

1993

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Patricia A. Mollica

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Recommended Citation

Mollica, Patricia A. (1993) "TURMOIL IN UNIFIED GERMANY: ASYLUM-SEEKERS BECOME THE NATION'S SCAPEGOAT," *NYLS Journal of International and Comparative Law*. Vol. 14 : No. 2 , Article 7.
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TURMOIL IN UNIFIED GERMANY: ASYLUM-SEEKERS BECOME THE NATION'S SCAPEGOAT

I. INTRODUCTION

On November 9, 1989, the Berlin Wall fell, symbolizing the end of a divided German state. The long dreamed-of unification finally came to its fruition. However, the euphoria experienced in 1989 proved ephemeral. In the past four years, Germans have faced the bitter ramifications of unity. The affluent, capitalist West was called on to assimilate and re-educate the repressed communist East. Since unification, Easterners have been plagued by unemployment and a lack of security and identity, while Westerners have sacrificed the many luxuries to which they have grown accustomed. A more sinister consequence of unity, however, is the emergence of a violent right-wing nationalist movement. Asylum-seekers and foreigners have become the target of brutal attacks by extremists who advocate a homogenous Germany.

Amidst the social volatility in unified Germany, the government amended its asylum laws and adopted more stringent standards for entry. The purpose of this Note is to show that the asylum-seekers are not the cause of Germany's ailments, but are rather a scapegoat for them. Furthermore, the government's preoccupation with the "Asylum Debate," only diverts attention from the country's more pressing social problems. Secondly, Germany's historic reliance on ethnicity and homogeneity has provided fertile ground for the radical extremism that now plagues the country. In fact, the amended asylum laws may exacerbate the resurgence of the far-right. The government has effectively sent the message that it agrees with the extremists' demand, "Foreigners Out!"; it is only their means that differ.

II. "GERMANY FOR GERMANS"

A. *Who Is a "German"?*

The definition of a "German" is enumerated in Article 116 of the Basic Law of the former Federal Republic of Germany ("FRG")¹:

1. The Basic Law, the constitution of the former FRG, was adopted by unified

(1) Unless otherwise provided by the law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock (Volkszugehoerigkeit) or as the spouse or descendant of such person.

(2) Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial or religious grounds, and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they have established their domicile (Wohnsitz) in Germany after 8 May 1945 and have not expressed and have not expressed a contrary a contrary intention.²

To fully understand article 116, one must retrace German history. In 1937, the "German Reich" included all of the present-day Western and Eastern states, as well as territories later annexed by Poland and the former Soviet Union, under the Potsdam Protocol of 1945.³ In the following two years, nearly thirteen million ethnic Germans who were expelled from Poland, Czechoslovakia, Romania and Hungary resettled in Germany and became citizens of the Eastern and Western states.⁴

Therefore, the term "German" encompasses three categories: citizens of the former FRG, citizens of the former German Democratic Republic ("GDR"), and ethnic Germans.⁵ Prior to unification, this concept of nationality was an anomaly. Although Germany was physically divided,

Germany via Chapter II, Articles 3 and 8 of the Unification Treaty. Treaty on the Establishment of German Unity, Aug. 31, 1990, 30 I.L.M. 463 (entered into force Sept. 29, 1991) [hereinafter Unity Treaty].

2. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 116 (promulgated by the Parliamentary Council on 23 May 1949 as amended by The Unification Treaty of 31 Aug. 1990 and Federal Statute of 23 Sept. 1990) (translated and revised by the Federal Ministries of the Interior, Justice and Finance of the FRG (German Information Center)).

3. T.C. HARTLEY, EEC IMMIGRATION LAW 81 (1978). After World War II, England, the former Soviet Union, and the United States signed the Potsdam Protocol in 1945, which essentially redrew Germany's eastern border, placing German territory under Polish and Soviet administration. James H. Walsh, *German Reunification and the Future of Asylum*, MIGRATION WORLD MAG., Mar.-Apr. 1990, at 5.

4. Walsh, *supra* note 3, at 5.

5. HARTLEY, *supra* note 3, at 80-83.

the east and west shared a single German citizenship under the Basic Law of The Federal Republic of Germany.⁶

The underlying premise of the nationality law is the principle of *jus sanguinis*,⁷ meaning those of German blood are Germans. This is best exemplified by article 116's inclusion of all ethnic Germans (or those of German stock) and their descendants. Philosophically, this inclusion comes from an old commitment to the notion of race—the commitment that found its most sinister expression in Hitler's Third Reich.⁸

Unlike foreigners, ethnic Germans wishing to reside in the country need not speak German nor have any means of financial support.⁹ They must, however, prove their German ancestry. Ironically, a Polish refugee gained entry by presenting a counterfeit Nazi document detailing his father's employment as an officer in the *Wehrmacht*.¹⁰ This satisfied the border official, since only those of German ancestry served in this section of Hitler's Third Reich.¹¹ One German politician criticized this reliance on ethnicity by stating that some ethnic Germans' closest link to the nation was that they "perhaps once owned a German shepard dog."¹²

B. Unified Germany: A Home for Germans

In recent years, the world has watched the disintegration of the Soviet Bloc, revolutions in Poland, Hungary, Czechoslovakia, and Romania, the fall of the Berlin Wall, and the emergence of a new unified German state. The repercussions of these events on the population of Germany are twofold. The opening of borders throughout western and eastern Europe resulted in the migration of over 600,000 ethnic Germans¹³ to Germany

6. William R. Brubaker, *Frontier Theses: Exit Voice & Loyalty in East Germany*, *MIGRATION WORLD MAG.*, Mar.-Apr. 1990, at 13 [hereinafter *Frontier Theses*]. See also TOMAS HAMMAR, *DEMOCRACY AND THE NATION STATE* 177 (1990).

7. Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 *N.Y.U. J. INT'L L. & POL.* 35, 44-45 (1990). See also HAMMAR, *supra* note 6, at 74.

8. AMITY SHLAES, *GERMANY: THE EMPIRE WITHIN* 20 (1991).

9. *Id.* at 26.

10. *Id.* at 24-25.

11. *Id.*

12. *Id.* at 34.

13. Over 20,000 Germans migrated in 1989. *More Asylum Seekers, Resettlers; Schauble Calls for New Asylum Policy*, *WK. IN GERMANY*, Jan. 11, 1991, available in LEXIS, News Library, AFP File. There were 397,073 Germans who migrated in 1990. *Fewer Ethnic Germans Come to Germany & Fewer Easterners in the West*, *WK. IN*

and the movement of over 700,000 eastern Germans into the former FRG.¹⁴ The constitutional right of all Germans to enter and reside as citizens in Germany emanates from Article 11(1)¹⁵ and Article 116 of the Basic Law. As previously noted, under article 116, those residing in the former FRG and GDR have always shared a single German citizenship.¹⁶ Ethnic Germans, under article 116(2), are regranted citizenship upon application.¹⁷ However, the right of entry derives directly from article 11(1),¹⁸ which states: "All Germans shall enjoy the freedom of movement throughout the federal territory."¹⁹

It is important to note that when the Basic Law was written in 1949, it was intended only as a temporary measure until unification was achieved.²⁰ Fifty-one years later, on October 3, 1990,²¹ the framers' desire for reunification materialized. This glorified Day of German Unity symbolized a break with the past and a genuine hope for the future. However, "[t]he euphoria of Germany's 1990 reunification may seem like a deceptive footnote in history"²² The affluent West continues to shoulder the burden of revitalizing the impoverished East. The government transferred "\$130 billion from west to east in 1993, up from

GERMANY Oct. 30, 1992, available in LEXIS, News Library, AFP File [hereinafter *Fewer Germans*]. There were 221,995 Germans who migrated in 1991. *Id.* And 173,746 Germans migrated in the first 10 months of 1992. Tom Heneghan, *Kohl May Force Through Tough New Laws on Asylum*, Reuter Libr. Rep., Nov. 2, 1992, available in LEXIS, News Library, LBYRPT File.

14. Over 150,000 eastern Germans migrated into the former FRG in 1989. Philip L. Martin & Mark J. Miller, *Guests or Immigrants?*, MIGRATION WORLD MAG., Mar.-Apr., 1990, at 11. About 333,290 Eastern Germans migrated in 1990 and about 243,000 migrated in 1991. *Fewer Germans*, *supra* note 13.

15. Siegfried Wiessner, *Blessed Be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 485 (1986).

16. *Frontier Theses*, *supra* note 6.

17. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 116, cl. 2.

18. Wiessner, *supra* note 15, at 486.

19. *Id.* at 485 n.150.

20. Walsh, *supra* note 3, at 5 ("The intention was clearly expressed in the preamble which declared that it was adopted to give new order to political life for a transition period.").

21. Chapter I, Article 2(2) of the Treaty on the Establishment of German Unity, states "3 October shall be a public holiday known as the Day of German Unity." Unity Treaty, *supra* note 1, at 464.

22. Mark Heinrich, *Anger and Aggression Overshadow German Unity Day*, Reuter Libr. Rep., Oct. 2, 1992, available in LEXIS, News Library, LBYRPT File.

\$120 billion in 1992 and \$105 billion in 1990.²³ The German state absorbed \$267 billion in debt from the former GDR and a loss of \$167 billion due to the privatization of state-owned enterprises.²⁴ Chancellor Helmut Kohl, speaking at the annual convention of his Christian Democratic Union ("CDU"), warned that "this is the hour of truth."²⁵ He called for greater sacrifices in the west, including public spending reductions, real wage cuts, and increased taxes.²⁶ In the east, industrial production is on a rapid decline and unemployment averages 13.6%²⁷ and in some regions is as high as 70%.²⁸

Despite this bleak²⁹ economic forecast, a leading CDU official announced that Germany would keep its doors open to an estimated four million ethnic Germans living outside its borders.³⁰ Indisputably, Germany is a home for all Germans. The question remains—will foreigners also have a place in unified Germany?

III. "NON-GERMANS"

A. *Gastarbeiter: The "Guestworkers"*

For decades the government has staunchly maintained that "Germany is not an immigration country."³¹ Despite such proclamations, Germany

23. Nomi Morris, *Two Years After Reunification an Ugly Mood Prevails*, S.F. CHRON., Oct. 6, 1992, at A7.

24. Craig R. Whitney, *Kohl Warns His Party of Higher Taxes and New Curbs on Migration*, N.Y. TIMES, Oct. 27, 1992, at A11.

25. *Helmut Kohl's Hour of Need*, ECONOMIST, Oct. 31, 1992, at 47.

26. Whitney, *supra* note 24. "Marginal income tax rates already range from 19 percent to a maximum of 53 percent on taxable income above \$80,000." *Id.* In terms of public spending, the government is likely to cut another \$4 billion in 1993. Richard Murphy, *Bonn to Cut Extra Six Billion Marks from 1993 Budget*, Reuter Libr. Rep., Nov. 2, 1992, available in LEXIS, News Library, LBYRPT File.

27. Whitney, *supra* note 24.

28. Anne McElroy, *An Invisible Wall: Two Years After Reunification, Germans Are Still Divided*, OTTAWA CITIZEN, Oct. 3, 1992, at A2.

29. Despite its economic difficulties, Germany remains one of Europe's wealthiest nations. *Where are Germany's Leaders?*, N.Y. TIMES, Nov. 12, 1992, at A24.

30. *Bonn's Doors Still Open to Ethnic Germans*, Reuter Libr. Rep., Sept 5, 1993, available in LEXIS, News Library, LBYRPT File. It is interesting to note that Germany spent more than half a billion dollars in one year alone to teach "Germans" German. SHLAES, *supra* note 8, at 26.

31. Christina Spencer, *Worried West Trying to Stem Flood of Refugees; Worried West Slowly Closing Door to Tide of Refugees Fleeing Turmoil*, TORONTO STAR, July 7, 1992,

has become a *de facto* immigration country.³² It is home to an estimated six million foreigners,³³ comprising eight percent of the population.³⁴ The vast majority of Germany's foreign population is composed of guestworkers,³⁵ along with their spouses and children.³⁶ The recruitment of foreign labor began in the early 1960s, when the former FRG had over 500,000 unfilled jobs.³⁷ The vacancies were the result of a dual phenomenon; few Germans sought such menial positions and those that did wanted higher wages than offered.³⁸

In subsequent years, Germany entered into worker recruitment agreements with Italy,³⁹ Greece, Portugal, Spain, Yugoslavia,⁴⁰ Turkey,⁴¹ Morocco, and Tunisia.⁴² Between 1962 and 1973, an average of 692,000

at A1. See also Neuman, *supra* note 7, at 40; SHLAES, *supra* note 8, at 19; Martin & Miller, *supra* note 14, at 9; Norman Birnbaum, *Anger and Angst: German Economic and Political Conditions*, 254 NATION 581 (1992); Marc Fisher, *Germany Sets End to Asylum Guarantee; Parties Agree to Curb Influx of Foreigners*, WASH. POST, Dec. 8, 1992, at A29.

32. JOHN ARDAGH, *GERMANY AND THE GERMANS: AN ANATOMY OF SOCIETY TODAY* 251 (1987).

33. *United Germany at Two: Helmut Kohl Sees Improvement, Helmut Schmidt "Moral Decay,"* WK. IN GERMANY, Oct. 9, 1992, available in LEXIS, News Library, AFP File [hereinafter *United Germany*].

34. *Facing Racist Upsurge, Children of Immigrants Look Homewards*, AGENCE FRANCE PRESSE, Oct. 14, 1992, available in LEXIS, News Library, AFP File [hereinafter *Racist Upsurge*].

35. In 1990, the former FRG's foreign population was approximately 5.2 million. Jean-Pierre Garson, *International Migration: Facts, Figures & Policies*, OECD OBSERVER (Org. for Economic Co-operation & Dev., France), June-July 1992, at 19, available in LEXIS, News Library, OECD File. In 1989, the comparable figure for the former GDR was 191,190. "Foreigners Out": *Xenophobia and Right-Wing Violence in Germany*, HELSINKI WATCH (Div. of Human Rights Watch, New York, N.Y.), Oct. 1992, at 3 [hereinafter HELSINKI WATCH]. This discussion is generally limited to the former FRG, since the majority of foreign workers were recruited by it, and also due to a lack of available information on the former GDR.

36. Neuman, *supra* note 7, at 50.

37. ARDAGH, *supra* note 32, at 237.

38. ULRICH HERBERT, *A HISTORY OF FOREIGN LABOR IN GERMANY: 1880-1980* 216 (William Templer trans., 1990).

39. *Id.* at 207.

40. *Id.* at 212.

41. Hartmut Esser & Hermann Korte, *Federal Republic of Germany*, in *EUROPEAN IMMIGRATION Policy* 172 (Tomas Hammer ed., 1985).

42. STEPHEN CASTLES ET AL., *HERE FOR GOOD: WESTERN EUROPE'S NEW ETHNIC MINORITIES* 72 (1984).

foreign workers arrived each year.⁴³ Despite the country's pressing need for immigrant workers, many feared that Germans would be *replaced* by foreign labor.⁴⁴ Passage of the Aliens Act of 1965 reaffirmed the meaning of the term *Gastarbeiter*, making clear that foreigners were simply "guests" in Germany.⁴⁵ The act required all foreigners who wished to reside or work in Germany to obtain a residence permit, which was valid for only one year.⁴⁶ Any further extension was entirely discretionary and "granted only if the 'interests of the Federal Republic were not damaged' as a result."⁴⁷

Thus the state established a system of institutionalized discrimination, through which temporary guest workers could be recruited, controlled and sent away, as the interests of the capital dictated. The laws do not give rights to foreign residence. Rather, they give the authorities the power to confer or deny privileges that can be withdrawn in the event of unemployment or if migrants do not conform to employer's requirements. Deportation is a permanent *Damocles' sword*.⁴⁸

"The regulations in legislation on foreigners reflected the fact that the greatest perceived advantage of foreigners for the German economy was their function as a mobile reserve army for the West German labor market."⁴⁹ In 1973, when the demand for labor declined due to the

43. Hilde Wander, *Federal Republic of Germany*, in HANDBOOK ON INTERNATIONAL MIGRATION 53 (William J. Serow et al. eds., 1990).

44. HERBERT, *supra* note 38, at 202-5. "Opinion polls carried out in the early sixties found that anything from 50% to 80% of respondents had negative attitudes toward foreign workers and wanted to get rid of them." CASTLES ET AL., *supra* note 42, at 198.

45. "The term [*Gastarbeiter*] expresses the government's vain wish that the arrivals are here for a short visit." SHLAES, *supra* note 8, at 36.

46. Esser & Korte, *supra* note 41, at 184.

47. HERBERT, *supra* note 38, at 214-15. Under this legislation "the residence permit is brought close to being an act of grace." CASTLES ET AL., *supra* note 42, at 77 (citing W. Kanein, *Auslandergesetz*, Munich (1966), quoting Hans Heinz Heldmann). The Aliens Act of 1965 did not provide foreigners with a right to residence or legal immigration. Esser & Korte, *supra* note 41, at 184.

48. CASTLES ET AL., *supra* note 42, at 77 (emphasis added). However, "residence entitlement" may be granted, which requires "five years residence and economic and social integration." Neuman, *supra* note 7, at 46. A foreigner with "residence entitlement" is more secure in that he/she may only be deported for serious reasons. *Id.*

49. HERBERT, *supra* note 38, at 214. See also CASTLES ET AL., *supra* note 42, at

recession, the government ordered that recruitment cease from all countries outside the European Community.⁵⁰ Ironically, the foreign population increased.⁵¹ Many workers feared that if they left Germany, they would be prohibited from returning; therefore, their families went to Germany to join them.⁵² The actual result of the ban was a decrease in the number of foreign *workers* and an increase in the total number of foreigners.⁵³

The government and segments of the German populace⁵⁴ have consistently viewed immigrants as economic commodities, welcomed when in need and returned when the need was satisfied.⁵⁵ This view was best exemplified in the years 1983 and 1984 when the government introduced an incentive scheme, whereby any guestworker could obtain a departure bonus of up to \$5,000 and a refund of his pension benefits if he returned home.⁵⁶ The main thrust of the scheme was to induce those receiving unemployment benefits to leave the country to alleviate the burden on the social security budget.⁵⁷ Initially, the measure proved to be successful, nearly 300,000 immigrants left.⁵⁸

Regardless of such measures, Germany's foreign population continued to flourish. Between 1984 and 1988, it increased by approximately

72.

50. Wander, *supra* note 43, at 53.

51. Martin & Miller, *supra* note 14, at 3.

52. *Id.*

53. ARDAGH, *supra* note 32, at 239.

54. Respondents in a 1984 study "recognized that guestworkers perform essential jobs but still thought they should be sent home when jobs are tight." MARILYN HOSKIN, *NEW IMMIGRANTS AND DEMOCRATIC SOCIETY: MINORITY INTEGRATION IN WESTERN DEMOCRACIES* 82 (1991). Many Germans make the assumption that "[t]wo million foreigners = two million unemployed Germans." ARDAGH, *supra* note 32, at 246. What many fail to realize is that Germans are not seeking the same jobs as guestworkers. *Id.* A study conducted by the city of Dusseldorf, showed "that if the [town's] 36,000 immigrant workers departed, rubbish disposal services and public transport might well collapse and hospitals and the building industries would be seriously short of labour." *Id.* at 246-47.

55. ARDAGH, *supra* note 32, at 246-47.

56. Martin & Miller, *supra* note 14, at 8.

57. ARDAGH, *supra* note 32, at 247.

58. *Id.* Eighty percent of those who left were Turks who were the worst victims of unemployment. *Id.* In 1983, 16.7 percent were unemployed, which was two times the national average. *Id.*

600,000.⁵⁹ By 1992, estimates were as high as six million,⁶⁰ twenty percent of whom have lived there for more than twenty years and sixty percent for more than ten years.⁶¹

Although many foreigners have resided in Germany for decades, only a small percentage have become citizens,⁶² or felt encouraged to do so.⁶³ Historically, Germany has not viewed citizenship as the anticipated result of residence.⁶⁴ The Interior Ministry's *Record of Policy & Laws Relating to Foreigners* states: "Naturalization should not be an instrument for the promotion of integration, but rather should stand at the end of a successful integration process. The Federal Republic does not intend to facilitate naturalization."⁶⁵

In keeping with this goal, the requirements for naturalization have been particularly stringent.⁶⁶ Applicants are generally required to: read and speak German⁶⁷ (which may include speaking a local dialect);⁶⁸ have adequate means of support and a cultural attachment to Germany;⁶⁹ have ten years residence and no criminal record; and pay a fee equal to seventy-five percent of their monthly income.⁷⁰ Naturalization has been

59. Martin & Miller, *supra* note 14, at 10 (table 2). In 1988, the foreign population was 4,717,000 as compared to 4,146,800 in 1984 (statistics based on former FRG). *Id.*

60. The German Institute for Economic Research predicts as many as eight million foreigners by the year 2010. Ramish Jaura, *Germany: Third World Immigrants Enter but at a Risk*, Inter Press Service, Aug. 7, 1992, available in LEXIS, News Library, INPRESS File.

61. HOSKIN, *supra* note 54, at 37.

62. HAMMAR, *supra* note 6, at 19, 77 (table 3). See also Richard Gwyn, *Scariest Thing About the Germans Is Their Insecurity*, TORONTO STAR, Dec. 4, 1992, at A31.

63. ARDAGH, *supra* note 32, at 237.

64. Neuman, *supra* note 7, at 43. Cornelia Schmalz-Jacobson, head of a foreign affairs agency, stated that Germany "protects its citizenship as if it were the Holy Grail." She has continually urged politicians to promote naturalization for second and third generation German-born foreigners and criticizes those who talk about immigration "as if it were an allergy." Marc Fisher, *Bonn Bans Neo-Nazi Main Party; Authorities Search House of Leader*, WASH. POST, Dec. 11, 1992, at A43.

65. HOSKIN, *supra* note 54, at 37.

66. William R. Brubaker, *Citizenship and Naturalization: Policies and Politics*, in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 126-27 (William R. Brubaker ed., 1986). See also HAMMAR, *supra* note 6, at 87.

67. ARDAGH, *supra* note 32, at 250.

68. *Id.*

69. Neuman, *supra* note 7, at 46.

70. Brubaker, *supra* note 66.

further stifled by Germany's aversion toward granting dual citizenship.⁷¹ Therefore, the individual applicant and members of their family are often required to forego citizenship in their homeland.⁷² It is also important to note that German law differs from that in most countries, since children born in Germany to foreign parents do not gain automatic citizenship.⁷³

As a result of the stringent requirements, few foreigners ever become citizens or even intend to apply for citizenship.⁷⁴ In a 1981 survey, ninety-four percent of foreigners polled stated that they had no intention of becoming citizens.⁷⁵ One possible explanation was that the "years of government resistance [towards naturalization] may have created a self-perpetuating cycle in which guestworkers are reluctant to pursue citizenship in a society which so clearly would prefer not to have them."⁷⁶ Of those who sought citizenship, only 0.3% were granted it.⁷⁷

The Aliens Act of 1990 relaxed somewhat the requirements for naturalization. Those residing in Germany for fifteen years have a

71. ARDAGH, *supra* note 32, at 250. See also HAMMAR, *supra* note 6, at 73-74.

The German culture and language preceded the German state, and so did the idea of a German Volk or nation. [T]his historic order of state and nation may have enduring effects on the state's citizenship policies. In the German case, it may contribute to the unwillingness to naturalize foreign citizens who are not of German descent, especially those who cannot be easily assimilated into the nation.

HAMMAR, *supra* note 6, at 79.

72. Neuman, *supra* note 7, at 49 n.52.

73. ARDAGH, *supra* note 32, at 250. See also HAMMAR, *supra* note 6, at 73-74. Germany, Luxembourg and Austria are the only countries in Europe "to demand a bloodline rather than place of birth as the central grounds for granting citizenship." Robin Gedye, *Plea on German Citizenship*, DAILY TELEGRAPH (London), Feb. 5, 1993, at 10.

Cornelia Schmaltz Jacobsen [head of Germany's Foreigner's Office] explains how the German law on citizenship is bound up with the old imperial decree of 1913. Article 5.7 of the Reichs-und Staatsangehörigkeitsgesetz, or Imperial and State Citizenship Law, states quite ambiguously: Through birth, one can acquire (German) citizenship if the legitimate child has a German parent; and if an illegitimate child has a German mother This means that 6.2 [million] foreigners in Germany have little chance of obtaining German citizenship.

Judy Dempsey, *A Change Foreign to Her Nature*, FIN. TIMES (London), Feb. 8, 1993, at 28.

74. HAMMAR, *supra* note 6, at 84-89.

75. HOSKIN, *supra* note 54, at 37.

76. *Id.*

77. Brubaker, *supra* note 66, at 120.

“presumptive claim for naturalization” which must be asserted before 1996.⁷⁸ Residents between the ages of sixteen and twenty-three have equivalent status if they resided in Germany for a minimum of eight years, were schooled in Germany for six years, have no criminal record, and have attempted to give up their prior citizenship.⁷⁹ Although the Act broadened eligibility requirements for foreigners, eighty percent of all naturalized continue to be of German descent.⁸⁰ Barbara John, head of an aliens’ affairs agency in Berlin, noted, “[i]f this snail-like and restrictive pace continues, one day we will find ourselves talking of a 25th generation of foreigners.”⁸¹

B. Asylum-Seekers

Asylum-seekers comprise less than ten percent⁸² of Germany’s foreign population. Yet, they are by far the most controversial group in Germany today. In recent years, the numbers seeking asylum have increased precipitously. In 1990, 193,063 sought asylum,⁸³ in 1991, 256,112,⁸⁴ in 1992, 400,000,⁸⁵ and last year a record high of 440,000 (over 1,000 per day).⁸⁶ The country is host to some 1.4 million⁸⁷ refugees from Romania,

78. Neuman, *supra* note 7, at 50.

79. *Id.*

80. *Racist Upsurge*, *supra* note 34.

81. Jaura, *supra* note 60 (emphasis added).

82. *United Germany*, *supra* note 33.

83. *SPD: Amendment of the Right to Asylum only Acceptable in European Context*, WK. IN GERMANY, May 15, 1992, available in LEXIS, News Library, WKGGERM File.

84. *Id.*

85. Philip Sherwell, *Europe Acts to Halt Traffic in Refugees*, DAILY TELEGRAPH (London), Feb. 17, 1993, at 12; *Help on Migrants*, FIN. TIMES (London), Feb. 17, 1993, at 17; *Racist Attacks Prompt New Awareness in Germany—President*, Reuter Libr. Rep., Jan. 12, 1993, available in LEXIS, News Library, LBYRPT File; *Record Number of Asylum Seekers Flock to Germany in 1992*, AGENCE FRANCE PRESSE, Jan. 5, 1993, available in LEXIS, News Library, AFP File; *Political Asylum Seekers in the Federal Republic of Germany: 1980 to 1992*, WK. IN GERMANY, Jan. 15, 1993, available in LEXIS, News Library, WKGGERM File.

86. *Number of Asylum-Seekers Rises in Germany*, Reuter Libr. Rep., Oct. 5, 1993, available in LEXIS, News Library, LBYRPT File.

87. Ron Feemster, *The German Question; Do Attacks Mean Return to Nazi Past*, NEWSDAY, Nov. 28, 1992, at 61; Dan Stets, *Remembering the Past. Questioning the Future Germany Looks in the Mirror and Recoils at What It Sees*, PHIL. INQUIRER, Nov.

Turkey, Bulgaria,⁸⁸ Vietnam,⁸⁹ Bosnia and the former Yugoslav Republic, the former Soviet-Bloc and many Third World nations.⁹⁰ Nearly two-thirds of all those seeking asylum in the European Community ("EC") apply in Germany.⁹¹

The explanation for the numerical disparity among those seeking asylum in Germany and the rest of the EC lies within German law. Prior to the recent amendment, Germany had the most liberal asylum laws in Europe.⁹² Article 16, Section 2, Clause 2 of the Basic Law ("Asylum Article" or "Article") provided: "[p]ersons persecuted on political grounds shall enjoy the right to asylum."⁹³

The intent behind the original Asylum Article is not without debate. Many perceived it as a symbolic atonement or penance for Nazi atrocities.⁹⁴ They argued that Germany was morally obligated to be a country of refuge, since hundreds of thousands sought refuge in foreign lands during the Third Reich.⁹⁵ James Walsh, Assistant General Counsel

15, 1992, at C1.

88. *Asylum-Seekers Keep up Pressure on Europe's "Land of Plenty,"* AGENCE FRANCE PRESSE, Oct. 9, 1992, available in LEXIS, News Library, AFP File [hereinafter *Land of Plenty*].

89. Marc Fischer, *Kohl's "Emergency" Suggestion Raises Questions, Draws Criticism*, WASH. POST, Nov. 3, 1992, at A16.

90. *Racist Upsurge*, *supra* note 34.

91. *EC/Former Yugoslavia: Refugee Problem Creates Tensions Within Community*, EUR. REP., July 29, 1992, available in LEXIS, World Library, EURRPT File. The reader should note that it is unclear at the time of this writing whether this figure will remain constant following the enactment of the Asylum Amendment.

92. *Seeking a Middle Ground; Bonn Struggles to Revise Its Generous Asylum and Refugee Policy*, L.A. TIMES, Oct. 15, 1992, at B6 [hereinafter *Middle Ground*]; *Rich Countries Must Share in Aiding Refugees*, TORONTO STAR, Dec. 24, 1992, at A18; H.D.S. Greenway, *The Roots of Ethnic Hatred; The Passions that Turn Neighbor Against Neighbor May Be Inherited from Our Most Distant Ancestors*, GAZETTE (Montreal), Jan. 9, 1993, at B1; Dempsey, *supra* note 73, at 28.

93. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 16, §2, cl. 2.

94. Spencer, *supra* note 31; *Middle Ground*, *supra* note 92; Mark Heinrich, *Bonn Leaders Agree on Deporting "Economic Refugees,"* Reuter Libr. Rep., Oct. 3, 1992, available in LEXIS, News Library, LBYRPT File; *German Parties Agree to Stem the Tide of Refugees; Liberal Law Is Seen as a Factor in Attacks on Foreigners*, ATLANTA J. & CONST., Dec. 8, 1992, at A14; Tyler Marshall, *New Analysis; Accord on Refugees May Cut Rightist Violence*, L.A. TIMES, Dec. 8, 1992, at A27; Adrian Bridge, *Germany Acts to Curb Refugees*, INDEPENDENT (London), Dec. 7, 1992, at 1.

95. Spencer, *supra* note 31.

for the Immigration and Naturalization Service in Washington, holds quite a different view. He argues that:

[a]dvocates for refugees look at the consequences of Article 16, rather than the reasons behind it . . . [t]hey consider the Article to be a humanitarian design [However], [t]he primary intent of the Asylum Article was to offer the *Aussieder*, those of German blood living outside German borders, who were or would be persecuted by the Soviet satellite regimes, the opportunity to come to West Germany until unification was achieved.⁹⁶

Historical conditions provide further support for this position. During Hitler's regime, Nazi-dissenters, including members of the Social Democratic Party, were forced into exile to avoid death or internment.⁹⁷ Upon the dismantling of the Weimer Republic, the Social Democrats, including the late Chancellor Adenauer who was detained in a Nazi concentration camp, fought for the inclusion of an unqualified right to asylum in the Basic Law.⁹⁸ However, irrespective of *whom* the Asylum Article was intended for, the reality is that well over one million⁹⁹ refugees of diverse ethnic origins have utilized the Article in recent years.

As the German economy has spiraled downward, the rising influx of asylum-seekers sparked vehement debates among politicians. German law provides that all applicants must receive free housing and food,¹⁰⁰ along with a \$275 stipend.¹⁰¹ Due to the backlog of requests, many asylum-seekers remain in the country for years, at the government's expense.¹⁰² In 1992, the government spent \$4.6 billion¹⁰³ in administrative costs and benefits, up from \$4 billion in 1991.¹⁰⁴ Many Germans resent

96. Walsh, *supra* note 3, at 7-10.

97. Joyce M. Mushaben, *Asylum Law Misses the Point*, CHRISTIAN SCI. MONITOR, Dec. 15, 1992, at 18.

98. *Id.*; Walsh, *supra* note 3, at 5.

99. See Stets, *supra* note 87.

100. *Germany Will Deport Romanians*, CHI. TRIB., Sept. 18, 1992, at C3.

101. Stephen Kinzer, *Germany Agonizes over a Dilemma Haunted by Ghosts of a Terrible Past*, N.Y. TIMES, Sept. 6, 1992, at 16.

102. *Land of Plenty*, *supra* note 88.

103. Patrick Moser, *Parliament Passes Outline of New Asylum Laws*, UPI, Oct. 15, 1992, available in LEXIS, News Library, UPI File.

104. Jonathan Kaufman, *Attacks on Foreigners Daze Germany; Analysts See No End*

this economic burden,¹⁰⁵ since fewer than five percent are actually granted asylum.¹⁰⁶ Right-wing extremists fueled the simmering coals of discontent with their rallying cries: "Foreigners Out!," "Germany for Germans!" Alas, ailing Germany found its scapegoat—the asylum-seekers.

IV. AUSLANDERFEINDLICHKEIT: "HOSTILITY TOWARD FOREIGNERS"¹⁰⁷

A. Anti-Foreigner Sentiment

Xenophobic tendencies are certainly not a new phenomenon in Germany; far-right political parties, sympathizers of Hitler's philosophy, supporters of fascist ideologies,¹⁰⁸ and forms of racial discrimination have existed for decades. Violent radical extremism, however, was undoubtedly the exception.¹⁰⁹

During the labor shortage in the 1960s, some perceived foreign workers as a vital economic asset.¹¹⁰ However, despite the pressing need for foreign labor, many did not accept the guestworkers enthusiastically. A study conducted in the mid-1960s revealed that the greater majority of Germans were "more opposed than in favor" of recruiting foreign workers.¹¹¹ Those ardently opposed to their presence refused to either employ or sublet an apartment to them.¹¹² The more vehement prohibited guestworkers from entering their places of business. One pub in Frankfurt hung a sign that read: *Kein Zutritt für Hunde und Turken* ("No Entry for

to *Rightist Violence*, BOSTON GLOBE, Sept. 7, 1992, at 2; Juan O. Tamayo, *Immigrants, Extremists an Explosive Mix*, MIAMI HERALD, Sept. 20, 1992, at 1A.

105. Although many Germans perceive asylum-seekers as a "burden" on the economy, few question why the government generally prohibits them from working during the review process. In order to discourage "economic refugees" asylum-seekers are rarely permitted to secure jobs for up to five years after their arrival. Martin & Miller, *supra* note 14, at 12.

106. Michael Lawton, *German Press Building New Walls*, CALGARY HERALD, Oct. 3, 1993, at A6.

107. HERBERT, *supra* note 38, at 259.

108. David Childs, *The Far-Right in Germany Since 1945*, in *NEO-FASCISM IN EUROPE 66-85* (Luciano Cheles et al. eds., 1991).

109. Christopher T. Husbands, *Contemporary Right-Wing Extremism in Western European Democracies: A Review Article*, in *EUR. J. OF POL. RES.* 75-93 (1981).

110. HERBERT, *supra* note 38, at 210-13.

111. *Id.* at 226.

112. ARDAGH, *supra* note 32, at 256.

Dogs and Turks").¹¹³ The radical right German National Party scored gains in the electorate by exploiting such xenophobic tendencies.¹¹⁴

In subsequent years, there were significant fluctuations between marginal and pervasive support of anti-foreigner sentiments. In 1978, thirty-nine percent of those polled preferred that guestworkers return to their homelands, as compared with sixty-nine percent in 1982.¹¹⁵ The corresponding numbers of members in far-right organizations in these years were 17,800 and 19,000, respectively.¹¹⁶

For decades, the radical right and its supporters went virtually unnoticed. However, in recent years the resurgence of the far-right has attracted international recognition. In 1989, the Republican Party (*Die Republikaner*), led by Franz Schoenhuber, a former Nazi SS Waffen sergeant, won 7.5%¹¹⁷ of the vote in municipal elections "by making 'foreigners out' a rallying cry."¹¹⁸ Of particular concern was the fact that twenty percent of the Berlin police force voted in favor of the Republicans.¹¹⁹ On November 8, 1993, millions of Americans were alarmed upon learning that black members of the United States Olympic team became the target of attacks by neo-Nazi skinheads.¹²⁰

More recent polls indicate that xenophobic tendencies are on the rise. According to the Allensbach Public Opinion Institute, the Republican party has enough support to win seats in the *Bundestag* (the lower house of parliament) in 1994.¹²¹ A study by Germany's Infrass Institute revealed

113. *Id.*

114. HERBERT, *supra* note 38, at 225.

115. *Id.* at 243-44.

116. Childs, *supra* note 108, at 74 (table 4.2).

117. *Id.* at 78 (table 4.5).

118. Martin & Miller, *supra* note 14, at 12. Recent estimates indicate that the extreme right-wing Republicans have approximately 23,000 supporters. *Third Extreme Right Wing Germany Movement Barred*, AGENCE FRANCE PRESS, Dec. 21, 1992, available in LEXIS, News Library, AFP File.

119. Childs, *supra* note 108, at 78-80.

120. George Rodrigue, *German Skinheads Attack on U.S. Team Renews Racism Fears*, DALLAS MORNING NEWS, Nov. 9, 1993, at 1A.

121. Quentin Peel, *Survey of Germany*, FIN. TIMES (London), Oct. 26, 1992, at 1. This spring, voters in two western German states put extreme right-wing parties in parliament. The German People's Union won 6 percent of the delegates in the northern state of Schleswig-Holstein, and the Republicans captured a surprising 11 percent in the southern state of Baden-Wuttenberg. More telling, perhaps, opinion surveys report that [the] right-wing won between 15 and 20 percent of the under-25 electorate in both states and

that fifty-one percent agree with the slogan *Deutschland vor die Deutschen* ("Germany for Germans")¹²² and twenty-five percent support *Auslander Raus* ("Foreigners Out").¹²³ "The Spiegel poll of 3,000 Germans found large majorities endorsing anti-foreigner sentiments, including statements that 'foreigners abuse our social system' (seventy-seven percent of Germans surveyed agreed), 'heighten Germans' housing shortage' (seventy-four percent agreed), 'increase unemployment among Germans' (sixty percent agreed), and 'pose a danger on the streets' (fifty-nine percent agreed)."¹²⁴

There is, however, an immeasurable difference between those who hold such beliefs, the "latent" xenophobics, and those who act on them. The vast majority of Germans neither condone violence against foreigners nor participate in such acts.¹²⁵ In fact, on the eve of the forty-fifth anniversary of *Kristallnacht*,¹²⁶ a dark day in German history, over

captured about 14 percent of the vote from Germans who had never voted before.

John Marks, *The Shadows of Their Swastika*, U.S. NEWS & WORLD REP., June 15, 1992, at 36.

122. Joseph Fleming, *Germany's Long-Sought Unification Now Much Cursed*, WASH. TIMES, Oct. 3, 1992, at A1.

123. HELSINKI WATCH, *supra* note 35, at 8.

124. Fischer, *supra* note 89. Note that some Germans misperceive foreigners and asylum-seekers as their competitors in the work force. "The asylum-seekers do not take jobs away from Germans, because the labor agencies (*Arbeitsaemeter*) may place an asylum-seeker in [a] job only if no German or European Community resident wants it." *Some Asylum-Seekers Get Temporary Work Permits, Jobs*, WK. IN GERMANY, Jan. 22, 1993, available in LEXIS, News Library, WKGERM File. For a general discussion on foreigners, see ARDAGH, *supra* note 32. See *supra* note 105 (discussion regarding asylum-seekers' so-called burden on the German economy).

125. *Germany's Nightmarish Present*, NAT'L TIMES, Nov. 1992, at 3.

126. On November 7, [1938] a 17-year-old German Jewish Herschel Gryszpan, whose father had been shipped to Poland in a boxcar from Germany along with ten thousand other Jews, shot and killed the third secretary of the German Embassy, Ernst Von Rath, in Paris. Hitler's fury was uncontrollable. On the night of November 9, Goebbles [chief of the Ministry of Propaganda and Popular Enlightenment] issued orders to the SS and to the police that a "spontaneous" demonstration against the Jews throughout Germany was to be organized. Jewish homes and synagogues were to be burned down—but care was to be taken that the fires did not spread to German property. Jews—especially rich Jews—were to be arrested, robbed and shipped to concentration camps. A night of pure horror followed these instructions. Synagogues and Jewish homes and shops throughout Germany went up in flames. Jewish

300,000¹²⁷ Germans marched in Berlin protesting against rightist violence.¹²⁸ Although most Germans deplore the violence, few will forget when 2,000 of their fellow countrymen applauded and cheered¹²⁹ while approximately 1,000 extremists fire-bombed a hostel housing 200 Romanian gypsies and 115 Vietnamese refugees.¹³⁰

B. Resurgence of the Radical Right

The Office for the Protection of the Constitution, which monitors extremism in Germany, has revealed an increase in the members of right-wing groups, as well as a growing willingness to participate in

men, women and children who tried to escape the flames were shot down in the street by the waiting SS troopers and police. Bloodthirsty gangs of Nazi roughnecks broke into thousands of Jewish homes, where they plundered, raped and killed at will. Over 200 synagogues were destroyed. The number killed, though never officially revealed, was believed to have reached over one thousand.

ROBERT GOLDSTON, *THE LIFE AND DEATH OF NAZI GERMANY* 110-11 (1967).

127. *German Leaders Protest Racism*, FORWARD, Nov. 13, 1992, at 2.

128. Stephen Kinzer, *Germany Block's a Big Neo-Nazi Rally Near Berlin*, N.Y. TIMES, Nov. 16, 1992, at A4. Since the Möelln killings, discussed *infra* section IV.B., thousands of Germans have organized in demonstrations to protest against anti-foreigner violence. See also Greg Calhoun, *German Rock Stars Stage Concert Against Racism*, Reuter Libr. Rep., Dec. 13, 1992, available in LEXIS, News File, LBYRPT File; Britta Sembach, *450,000 Germans Rock and Rally Against Racism*, Reuter Libr. Rep., Dec. 13, 1992, available in LEXIS, News Library, LBYRPT File; Tyler Marshall, *Germans Light up Munich in Protest of Right-Wing Extremism*, L.A. TIMES, Dec. 7, 1991, at A4; Daniel Benjamin, *Cracking Down on the Right*, TIME, Dec. 14, 1992, at 43; Stephen Kinzer, *300,000 in Munich Protest Violence*, N.Y. TIMES, Dec. 7, 1992, at A7; *Protesters Light the Way for a New Germany*, N.Y. TIMES, Dec. 23, 1992, at A12; *500,000 in Dozen German Cities Protest Attacks on Foreigners*, N.Y. TIMES, Dec. 21, 1992, at A3; *Germany's Vietnamese Protest at Wave of Violence*, Reuter Libr. Rep., Dec. 5, 1992, available in LEXIS, News Library, LBYRPT File; Jim Bovard, *Shadows of a Fourth Reich?*, WASH. TIMES, Dec. 7, 1992, at E3; Stephen Kinzer, *Germany Ablaze: It's Candlelight, Not Firebombs*, N.Y. TIMES, Jan. 13, 1993, at A4; William Boston, *German Business Steps up Campaign Against Racism*, Reuter Bus. Rep., Dec. 7, 1992, available in LEXIS, News Library, BUSRPT File; *Germans Demonstrate Against Racism as Arson Attacks Continue*, AGENCE FRANCE PRESSE, Dec. 6, 1992, available in LEXIS, News Library, AFP File; Patrick Moser, *One Killed Is Suspected Arson in Munich*, UPI, Dec. 7, 1992, available in LEXIS, News Library, UPI File.

129. Daniel Benjamin, *Foreigners Go Home!*, TIME, Nov. 23, 1992, at 48.

130. Steven Vogel, *German Anti-Foreigner Riots in 4th Night*, WASH. POST, Aug. 26, 1992, at A7.

violent acts.¹³¹ The organization's 1990 report indicated that 32,300 Germans belonged to far-right groups, including 3,200 members of violent neo-Nazi gangs.¹³² The corresponding figures for 1991 were 40,000 and 4,200, respectively.¹³³ At the close of 1993, far-right groups garnered an estimated 42,700 members, a slight increase since 1991, but almost 10,000 more than a few years ago.¹³⁴ A 1992 report set the number of staunch neo-Nazis at 6,500.¹³⁵

Obviously, there is great concern over the growing popularity of right-wing ideology in Germany. Historical comparisons are inevitable when extremists sporting swastikas and jackboots desecrate Jewish memorials dedicated to the victims of the Third Reich,¹³⁶ hail Hitler as their hero,¹³⁷ attack foreigners to experience a "high,"¹³⁸ throw molotov cocktails into hostels housing hundreds of refugees,¹³⁹ and beat men to death for denouncing Hitler.¹⁴⁰ Many ask if Germans have turned a blind eye to their past when they choose the Gypsies of Romania,¹⁴¹ the second largest group chosen for extermination by the Nazis,¹⁴² to be the first wave of asylum-seekers to be deported. When Germans planned to commemorate the V-2 rocket as a technological advance, disregarding that

131. HELSINKI WATCH, *supra* note 35, at 7.

132. Christopher Springate, *Neo-Nazi Growth Echoes History*, CALGARY HERALD, Oct. 25, 1992, at A12.

133. *Id.*

134. Frank Wright, *Echoes of a Stormy Past; Increasingly Violent German Right Wing Grows Closer to Mainstream*, STAR TRIB., Dec. 12, 1993, at 1A. "Others say the growth is faster—and the outlook worse. Ernst Uhrlau, head of the Federal Office on the protection of the Constitution in Hamburg, estimates there are 60,000 right wing extremists not counting the Republicans." *Id.*

135. Craig Whitney, *East Europe's Frustration Finds Target: Immigrants*, N.Y. TIMES, Nov. 13, 1992, at A8.

136. *German Cemetery Vandalized*, JERUSALEM POST, Nov. 14, 1992, at 5.

137. Carl Schoettler, *Spectre of Hitler Raised by Leader of National Party; Wants All Foreigners Out*, GAZETTE (Montreal), Oct. 4, 1992, at B5.

138. *German Rightists Get Suspended Terms for Refugee Attack*, Reuter Libr. Rep., Oct. 12, 1992, available in LEXIS, News Library, LBYRPT File [hereinafter *German Rightists*].

139. *The Devil and Helmut Kohl*, U.S. NEWS & WORLD REP., Oct. 5, 1992, at 50.

140. Springate, *supra* note 132.

141. Allison Kaplan, *Germany Troubled Child of Divorce, Remarriage*, JEWISH WK., Nov. 6-12, 1992, at 3.

142. DELTEV J.K. PEUKERT, *INSIDE NAZI GERMANY: CONFORMITY, OPPOSITION AND RACISM IN EVERYDAY LIFE* 210 (Richard Deveson trans., 1987).

it killed thousands of British, and that slave labor perished in its making,¹⁴³ many questioned—has Germany learned its lesson?

Answering this question in the negative may, at first glance, appear to be the correct response. First impressions, however, are not necessarily correct ones. Germany is far from ever becoming the “Fourth Reich.” The vast majority of Germans support democratic ideals and are undeserving of the label “the ugly Germans.”¹⁴⁴ Nevertheless, the increasing propensity toward violence by certain extremist factions must be abated.

Hans-Ludwig Zachert, president of the *Bundeskinminalamt* (Federal Criminal Police), reported 2,450 acts of anti-foreigner violence in 1991,¹⁴⁵ up five-fold from 1990.¹⁴⁶ In 1992, the number of attacks reached 4,587, almost double that in 1991,¹⁴⁷ causing over 800 injuries and seventeen deaths.¹⁴⁸ By the end of 1993, xenophobic violence claimed over 24 lives.¹⁴⁹ The perpetrators’ blatant disregard for human life is evidenced by the brutality of their attacks. Gustav Scheeclaus was beaten to death with a plank of wood for calling Hitler a criminal.¹⁵⁰ Hoang Ti Vinh, a pregnant Vietnamese woman, was struck in the stomach by masked men in her apartment.¹⁵¹ Skinheads attacked Vu Xuan Ke, stabbing him in the

143. “I Worked as a Slave Laborer on the V-2,” N.Y. TIMES, Oct. 15, 1992, at A26 (letter from Alfred Lipson, survivor of Nazi concentration camp).

144. *Nightline: Germany’s Ethnic Turmoil* (ABC television broadcast, Oct. 7, 1992). As previously noted, thousands of Germans have gathered to protest against the rising tide of violence. See *German Leaders Protest Racism*, *supra* note 127.

145. *Attacks on Foreigners Continue, but Support also Evident; First Sentences Passed*, WK. IN GERMANY, Sept. 18, 1992, available in LEXIS, News Library, WKGERM File.

146. Christopher Parkes, *Survey of Germany*, FIN. TIMES (London), Oct. 26, 1992, at IX.

147. Carlos Bendana, *Germany: Anti-Racist Measures Considered Insufficient and Late*, Inter Press Agency, Dec. 23, 1992, available in LEXIS, News Library, INPRES File. Fortunately, Germany has reported a decrease in the number of attacks in 1993—about 28 percent fewer than in 1992. Wright, *supra* note 134.

148. *Opposition Approves Germany’s Asylum Deal*, Reuter Libr. Rep., Dec. 15, 1992, available in LEXIS, News Library, LBYRPT File; Tom Paterson & Rory Watson, *Crackdown on Migrants*, EUR., Nov. 12, 1992, at 1. The actual number of foreigners killed by right-wing extremists is difficult to ascertain. Some reports set the number as high as 30. See HELSINKI WATCH, *supra* note 35, at 11 n.24.

149. Craig R. Whitney, *Germany Begin to Recognize Danger in Neo-Nazis’ Surge*, N.Y. TIMES, Oct. 21, 1993, at A1.

150. Schoettler, *supra* note 137.

151. HELSINKI WATCH, *supra* note 35, at 13.

head and leg with a serrated knife that removed lumps of flesh.¹⁵² Amadeu Antonio, an Angolan guestworker, was attacked by a group of fifty skinheads. "They cracked his skull and chest with baseball bats. One jumped on his head, grinding it against the ground with his boots."¹⁵³ When his German widow returned home after giving birth, she found their apartment daubed with swastikas.¹⁵⁴ In November of 1992, in the town of Möelln, a Turkish woman, her ten year old granddaughter and fourteen year old niece were burned to death when their home was fire-bombed.¹⁵⁵ The perpetrators called local police, taking responsibility for the attack, and cried, "It's burning on Ratzaburger Street! Heil Hitler!"¹⁵⁶

Despite the invidiousness of these attackers, the courts have consistently handed down light sentences. Bismarck once said, "the weak get strong by effrontery and the strong get weak by inhibition."¹⁵⁷ Perhaps the German courts should heed this warning when they deliver the sentences for these perpetrators.¹⁵⁸

152. *Id.* at 14.

153. Tony Allen-Mills, *Kohl Dithers as Fires of Race Hate Flare*, SUNDAY TIMES (London), Aug. 30, 1992, available in LEXIS, World Library, TTIMES File.

154. *Id.*

155. Stephen Kinzer, *3 Turks Killed; Germans Blame Neo-Nazi Strife*, N.Y. TIMES, Nov. 24, 1992, at 1.

156. Stephen Kinzer, *A Look into the Violent World of a Young Neo-Nazi*, N.Y. TIMES, Dec. 12, 1992, at A4.

157. Gideon Rafael, *The Duty of the German State Is to Put out This Fire*, INT'L HERALD TRIB., Oct. 6, 1992, available in LEXIS, World Library, IHT File.

158. The following are some examples of the lenient sentences imposed by the German courts:

Five of the defendants, in the murder of Amadeu Antonio, were given sentences of two to four years. The maximum sentence that they could have received was ten years The Commissioner for foreigners for the state of Brandenburg, Almuth Berger, criticized the sentences as "clearly too light." He said he was worried they might be interpreted as an encouragement for attacks against foreigners. In most cases, however the sentence is suspended without probation. Ten right-wing skinheads who brutally beat a pregnant Vietnamese woman were sentenced to between five months and two years. The majority were suspended without probation.

HELSINKI WATCH, *supra* note 35, at 29.

Ten German rightists [were] given suspended sentences for burning down a hostel for foreign asylum-seekers [They] were convicted of disturbing the peace . . . [and] received prison terms between 9 and 22 months which were immediately suspended because they were minors The 10 defendants testified breezily that they loathed foreigners and drove to the hostel on a sudden urge to "raise hell" and "experience something."

Another facet of the problem lies with the inability or unwillingness by local and federal law enforcement agencies to utilize legislation designed to combat right-wing violence.¹⁵⁹ Article 3 of the Basic Law forbids discrimination based on race, language, religion or political beliefs;¹⁶⁰ "Paragraph 131 of the Criminal Code on 'inciting racism' forbids written or verbal attacks . . .";¹⁶¹ and article 18 empowers the Federal Constitutional Court to forfeit the rights of individuals who abuse the freedoms of speech, press, assembly or association in order to disturb the free democratic order.¹⁶²

Perhaps "only death will stir the living,"¹⁶³ as these measures had virtually gone unnoticed until the horrifying attacks in Möelln in November of 1992.¹⁶⁴ Since then, police and other law enforcement officials have made a more concerted effort at curtailing right-wing extremism. The government officially banned far-right organizations, known as the Nationalist Front,¹⁶⁵ German Alternative,¹⁶⁶ Alliance of

German Rightists, *supra* note 138. Note, however, that in recent months the German courts showed signs of a possible turnaround. Two men, aged 26 and 20, were convicted of murdering three Turks in the November 1992 fire-bombing in Möelln. The older defendant was sentenced to life in prison, the harshest penalty ever given for an attack against foreigners. The younger was sentenced to 10 years, the maximum for a juvenile. Rick Atkinson, *2 Neo-Nazis in Germany Get Maximum Sentences*, WASH. POST, Dec. 9, 1993, at A33.

159. Stephen Kinzer, *Police Under Fire in German Unrest*, N.Y. TIMES, Dec. 27, 1992, at A18. See generally HELSINKI WATCH, *supra* note 35, at 16, 28. More alarming, however, are recent reports linking policemen and soldiers to racist violence. Anna Tomforde et al., *Immigrants: Racist Violence Greets Newcomers*, CALGARY HERALD, Feb. 4, 1993, at A5; HELSINKI WATCH, *supra* note 35, at 24. "[The] German Defense Ministry admitted that soldiers were responsible for three . . . deaths stemming from attacks on foreigners One involved a homeless man mistaken for a gypsy and drowned after he refused to give the Nazi salute." Holger Jensen, *Germany Like a Sinking Ship Awash in a Sea of Hate*, ROCKY MTN. NEWS, Nov. 12, 1992, at 3.

160. Michael H. Haltzel, *Why Kohl Has Been Soft on Right-Wing Groups; Germany: Fear of Reviving Memories of Repression in Third Reich and East Germany Has Made Bonn Hesitant About Getting Tough with Racism*, L.A. TIMES, Dec. 6, 1992, at M1.

161. *Id.*

162. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 18.

163. Daniel Benjamin, *Cracking down on the Right*, TIME, Dec. 14, 1992, at 43.

164. See *infra* part V (discussing the Möelln attacks).

165. Stephen Kinzer, *Germany Outlaws a Neo-Nazi Group*, N.Y. TIMES, Nov. 28, 1992, at A1.

166. Ferdinand Protzman, *Germany Moves to Ban a Second Neo-Nazi Party*, N.Y. TIMES, Dec. 11, 1992, at A15.

German Comrades and National Offensive.¹⁶⁷ The legal basis for the bans is found in Article 9(2) of the Basic Law, which permits the government to "outlaw a group whose activities are aimed against the constitutional order of the state or whose ideology violates 'the rules of agreement between nations.'"¹⁶⁸ Officials have also announced the creation of a new police unit to monitor and combat right-wing groups.¹⁶⁹

V. THE GERMAN "SOLUTION"

Amidst the rising tide of right-wing violence and the increased support for far-right political parties, German officials repeatedly called for an amendment of Article 16 of the Basic Law. An amendment of the constitution requires approval by two-thirds of the members in both houses of parliament.¹⁷⁰ In recent years, the CDU's proposals have failed to meet the necessary consensus, since many members of the Social Democratic Party ("SPD") had opposed a constitutional amendment.¹⁷¹ However, on May 26, 1993, after decades of vehement debates among the ruling coalitions, the Christian Democratic Party and Free Democratic Party, along with the opposition SDP, agreed to amend the Asylum Article.¹⁷²

The Amendment incorporates the following provisions: the legal standard provided by the 1951 United Nations Convention Relating to the Status of Refugees;¹⁷³ the denial of entry by any refugee coming from a so-called "safe" third country¹⁷⁴ or those deemed free of political

167. *Fourth Extreme Right Wing German Movement Banned*, AGENCE FRANCE PRESSE, Dec. 22, 1992, available in LEXIS, News Library, AFP File.

168. Wlodzimierz Korzycki, *Stamping Out Fascism: Germany Gets Serious*, WARSAW VOICE, Dec. 20, 1992, available in LEXIS, Europe Library, POLAND File.

169. Stephen Kinzer, *Germany Creating Police Unit Aimed at Rightist Groups*, N.Y. TIMES, Nov. 19, 1992, at A1.

170. Craig R. Whitney, *Bonn Plans Curbs to Halt Refugees*, N.Y. TIMES, Oct. 14, 1992, at A9.

171. *Id.* See also *supra* section III.B. (discussing the historical conditions that led the Social Democrats to include an unqualified right of asylum in the Basic Law).

172. Marc Fischer, *Germany Ends Right to Asylum; Legislators Shut Door to Masses Seeking Refuge in Country*, HOUSTON CHRON., May 27, 1993, at A22.

173. The mandate of the Convention extends to:

any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country

GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 253 (1983).

174. Rolf Soderlind, *German Asylum Deal Criticized*, Reuter Libr. Rep., Dec. 8,

prosecution, including the EC, Poland, Czechoslovakia, Switzerland and Austria,¹⁷⁵ and an inability to appeal a negative decision until the applicant leaves Germany.¹⁷⁶ It also provides that war refugees may stay temporarily in Germany, yet are not entitled to apply for asylum.¹⁷⁷ Additionally, appeals will only be accepted after the applicant leaves Germany.¹⁷⁸ The agreement is said to reduce the numbers of eligible applicants by ninety percent.¹⁷⁹

The plan has been met with vehement criticism by human rights groups who argue that the amendment violates international law "if refugees were sent back to countries where they are not guaranteed the chance of political asylum,"¹⁸⁰ and nations who fear that Germany is simply passing its immigrant problems to its neighbors.¹⁸¹ Many nations have even accused Germany of simply passing its immigrant problems on its neighbors, since the Bonn government has declared *all* nine bordering nations "safe countries."¹⁸² Herbert Leuninger, spokesperson for Pro-Asyl, Germany's most prominent refugee rights group, commented: "Practically the only chance left for asylum seekers is either to parachute into the Lureneburger Heath or land a hang-glider in the Alegaeu."¹⁸³

However, what is most troublesome are the amendment's "timing," "motive," and "message." On the issue of "timing," it is particularly circumspect that after decades of debate, legislators only reached a compromise when the electorate began to sway in favor of right-wing political parties. Thus, the legislators' "motive" may also be somewhat tainted. However, the most significant issue is the grave "message" the amendment sends: Foreigners are unwelcome in unified Germany. Many

1992, available in LEXIS, News Library, LBYRPT File.

175. *Parties Reach an Agreement on Asylum Issue, Paving Way for a New Asylum Law*, WK. IN GERMANY, Dec. 11, 1992, available in LEXIS, News Library, APF File.

176. Rolf Soderlind, *Germans Reach Deal to Shut out Economic Refugees*, Reuter Libr. Rep., Dec. 7, 1992, available in LEXIS, News Library, LBYRPT File.

177. Zycie Warszawy, *German Asylum More Difficult to Win*, POLISH NEWS BULL., Dec. 8, 1992, available in LEXIS, News Library, PNBUL File.

178. Soderlind, *supra* note 176.

179. *Opposition Approves Germany's Asylum Deal*, Reuter Libr. Rep., Dec. 15, 1992, available in LEXIS, News Library, LBYRPT File.

180. Marcus Kabel, *Bonn Says Poland Agrees to Take Back Rejected Refugees*, Reuter Libr. Rep., Feb. 9, 1993, available in LEXIS, News Library, LBYRPT File.

181. *Czechs Fear Germans Erecting New "Iron Curtain"*, Reuter Libr. Rep., Feb. 5, 1993, available in LEXIS, News Library, LBYRPT File.

182. *Id.*

183. *Id.*

critics argue that the government's preoccupation with the asylum issue has conferred legitimacy on the racist agenda of extremists.¹⁸⁴ In an address by Chancellor Kohl, he warned: "[t]his influx is rising from month to month, leading to unbearable conditions in our cities and towns . . . [i]f we do not act, we face the danger of a deep crisis of confidence in our democratic state—yes, even a *national state of emergency*."¹⁸⁵

For every report of right-wing violence, there was an accompanying plea by officials to amend the Asylum Article.¹⁸⁶ The underlying implication is that the volume of immigrants will necessarily influence the volume of atrocities. There is abundant evidence that this assumption is without any basis.

Firstly, the attacks are not confined to asylum-seekers. Amadeu Antonio, an Angolan guestworker, was killed because he was an African.¹⁸⁷ Gustav Scheeclaus was murdered for denouncing Hitler.¹⁸⁸ "The self-proclaimed neo-Nazis who fire-bombed the home of Turkish residents [from] Möelln, killing a grandmother and two children (one of who had been born in Germany), did not inquire into their residency status before causing their deaths"¹⁸⁹

Even if the Asylum Article was done away with in its entirety, six million¹⁹⁰ foreigners would remain. Each of them is a potential victim.¹⁹¹ Now assume that each and every foreigner was deported—would the violence end? Unfortunately not. The violence is not limited to foreigners, but extends to Jews as well. A Jewish man fell victim to

184. *Sanctuary's Limits in Germany*, PLAIN DEALER, Nov. 20, 1992, at 6B; Rolf Soderlind, *Nearly 80 Jewish Monuments Defaced in Germany*, Reuter Libr. Rep., Dec. 20, 1992, available in LEXIS, News Library, LBYRPT File; Jensen, *supra* note 159; Craig R. Whitney, *To Be a Jew in Germany Is to Plead: End the Hate*, N.Y. TIMES, Nov. 24, 1992, at 6.

185. Fischer, *supra* note 89 (emphasis added).

186. HELSINKI WATCH, *supra* note 35, at 33.

187. Allen-Mills, *supra* note 153.

188. Schoettler, *supra* note 137.

189. Mushaben, *supra* note 97.

190. *United Germany*, *supra* note 33.

191. Wolfgang Gretz of Amnesty International in Bonn, stated: "Even if the number of asylum-seekers were reduced by half, this (anti-foreigner) mood will remain." Bill Schiller, *Rights Groups Decry Germany's "New Wall"*, TORONTO STAR, Dec. 9, 1992, at A17. He argues that the amendment to the Asylum Article, which in effect acts as a "new wall" aimed at keeping out foreigners, will do nothing to address Germany's mounting neo-fascist problem. *Id.*

neo-Nazi skinheads, who beat him and then set his body on fire.¹⁹² Germany is home to over 45,000 Jews,¹⁹³ many of whom feel threatened by the rise in anti-Semitism.¹⁹⁴

Secondly, nations that receive a small fraction of the number of asylum-seekers Germany accepts have also experienced a rise in xenophobic violence and a resurgence of right-wing factions. In Britain, which accepts very few immigrants, six Asians were killed by extremists in 1992.¹⁹⁵ Right-wing parties have gained electoral support in Austria, Belgium, Italy, Switzerland and France.¹⁹⁶ Extremist groups are now present in Hungary,¹⁹⁷ Russia,¹⁹⁸ Austria,¹⁹⁹ Britain,²⁰⁰ Romania,²⁰¹ and Italy.²⁰²

Finally, the city of Magdeburg located in eastern Germany reported an increase in the number of attacks, as the number of foreigners decreased.²⁰³ Moreover, in a study conducted in 1990, "before a single asylum-seeker was sent to [former] East Germany, forty percent of East German youths found foreigners bothersome; twenty-five percent wanted to force foreigners out of the country, and twenty percent were willing to act personally to see that foreigners were not allowed to remain in

192. *Eastern Germany Wracked by Riots*, N.Y. TIMES, Nov. 23, 1992, at A6.

193. *Germany's Growing Jewish Population*, JERUSALEM POST, Nov. 7, 1992, at 12A.

194. *Poll: Germany's Jews Feel Threatened by Neo-Nazis*, JERUSALEM POST, Nov. 7, 1992, at 24. Ignatz Bubis, chairman of Germany's Central Council of Jews stated: "We had nearly 80 desecrations of Jewish cemeteries and memorials this year. We see anti-semitic statements and they are no longer anonymous, but appear in a very open way." Bill Schiller, *German Jews Hear Echoes of Past*, TORONTO STAR, Dec. 14, 1992, at A3.

195. *Curbing Racism; Constant Effort Is Essential*, OTTAWA CITIZEN, Nov. 10, 1992, at A10.

196. Daniel Singer, *The Ghosts of Nationalism*, NATION, 373, 374 (1992).

197. *Verdict in Neo-Nazi Group's Trial*, MTI ECONews (Hungary), Oct. 29, 1992, available in LEXIS, News Library, MTI File.

198. *A Frightening Cause for Concern*, TORONTO STAR, Oct. 30, 1992, at A28.

199. *Austrian Cemetery Hit by Neo-Nazi Vandals*, UPI, Oct. 31, 1992, available in LEXIS, News Library, UPI File.

200. Linda Joffee, *Neo-Facist Bands Link Music to Anger*, CHRISTIAN SCI. MONITOR, Oct. 27, 1992, at 10.

201. Whitney, *supra* note 135.

202. *Skinheads & Neo-Nazis Festering Throughout Europe*, JEWISH PRESS, Nov. 13-19, 1992, at 30.

203. HELSINKI WATCH, *supra* note 35, at 9-10.

Germany.²⁰⁴ Perhaps, most telling, however, is that on the *day following* the amendment, German rightists engaged in the single most deadly attack since unification.²⁰⁵ Throughout the "Asylum Debate," the government staunchly maintained that an amendment would diffuse xenophobic violence. Yet, as many political analysts foresaw, it may have encouraged neo-Nazis by showing that the government shares their goal of ridding Germany of foreigners.

VI. CONCLUSION

Undoubtedly, Germany has shouldered a disproportionate burden of the world's refugees.²⁰⁶ Hence, there is merit in the argument that its asylum laws needed to be tightened. However, regardless of the amendment, Germany must recognize that it has become a multicultural society. It is home to over six million immigrants, many of whom have resided in Germany for decades. Yet, this prodigious community has neither been embraced nor welcomed as "Germans."²⁰⁷ "Under the citizenship laws, non-Germans in far-off lands who can show ancient germanic ties can claim a right of return to the fatherland, while children born on German soil to immigrant parents face bureaucratic obstacles."²⁰⁸ It is this delineation that fosters a fear and hatred of foreigners. Amending the asylum law, without more, will do nothing to alleviate the social injustices with which Germany is now plagued.

Article 1(1) of the Basic Law provides: "[t]he dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."²⁰⁹ Clearly, this article encompasses all of Germany's

204. *Id.* at 10.

205. *German Violence Rises Sharply; Anti-Asylum Law Fails to Stem Attacks on Foreigners*, CHI. TRIB., July 31, 1993, at 13.

206. *Germany's Half Step*, CHRISTIAN SCI. MONITOR, Dec. 10, 1992, at 20; Jensen, *supra* note 159; *No Room at Europe's Inn*, FIN. TIMES (London), Dec. 24, 1992, at 6; *Help on Migrants*, FIN. TIMES (London), Feb. 17, 1993, at 17. Germany prior to the Asylum Amendment accepted about eight percent of the world's refugees. *Sanctuary's Limits in Germany*, *supra* note 185. Refugees gravitated to Germany because of its liberal laws as opposed to the stringent entry requirements in neighboring nations. James Drake von Hauer, *Nazi Analogy Isn't Apt*, FRESNO BEE, Dec. 16, 1992, at B7.

207. "There are Turks whose parents came at the Bonn government's invitation 30 years ago, and who themselves have never set foot on Turkish soil, who are essentially treated as indigestible aliens." *Germany's Problems with Foreigners*, CHI. TRIB., Dec. 14, 1992, at 18.

208. William Safire, *Germany's "Shut-the-Gates" Policy on Immigration*, TIMES-PICAYUNE, June 14, 1993, at B7.

209. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 1, cl. 1.

inhabitants. "Article 1 does not differentiate between 'the deserving' and the 'undeserving,' between Germans and other human beings."²¹⁰ Where a distinction is made based on nationality, the law's humanitarian purpose is vitiated.

Patricia A. Mollica

210. Mushaben, *supra* note 97.

