kluge also confronts institutional language as part of their approach to making-good-again, whilst Sebald's speech on restitution was delivered in and directed to a specific institutional place. Chapter 4 highlights my research work in a particular library, the Central Institute for Art History in Munich, which carries layers of law, history and restitution, whilst also visiting gallery spaces and the Reichstag. Chapter 5 notices how institutional *Wiedergutmachung* from the German state creates a certain form of public responsibility through memorial art, which I contend is then overlaid with a different way of taking responsibility through walking and bodily posture. As such, institution is a way of bringing together my approach to jurisprudence – it focuses attention on legal relations in a time and a place, and how they subsist. Thinking about relationships with institutions is to look for residues of expectation and obligation.

My four substantive chapters demonstrate different accounts of making-good-again.⁹⁵ Read together, they show how the conduct of restitution emerges as a material question of responsibility which is asked through texts and objects in different genres, including law. Responsibility as a material practice is shown to be contingent, shaped by personae and places. Despite this, 'restitution' as my subject remains inchoate: the fragments do not fit together, the scales do not balance.⁹⁶

⁹⁵ The aim is not to provide an exhaustive catalogue of accounts of making-good-again but rather to open up the possibilities of what may be considered restitutionary practice. Other important mediums such as films, theatre productions, dance, music, architecture and the displays at museums and concentration camps could not be examined in depth.

⁹⁶ On the impossibility of fitting the shards together in the aftermath of the Holocaust, see Marett Leiboff, 'Theatricality' in Peter Goodrich, Daniela Gandorfer and Cecilia Gebruers (eds), *Research Handbook in Law and Literature* (Edward Elgar Publishing, 2022) 38.

As such, there are two key strands to the ‘making’ of responsibility which emerge throughout this book. ‘Making’ relates to the accounts of making-good-again as a practical, material activity of responsibility which is reconstructed through my description of selected texts and objects. The second strand is the way I write the persona of a scholar who is undertaking the activity of translating how these accounts emerge out of our relationship with texts and objects, and paying attention to how I do this activity in places and institutions.⁹⁷ The texts and objects in this book thematise the process of writing through writing, for example, or they challenge the limits of paint through the action of painting and its display. My self-reflexivity therefore echoes the hum of meta-commentary heard in the texts and objects under examination. It is my own form of reckoning; it refracts outwards the concerns of form and conduct which are caught up within the accounts of making-good-again in this book.

⁹⁷ As Marett Leiboff recognises, ‘the jurist, as the legal self responsible for law, is rarely asked to consider who they are and the conditions of their responsiveness towards law’. Leiboff, ‘Theatricality’ 3.