

1994

Striking a Difficult Balance: Combatting the Threat of Neo-Nazismin Germany While Preserving Individual Liberties

David E. Weiss

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Law Commons](#)

Recommended Citation

David E. Weiss, Striking a Difficult Balance: Combatting the Threat of Neo-Nazismin Germany While Preserving Individual Liberties, 27 *Vanderbilt Law Review* 899 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol27/iss4/5>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties

ABSTRACT

Through violence, intolerance, and fascism, neo-Nazis threaten the political and social structure of Germany's democratic state. As the neo-Nazi movement continues to grow throughout Germany, the German government faces the difficult challenge of quelling the neo-Nazis. By invoking the laws enacted to prevent the resurgence of Nazism, the government has infringed upon basic individual liberties such as freedom of expression and association. This Note discusses the various devices implemented by both Germany and the international community to combat neo-Nazis, and the effects these measures have had on the neo-Nazis themselves. This Note concludes that in attempting to strike an appropriate balance between combatting neo-Nazis and preserving individual liberties in Germany, the German government may actually drive the neo-Nazi movement into the mainstream, where its disguised message may find broader appeal.

TABLE OF CONTENTS

I.	INTRODUCTION.....	900
II.	POST-WORLD WAR II GERMANY.....	903
	A. <i>Denazification</i>	903
	1. Trial and Error.....	903
	2. Cold War Strategies.....	905
	B. <i>Confronting the Nazi Past</i>	907
	1. Repression.....	907
	2. Education and Awareness.....	909
	C. <i>Nationalism and Reunification</i>	911
III.	MAGNITUDE OF THE NEO-NAZI THREAT.....	912
	A. <i>Actions and Words</i>	912
	B. <i>Organization</i>	915
IV.	GERMAN LAW.....	917

- A. *Individual Liberties Guaranteed by the Basic Law* 917
 - 1. Overview 917
 - 2. Freedom of Expression 919
 - 3. Political Parties 923
- B. *Statutory Restrictions on Individual Liberties: The German Penal Code* 924
 - 1. Criminal Agitation 925
 - 2. Representation of Violence and Incitement to Racial Hatred 925
 - 3. Insult and Formal Complaints 926
 - 4. Genocide 927
- C. *Implications for Individual Liberties* 927
- V. THE INTERNATIONAL COMMUNITY'S RESPONSE TO THE NAZI ERA 930
 - A. *Conventions* 931
 - 1. International Convention on the Elimination of All Forms of Racial Discrimination 931
 - 2. Convention on the Prevention and Punishment of the Crime of Genocide 932
 - 3. European Convention for the Protection of Human Rights and Fundamental Freedoms 933
 - B. *Implications for Individual Liberties* 934
- VI. EFFECT AND EFFECTIVENESS OF LAWS 936
- VII. CONCLUSION 938

I. INTRODUCTION

Upon the conclusion of the Second World War, the German people faced a daunting challenge. The Germans sought to emerge from their defeat at the hands of the Allies as a new and formidable nation, worthy of acceptance and moral respect from the world community.¹ To achieve this goal, the Germans would have to prove to Europe and the rest of the world that their recent Nazi history, responsible for the systematic extermination of millions of innocent lives, would remain forever in the past.

1. The Preamble of the German Basic Law (*Grundgesetz*) or Constitution, enacted in 1949, prominently proclaims that “[t]he German People [are] . . . [a]nimated by the resolve . . . to serve the peace of the world as an equal partner in a united Europe, and [desire] to give a new order to political life.” GRUNDGESETZ [Constitution] [GG] pmb. (F.R.G.), translated in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (Ulrich Karpen ed., 1988) 223, 226 [hereinafter Karpen].

In the years following the Allied occupation, Germany began its journey back to world acceptance.² The newly created Federal Republic of Germany³ weaved provisions into its legal fabric⁴ that were designed to make many of the fundamental tenets of Nazism illegal.⁵ For example, the Basic Law, effectively Germany's Constitution, provides that political parties which do not conform with democratic principles are unconstitutional.⁶ In addition, although Germany did not remilitarize until the 1950s,⁷ the international community acted quickly to prevent the repetition of Germany's Nazi past by adopting conventions that declared⁸ its intolerance of the atrocities committed by the Nazis.⁹ For

2. For a useful overview of German history in this century, see MARY FULBROOK, *THE DIVIDED NATION: A HISTORY OF GERMANY, 1918-1990* (1991).

3. East Germany, or the German Democratic Republic (GDR), was partitioned by the occupying forces following the war and remained a separate, communist nation until its reunification with the Federal Republic of Germany (FRG) in 1990. See FULBROOK, *supra* note 2, at 160-67. Notably, the Basic Law was originally intended to be subject to change upon the reunification of Germany and was therefore deemed temporary. For this reason the Basic Law was not accorded the official title "Constitution." *Id.* at 163. See also Gregory S. McCurdy, Note, *German Reunification: Historical and Legal Roots of Germany's Rapid Progress Towards Unity*, 22 N.Y.U. J. INT'L L. & POL. 253, 257 (1990).

4. The Basic Law of the Federal Republic of Germany was implemented in 1949, during the period of Allied occupation immediately following World War II. During the occupation of the German territory, the Allies repealed all of the Nazi laws, and subjected the remaining laws to a rule under which no law could in any way cause injustice or discriminate in favor of the Nazis. See NIGEL FOSTER, *GERMAN LAW & LEGAL SYSTEM* 27 (1993).

5. For example, the Basic Law bans certain political parties, hate speech, and discrimination. GG art. 1(1), 21(2), *translated in* Karpen at 227, 236.

6. Article 21(2) states:

Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional.

GG art. 21(2), Karpen at 236. For a more detailed discussion of Article 21(2), see *infra* part IV.A.3.

7. FULBROOK, *supra* note 2, at 130.

8. See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]; *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter *Genocide Convention*].

9. Approximately six million Jews, 300,000 Gypsies, ten million Slavs, and 200,000 homosexuals were killed by the Nazi regime. For a more detailed breakdown of the victims of the Holocaust, see R. J. RUMMEL, *DEMOICIDE: NAZI GENOCIDE AND MASS MURDER* 85-101 & tbl. A (1992). See also A MOSAIC OF VICTIMS (Michael Berenbaum ed., 1990); JOE J. HEYDECKER & JOHANNES LEEB, *THE NUREMBERG TRIAL* 346-47 (R.A. Downe ed. & trans., 1962).

example, the United Nations Charter itself, enacted in 1948, proclaims equality for all men and women and upholds the dignity and worth of all individuals.¹⁰

Despite the legal measures adopted by Germany and the international community, groups and individuals espousing neo-Nazi ideals have organized followings across much of Germany in the postwar years. These groups are outgrowths of the Nazi regime itself; many of the leaders of the postwar neo-Nazi movement were active participants and leaders in the Third Reich.¹¹ Today, a new generation of neo-Nazis threatens to undermine much of the social and political progress Germany has made over the past forty-five years. As a result, many of the laws designed to prevent the resurgence of Nazism are now being invoked.

This Note examines how the legal measures taken against neo-Nazis may implicate individual liberties such as freedom of expression and association. Part II of this Note analyzes the political and social climate existing in post-war Germany that allowed the government to take strong measures to curtail Nazism, yet simultaneously provided fertile ground for the neo-Nazi movement. Part III discusses the magnitude of the current neo-Nazi threat. Parts IV and V, respectively, examine the devices employed by German and international authorities to ensure that the atrocities of the Holocaust are never repeated. Part V also analyzes the effect of these laws on the individual liberties of those in the neo-Nazi movement. Finally, Part VI discusses the effect that these attempts to combat the current neo-Nazi threat have had upon the practices of neo-Nazis. This Note concludes that although Germany may be justified in suppressing certain types of speech and association, this suppression may actually drive the neo-Nazi movement into the mainstream where its disguised message may find an even larger audience.

For an examination of the extent to which the Germans, as a people, were a de facto party to the Holocaust by providing the infrastructure under which it occurred, see *infra* note 44.

10. U.N. CHARTER pmbl.

11. See RAND C. LEWIS, A NAZI LEGACY: RIGHT-WING EXTREMISM IN POSTWAR GERMANY xii (1991).

II. POST-WORLD WAR II GERMANY

A. Denazification

As the Second World War came to an end, the victorious Allied forces convened to devise a plan for the future of Germany.¹² The Allies agreed, in principle, on three policy goals: the demilitarization, denazification, and democratization of Germany.¹³ The Allies also agreed to divide Germany among themselves into four separate zones of occupation¹⁴ in which to implement their policy goals.

The Allies initially envisioned a cooperative administration of the occupied zones and the eventual emergence of Germany as a single political unit.¹⁵ However, during the occupation period from 1945 to 1949, different policies emerged in the four zones as "the aims and practices of all the occupying powers shifted dramatically."¹⁶ The polarization of the western and eastern allies intensified throughout the period of occupation,¹⁷ culminating in the "Berlin Blockade" in 1948 when the Soviet Union cut off Berlin from the western zones.¹⁸

1. Trial and Error

In 1945, the Allies began the task of denazifying Germany.¹⁹ In the western zones, particularly the United States zone, the

12. The Allies held conferences in Yalta (February 4-11, 1945) and Potsdam (July 17-August 2, 1945). See FULBROOK, *supra* note 2, at 131-32.

13. *Id.*

14. The four zones were occupied by the United States, the Soviet Union, Great Britain, and France. Originally, the Allies divided Germany into three parts of substantially equal population. The original zones went to the United States, the Soviet Union, and Great Britain, leaving the Soviets with the greatest geographical land area spanning most of eastern Germany. The Yalta conference allocated a fourth zone to France. Although the United States and Great Britain argued that France's zone should be taken from the Soviet Union's larger land area, this zone was carved out of the United States and British zones to the west. See FULBROOK, *supra* note 2, at 130-32.

15. See Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 480 (1991).

16. FULBROOK, *supra* note 2, at 134.

17. *Id.* at 160-67.

18. *Id.* at 158. The "Berlin Blockade," which lasted from June 1948 to May 1949, effectively isolated Berlin from the rest of the world, cutting off all road, rail, and water routes to the city. The western allies were forced to air-drop food and basic supplies to Berliners for almost one year. *Id.*

19. The general Allied philosophy of denazification has been summarized as follows:

Western Allies approached denazification from an individual and psychological level.²⁰ The denazification process was originally designed to purge from office all German officials who were known members of, or collaborators with, the Nazi Party.²¹ In addition to targeting individuals affiliated with the Nazi Party, the Allies also proscribed all Nazi organizations and institutions, and confiscated property believed to have belonged to the Nazi Party.²²

The Western Allies' individual approach to denazification became a logistical juggernaut. First, definitively identifying individuals who were legitimate targets of the purge was difficult.²³ The criteria used to identify Nazis were less than exact classifications of individuals, which frustrated the ability of the Allied authorities to make swift and consistent identifications for the purpose of making arrests.²⁴ Second, eradicating the vestiges of Nazism from Germany required tremendous amounts of effort and resources.²⁵ While membership in the Nazi Party itself established a legitimate, bright-line rule for arrests, U.S. authorities estimated that there were millions of other Germans who belonged to affiliated organizations, but escaped the denazification effort.²⁶ Consequently, implementation of the denazification program was arbitrary and incomplete at best. Finally, even when the denazification program successfully removed identified Nazis from various government and civic

[I]n some way, Germany must be cleansed of Nazis, that those guilty of sustaining Nazi rule must be punished, and that it was essential, if future peace was to be secured, that Germans should be convinced of the error of Nazi views and persuaded to assent to more democratic and peaceful values.

Id. at 141.

20. *Id.* at 144.

21. *See id.* This program called for the systematic firing of all officials and administrators throughout all levels of national and local government who were affiliated with the National Socialist German Workers Party (NSDAP), known as the Nazi Party. *Id.* For example, the Allied Control Council issued Directive Number 24, which explicitly required the removal of Nazis from government offices and positions of responsibility. *Id.* at 29.

22. *See* LEWIS, *supra* note 11, at 29.

23. The Control Council proffered a set of criteria for the arrest of those who were "more than nominally involved in the Nazis program." *Id.* These criteria included those who had held national or local office, authorized or participated in Nazi atrocities or Nazi discrimination, avowed continual belief in Nazism, and those who "voluntarily gave substantial moral or material support or political assistance to the NSDAP." *Id.* (citing Control Council, *Official Gazette* 5 (March 31, 1946) at 98).

24. "[T]he task became one of trying to find appropriate external indices or evidence for internal predispositions and states of mind." FULBROOK, *supra* note 2, at 144.

25. LEWIS, *supra* note 11, at 30.

26. *Id.*

positions, removing these administrators adversely affected the communities they served.²⁷ Vacancies created by the removal of otherwise able administrators were often filled by less experienced persons, and the communities suffered.²⁸

Both the Allies and the German people became skeptical of the denazification program because of its inherent inadequacies and inefficiencies.²⁹ In fact, in the zones occupied by the West, "efforts towards denazification rapidly turned into an enormous bureaucratic machine."³⁰ This bureaucratic machine affected German society psychologically by confirming a sense of self-pity and victimization among the majority of the German population.³¹ Ironically, on an individual level, the denazification program stimulated a sense that the German masses were not responsible for the Holocaust, which enabled the culpable *Mitläufer*³² to perceive themselves as more akin to victims than perpetrators of the Holocaust.³³

2. Cold War Strategies

By 1948 the Cold War had begun, and the Allied powers had tailored their occupation strategies according to their respective goals and desires. In the Soviet occupation zone, the Soviet Union placed greater emphasis on denazification through the dismantling of German industry than on implementing a denazification strategy also focused on individuals.³⁴ In this effort to denazify Germany, the Soviet Union radically transformed the social and economic organization of its eastern zone.³⁵ This reorganization also focused on educational reform,

27. *Id.* at 33-34.

28. *Id.*

29. *Id.* at 32. Because of these inadequacies, the Allies shifted the focus of their efforts from an individualistic denazification program to the denazification and dismantling of German industry, which the Allies perceived as the cornerstone of the Nazi program. *Id.* at 29. For a discussion of the Soviet Union's denazification program, see *infra* text accompanying notes 34-37.

30. Alf Lüdtkke, *Coming to Terms with the Past: Illusions of Remembering, Ways of Forgetting Nazism in West Germany*, 65 J. MOD. HIST. 542, 549 (1993). In attempting to make determinations of whether suspected Nazis met the proffered criteria for discharge from specific duties, the Allies' backlog in processing dossiers reached into the thousands. See LEWIS, *supra* note 11, at 33.

31. Lüdtkke, *supra* note 30, at 549.

32. *Mitläufer*, which literally translates as "fellow travelers," is the term used to classify the "registered people," members of the Nazi party or its affiliates. *Id.*

33. *Id.*

34. LEWIS, *supra* note 11, at 34.

35. FULBROOK, *supra* note 2, at 145.

resulting in the systematic discharge and replacement of teachers who were former members of the Nazi Party.³⁶ Moreover, the Soviet Union altered the educational system to conform to its own socialist views, for example, by offering evening classes on Marxist-Leninist philosophy.³⁷

The advent of the Cold War also caused the United States to change its occupation strategy. The U.S. authorities, who preferred a well-functioning German economy and efficient administration to counter the Soviet transformation, pressed for a quick end to the cumbersome denazification effort.³⁸ Consequently, by 1949 many former Nazis were reintroduced into German society,³⁹ and the goal of eradicating Nazism from Germany was never fulfilled.

By 1949 the rift in relations between the United States and the Soviet Union made Germany's reunification unlikely.⁴⁰ The Cold War resulted in the division of Germany into two separate states: the Federal Republic of Germany (FRG) or West Germany, formerly occupied by the American, British, and French forces, and the German Democratic Republic (GDR) or East Germany, formerly occupied by the Soviet Union.⁴¹ Thus, while East Germany remained a communist state under the auspices of the Soviet Union, West Germany established a democracy.⁴²

36. *Id.* It was estimated that by 1949, new teachers accounted for over 80% of the lower school staff in the Soviet zone, and in 1948 two-thirds of all teachers were under the age of thirty-five. *Id.*

37. *Id.* at 145-46.

38. See Lüdtke, *supra* note 30, at 550. The United States recognized the potential harmful effects of further depleting the western zone of capable administrators and industrial leaders. *Id.*

39. LEWIS, *supra* note 11, at 37. Disarray in the administration of the denazification program facilitated many former Nazis' reentry into German society. For example, those who were able to convince the occupying authorities of their active resistance to the Nazi regime could circumvent the system—and avoid being purged—by obtaining a category “V” classification, which enabled them to reenter the West German work force. *Id.*

40. National unification was regarded by Germans as a lofty goal that, under the new world order, could never be achieved. Yet the Germans still “universally invoked [national unification] as an unavoidable piety, but with a degree of commitment directly proportional to the perceived likelihood of its impossibility.” Steven Muller, *Democracy in Germany*, DAEDALUS, Winter 1994, at 36.

41. The first national elections in West Germany were held on August 14, 1949, three months after the approval and signing of the West German Basic Law. East Germany was formally established on October 7, 1949. FULBROOK, *supra* note 2, at 164.

42. Generally, both West Germany and Western Europe acknowledged the seemingly insurmountable ideological and political differences and difficulties in establishing a single, unified Germany in the foreseeable future. Thus, the collective West focused on the economic and political reconstruction of Europe without regard for Eastern Europe, which the West deemed “firmly and perhaps forever in the grip of Soviet imperialism.” *Id.*

B. Confronting the Nazi Past

Notwithstanding the efforts to create a democratic West Germany, the denazification efforts of the occupation period were unsuccessful. In particular, the many Nazis who remained active in West Germany threatened to undermine the new West German democracy and its ideals.⁴³ Thus, the West German government needed to prove to the world, especially its European neighbors, that it would never allow its recent Nazi past to recur and that it would reject proponents of Nazism.⁴⁴

1. Repression

During the years following the formation of West Germany, a tension emerged between the government's attempt to repudiate Nazism by educating its populace about its Nazi past,⁴⁵ and the population's resistance to remembering this past.⁴⁶ Even before the official creation of the country in 1949, West German society showed signs that confronting its Nazi past would not be an easy task.⁴⁷ The difficulty in remembering the Nazi era can be

43. In the immediate postwar period, roughly 15-18% of the adults in West Germany were unreconstructed Nazis. LEWIS, *supra* note 11, at 38 (citing ABRAHAM ASHKENASI, *MODERN GERMAN NATIONALISM* 59 (1976)). Furthermore, former members of the SS (*Schutzstaffel*, Hitler's elite police force) and other Nazi sympathizers continued to hold gatherings and meetings as well as distribute informational newsletters. *Id.*

44. One commentator described the enormity of the Holocaust in terms of social and moral responsibility:

What set the Holocaust apart was the unprecedented application of industrial technology and the factory-based manufacturing process to the extermination of several million human beings. This was neither a sudden, brief, and uncontrollable explosion of rage, nor merely the work of a few. Instead, what those who conceived and ordered this extermination called the "Final Solution" was a systematically planned and efficiently executed program to create and operate a new industry solely and explicitly for the purpose of mass murder. Thousands of people were employed in this process: collecting and transporting the victims, storing and putting them to work while in storage, exterminating them, and disposing as productively as possible any usable remains—for example, fat drained from the cremation process was used to make soap. These thousands worked at such tasks not just for weeks and months, but for several years. Their work in the murder industry was the source of their daily bread.

Muller, *supra* note 40, at 33-34.

45. The government was not interested in fostering any form of German nationalism at this early stage of rebuilding. See FULBROOK, *supra* note 2, at 304.

46. See Lüdtke, *supra* note 30, at 557.

47. This attitude can be illustrated by examining trends found in the German press and publishing industry. Until 1947, among the books published

attributed to a sense of guilt,⁴⁸ as well as a sense of vulnerability.⁴⁹ In fact, in an attempt to alleviate the guilt associated with the acts perpetrated by the Nazis, the West German government established a compensation program designed to repay victims of Nazi war crimes.⁵⁰ However, on the whole, through the 1950s the German population still repressed its Nazi past.⁵¹

While the general population ignored or repressed memories of the Nazi era,⁵² the emerging neo-Nazi movement spurred a resurgence of anti-Semitic ideology and actions,⁵³ leading to the widespread desecrations of Jewish cemeteries and cultural sites

on the Third Reich, the largest group consisted of diaries by survivors from concentration camps. See *id.* at 550 (citing Helmut Peitsch, "Autobiographical Writing as *Vergangenheitsbewältigung* (Mastering the Past)," 7 GERMAN HIST. 47, 70 (1989)). In 1947 and 1948, however, these diaries were met with increasing skepticism by reviewers in the publishing journals, who began criticizing these personal accounts for the authors' lack of objectivity and lack of "distance towards themselves," calling instead for "more appropriate forms of artistic and fictional presentation." *Id.*

In addition, a statistical study in 1987 analyzed studied the political leanings of Germans who were young adults during the Nazi Era. The study concluded that the "Nazi Generation," as a group, lagged initially in embracing the new West German democracy, but its views did subsequently converge with those of other cohorts. See Frederick D. Weil, *Cohorts, Regimes, and the Legitimation of Democracy: West Germany Since 1945*, 52 AM. SOC. REV. 308, 321 (1987). "It has been recognized . . . that the young generations after 1945 maintained a residual attachment to the Nazi regime and skepticism towards democracy . . ." *Id.* at 310 (citing ANNA J. MERRITT & RICHARD MERRITT, PUBLIC OPINION IN OCCUPIED GERMANY: THE OMGUS SURVEYS, 1945-1949, (1970)).

48. The general treatment of the Holocaust by the West Germans in its histories has been summarized as follows: "[A] sad story, we raise our hands in horror or hang our heads in shame, this exonerates us, and fortunately it is all over now." FULBROOK, *supra* note 2, at 107.

49. Recalling the atrocities of the Holocaust necessarily sparked vivid emotions, yet "since emphatic and emotional fervor seemingly had prepared the ground for nazism, every effort was made to suppress emotions and irrationality." Lüdtke, *supra* note 30, at 550.

50. For a discussion on the evolution and scope of the compensatory policies instituted by the West German government, see *id.* at 562-70. The GDR never recognized any responsibility for such war crimes or any need to make restitution to the Jews until the fall of the GDR in 1989. See FULBROOK, *supra* note 2, at 276.

51. FULBROOK, *supra* note 2, at 303. This repression of the past by Germans in the 1950s was also matched by a general political apathy on the part of Germans. *Id.* at 304.

52. During the 1950s and early 1960s, a collective repression of the violent and murderous practices of the Nazi era persisted, such that "one's own role and activity during fascism was 'forgotten' or 'cut out:' people silently erased any remembrance of their own acceptance, support, and complicity." Lüdtke, *supra* note 30, at 554.

53. Extremist right-wing parties and organizations, including groups formed by former SS and Hitler Youth members, garnered tens of thousands of members during the postwar period. See LEWIS, *supra* note 11, at 40-41.

in 1959.⁵⁴ Public outcry prompted the West German government to focus its efforts on education.⁵⁵ The authorities viewed the desecrations as "deviant behavior" on the part of youngsters, and concluded that educating the youth about Nazism would help alleviate such right-wing extremism.⁵⁶

2. Education and Awareness

The West German government embarked on a plan to increase awareness of anti-Semitism, racism, and the history of Nazism. The plan included changes in both grade school and adult education curricula.⁵⁷ The government provided special training to teachers and leaders of youth organizations,⁵⁸ and funding for brochures and other teaching aides for classroom lessons on the subject.⁵⁹ Outside the classroom, by the mid-1960s the government had created displays and restored certain buildings at former concentration camps.⁶⁰

Notwithstanding these efforts, the government itself encountered substantial difficulty in helping Germans confront their Nazi past. The West German government's efforts to sponsor public commemorations and ceremonies were modest and poorly publicized, in part because the government feared that the emotions stirred by these events could cause the public to react irrationally.⁶¹ Consequently, these official actions were met with public skepticism.⁶²

As an alternative to public ceremonies, formal education proved to be a less incendiary and therefore more effective means of coming to terms with Germany's Nazi history. The educational

54. For example, members of a right-wing extremist youth group painted swastikas on various Jewish cultural sites in the city of Cologne. *Id.* at 61.

55. Describing the reaction to the desecrations, one commentator noted:

Politicians of all parties and journalists and commentators at national and regional papers alike hastily proclaimed utter shame. Moral disgust was made public over and over again. When it came to action, the publicists and politicians joined forces to exert strong pressures on schools, teachers, and publishers of textbooks for schools: nazism should not be omitted but dealt with extensively.

Lüdtke, *supra* note 30, at 552.

56. *Id.*

57. *Id.* at 553.

58. *Id.*

59. *Id.*

60. *Id.* at 555-56.

61. *Id.* at 555.

62. The government's activities were criticized for "gloss[ing] over the concrete suffering and grief of the mourners." *Id.* at 559.

environment guaranteed "both orderly behavior and increased rationality,"⁶³ and did not incite the high emotions raised by public events. Nevertheless, even the West German educational policy on Nazism produced some unforeseeable consequences. For example, a high school program designed to stimulate critical thinking⁶⁴ resulted in the re-circulation of once influential anti-Semitic writings.⁶⁵ Ironically, contrary to the express goals of educating German youth about the horrors of Germany's Nazi past, the educational policy apparently caused some young Germans to support Nazi ideologies. Concerned by such developments, as recently as 1993 the German Federal Center for Political Education banned a book entitled *Hiliter* from use in tenth-grade German classrooms.⁶⁶ After three years of experimental use in two German states, the Center pulled the book, citing fears that it might make neo-Nazis out of some of the students.⁶⁷

Despite West Germany's attempt to confront its Nazi past, by the 1980s certain incidents revealed "a startling ignorance of, or set of misapprehensions about, the past on the part of many . . . West Germans."⁶⁸ The reactions of the population to the broadcast debut of the American television movie *Holocaust* illustrates this general lack of knowledge.⁶⁹ The networks prepared the Germans in the weeks before the air dates of *Holocaust* by outlining the film and its story to the public through preparatory broadcasts and press reviews, and by providing information packages to schools.⁷⁰ In addition, throughout the broadcast, professional historians and survivors of the Holocaust served as telephone panelists, answering questions from viewers and offering opinions on both the film and German fascism.⁷¹

63. See *id.* at 555.

64. Lüdtke, *supra* note 30, at 553. The program materials included reprints and highlighted statements by several prominent, nineteenth-century, pre-Nazi ideologues. *Id.*

65. *Id.* The reading list included works and statements by Houston Stuart Chamberlain, Count Gobineau, Günther Maar, Alfred Stöcker, Richard Wagner, and Alfred Rosenberg. *Id.*

66. See Craig R. Whitney, *German Schools Ban Books on Rise of Nazis*, N.Y. TIMES, Oct. 21, 1993, at A10.

67. *Id.* *Hiliter* depicts, through text and drawings, the torture of Jews and political opponents of the Nazis in concentration camps, as well as the words of Hitler, Goebbels, and other Nazi leaders. *Id.* One official at the Federal Center for Political Education recognized the inclusion of such a book in the public school curriculum as "an embarrassing mistake." *Id.*

68. FULBROOK, *supra* note 2, at 306.

69. *Holocaust* was a fictional depiction of the lives of a Jewish family in Germany prior to and throughout World War II. *Id.*

70. See Lüdtke, *supra* note 30, at 544.

71. *Id.* at 545.

The responses by the viewers revealed that many Germans were previously unaware of the “‘other’ or ‘silent’ histories of the Nazi past [that] existed outside academia and the schools.”⁷²

C. Nationalism and Reunification

By the 1980s, West Germans openly and willingly adopted the concept of *Vergangenheitsbewältigung* (coming to terms with the past).⁷³ In fact, a new nationalism and German pride spread across conservative corners of West Germany, symbolizing an end to the guilt and shame of being German.⁷⁴ In 1989, the demise of the Soviet Union enabled East Germany to end communist rule, and the Berlin Wall, which symbolized the ideological barrier between East and West Germany, was torn down.⁷⁵ The rising sense of nationalism in the West, including increased talk of the traditional “fatherland,”⁷⁶ facilitated reunification. On October 3, 1990, East and West Germany reunited as one nation.⁷⁷

Reunification had two distinct implications that advanced the right-wing movement. First, the influx of sixteen million former communists from the east who suddenly became new citizens and voters in a democratic society⁷⁸ gave Germany the opportunity to develop a strong national and ethnic identity.⁷⁹ Second, since Germany’s borders opened after the fall of the Berlin Wall, over one million foreigners have crossed into Germany seeking

72. *Id.* at 547. Indeed, thousands phoned in, and “thousands cried on the phone.” *Id.* at 545-46. More than 20 million citizens, over 50% of the adult population of the country, watched the film. More than one half of the survey’s respondents talked to relatives, friends, and colleagues about the film. Thus, “non-viewers almost could not have avoided some information” pertaining to the film. *Id.* at 545 n.10. On the whole matter of the broadcast and the responses, see DER FERNSEHFILM “HOLOCAUST”: EINE NATION IST BETROFFEN (Peter Marthesheimer & Ivo Frenzel eds., 1979); F.T. ERNST, HOLOCAUST: *Das Fernsehereignis aus der Sicht politischer Bildung*, AUS POLITIK UND ZEITGESCHICHTE 34 (1981).

73. See FULBROOK, *supra* note 2, at 304.

74. *Id.*

75. See Serge Schmemmann, *Clamour in the East; East Germany Opens Frontier to the West for Migration or Travel; Thousands Cross*, N.Y. TIMES, Nov. 10, 1989, at A1; Serge Schmemmann, *Wall Opened at Old Center of Berlin, and Mayors Meet; Communists Call Congress; Square Is Mobbed*, N.Y. TIMES, Nov. 13, 1989, at A1.

76. See FULBROOK, *supra* note 2, at 304.

77. See Serge Schmemmann, *Evolution in Europe Two Germanys Unite After 45 Years with Jubilation and a Vow of Peace*, N.Y. TIMES, Oct. 3, 1990, at A1.

78. See Muller, *supra* note 40, at 42-43.

79. *Id.* at 43. For a general discussion of German identity, see Anne-Marie Le Gloannec, *On German Identity*, DAEDALUS, Winter 1994, at 129. See also FULBROOK, *supra* note 2, at 291-317.

asylum.⁸⁰ As a consequence of reunification, discontent has fallen particularly over the eastern part of Germany, where the millions of Germans left unemployed by the demise of socialism have found themselves competing for jobs with over one million asylum seekers. The modern rise of neo-Nazism may indeed be attributed to the unification of people from two states that espoused bipolar ideologies, coupled with a constant influx of immigrants.⁸¹

III. MAGNITUDE OF THE NEO-NAZI THREAT

A. Actions and Words

In August 1992, in the eastern German Baltic seaport of Rostock, more than eight hundred young neo-Nazis launched an armed attack on an apartment complex for refugees.⁸² The eastern German youths, armed with Molotov cocktails, shotguns, and clubs, shouted slogans such as "Sieg Heil!" and "We demand a New Fürher."⁸³ They were lashing out at foreigners, whom they blamed for Germany's high unemployment rate and recessed economy.⁸⁴ The neo-Nazis sent a clear message of dissatisfaction with Germany's immigration policies, compelling the German government to announce policy changes favored by neo-Nazis.⁸⁵

80. See Craig R. Whitney, *A Shadow in Germany: A Special Report*, N.Y. TIMES, Oct. 21, 1993, at A1. After the fall of the Berlin Wall:

[t]he euphoria of freeing East Germany from its Communist shackles evaporated quickly, to be replaced by uncertainty, resentment and bitter reality. The costs of rebuilding the decrepit east are staggering—estimates run as high as \$610 billion—and this normally prosperous nation . . . is now coping with increased unemployment—7% in western Germany, 14% in the east—and a worrisome recession.

Tamara Jones, *Germany's Troubles*, L.A. TIMES, Mar. 7, 1993, (Magazine), at 14.

81. See Heiner Müller, *Germany's Identity Crisis*, NEW PERSP. Q., Winter 1993, at 16. The demise of socialism, coupled with German unification, created a vacuum in Germany where capitalism no longer had an enemy. In short, "[i]n the wake of the discrediting of the left-wing ideologies, right wing extremism has simply assumed the role of capitalism's harshest critic." *Id.*

82. See Martin A. Lee, *Hitler's Offspring*, THE PROGRESSIVE, Mar. 1993, at 30. The apartment complex housed more than 100 asylum-seekers from Vietnam and other countries. See also Stephen Kinzer, *Germans Sentence Anti-Foreign Rioter to 2 1/2 Years*, N.Y. TIMES, Mar. 4, 1993, at A15 [hereinafter *Germans Sentence Anti-Foreign Rioter*].

83. See Lee, *supra* note 82, at 30.

84. See Jones, *supra* note 80, at 14.

85. Shortly after the Rostock attack, German officials called for the immediate repeal of the German constitutional guarantee of asylum for political

In response to this apparent victory, these extremists staged a series of rallies leading to further attacks in Rostock and throughout Germany.⁸⁶ The violence was not limited to foreigners; the attacks were also aimed at Jews and represented a broader sentiment of racism and hatred.⁸⁷ In August 1992 and the months that followed, the neo-Nazi movement demonstrated its resources, resolve, and destructive force.⁸⁸ For example, several dozen policemen were injured in the original Rostock attack.⁸⁹ Incidents of anti-Jewish violence, in particular, increased in Germany from sixty-five in 1992 to seventy-two in 1993.⁹⁰ The number of anti-Jewish incidents, including the defacing of Jewish synagogues, cemeteries, and community centers, also rose from 562 in 1992 to 656 in 1993.⁹¹

German neo-Nazis pose a very real, physical threat because they are well-fortified with an impressive arsenal of weaponry. In addition to the more easily obtainable generic weapons, such as the shotguns and Molotov cocktails used in the attack in Rostock, neo-Nazis have stockpiled state-of-the-art munitions by raiding the military installations of the former Red Army in eastern Germany.⁹² In fact, neo-Nazis reportedly have purchased rocket launchers and other high-tech arms directly from withdrawing Russian soldiers.⁹³

Since the end of the Second World War, the German government has viewed neo-Nazi violence as a "minor nuisance,"

refugees and ordered the deportation of nearly 100,000 Gypsies to Romania. See Lee, *supra* note 82, at 30.

86. Cf. John Eisenhammer, *Racist Violence Sweeps Over Germany in Rostock's Wake*, THE INDEPENDENT, Aug. 31, 1992, at 8. In Eisenhüttenstadt, for example, a foreigner's hostel was gutted by a petrol-bomb attack. In Zielitz, 40 neo-Nazi youths bombed another hostel, severely burning two residents. In Leipzig, a refugee tent encampment was obliterated by petrol-bombs. *Id.*

87. "The [neo-]Nazis sparked a wave of terror unlike anything Germany has witnessed since Hitler was in power. [Neo-]Nazi thugs went on a rampage, attacking foreigners in hundreds of cities and towns. Jewish cemeteries were desecrated with swastikas, and a memorial to a concentration camp was gutted by arsonists." Lee, *supra* note 82, at 30. Attacks on Jewish cemeteries had increased from 62 in 1992 to 67 in 1993. See Anna Tomforde, *Neo-Nazi Hate Shifts from Turks to Jews*, THE GUARDIAN, May 28, 1994, at 13.

88. "[E]very weekend still brings new assaults on refugees." Marc Fisher, *Rightists' Attacks on Foreigners Ebbing in Germany*, WASH. POST, Mar. 5, 1993, at A23. The number of attacks against foreigners had decreased by March 1993. *Id.*

89. See Ian Murray, *Police Battle Racist Mob in Fifth Night of Rostock Riots*, THE TIMES (London), Aug. 27, 1992.

90. See Tomforde, *supra* note 87, at 13.

91. *Id.*

92. See Lee, *supra* note 82, at 30.

93. *Id.*

instigated by a "lunatic fringe composed of deranged misfits and malcontents."⁹⁴ However, the recent rise in Neo-Nazi violence⁹⁵ has impressed upon the German government that right-wing extremism is now much more than a mere nuisance⁹⁶ and has compelled the government to act accordingly. In fact, Germany's federal intelligence service recently tripled the size of the department responsible for the surveillance of right-wing militants.⁹⁷

For many of those living in Germany, especially foreigners seeking asylum, fears of violence are compounded by the fact that the German police appear apathetic, and in some cases sympathetic, toward the neo-Nazi cause.⁹⁸ The police do not rigidly enforce provisions outlawing slogans such as "Sieg Heil"⁹⁹ In the Rostock attack, the police were accused of standing idle while the neo-Nazis wreaked havoc.¹⁰⁰ Most significantly, the police actually participated in the attacks on foreigners in the towns of Dresden and Eisenhüttenstadt. In Eisenhüttenstadt, the attacks by the police continued even after the neo-Nazis left the scene.¹⁰¹

The neo-Nazis can be recognized as much by their words as by their violent actions. A popular rallying cry among neo-Nazis is to deny or cast into doubt the historical fact of the Holocaust. This theory, known as the "Auschwitz Lie," denies that the Nazis orchestrated the systematic extermination of Jews. Neo-Nazis contend that the Allies and Jews deliberately lied in reports of

94. *Id.* at 31.

95. In 1990, 375 acts of violence by right-wing extremists were recorded by the German government's Office for the Protection of the Constitution. In 1991, 1,483 acts of violence were recorded. In 1992, the number rose to 2,285 recorded acts of violence. *See Jones, supra* note 80, at 14. By comparison, only 388 acts of violence were documented between 1983 and 1987. LEWIS, *supra* note 11, at 126 (setting forth these statistics at tbl. 5.3).

96. Writing in the *Christian Science Monitor* in February 1993, a German cabinet minister noted the "destructive potential" of right-wing radicals, and stated that the violent threats of these groups are taken "very seriously" by the government. *See Friedrich Bohl, Germans Move to Stem Violence, CHRISTIAN SCI. MONITOR*, Feb. 9, 1993, at 18.

97. *See Whitney, supra* note 80, at A1.

98. The Republican Party, on the right of the German political spectrum and the party that many neo-Nazis support in elections, has a higher proportion of supporters among police than the general electorate, which may explain the reluctance of the police to crack down on neo-Nazi groups. *Lee, supra* note 82, at 31.

99. *See id.* "Unless they are physically assaulted by Nazi groups . . . the police are apt to turn a blind eye as [these groups] parade through the streets . . ." *Id.* For a discussion of the applicable laws prohibiting such slogans, see *infra* part IV.

100. *See Kinzer, Germans Sentence Anti-Foreign Rioter, supra* note 82, at A15.

101. *See Lee, supra* note 82, at 31.

such events in order to discredit Germany.¹⁰² For example, many neo-Nazis espousing the Auschwitz Lie claim that reports documenting the number of Jews killed in Nazi death camps were greatly exaggerated.¹⁰³ Others claim that the Holocaust took place without Hitler's knowledge.¹⁰⁴ Most proponents of the Auschwitz Lie, however, deny the existence of the Nazi death camps and gas chambers altogether.¹⁰⁵ Neo-Nazis propagate the Auschwitz Lie through a vast array of media and communications, including books, videos, brochures, and speeches.¹⁰⁶

B. Organization

Active right-wing extremists account for approximately 42,500 of Germany's present population.¹⁰⁷ Many are affiliated with known and established political or militant organizations, and many others are affiliated with political organizations that are banned by the government and remain underground.¹⁰⁸ As a purely political threat, the total number of people in the extremist groups is minimal compared to the total population of Germany.¹⁰⁹ Nevertheless, these groups have caused substantial destruction throughout Germany and influenced German

102. Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz" and Other "Lies,"* 85 MICH. L. REV. 277, 280 (1986). See discussion *supra* part IV.A.2.

103. *Holocaust Denial Not Covered by Free Speech*, Press Association Newsfile, April 26, 1994, available in LEXIS, News Library, Non-US File.

104. *Id.*

105. See Stein, *supra* note 102, at 280 n.11.

106. See *id.* at 280.

107. See Jones, *supra* note 80, at 14. The *New York Times* recently reported the number of right-wing extremists to be approximately 41,900. See Whitney, *supra* note 80, at A1. Significantly, the reunification with East Germany has provided a receptive mass constituency to expand the ranks of neo-Nazi parties, who deftly exploit the economic troubles and social hardship in eastern Germany. Lee, *supra* note 82, at 29.

108. See LEWIS, *supra* note 11, at 6-8. For example, the National Democratic Party (NDP) is an extreme right-wing political party on the fringe of legality in Germany. *Id.* The neo-Nazi group Nationalist Front, on the other hand, was banned by the government in November 1992. See Kinzer, *Germans Sentence Anti-Foreign Rioter*, *supra* note 82, at A15. The federal intelligence service has reported that 82 right-wing extremist organizations and other groupings existed in 1992 in Germany. In 1991, there were only 76 of these groups. Whitney, *supra* note 80, at A1.

109. LEWIS, *supra* note 11, at 8. Roughly 80 million people currently live in Germany. See Jones, *supra* note 80, at 14.

policy.¹¹⁰ Moreover, neo-Nazis have begun to cooperate with accepted, albeit far right-wing, political parties such as Germany's Republican Party.¹¹¹

The organizational structure of the right-wing extremists is informal, yet strong. The groups are in close, constant contact with one another through the efforts of *Die Bewegung* (The Movement), which is controlled by a "well organized network of neo-Nazi stalwarts."¹¹² The leaders of *Die Bewegung*, who know that the German government continuously monitors their activities, operate through a "diffuse array of front groups and factions, with different names in every region of the country."¹¹³ In an effort to spread their message and evade the German authorities, neo-Nazis have become increasingly sophisticated in their use of computer networks and other high-technology devices.¹¹⁴ In addition, neo-Nazi leaders escape governmental monitoring by using computers with encoded software and private mailboxes on an international network. This computer network effectively operates as a black market where neo-Nazis can trade various articles of propaganda, including banned copies of Hitler's speeches and books denying the existence of the Holocaust.¹¹⁵ Journalists who have infiltrated the neo-Nazi groups report that neo-Nazis are better coordinated and organized than the authorities anticipated, and that the German government has underestimated the depth and power of the movement.¹¹⁶

110. The Rostock attacks and riots exemplify the breadth of the right-wing extremists' power. See *supra* text accompanying notes 79-85 for a discussion of the Rostock incident.

111. Lee, *supra* note 82, at 31. The Republican Party, whose leader is a former SS member named Franz Schonhuber, is the foremost nationalist party in Germany, with approximately 25,000 members. Whitney, *supra* note 80, at A1. In August 1994, Germany's interior minister ordered the Republican Party placed under surveillance by federal security agents and labeled "extremist." The action was taken after Schonhuber announced an alliance with the German People's Union, a fellow ultra-nationalist political party, already deemed unconstitutional by the German government. See Rick Atkinson, *Bonn Orders Close Watch On Far-Right Nationalists*, INT'L HERALD TRIB., August 24, 1994.

112. Lee, *supra* note 82, at 29.

113. *Id.*

114. See Elizabeth Neuffer, *Neo-Nazi Spreading Hate with High-Tech*, BOSTON GLOBE, June 12, 1994, at 1. Computer networks, cellular phones, and fax machines have enabled the neo-Nazis to reach a greater audience across Europe, where they garner both ideological and financial support. *Id.*

115. *Id.* In April 1994, "large quantities" of neo-Nazi literature denying the existence of the Holocaust were reported to have been filed into Internet, the world's largest computer network. *TV Says Neo-Nazi Propaganda Uploaded Into Internet*, Reuters World Service, April 11, 1994, available in LEXIS, News Library, Non-US File.

116. Whitney, *supra* note 80, at A1.

IV. GERMAN LAW

A. Individual Liberties Guaranteed by the Basic Law

1. Overview

The Basic Law represents the primary legal attempt of the West German government to combat the resurgence of Nazism. The Basic Law, originally intended as a temporary constitution pending reunification with East Germany,¹¹⁷ established a "militant democracy" in West Germany.¹¹⁸ This constitutional scheme places a value on the dignity of man and restricts those who attempt to undermine that dignity.¹¹⁹ Thus, it "does not grant any liberties to the enemies of liberty."¹²⁰ For example, while Article 21, Section 1 states that political parties may be freely established,¹²¹ Section 2 empowers the Federal Constitutional Court to eliminate those parties that seek to impair or abolish the free democratic basic order.¹²²

117. Promulgated by the Parliamentary Council of West Germany on May 23, 1949, the Basic Law was actually designed to be the temporary law of the land, pending reunification with East Germany and subsequent adoption of a "permanent," formal constitution. See FULBROOK, *supra* note 2, at 163.

The temporary nature of the Basic Law is best illustrated by an examination of its own language. For example, the Preamble of the Basic Law resolves "to give a new order to political life for a transitional period." GG pmbL., Karpen at 226. (emphasis added). Further, the final article of the Basic Law provides that the "Basic Law shall cease to be in force on the day which a constitution adopted by a free decision of the German people comes into force." GG art. 146, Karpen at 306. Finally, Article 116 defines "German" to encompass persons living in the German Democratic Republic. *Id.* at 116, Karpen at 296.

118. See Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 674 (1980). A militant democracy ensures that "the state has the right, if not the duty, to defend itself by suppressing anticonstitutional activities. The state is not helpless and need not constitutionally observe a stoical silence even in the face of verbal assaults on its constitutional structure." *Id.* at 680.

119. Professor Andreas Heldrich of the University of Munich agreed with the following characterization of the underlying principle of the militant democracy by Professor Heldrich's interviewer, Robert Siegel: "Militant democracy says there are people who are undemocratic and it's our duty not to protect their right to be undemocratic." *All Things Considered* (NPR radio broadcast, Dec. 3, 1992).

120. Günter Dürig, *An Introduction to the Basic Law of the Federal Republic of Germany*, in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 11, 16 (Ulrich Karpen ed., 1988).

121. GG art. 21(1), Karpen at 236.

122. *Id.* This section provides:

The individual liberties guaranteed by the Basic Law are not absolute even though Article 1, Section 1 of the Basic Law proclaims: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."¹²³ The Federal Constitutional Court¹²⁴ has described this "dignity of man" as the "center of all [the Basic Law's] determinations."¹²⁵ However, the individual liberties guaranteed in the Basic Law may be limited by "general laws"¹²⁶ and by "the right to inviolability of personal honor."¹²⁷ A general law satisfies two requirements: (1) the law must be content neutral, meaning it must regulate matters rather than ideas; and (2) the law may only limit individual liberty if the purpose of the law has a higher rank of importance than the individual liberty itself.¹²⁸ Article 2 of the Basic Law is even more explicit in recognizing the extent to which individual rights may be limited. Article 2 provides: "Everyone shall have the right to the free development of his personality *in so far as* he does not violate the rights of others or offend against the constitutional order or the moral code."¹²⁹

The Basic Law has been construed to govern the relationship between the individual and the state as well as relationships between individuals. The Basic Law confers both "subjective" and "objective" fundamental rights upon individuals. Fundamental constitutional rights such as freedom of speech and freedom of association may be claimed by an individual directly against the state. These rights are subjective or defensive rights, binding on

Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

Id.

123. *Id.* art. 1(1), Karpen at 227.

124. The Federal Constitutional Court of Germany is the highest court in the land and acts as the guardian of the Basic Law, interpreting it to ensure uniformity and consistency throughout Germany. This court is the ultimate protector of basic rights. See FOSTER, *supra* note 4, at 44-45.

125. Judgment of February 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court] [BVerfGE] 1, 67 (F.R.G.).

126. Article 5(2) provides: "These rights are limited by the provisions of the general laws . . ." GG art. 5(2), Karpen at 228. See *infra* Part IV.B. (discussing how the Penal Code may limit individual liberties).

127. *Id.*

128. Ulrich Karpen, *Freedom of Speech, in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 91, 97 (Ulrich Karpen ed., 1988). Valid general laws include, for instance, laws protecting individual honor and personality, as well as laws protecting youth. *Id.* See also GG art. 5(2), Karpen at 228.

129. *Id.* art. 2(1), Karpen at 227 (emphasis added).

all branches of government and state actors.¹³⁰ In contrast, objective rights are general protections afforded by the Basic Law. The objective rights attempt to ensure that the subjective rights may be realized by the individual, without interference by the government, by encouraging the state to create a safe environment in which individuals may exercise their subjective rights.¹³¹ Therefore, while the Basic Law generally involves the relationship between the individual and the state, the Federal Constitutional Court has established that the Basic Law applies to relationships between individuals through the objective rights.¹³²

Although the Basic Law is the supreme law of the land, German constitutional interpretation is grounded in the "ordinary law" of the German Civil Code (Civil Code), similar to the grounding of U.S. constitutional jurisprudence in the common law.¹³³ The Civil Code is still the primary source of private law between individuals in Germany.¹³⁴ The underlying philosophy of the Civil Code is freedom of the individual, expressed as the autonomy of the will.¹³⁵ Thus, individuals seeking to protect their freedom of expression turn first to the doctrines of the ordinary law found in the Civil Code before looking to the Basic Law for protection.¹³⁶

2. Freedom of Expression

The bedrock democratic principle of freedom of expression forms the foundation of the Basic Law. Article 5, Section 1 specifically guarantees the freedoms of speech, press, reporting, and informing oneself.¹³⁷ In part, these freedoms represent an

130. Helmut Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 45, 50 (Ulrich Karpen ed., 1988). See also Kommers, *supra* note 118, at 675.

Article 1(3) states that the basic rights "shall bind the legislature, the executive and the judiciary as directly enforceable law." GG art. 1(3), Karpen at 227.

131. See Kommers, *supra* note 118, at 676. For a further discussion on subjective and objective rights, see FOSTER, *supra* note 4, at 115-16.

132. 7 BVerfGE at 205.

133. See Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 251 (1989).

134. See FOSTER, *supra* note 4, at 193. The German Civil Code (*Bürgerliches Gesetzbuch*) became effective on January 1, 1900, and remains the basis for German law today. See *id.*

135. See FOSTER, *supra* note 4, at 22.

136. Quint, *Free Speech*, *supra* note 133, at 251.

137. Article 5(1) provides:

attempt by the government of West Germany to ensure that the evils of Nazism remain in the past. For example, the freedom to inform oneself from generally accessible sources is designed to prevent the resurgence of a Hitlerian dictatorship, which existed "even over minds."¹³⁸ Moreover, the freedom of speech provides a "barrier against an overweight of government propaganda," that may potentially sweep "over the people under an alleged 'duty of the democratic state.'"¹³⁹ Nevertheless, the freedom of expression guaranteed in the Basic Law is not without limits. The prohibitions against violating the rights of others and offending the constitutional order or the moral code may limit freedom of expression.¹⁴⁰ Article 18 reads: "Whoever abuses freedom of expression . . . in order to combat the free democratic basic order, shall forfeit these basic rights."¹⁴¹ Thus, the scope of the limitation on free speech hinges upon the extent to which the speech threatens the "free democratic basic order," a concept that generally means "the liberal democracy consciously created, promoted, and protected by express provisions of the Basic Law."¹⁴²

The German courts have addressed the tension between the guarantees of the Basic Law and limitations found in other sources of law or in the Basic Law itself. In the *Lüth* case,¹⁴³ the Federal Constitutional Court confronted the issue of whether the general laws of the Civil Code supersede the freedom of expression guaranteed by the Basic Law. *Lüth*, an official in the Hamburg government acting in a private capacity, proposed a boycott of the film *Immortal Lover*, because the notorious anti-Semite and Nazi Era propagandist, Veit Harlan, directed the film.¹⁴⁴ Harlan sought an injunction prohibiting *Lüth* from

Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

GG art. 5(1), Karpen at 228.

138. Karpen, *supra* note 128, at 94 (citing THEODOR MAUNZ-REINHOLD ZIPPÉLIUS, *DEUTSCHES STAATSRICHT* 180 (24th ed. 1982)).

139. *Id.* at 94.

140. See GG art. 2(1), Karpen at 227.

141. *Id.* art. 18, Karpen at 234.

142. Kommers, *supra* note 118, at 680. For a more specific definition of the concept of "free democratic basic order," including the criteria designed by the Federal Constitutional Court to be its essential components, see Karl Doehring, *The Special Character of the Constitution of the Federal Republic of Germany as a Free Democratic Basic Order*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 25, 27 (Ulrich Karpen ed., 1988).

143. *Lüth* case, Judgment of January 15, 1958, 7 BVerfGE 198.

144. *Id.* at 199-200.

calling for the boycott.¹⁴⁵ Relying upon Section 826 of the Civil Code, Harlan claimed that Lüth's conduct intentionally inflicted economic injury upon him "in a manner contrary to public policy."¹⁴⁶ In response, Lüth claimed that a court-ordered injunction would violate his freedom of expression guaranteed under Article 5 of the Basic Law.¹⁴⁷

The court recognized that the rights of free speech are "absolutely fundamental."¹⁴⁸ Thus, while the general laws may limit free speech, these laws must be read in light of the constitutional provision upholding this most basic right.¹⁴⁹ The court concluded that this "reciprocal effect"¹⁵⁰ between the basic rights and the general laws¹⁵¹ requires it to weigh the values of the general law against the values of the Basic Law under the circumstances of each case.¹⁵²

The Federal Constitutional Court applied this balancing approach, holding that Lüth was entitled to proceed with his call for a boycott. In examining the particular circumstances of the case, the court considered Lüth's motive in seeking the boycott, recognizing that he would not benefit financially from a successful boycott.¹⁵³ Rather, Lüth's speech was intended to prevent the rest of the world from thinking that Germans had not fully repudiated their Nazi past.¹⁵⁴ Upon examining the underlying motives and implications of the speech itself, the court noted that Lüth's proposal for a boycott of Harlan's film was consistent with the principles of the Basic Law and democracy.¹⁵⁵ Consequently, Harlan's opposing private and purely economic interests, which were protected under the general law of the Civil Code,¹⁵⁶ had a minimal effect on the court's decision. The court concluded that Lüth's interest in freedom of expression outweighed the private economic interests professed by Harlan.¹⁵⁷

145. *Id.*

146. BÜRGERLICHES GESETZBUCH [Civil Code] [BGB], art. 826 (F.R.G.).

147. 7 BVerfGE at 200.

148. *Id.* at 208.

149. *Id.* at 208-209.

150. *Id.*

151. GG art. 5(1)-(2).

152. 7 BVerfGE at 210-11. According to the court, this balancing approach is necessary because the rights under Article 5, Section 1 of the Basic Law are limited by the general laws under Article 5, Section 2 which are, in turn, influenced by the basic rights (reciprocal effect). *Id.* See also Quint, *Free Speech*, *supra* note 133, at 283-84.

153. 7 BVerfGE at 215-216.

154. *Id.* at 216.

155. *Id.* at 216-17.

156. BGB art. 826.

157. See Quint, *Free Speech*, *supra* note 133, at 286.

The *Mephisto* case,¹⁵⁸ decided by the Federal Constitutional Court in 1971, contrasts sharply with the *Lüth* court's strong assertion of the constitutional right to freedom of expression.¹⁵⁹ The *Mephisto* holding suggests that the Basic Law guarantees of freedom of expression¹⁶⁰ and artistic freedom¹⁶¹ are not inviolate, and that under certain circumstances they must yield to countervailing interests. In *Mephisto*, the heir of a deceased German actor sought to enjoin the publication of a novel allegedly based on the actor's life.¹⁶² The *Mephisto* court found that the novel was a work of art and, therefore, was protected not by the Basic Law right to free expression, but rather by the Basic Law guarantee of artistic freedom.¹⁶³ The *Mephisto* court clarified a significant distinction between these two Basic Law provisions. Whereas the right to freedom of expression may be limited by either general law provisions or by the Basic Law itself, the guarantee of artistic freedom may be limited only by countervailing Basic Law provisions.¹⁶⁴ The *Mephisto* court found such countervailing provisions in the Basic Law's protection of personality¹⁶⁵ and human dignity.¹⁶⁶

The court determined that because truth and fiction were so intertwined in the novel, the fictional accounts would have defamed the memory of the deceased actor.¹⁶⁷ Therefore, the court held that the actor's interest in personality and human dignity outweighed the writer's interest in free artistic expression, and it enjoined publication of the novel.¹⁶⁸ Thus, *Mephisto* suggests that "the interest in free expression is not significantly weightier than any other constitutional interest."¹⁶⁹ Indeed, the subsequent decision of the Federal Constitutional Court in

158. Judgment of February 9, 1971, 30 BVerfGE 173.

159. Quint, *Free Speech*, *supra* note 133, at 290.

160. GG art. 5(1), Karpen at 228.

161. Article 5, Section 3 provides, in relevant part, "Art and science . . . shall be free." GG art. 5(3), Karpen at 228.

162. Quint, *Free Speech*, *supra* note 133, at 291.

163. *Id.* at 292-93

164. *Id.* at 296. In practice, the *Mephisto* court's distinction between a general law provision and a Basic Law guarantee may be irrelevant. Often a general law protects an important personal interest that is simultaneously protected by a Basic Law guarantee. *Id.* Therefore, an infringement of such a general law may implicate a Basic Law interest, such as human dignity, the protection of which may outweigh other conflicting Basic Law guarantees, such as artistic freedom or freedom of expression. *Id.*

165. GG art. 2(1), Karpen at 227. For the full text of this provision, see *supra* text accompanying note 129.

166. GG art. 1(1), Karpen at 227.

167. 30 BVerfGE at 195.

168. See Quint, *Free Speech*, *supra* note 133, at 295.

169. *Id.* at 307.

*Lebach*¹⁷⁰ solidified this conclusion by granting a preliminary injunction preventing the showing of a teleplay.¹⁷¹ The court weighed the values of freedom of reporting¹⁷² against an individual's right to personality¹⁷³ and again ruled in favor of the individual's right to personality.¹⁷⁴

In sum, the freedom of expression guaranteed by Article 5 of the Basic Law is not absolute. Freedom of expression may be limited by general laws under the Civil Code or balanced in light of all of the circumstances against other fundamental rights protected by the Basic Law.

3. Political Parties

The general provision of Article 21 of the Basic Law maintains that "political parties shall participate in the forming of the political will of the people. They may be freely established."¹⁷⁵ However, consistent with the concept of a militant democracy,¹⁷⁶ Germany will not tolerate enemies of its democratic structure and Basic Law. When Germany promulgated the Basic Law, it sought to eradicate Nazism and disassociate itself from any political party espousing goals and values the same as, or similar to, those of the Nazi Party. Therefore, the German Basic Law explicitly outlaws political parties whose central beliefs are contrary to the current constitutional system—the free democratic basic order.¹⁷⁷

170. Judgment of June 5, 1974, 35 BVerfGE 202.

171. See Kommers, *supra* note 118, at 691. *Lebach*, decided in 1973, involved a television documentary depicting a series of murders that occurred in Germany in 1969. When one of the perpetrators was scheduled for parole in 1973, he sought to enjoy the broadcast because it identified him by name, making him fear for his safety. *Id.*

172. See GG art. 5(1), Karpen at 228. This section provides, in full:

Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and *freedom of reporting by means of broadcasts* and films are guaranteed. There shall be no censorship.

Id. (emphasis added).

173. GG art. 2(1) provides: "Everyone shall have the right to the free development of his personality *in so far as* he does not violate the rights of others or offend against the constitutional order or the moral code." GG art. 2(1), Karpen at 227 (emphasis added).

174. 35 BVerfGE at 225.

175. GG art. 21(1), Karpen at 236.

176. See *supra* notes 118-19 and accompanying text.

177. Article 21(2) provides:

Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the *free democratic basic order* or to

For example, within the first seven years of the formation of West Germany, two political parties were banned by the Federal Constitutional Court¹⁷⁸—the Socialist Reich Party in 1952,¹⁷⁹ and the Communist Party of Germany in 1956.¹⁸⁰ The court held that “it is fundamentally inconsistent to allow parties to function in a constitutional system that presupposes basic values rejected by those parties.”¹⁸¹

Article 9 of the German Basic Law provides the more general guarantee of freedom of association.¹⁸² Nevertheless, even this Article prohibits associations or societies whose purposes or activities conflict with criminal laws or are directed against the basic constitutional order.¹⁸³ However, Article 9 does not restrict political groups, which are specifically addressed in Article 21.¹⁸⁴

B. *Statutory Restrictions on Individual Liberties: The German Penal Code*

The German Penal Code (Penal Code)¹⁸⁵ is another tool that the German government may use to combat the resurgence of Nazism. The Penal Code was amended in 1975 to include revisions that had occurred in the formative years of West Germany, beginning in 1952.¹⁸⁶ The Penal Code, in its current form, was enacted in 1987.¹⁸⁷ The Penal Code represents one set

endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

GG art. 21(2), Karpen at 236 (emphasis added).

For a discussion of the components of a free democratic basic order, see Doehring, *supra* note 142, at 27.

178. See FOSTER, *supra* note 4, at 111. Political parties may only be prohibited by the Federal Constitutional Court. GG art. 21(2).

179. Judgment of October 23, 1952, 2 BVerfGE 1.

180. Judgment of August 17, 1956, 5 BVerfGE 85.

181. Quint, *Free Speech*, *supra* note 133, at 262 n.54.

182. GG art. 9(1), Karpen at 229. Article 9, Section (1), explicitly states: “All Germans shall have the right to form associations and societies.” *Id.*

183. Article 9(2) provides: “Associations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.” GG art. 9(2), Karpen at 229.

184. FOSTER, *supra* note 4, at 122; see *supra* note 122.

185. *Strafgesetzbuch* [Penal Code] [StGB], translated in THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY (Joseph J. Darby trans., 1987) [hereinafter Darby].

186. See Hans-Heinrich Jescheck, *Introduction to THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY* 1, 4 (Joseph J. Darby trans., 1987).

187. See FOSTER, *supra* note 4, at 167. This version of the Code remains in place even after the reunification of East and West Germany. Upon reunification, the German Penal Code applied to the former East Germany as well, with few changes. See *id.*

of general laws that may limit the individual freedoms guaranteed by the Basic Law.¹⁸⁸

1. Criminal Agitation

The offense of criminal agitation set forth in Article 130 of the Penal Code primarily focuses on "safeguarding public peace."¹⁸⁹ This provision proscribes conduct against human dignity likely to breach the public peace by arousing hatred among segments of the population; instigating violence or arbitrary acts; or insulting, ridiculing, or defaming segments of the population.¹⁹⁰ An attack against human dignity exists only if "it is directed against the unrenounceable and nonincidental core of a personality of another, against him as a human being, and only if it denies his value."¹⁹¹ The penalty for this crime is imprisonment for six months to five years.¹⁹²

2. Representation of Violence and Incitement to Racial Hatred

Article 131 of the Penal Code also provides for the protection of public peace.¹⁹³ In addition, Article 131 explicitly proscribes any writing or broadcast that incites racial hatred or "depicts cruel or otherwise inhumane acts of violence against persons in such a manner as to glorify or deny the wrongfulness of such acts."¹⁹⁴ However, it exempts historical reports and current

188. Stein, *supra* note 102, at 279. See also discussion *supra* part IV.A.2.

189. Stein, *supra* note 102, at 283.

190. StGB art. 130, Darby at 140. The full text provides:

Whoever in a manner likely to disturb the public peace, attacks human dignity by:

1. arousing hatred against segments of the population;
2. fomenting arbitrary or violent action against them; or
3. by insulting, maliciously degrading or defaming them,

shall be punished by imprisonment from six months to five years.

Id.

191. *Id.* at 292 (quoting 1981 NSTZ 258).

192. StGB art. 130, Darby at 140.

193. See Stein, *supra* note 102, at 285.

194. Article 131 states, in pertinent part:

(1) Whoever

1. distributes;

2. publicly displays, posts up, presents or otherwise makes accessible; . . . any writings which incite to racial hatred or which depict cruel or otherwise inhumane acts of violence against persons in such a manner as to glorify or deny the wrongfulness of such acts of violence, or which represent the cruel or inhumane aspects of the subject

events from its coverage.¹⁹⁵ This provision was aimed primarily at the incitement of racial hatred against Jews.¹⁹⁶ A violation of Article 131 carries the penalty of imprisonment for up to one year or a fine, a substantially lower penalty than that imposed by Article 130 for criminal agitation.¹⁹⁷

3. Insult and Formal Complaints

Until 1985, the crime of "insult" under Article 185 of the Penal Code¹⁹⁸ only applied to individuals in private matters. Prior to its amendment, a private petition was required to bring an action for insult.¹⁹⁹ This private petition requirement often left such conduct unpunished because many insults, such as denying the existence of the Holocaust, are not directed at particular individuals.

In 1985 the government revised the provision in the Penal Code defining who may bring a petition for insult.²⁰⁰ As amended, the private petition requirement may be waived if (1) the crime of insult was committed through a writing or broadcast; (2) the victim suffered persecution under the National Socialists or any other form of tyranny; and (3) the persecuted group is part of the German population.²⁰¹ By making it possible for the government to prosecute the crime of insult, the government has facilitated actions against neo-Nazis for insulting Jews. In particular, the amended provision has "relieve[d] the offended party from the burden of proof, including the showing that he is a Jew."²⁰²

Article 194(2) of the Penal Code criminalizes the act of defaming the memory of a deceased person.²⁰³ This provision,

matter in a manner violative of human dignity, shall be punished by imprisonment for up to one year or by fine.

StGB art. 131, Darby at 141.

195. StGB art. 131(3), Darby at 141.

196. See Stein, *supra* note 102, at 285-86.

197. StGB art. 131(1), Darby at 141.

198. StGB art. 185, Darby at 141. Article 185 of the German Penal Code provides: "An insult shall be punished by up to one year's imprisonment or by fine and, if the insult is committed by means of violence, by up to two years' imprisonment or by fine." *Id.*

199. See Stein, *supra* note 102, at 312.

200. *Id.* at 305-12.

201. StGB art. 194(1), Darby at 170-71.

202. Stein, *supra* note 102, at 315.

203. StGB art. 194(2), Darby at 171. This section provides, "If the memory of a deceased person is blackened, the surviving relatives . . . shall be entitled to file a formal complaint." *Id.*

which allows the relative of the deceased to file a complaint, could be used to combat neo-Nazi hate speech and propaganda.²⁰⁴

4. Genocide

Finally, in a direct attempt by the West German government to eradicate the vestiges of Nazism, Article 220a of the Penal Code explicitly criminalizes genocide.²⁰⁵ This provision criminalizes many of the evils of the Nazi era including murder, infliction of injury, subjection to living conditions likely to cause death, eugenics, and forcible child transfers from one group to another. This Article provides for a maximum sentence of life in prison²⁰⁶ and a minimum sentence of five years in prison.²⁰⁷

C. *Implications for Individual Liberties*

The Basic Law provides the primary means by which the German government may restrict the expression of neo-Nazis. In applying the Basic Law in free speech cases, the Federal Constitutional Court may balance the social value of the speech against the value of freedom of expression itself.²⁰⁸ If the court determines that under the totality of the circumstances the speech threatens the free democratic basic order in Germany, then the court may prohibit that speech. Alternatively, the Federal Constitutional Court may weigh the value of free speech against the value of the dignity of man and personality, the most fundamental of all basic rights.²⁰⁹ Certain types of speech—especially speech offensive to Jews—may be prohibited if the damage to the dignity

204. *See id.*

205. StGB art. 220a, Darby at 182.

206. Article 220a(1) states:

Whoever, with the intention of wholly or partially destroying a national, racial, religious or ethnically distinct group as such,

1. kills a member of a group;
 2. inflicts serious physical or mental injury . . . on members of a group;
 3. subjects the group to living conditions likely to cause death to all or some of the members;
 4. imposes measures designed to prevent births within the group;
 5. forcibly transfers children from one group to another,
- shall be punished by imprisonment for life.

StGB art. 220a(1), Darby at 182.

207. StGB art. 220a(2), Darby at 182.

208. *See supra* text accompanying notes 153-57.

209. *See supra* text accompanying notes 158-66.

of those subjected to the speech outweighs the value of the speech itself.

Germany has relied on the Basic Law²¹⁰ to ban certain political parties that contradict its free democratic basic order.²¹¹ By outlawing such parties, the German government seeks to ensure that neo-Nazi groups do not sponsor candidates in state elections. The government banned at least seven right-wing extremist groups in the 1980s,²¹² and at least one group as recently as 1992.²¹³

In addition to the Basic Law, Germany's criminal law vests its courts with broad discretion to restrict neo-Nazi speech. For example, German courts have imposed penalties for using banned Nazi symbols such as the swastika and the "Heil Hitler!" salute.²¹⁴ Under the rubric of insult and inciting racial hatred, the swastika and "Heil Hitler!" salute remain illegal in Germany today. However, neo-Nazis have circumvented the laws prohibiting the "Heil Hitler!" salute by raising their arms and extending three fingers rather than five fingers, or by raising their arms and spreading two fingers to indicate "victory."²¹⁵ In fact, one German judge released a man for this variation.²¹⁶ Likewise, neo-Nazis have altered the swastika—the infamous symbol of the Nazi party noted for its prominent right angles and criss-cross shape—into a stylized and rounded, yet clearly recognizable, shape. The German government responded to the neo-Nazis prolific usage of altered Nazi symbols by enacting further legislation specifically criminalizing such variations. In September 1994, the government extended its ban on Nazi symbols and slogans to include anything that might even resemble such symbols and slogans.²¹⁷

The German Penal Code also outlaws public statements that deny or call into question the historical fact of the Holocaust. The Federal Court of Justice in Germany has held that statements, books, or other propaganda denying the existence of the

210. Article 21(2) of the Basic Law provides for banning political parties that "seek to impair or abolish the free democratic basic order." GG art. 21(2), Karpen at 236.

211. See *supra* text accompanying notes 175-84.

212. Stephen Kinzer, *Germany Outlaws a Neo-Nazi Group*, N.Y. TIMES, Nov. 17, 1992, at A1.

213. The neo-Nazi group known as the Nationalist Front was banned by the German government on November 27, 1992. *Id.* at A8.

214. See *All Things Considered*, *supra* note 119.

215. *Id.*

216. See Jonathan Kaufman, *As Neo-Nazis Riot, Germany Still Outlaws the Swastika*, BOSTON GLOBE, Feb. 4, 1993, at 1.

217. See Robin Gedve, *Denying the Existence of the Holocaust Is a Crime in Germany*, THE DAILY TELEGRAPH, September 22, 1994, at 16.

Holocaust²¹⁸ have no social value and, therefore, constitute an insult under the Penal Code.²¹⁹ Two recent German court decisions highlight the tension between suppressing statements denying the Holocaust and freedom of expression. In March 1994, the Federal Court of Justice stated that a denial of the Holocaust alone did not constitute the crime of inciting racial hatred. Instead, the court required lower courts to determine if the defendants, by propagating the Auschwitz Lie, committed the separate offense of insult to the dignity of Jews.²²⁰ In April 1994, however, Germany's constitutional court ruled that freedom of expression does not apply to groups propagating the Auschwitz Lie. The court held that denying the existence of the Holocaust denied a fact and that the severity of the insult to the Jewish community rendered the right to freedom of speech

218. See generally Stein, *supra* note 102 (discussing efforts to deny that the Holocaust took place).

219. References to the German court decision are found in X. v. Federal Republic of Germany, App. No. 9235/81, 29 Eur. Comm'n H.R. Dec. & Rep. 194, 195-96 (1982).

220. *Holocaust Denial Not Covered by Free Speech*, *supra* note 103. This case originated in the German state of Mannheim. In 1992, Günther Deckert, head of the right wing National Democratic Party, interpreted and expanded upon a lecture given by Fred Leuchter, a leader of the United States Holocaust denial movement. The Mannheim court, upon remand by the Federal Court of Justice, convicted Deckert but suspended his one-year sentence. The court stated that Deckert probably would not repeat the crime, now that he knew denying the existence of the Holocaust was against the law.

Upon its official publication in August 1994, the Deckert sentence suspension developed into one of Germany's worst legal scandals, as the published decision described Deckert admirably and appeared to condone his behavior. Furthermore, the panel incited sharper criticism both domestically and abroad by describing Deckert as a "nationalist," not an anti-Semite. In an apparent attempt to quell the uproar over the decision, Wolfgang Mueller and Rainer Orlet, two of the three judges who presided over the Deckert sentence suspension, were relieved from their duties on the Mannheim bench approximately one week after the decision was published. Mueller was reinstated in Mannheim after a five week suspension. Orlet, on the other hand, remained suspended, ostensibly because of health-related problems. See Gedve, *supra* note 217, at 16. See also Thom Shanker, *German Holocaust Cases Stymie Courts: Small Party Provokes Legal Dispute*, CHI. TRIB., June 3, 1994, at 6; Craig R. Whitney, *German Court Criticized for Its Treatment of a Holocaust Skeptic*, N.Y. TIMES, Aug. 10, 1994, at A8.

The Federal Court of Justice expressed its own disapproval of the Mannheim court's decision to suspend Deckert's sentence. In December 1994, the court overturned the suspension of Deckert's sentence on the ground that it was wholly insufficient for Deckert's crime, and the court remanded the sentencing to a regional court in Karlsruhe. See Steve Vogel, *New Sentence Ordered For German Neo-Nazi; Suspended Jail Term Had Drawn Protests*, WASH. POST, Dec. 16, 1994, at A42.

inapplicable.²²¹ Thus, courts may find that the German Penal Code proscribes speech denying the existence of the Holocaust.²²²

The German courts' inconsistent decisions regarding the applicability of Germany's laws of incitement to racial hatred and insult to those who deny the Holocaust have led to calls for reform of Germany's criminal provisions. In September 1994, after months of national debate and speculation,²²³ the German parliament passed a bill that explicitly outlaws denying or casting doubt upon the existence of the Holocaust.²²⁴ This provision, which makes denial of the Holocaust punishable by up to five years imprisonment,²²⁵ is substantially tougher than the one-year maximum sentence imposed by Germany's law prohibiting incitement to racial hatred.²²⁶

V. THE INTERNATIONAL COMMUNITY'S RESPONSE TO THE NAZI ERA

A prudent and watchful international community emerging from the Second World War quickly responded to a recovering Germany with legal measures intended to declare its intolerance of the atrocities committed by the Nazis. The United Nations Charter itself, enacted in 1948, proclaims equality for all men and women and upholds the dignity and worth of all individuals.²²⁷ In addition, the United Nations adopted the Universal Declaration of Human Rights,²²⁸ which sought "a common standard of

221. *Holocaust Denial Not Covered by Free Speech*, *supra* note 103.

222. *Court Denies Free Speech to Neo-Nazis*, CHI. SUN-TIMES, April 27, 1994, at 31.

223. National outrage and controversy resulted from both the March 1994 ruling by the Federal Court of Justice, which stated that denying the Holocaust's existence did not alone constitute inciting racial hatred, and the August 1994 publication of the Mannheim court's suspension of Holocaust denier Günther Deckert's sentence. The ruling by the Federal Court of Justice, which overturned and remanded a lower court's conviction of Deckert, sparked calls for a law explicitly outlawing public denial of the Holocaust. By May, a law criminalizing denial of the Holocaust, punishable by up to three years in prison, was presented to the German *Bundestag* where it quickly won unanimous approval. Although widely expected to be enacted, the bill was defeated when the upper house of parliament objected to elements unrelated to the Holocaust provision. However, the parliament subsequently passed the bill in September 1994. See *Nazi Apologist Re-Convicted German Court*, B.C. CYCLE, June 22, 1994; Elizabeth Neuffer, *German Legislators Vote to Criminalize Holocaust Denial*, BOSTON GLOBE, May 21, 1994, at 2; *Jail Threat Over 'Auschwitz Lie'*, DAILY MAIL, May 14, 1994, at 5.

224. See Gedve, *supra* note 217, at 6.

225. *Id.*

226. See StGB art. 131(1).

227. U.N. CHARTER pmbi.

228. See *supra* note 8 and accompanying text.

achievement for all peoples and all nations."²²⁹ Generally, the Universal Declaration provides that all humans are born free and equal,²³⁰ and it declares a universal right to freedom from discrimination on the basis of race, sex or religion.²³¹ Other measures taken by the international community took the form of covenants and conventions. Parties to these agreements, including Germany, are bound by their terms as a matter of international law. Accordingly, these measures may be applicable to the neo-Nazis who advocate racial hatred in Germany today.

A. Conventions

1. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (Racial Discrimination Convention),²³² which entered into force on January 4, 1969, represents one of several attempts by the international community to promote human rights and equality in the post-war period. Article 1 of the Racial Discrimination Convention defines discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms."²³³

Under Article 4 of the Racial Discrimination Convention,²³⁴ freedom of expression, particularly for "groups which preach race

229. Universal Declaration, *supra* note 8, pmb1. While the Universal Declaration is non-binding as a body of international law, many scholars argue that it commands the force of customary international law because of its universal recognition. See, e.g., Jack Greenberg, *Race, Sex, and Religious Discrimination in International Law*, in HUMAN RIGHTS IN INTERNATIONAL LAW 310 (Theodor Meron ed., 1984); see also Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 533 (1993).

230. *Universal Declaration*, *supra* note 8, art. 1.

231. *Id.* art. 2.

232. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 212 (entered into force Jan. 4, 1969) [hereinafter Racial Discrimination Convention].

233. *Id.* art. 1(1).

234. Article 4 provides:

State parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic group, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate

hatred,"²³⁵ must yield to human rights concerns. Article 4 declares that "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts" are punishable.²³⁶ In addition, Article 4 outlaws all organizations that promote or incite such racial discrimination.²³⁷ Therefore, states adopting this provision must weigh the Convention's restrictions on ideas against their own notion of freedom of expression.²³⁸

2. Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),²³⁹ a direct response to the Nazi atrocities, was the first human rights convention adopted by the United Nations General Assembly.²⁴⁰ The Convention defines genocide as any "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group"²⁴¹ through a variety of means, including murder, injury, eugenics, and forcible child transfers.²⁴² This definition is nearly identical to the German Penal Code's criminalization of genocide.²⁴³ In addition, Article III of the Genocide Convention states that "direct and public incitement to commit genocide" shall be punishable,²⁴⁴ again restricting traditional notions of free speech.

and positive measures designed to eradicate all incitement to, or acts of, such discrimination

Id. art. 4.

235. Greenberg, *supra* note 229, at 324.

236. Racial Discrimination Convention, *supra* note 232, art. 4(a).

237. *Id.* art. 4(b).

238. See generally Thomas David Jones, *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 HOW. L. J. 429 (1980) (discussing the trade-off between liberty and prevention of discrimination).

239. See *supra* note 8 and accompanying text.

240. Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 90 (1992). Genocide was already recognized as a crime by Resolution 96(I) of the General Assembly in 1946. G.A. Res. 96(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. a/64/Add.1 (1946).

241. Genocide Convention, *supra* note 8, art. II, 78 U.N.T.S. at 280.

242. *Id.*

243. See *supra* part IV.B.4 and accompanying notes.

244. Genocide Convention, *supra* note 8, art. III, 78 U.N.T.S. at 280.

3. European Convention for the Protection of Human Rights and Fundamental Freedoms

In addition to the Universal Declaration of Human Rights,²⁴⁵ Europe has adopted its own treaty to address human rights abuses. In 1949 and 1950, the Council of Europe²⁴⁶ drafted the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which entered into force in 1953.²⁴⁷ The European Convention, which established the European Commission on Human Rights and the European Court of Human Rights,²⁴⁸ was ratified by West Germany in 1952 and incorporated into federal law in that same year.²⁴⁹ Today, the European Convention is recognized as the "world's most successful system of international law for the protection of human rights currently in force."²⁵⁰

Three articles in the European Convention bear directly on freedom of expression and its possible limitations. First, Article 10 guarantees the right to freedom of expression,²⁵¹ but limits this right by proclaiming that it includes "duties and responsibilities" that may restrict it when "necessary in a democratic society."²⁵² Second, Article 17 provides that the rights guaranteed in the Convention may not be exercised to the

245. See *supra* note 8 and accompanying text.

246. The Council of Europe was established on May 5, 1949. See Defeis, *supra* note 240, at 94 n.190.

247. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

248. The Commission accepts and reviews applications from those seeking redress from the European Court of Human Rights. The Commission publishes its own decisions regarding whether to forward the party's complaint to the court. For a detailed discussion of the procedures established by the European Convention, see Rosalyn Higgins, *The European Convention on Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 505-11 (Theodor Meron ed., 1984).

249. FOSTER, *supra* note 4, at 62.

250. Defeis, *supra* note 240, at 95.

251. European Convention, *supra* note 247, art. 10(1), 213 U.N.T.S. at 230.

252. *Id.* art. 10(2), 213 U.N.T.S. at 230. The full text of Article 10(2) reads:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. (emphasis added).

detriment of the rights of another.²⁵³ Finally, Article 14 recognizes that the rights upheld in the Convention "shall be secured without discrimination on any ground such as sex, race, colour, . . . religion, political or other opinion."²⁵⁴ While the European Convention does not explicitly prohibit speech promoting racial hatred, the decisions of the European Court of Human Rights, according to one commentator, tend to "support the position that such restrictions are permissible and indeed encouraged."²⁵⁵

B. *Implications for Individual Liberties*

International tribunals impose a balancing test similar to the German courts in deciding freedom of speech cases. By invoking the "duties and responsibilities" clause of the European Convention,²⁵⁶ courts weigh the value of the speech against the speaker's duty and responsibility to society in making that speech.²⁵⁷ Both the European Court of Human Rights and the European Commission of Human Rights have aggressively upheld restrictions on freedom of expression when the restrictions would curtail the spread of Nazi views.

For example, in *Kosiek v. Germany*,²⁵⁸ the European Court of Human Rights upheld Germany's decision not to offer Mr. Kosiek a civil service teaching position because he supported in writing the aims of the National Democratic Party of Germany,²⁵⁹ which Germany found to be "inimical" to its Basic Law.²⁶⁰ In another case, the European Commission of Human Rights ruled that the German Federal Court of Justice's conviction of a propagator of the Holocaust "myth"²⁶¹ deserved no recourse to the guarantee of freedom of expression in Article 10 of the European

253. *Id.* art. 17, 213 U.N.T.S. at 234. Article 17 provides:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Id.

254. *Id.* art. 14, 213 U.N.T.S. at 233.

255. Defeis, *supra* note 240, at 103.

256. European Convention, *supra* note 247, art. 10(2), 213 U.N.T.S. at 230.

257. *Id.*

258. *Kosiek v. Germany*, 105 Eur. Ct. H.R. (ser. A) at 1 (1986).

259. *Kosiek* was a leader in the National Democratic Party of Germany (NDP), which the West Germany government considered to be an extremist right-wing party. See LEWIS, *supra* note 11, at 47.

260. *Kosiek*, 105 Eur. Ct. H.R. (ser. A) at 11.

261. See *supra* text accompanying note 102-06.

Convention,²⁶² deeming the propagator's application to the court to be "manifestly ill-founded."²⁶³

Finally, in 1988, the European Commission of Human Rights reviewed an application from Michael Kühnen, a militant neo-Nazi leader who represents the voice of the young neo-Nazi generation.²⁶⁴ A German court²⁶⁵ had found Kühnen guilty of disseminating propaganda by means of unconstitutional organizations in violation of Article 86 of the German Penal Code.²⁶⁶ The German court held that his pamphlets, which advocated the reinstatement of the Nazi Party, clearly violated the basic order of freedom and democracy.²⁶⁷ In applying to the Commission, Kühnen alleged that German authorities had denied him the freedom of expression²⁶⁸ guaranteed by Article 10.²⁶⁹ The Commission refused to forward the application to the European Court of Human Rights and deemed Germany's interference with Kühnen's expression under Article 86 of the Penal Code "necessary in a democratic society" within the meaning of Article 10(2) of the European Convention.²⁷⁰

262. European Convention, *supra* note 247, 213 U.N.T.S. at 230.

263. *X. v. Federal Republic of Germany*, App. No. 9235/81, 29 Eur. Comm'n H.R. Dec. & Rep. 194, 199 (1982).

264. *Kühnen v. Federal Republic of Germany*, App. No. 12194/86, 56 Eur. Comm'n H.R. Dec. & Rep. 205 (1988). Kühnen, who organized the neo-Nazi group ANS/NA (*Aktionsfront Nationaler Sozialisten/Nationale Aktivisten*) central in this matter before the Commission, has been described as "the driving force in the development of the most visual [sic] neo-Nazi organizations in the Federal Republic of Germany during the late 1970s and early 1980s . . . [His] overt use of Nazi sloganism and memorabilia placed him at the forefront of the German neo-Nazi movement." LEWIS, *supra* note 11, at 94.

265. Kühnen appeared before the Frankfurt Regional Court. See 56 Eur. Comm'n H.R. Dec. & Rep. at 206.

266. *Id.* at 206-07. Section 86 of the Penal Code provides in pertinent part:

Whoever . . . produces for distribution . . . propaganda:

1. . . . of a political party which has been held unconstitutional . . . or . . .

4. . . . the contents of which is designed to further the aspirations of a former National Socialist organization shall be punished by up to three years' imprisonment or by fine.

StGB art. 86(1).

267. 56 Eur. Comm'n H.R. Dec. & Rep. at 207.

268. European Convention, *supra* note 247, art. 10(1), 213 U.N.T.S. at 230.

269. 56 Eur. Comm'n H.R. Dec. & Rep. at 208.

270. *Id.* at 210.

VI. EFFECT AND EFFECTIVENESS OF LAWS

The legal measures adopted by West Germany in the period immediately following World War II have been used to combat the resurgence of Nazism nearly a half century later. Domestic laws and international agreements have infringed upon the individual liberties of Germans by proscribing neo-Nazi propaganda and hate speech, banning neo-Nazi political parties, and outlawing neo-Nazi symbols and slogans.

The German government's attempt to combat Nazism through the invocation of specific laws has had the unanticipated effect of promoting the message the government seeks to suppress. Instead of eradicating the message of the neo-Nazis, the German government has simply compelled them to convey their ideas through different channels and by different means. Therefore, the effectiveness of the foregoing measures in quashing the neo-Nazis' views remains unclear.

For example, when the government initially banned certain Nazi symbols and slogans, it unwittingly prompted the neo-Nazis to change these forms of expression subtly in order to avoid prosecution.²⁷¹ The neo-Nazis circumvented these laws by creating new symbols and slogans clearly recognizable as Nazi emblems.²⁷² The German government then modified its ban on Nazi symbols and slogans to encompass anything that might even resemble Nazi symbols and slogans.²⁷³

This ad hoc approach to suppressing the neo-Nazis' message demonstrates the ineffectiveness of laws specifically designed to contain these extremists. The next logical step for neo-Nazis who wish to maintain both an identity and a battle cry is to adopt insignias and slogans that are not rooted in traditional Nazi symbols. Over time, these new symbols may become as clearly associated with the neo-Nazi cause as the original Nazi symbols.

Likewise, banning neo-Nazi political parties²⁷⁴ has not solved the immediate problem facing the German government, namely, the resurgence of Nazism. Banning the parties, of course, prevents neo-Nazis from participating in and winning official state elections. Declaring these parties unconstitutional, however, has encouraged neo-Nazis to affiliate with more mainstream groups. For example, in August 1994 the German People's Union, an ultra-nationalist party deemed unconstitutional by the German government, formed an alliance with the right-wing German

271. See Kaufman, *supra* note 216, at 1.

272. See *supra* text accompanying notes 214-17.

273. See Gedve, *supra* note 217, at 16.

274. See *supra* text accompanying notes 210-13.

Republican party.²⁷⁵ As a result, the German People's Union has a new and legitimate means by which to further its own cause and spread its message.

Moreover, banning political parties may also drive the parties further underground, making it more difficult for German authorities to monitor their activities.²⁷⁶ Parties that cease operating as vote-garnering organizations may instead focus on covert activities, such as violence and the dissemination of propaganda. Neo-Nazis have turned to the electronic media of personal computers in order to disseminate their outlawed literature and spread their ideas directly into the homes of the German people. By resorting to such high-tech means, the neo-Nazis effectively evade the surveillance of the government because transmissions over computer networks are virtually untraceable.²⁷⁷

Laws proscribing certain types of speech may not curtail the *ideas* behind the speech. While the German government continues to increase the scope of prohibited expression,²⁷⁸ such as prohibiting the denial of the Holocaust, this expression has found new outlets. Neo-Nazis who promote their ideas through traditional channels of communication may nevertheless evade prosecution by invoking euphemisms as code words for anti-Semitic rhetoric. Such tactics provide a means of public communication that is both powerful and, more importantly, legal.

Finally, even when the neo-Nazis do not disguise their messages, they may nevertheless pass constitutional muster. Identifying and outlawing both symbols, such as the swastika, and neo-Nazi groups, such as the Nationalist Front, is relatively easy; if a symbol is clearly associated with Nazism or the group unmistakably supports Nazism, then the symbol or group is prohibited.²⁷⁹ Yet some determinations are not so easily made. For example, in 1993 a documentary film was released about the life of Bela Ewald Althans, one of the leaders of the current neo-Nazi movement.²⁸⁰ In the film, Althans "launches into a

275. See Atkinson, *supra* note 111. This alliance prompted German authorities to place the Republican Party under federal surveillance for anti-constitutional activities. *Id.*

276. See Kinzer, *Germany Outlaws a Neo-Nazi Group*, *supra* note 212, at A1; see also Whitney, *supra* note 80, at A1.

277. See Neuffer, *supra* note 114, at 1.

278. See *supra* text accompanying notes 217, 224.

279. See GG art. 21(2); StGB art. 131.

280. In December 1994, Althans was sentenced to 18 months in prison for spreading pro-Nazi propaganda and insulting the memory of Jews killed by the

monologue" asserting that accounts of mass gassings at Auschwitz were a complete hoax.²⁸¹ Although labeled a documentary, the eighty-three minute film was shot entirely without commentary or rebuttal, prompting some to liken the film to "pure propaganda."²⁸² Although charges of racism and promoting violent acts were eventually dropped,²⁸³ the debate over the boundary between freedom of artistic expression and propaganda continues.

VII. CONCLUSION

Germany is struggling to rid itself of its Nazi past and to suppress those who resolve to keep this past alive. In the post-war occupation period, the Allies tried to eliminate the vestiges of Nazism in Germany through the denazification program. Yet thousands of neo-Nazis are active in Germany today. As reunification with East Germany creates increasing social unrest, neo-Nazi groups across Germany are beginning to flourish and pose a direct threat to the social and political welfare of the state. Despite a menu of provisions both in Germany's Basic Law and Penal Code and in the various international conventions it has adopted, Germany still faces a formidable and dangerous neo-Nazi population within its borders.

The effectiveness of the legal measures designed to combat the growing neo-Nazi threat may be improved. First, German courts could factor this growing threat into their constitutional balancing process, weighing neo-Nazis' words and deeds more heavily in light of an ever more fragile free democratic basic order. The European Court of Human Rights performs a similar balancing approach under the European Convention,²⁸⁴ and this court could adopt a standard comparable to that proposed for the German courts. Although such measures arguably do not promote uninhibited political discourse, neither do they promote speech that questions the existence of the Holocaust. Second, Article 18 of the German Basic Law could be applied, under which a convicted abuser of freedoms of expression forfeits his basic

Nazis. *Neo-Nazi Faces Retrial for Denial of the Holocaust*, THE DAILY TELEGRAPH, Dec. 16, 1994, at 14.

281. Stephen Kinzer, *Germans Ask If Film Hurts or Aids Nazis*, N.Y. TIMES, Dec. 15, 1993, at A17.

282. *Id.*

283. *Neo-Nazi Docu Fans Media Brouhaha*, VARIETY, Jan. 10, 1994, at 56.

284. See *supra* text accompanying notes 245.

rights altogether.²⁸⁵ This provision, however, has never been invoked.²⁸⁶

At the expense of eradicating Nazism in Germany, many basic rights and individual liberties characteristic of a democratic society have been abridged. The Basic Law and the Penal Code provide the primary means for fighting neo-Nazism in Germany, often by prohibiting certain forms of expression and association. Thus, certain books, symbols, slogans, and types of speech have been banned as they were deemed to incite racial hatred or to threaten the German free democratic basic order. Similarly, certain political parties have been declared unconstitutional for the undemocratic views they profess. According to one commentator, while attempts to regulate the neo-Nazis' actions inevitably involve an infringement on expression, these infringements may be justified because hate speech never led to consequences as terrible as it once did in Germany.²⁸⁷

Ultimately, the German government's prohibition of neo-Nazi expression and association may have unanticipated results. While suppression of speech may indeed quiet the extreme views of the neo-Nazis in the public fora, the neo-Nazis will not disappear, nor will suppression of their speech alter their views or values. Instead, such suppression may actually drive these neo-Nazis into the mainstream where their expression is less drastic, but their underlying message is the same. Neo-Nazis may disguise their extremist views in more politically palatable rhetoric. Thus, their speech may not incite racial hatred overtly, but may engender it subtly. Similarly, the neo-Nazis may not derive their symbols from the Nazi regime itself, but instead may use symbols reminiscent of the Nazi era generally. Finally, their ideas may be channeled through accepted, constitutional parties who affiliate with the neo-Nazis. Thus, the real danger is that a new generation of neo-Nazis, with a disguised message, may find broader appeal and an even greater audience across Germany.

David E. Weiss

285. See *supra* note 141 and accompanying text.

286. See Fisher, *supra* note 88, at A33.

287. *All Things Considered*, *supra* note 119 (remarks of Professor Andreas Heldrich, University of Munich).

