Florida Journal of International Law

Volume 20 | Issue 2 Article 2

August 2008

The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany

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THE SCOPE OF DEMOCRATIC PUBLIC DISCOURSE: DEFENDING DEMOCRACY, TOLERATING INTOLERANCE, AND THE PROBLEM OF NEO-NAZI DEMONSTRATIONS IN GERMANY

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I. INTRODUCTION

Recent heated debates over Neo-Nazi demonstrations have brought Germany's perhaps most socially and politically sensitive topic to the forefront of an intensive dialogue over the limits of free speech and assembly. The underlying question is how much freedom of speech can right-wing extremist and Neo-Nazi groups in Germany claim today? The Federal Constitutional Court and the State Administrative Court of North Rhine-Westphalia are engaged in a particularly memorable dispute, with the state court refusing to follow the Federal Constitutional Court's standard. This dispute among the two courts is highly instructive as it highlights the arguments on both sides of the debate in an exemplary fashion.

The Federal Constitutional Court, described as the "guardian of German democracy,"[1] has a central role in defining what constitutes permissible public discourse and has, over the years, been trying to find a workable balance between freedom of speech and the protection of countervailing constitutional interests. The relatively more speech-protective stance of the Federal Constitutional Court, which may still appear highly restrictive from a U.S. perspective,[2] has led to decisions overruling bans of right-wing extremist and Neo-Nazi demonstrations. This, needless to say, struck a nerve with the German public that, joined by leading politicians, reacted with considerable outrage to Neo-Nazi and right-wing extremist groups using the symbolism and imagery of historic locations like the Brandenburg Gate in Berlin.[3]

Those opposed to the ideas propagated at these events, the vast majority of the German public, consequently, fall into two groups. Some,

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1. Donald P. Kommers, *The Federal Constitutional Court: Guardian of German Democracy*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 111 (2006).

2. *Infra* Part V.B.1

3. Hilmar Sander, *Wiederkehrthema: Die Öffentliche Ordnung—das verkannte Schutzgut?* [Returning Topic: Public Order—The Underestimated Subject of Protection?], 21 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 831, 831-34 (2002).

taking a cue from the Federal Constitutional Court, argue that the best way to fight objectionable ideas is to let them be articulated in an open "battle of opinions"[4] where these ideas can be met with strongly articulated opposition. From a U.S. perspective, this struggle between speech and counterspeech[5] should sound familiar. The Federal Constitutional Court's approach, however, departs somewhat from the U.S. approach, as this Article will show, because speech that falls within the scope of certain provisions of the German Criminal Code is prohibited.

Others, taking a cue from the state administrative court, argue that right-wing extremist and Neo-Nazi ideas should be banned from public discourse altogether. "Nip it in the bud" perhaps best sums up the sentiment articulated by the state administrative court.[6] According to this approach, the fact that a majority of the public would find the ideas disseminated at right-wing and Neo-Nazi demonstrations objectionable should be sufficient to prohibit the demonstrations, even if the ideas propagated at these demonstrations do not run afoul of the Criminal Code.

The disagreement about the level of free speech protections illustrates Germany's ongoing struggle with its past. It further highlights important aspects of basic constitutional doctrine in the area of free speech and assembly, reflecting the struggle between permissiveness and faith in the "good" opinions on the one hand, and weariness and distrust of judgment on the other. This Article seeks to place both the clash of the courts and related recent legislative activities in the area in a larger societal context by asking whether it is desirable in a liberal democracy in general, and in Germany in particular, to prohibit extremists' assemblies and speech.

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4. *See, e.g.*, Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 25, 1961, 12 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 113, 125 (F.R.G.) [hereinafter: Schmid-Spiegel decision]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198, 208 (F.R.G) [hereinafter: Lüth decision].

5. *See, e.g.*, Schmid-Spiegel decision, *supra* note 4, at 125.

6. *See also* Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law*, 4 GERMAN L.J. 42, 81 (2003), originally published in STOCKTAKING IN GERMAN PUBLIC LAW 117 (Bullinger & Starck eds., 2002), *available at* www.germanlawjournal.com/article.php?id=225.

> Common rallying cries in Germany are "Nip it in the bud" (*Wehret den Anfängen*) and "Never Again" (*Nie wieder*). These slogans were initially directed only against a recurrence of the Nazi regime of terror but are now used to condemn hate speech writ large. Although no person of good will could dispute the wisdom of these admonishments, constitutional scholars must be concerned that they not be used to support undue encroachment upon free speech.

Id.

Part II will use data compiled by the Federal Ministry of the Interior to sketch a picture of right-wing extremism and Neo-Nazism in contemporary Germany. As will be shown, right-wing extremism and Neo-Nazism in Germany is more than just a ghost of the past. Part III turns to the clash of the courts, illustrating the two sides of the debate using the case that was the basis for the 2004 decision of the Federal Constitutional Court's First Senate.

Part IV then turns to recent legislative activity in connection with the 60th anniversary of the end of World War II. Part V tries to identify the scope of democratic public discourse, first placing references to U.S. First Amendment doctrine into context, then examining the justifiable limits on free speech, and finally turning to public discourse at the fringes. While there is a historically justifiable limit to free speech in Germany, widening speech restrictions threaten to undermine the legitimacy of the limit. The new legislative activities and the stance proposed by the state administrative court endanger the rather delicate balance between freedom of expression and countervailing constitutional interests that the Federal Constitutional Court has established.

II. NEO-NAZISM & RIGHT-WING EXTREMISM IN CONTEMPORARY GERMANY

The Federal Ministry of the Interior (*Bundesinnenministerium*) and the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) monitor the activities of far-right organizations and report their findings in the Annual Reports on the Protection of the Constitution (*Verfassungsschutzbericht*). These reports also include information on the activities of other groups and organizations opposed to the current democratic order, such as far-left organizations, and religious extremist organizations. Using data from the Annual Reports, this section will first provide a sketch of contemporary far-right and Neo-Nazi criminal activity in Germany, then turn to the activities of far-right political parties in Germany. It should be noted, however, that the Annual Reports themselves have been the target of criticism because of their potentially chilling effect on political speech.[7]

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7. *See, e.g.*, Günter Bertram, *Kollateralschäden einer wehrhaften Demokratie?* [Collateral Damage of a Militant Democracy?] 59 NEUE JURISTISCHE WOCHENSCHRIFT 2967, 2968 (2006); Dietrich Murswiek, *Der Verfassungsschutzbericht—das scharfe Schwert der streitbaren Demokratie—Zur Problematik der Verdachtsberichterstattung* [The Report on the Protection of the Constitution—The Sharp Sword of Militant Democracy—On the Problems of Reporting Suspicion], 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 769, 769-70 (2004)

A. *Right-Wing Politically Motivated Crime and Right-Wing Extremism*

According to the 2005 Annual Report on the Protection of the Constitution,[8] right-wing politically motivated crime is increasing.[9] Data cited in the Annual Reports on politically motivated crime is based on information from the Federal Criminal Police Office (*Bundeskriminalamt, BKA*).[10] According to the report, "[a]n offence is defined as politically motivated if the circumstances of the offence or the attitude of the offender lead to the conclusion that it is directed at individuals due to their political beliefs, nationality, ethnic origin, race, color, religion, ideology, origin, sexual orientation, disability, appearance or social status."[11] In the 2005 report, 15,914 criminal offences were classified as right-wing politically motivated crime compared to 12,553 criminal offense in the previous year.[12] According to the report's definition, "[c]rimes motivated by right-wing extremism constitute a subset of... right-wing politically-motivated crime."[13] Of the 15,914 criminal offenses classified as right-wing politically motivated crime, "10,905 ... were propaganda crimes pursuant to Sections 86, 86a of the Criminal Code ... and 1,034 ... were violent crimes. In this area, 15,361 criminal offences were recorded as motivated by extremism, ... including 958 violent crimes."[14] As such, "[t]he number of criminal offences with a right-wing extremist background ... rose by 27.5% while that of violent crimes with a right-wing extremist background rose by 23.5%."[15] Of the right-wing violent crimes, in 2005, 355 (37.1%) showed an extremist and xenophobic background. Another 316 (33%) were directed at actual or supposed left-wing extremists.[16] Violent crimes

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(asserting that the current practice is unconstitutional). *But see* Hans-Jürgen Doll, *Der Verfassungsschutzbericht—ein unverzichtbares Mittel zur geistig-politischen Auseinandersetzung mit dem politisch Motivierten Extremismus* [The Report on the Protection of the Constitution—An Indispensible Means for the Intellectual-Political Debate with Politically Motivated Extremism], 24 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 658, 658-59 (2005)(for a reply to Murswiek).

8. FEDERAL MINISTRY OF THE INTERIOR, 2005 ANNUAL REPORT ON THE PROTECTION OF THE CONSTITUTION [hereinafter 2005 ARPC], *available at* http://www.verfassungsschutz.de/download/show/vsbericht2005_engl/vsbericht_2005_engl.pdf.

9. *Id.* at 20.

10. *Id.* at 18.

11. *Id.*

12. *Id.* at 20.

13. 2005 ARPC, *supra* note 8, at 20.

14. *Id.*

15. *Id.*

16. *Id.* at 22.

with an anti-Semitic background were reported in 49 cases, accounting for 5.1% of all violent right-wing crimes.[17]

Anti-Semitism is a basic element of right-wing extremist ideology. Although the number of individuals holding such views has been decreasing since the 1950s, the Federal Office for the Protection of the Constitution warned in a 2002 report on "The Role of anti-Semitism in current German right-wing extremism" that it should not be underestimated.[18] In 2005, there were 1,658 right-wing crimes with an extremist and anti-Semitic background reported, representing an increase of 25.9% compared to the previous year.[19]

A geographic distribution of violent crimes reveals that North Rhine-Westphalia, Germany's most populous state, had the highest aggregate number of violent crimes with 121 registered offenses.[20] When adjusted for crimes per 100,000 residents, however, North Rhine-Westphalia ranges toward the bottom of the violent crimes list.[21] In per capita terms, the highest numbers of violent crimes were recorded in Saxony-Anhalt, followed by Brandenburg, Thuringia, and Saxony.[22]

B. *Far-Right Political Parties*

Several far-right political parties remain active in Germany. Some, in recent elections, even won seats in several state legislatures. Political parties have a central role in German democracy as described in Article 21(1) of the Constitution of the Federal Republic of Germany or Basic Law.[23] They aid the formation of the people's political will, and thus, one may call political parties "the principal organs of political

17. *Id* at 25.

18. FEDERAL OFFICE FOR THE PROTECTION OF THE CONSTITUTION, THE SIGNIFICANCE OF ANTI-SEMITISM IN CURRENT GERMAN RIGHT-WING EXTREMISM (2002), *available at* http://www.extremismus.com/vs/antisemitism-e.pdf.

19. 2005 ARPC, *supra* note 8, at 25.

20. *Id.* at 27.

21. *Id.*

22. *Id.*

23. Article 21(1) of Grundgesetz für die Bundesrepublik Deutschland states that "The political parties participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They have to publicly account for the sources and use of their funds and for their assets." Translation taken from THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 74 (May 23, 1949) (Axel Tschentscher trans., 2003) [hereinafter Tschentscher], *available at* http://www.oefre.unibe.ch/law/lit/the_basic_law.pdf.

representation."[24] Therefore, political parties are privileged under the Constitution insofar as only the Federal Constitutional Court can declare them unconstitutional, as opposed to such groups that are not political parties or groups that the executive branch may prohibit.[25] This is known as the political party privilege (*Parteienprivileg*) of Article 21. This privilege also has consequences for the freedom of assembly. Assemblies of political parties cannot be prohibited on the basis that other state actors, such as the federal legislature (*Bundestag*) or the state chamber (*Bundesrat*) or the federal government, deem these parties unconstitutional, or if a party prohibition is pending before the Federal Constitutional Court.[26]

1. Political Participation

Overall, the membership numbers of right-wing extremist political parties in Germany have declined since 2001.[27] The National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*, NPD) is perhaps the most notorious far-right political party active in Germany today. Recently, the party membership has been assessed at between five and six thousand members.[28] Far-right parties with antidemocratic platforms routinely participate in state and federal elections. The NPD, for example, participated in every state in the September 18, 2005 federal elections.[29] Its candidate lists included candidates from the NPD, DVU (*Deutsche Volksunion*, German People's Union), and Neo-Nazi organizations.[30] Specifically, the NPD had direct candidates for 295 of the

24. Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 853 (1991).

25. Judith Wise, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 U. CHI. L. SCH. ROUNDTABLE 301, 308 (1998).

26. Wolfgang Hoffmann-Riem, *Neuere Rechtsprechung des BVerfG zur Versammlungsfreiheit* [Recent Decisions of the BVerfG on Freedom of Assembly], 21 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 257, 260 (2002).

27. Political Party membership (DVU, NPD, REP): 33,000 in 2001; 28,100 in 2002; 24,500 in 2003; 23,800 in 2004; 21,500 in 2005. 2005 ARPC, *supra* note 8, at 47; 2004 ARPC at 28; 2003 ARPC at 27. It should be noted that the status of Die Republikaner (REP) as an extremist party is somewhat questionable. The ARPC itself states that "not every member of the [REP] can be considered a right-wing extremist." 2005 ARPC, *supra* note 8, at 46.

28. The Federal Ministry of the Interior assesses the numbers for each year, respectively, at 6,000 in 2005, 5,300 in 2004, 5,000 in 2003, 6,100 in 2002. 2005 ARPC, *supra* note 8, at 47; 2004 ARPC at 28.

29. 2005 ARPC, *supra* note 8, at 82-83.

30. *Id.*

299 voting districts.[31] The NPD received 1.6% of the second votes, an increase of 1.2% from the 2002 federal elections.[32] It "received 1.1% of the votes in western Germany (and West Berlin) and 3.6% of the votes in eastern Germany (and East Berlin)."[33] The highest vote was achieved in Saxony (4.8%), followed by Thuringia (3.7%), and Mecklenburg-Western Pomerania (3.5%).[34] The lowest vote was achieved in North Rhine-Westphalia (0.8%).[35] The NPD's appeal is greatest with young male voters. In the 2005 federal elections, "5.2% of young male voters (age 18–24) . . . voted for the NPD, as did 9.5% of all voters in eastern Germany, including 4.7% of male voters of all ages."[36]

Further, the NPD has successfully participated in elections on the state level, winning seats in the state legislatures of two states, Mecklenburg-West Pommerania and Saxony.[37] The presence of NPD legislators in the state legislatures of two states has caused considerable outrage, fueled by several high-profile incidents reflecting the party's far-right agenda. One such incident, which received front page coverage in the national media, involved members of the Saxony legislature refusing to participate in a moment of silence commemorating the 60th anniversary of the liberation of Auschwitz.[38] In late 2005, however, three MPs of the Saxony legislature left the NPD, citing among other reasons objections to the "Fourth Reich" strategy of the party and its endorsement of National Socialism.[39]

The NPD initiated cooperation with the DVU, which has won seats in the state of Brandenburg.[40] The DVU boasts the largest membership of all right-wing extremist parties, with an estimated 9,000 members in 2005, down from 11,000 members in 2004.[41] The "Pact for Germany" between the NPD and the DVU is intended to keep the parties from campaigning

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31. *Id.* at 83.
32. *Id.*
33. *Id.*
34. 2005 ARPC, *supra* note 8, at 83.
35. *Id.*
36. *Id.*
37. Severin Weiland, NPD-Schock in Sashsen—Milbradt Abgestraft, Spiegel Online, Sept. 19, 2004, Online at http://www.spiegel.de/politik/deutschland/0,1518,318817,00.html; Frust über Einzug der NPD, Spiegel Online, Sept. 17, 2006, Online at http://www.spiegel.de/politik/deutschland/0,1518,437529,00.html.
38. *See, e.g., Die UN gedenken der Auschwitz-Opfer In Berlin Empörung Über die NPD,* FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 25, 2005, at 1-2; Reiner Burger, *Brüllende Parlamentsfeinde, id.* at 3.
39. 2005 ARPC, *supra* note 8, at 82.
40. *Id.* at 92-93.
41. *Id.* at 86.

against each other.[42] There continues to be substantial disagreement, however, between the NPD and the DVU concerning cooperation with Neo-Nazi groups. While the NPD views Neo-Nazis favorably, and has leading Neo-Nazis in the party leadership, the DVU disapproves of close Neo-Nazi ties.[43]

In the 2005 state elections in North-Rhine Westphalia and Schleswig-Holstein, the NPD did not receive enough votes to win seats in the state legislature.[44] It received 0.9% of the vote in North Rhine-Westphalia, outperforming another far-right party, the Republicans (*Die Republikaner*) which received only 0.8% of the votes.[45] The absolute number of votes for the NPD, however, significantly increased since the previous state election in 2000. The NPD received 2,357 votes (less than one-tenth of a percent) in 2000, compared to 73,969 votes (0.9%) in 2005.[46]

The NPD continued its "battle for the streets," in 2005. The number of demonstrations and public events put on by the NPD and its youth organization, Junge Nationaldemokraten (*Young National Democrats, JN*), and other Neo-Nazis and skinheads rose significantly from about 40 in 2004 to 60 in 2005.[47] Part III of this Article is primarily concerned with demonstrations the NPD or its subsections held, or wanted to hold, in the state of North Rhine-Westphalia.

2. Militant Democracy and the Failed NPD Ban

Recently, there were efforts to ban the NPD as a political party pursuant to Article 21(2).[48] The Federal Constitutional Court can declare political parties unconstitutional if "by reason of their aims or the behavior of their adherents, [they] seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of

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42. *Id.* at 81.
43. *Id.* at 80-81.
44. 2005 ARPC, *supra* note 8, at 83.
45. *Id.*
46. *Id.*
47. *Id.* at 79.
48. Tschentscher, *supra* note 23, art. 21.

> (2) 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 are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.
> (3) Details are regulated by federal statutes.

Id.

Germany. . . ."[49] Article 21(2) is a central aspect in the militant democracy scheme adopted in the Constitution.[50] The Basic Law implements a variety of mechanisms created for the protection of democracy, Article 18 allows the government to suspend basic individual rights (a provision which, to date, has never been used); Article 5(2) provides for restrictions on expression; Article 20(4) guarantees a right of resistance in defense of democracy; Article 79(2) restricts amendments to the Basic Law itself; and Articles 9 and 21(2) allow bans of antidemocratic associations and political parties.[51] These provisions "both permit[] and require[] the state to protect the democracy through the apparent paradox of intolerance of intolerance."[52] The militant democracy scheme obligates the state to actively oppose those who intend to use the rights protected in a free society to subvert or destroy democracy.[53] As a safeguard against the abuse of this authority, only the Federal Constitutional Court is granted the power to issue political party bans and to rule on the forfeiture of basic rights of individuals.[54]

In the Federal Republic's early years, two political party bans were enforced. In 1952, the Socialist Reich Party (*Sozialistische Reichspartei*, SRP) was banned and ordered to dissolve.[55] In 1956, the Communist Party (*Kommunistische Partei Deutschlands*, KPD) met the same fate.[56]

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49. *Id.*; Kommers, *supra* note 24, at 853-54.

50. *See, e.g.*, Wise, *supra* note 25, at 301; Ronald J. Krotoszynski Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004); Brugger, *supra* note 6, at 5-6; David A. Jacobs, *The Ban of Neo-Nazi Music: Germany Takes On the Neo-Nazis*, 34 HARV. INT'L L.J. 563 (1993); Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 32-34 (1995) (explaining the concept of Germany's militant democracy).

51. Wise, *supra* note 25, at 307; Tschentscher, *supra* note 23, arts. 18, 5, 20, 79, 9 & 21.

52. *Id.* at 302.

53. Kommers, *supra* note 24, at 854.

54. *Id.*; Wise, *supra* note 25, at 311.

> The Constitutional Court's recognition of authoritarianism in German history and its obligation to balance the Basic Law's hierarchy of individual rights against the state's duty to protect the democracy do mitigate the danger of renewed tyranny in the name of the militant democracy. The division of banning authority between the judiciary and the executive is more than a formality.

Brugger, *supra* note 6, at 5.

55. Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Oct 23, 1952, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (F.R.G.) [hereinafter SRP decision].

56. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Aug 17, 1956, 5 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 85 (F.R.G.) [hereinafter KPD

The Federal Constitutional Court's decisions display its full awareness of the highly problematic role of political party bans in a democratic society. In the SRP case, the Court acknowledged the general democratic principle permitting the manifestation of any idea, including antidemocratic ideas, in a political party.[57] However, the framers of the German Constitution were faced with the question whether, in light of recent experiences, certain limits should be imposed on this principle. In particular the framers considered whether political parties should be required to accept the fundamental principles of democracy.[58] Thus, parties working toward abolishing democracy would be excluded from the political arena.[59] The Court stated that a party ban is not justified when a party challenges individual provisions or institutions with legal means.[60] However, a party ban is justified when a party seeks to abolish supreme fundamental values of the free democratic constitutional order.[61] The fundamental principles that the Basic Law refers to as the "free democratic constitutional order" include, at a minimum, the enumerated human rights, sovereignty of the people, separation of powers, government accountability, the legality of the executive, judicial independence, and the multi-party system, including the right to form and exercise opposition.[62]

After examining the membership, objectives, and party platform of the SRP, the Federal Constitutional Court concluded that the SRP was a substitute organization for the Nazi party and as such unconstitutional under Article 21(2).[63] In the KPD case, the Court added that a party is not unconstitutional if it merely refuses the fundamental principles of the free democratic basic order.[64] Rather, a party has to be actively combative and aggressive toward the existing order, and acting in accordance with a fixed plan with the ultimate goal of abolishing the existing order.[65] The Court pointed out that, contrary to the KPD's assertion that the state prohibits antidemocratic ideologies,[66] the state does not actively pursue the banning

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decision]. *See also* Krotoszynski Jr., *supra* note 50, at 1590-92; Fox & Nolte, *supra* note 50, at 33 (discussing SRP and KPD bans); Wise, *supra* note 25, at 310-11 (discussing the KPD case).

57. SRP decision, *supra* note 55, at 10-11.
58. *Id.* at 11.
59. *Id.*
60. *Id.* at 13.
61. *Id.*
62. SRP decision, *supra* note 55, at 13.
63. *Id.* at 68-71.
64. KPD decision, *supra* note 46, at 140-41.
65. *Id.* at 140-41.
66. *Id.* at 143.

of antidemocratic parties, but rather acts defensively in guarding its basic order.[67]

Enforcement of association and party bans became less strict between the seventies and the early nineties, a trend attributed to a growing confidence in Germany's democratic processes and institutions.[68] In the aftermath of German reunification, however, a rise in xenophobic violence was met with an increased activity in banning antidemocratic organizations.[69]

In 2003, however,the Federal Constitutional Court denied applications for a party ban submitted by the federal government, the federal legislature (*Bundestag*) and the state chamber (*Bundesrat*).[70] A qualified majority of the Second Senate's members would have been required to proceed with a ban.[71] In this case, however, the qualified majority requirement was not met as three judges found that there was an obstacle to proceeding with the ban.[72] The asserted obstacle stemmed from the fact that undercover agents had become active in the party in order to monitor party activities and to gather evidence for the upcoming party ban proceedings.[73]

Judges Hassemer, Broß, and Osterloh, however, found the presence of state agents in elevated positions of the party leadership to be highly problematic because these agents would inevitably influence the opinion formation process of the party they sought to ban.[74] A role in party leadership, whether taking an active or passive approach, necessarily influences the public appearance of the party and its platform.[75] In political party ban proceedings it is essential that the party presents itself according to its own self-determined role, free from state influence.[76]

Members of the party leadership who are state agents inevitably taint the necessary free and self-determined self-representation of the party before the Federal Constitutional Court.[77] The three judges stated that party ban proceedings are the most effective, but at the same time double-

67. *Id.* at 140-41.

68. Krotoszynski Jr., *supra* note 50, at 1592.

69. *Id.*; Wise, *supra* note 25, at 301-02; Fox & Nolte, *supra* note 50, at 34.

70. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Mar. 18, 2003, 107 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 339 (F.R.G.).

71. *Id.* at 356-57.

72. *Id.* at 356.

73. *Id.* at 346-56.

74. *Id.* at 366.

75. Bundesverfassungsgericht, *supra* note 70, at 367.

76. *Id.* at 367-68.

77. *Id.* at 368.

edged, weapon of the democratic state against its organized enemies.[78] Therefore, it requires the highest degree of legal certainty, transparency, and dependability. This requirement extends to facts as well: individuals and their conduct have to be unambiguously attributable either to the petitioner requesting the party ban or to the political party itself.[79] Only if these requirements are met can a sound decision on the constitutionality of a political party be made.[80]

In 2006 the federal government announced that it did not intend to apply for another NPD party ban because renewed proceedings were unlikely to be successful.[81] This stance was reiterated by Interior Minister Wolfgang Schäuble in May 2007. He asserted that rather than removing the state agents from their NPD leadership positions in anticipation of new party ban proceedings, the agents would prove more useful in continuing to monitor the party's activities.[82] Thus, as long as the NPD is not found to be unconstitutional and prohibited by the Federal Constitutional Court, it remains free to operate as a political party in Germany.

III. THE CLASH OF THE COURTS

The clash between the State Administrative Court of North Rhine-Westphalia and the Federal Constitutional Court over the limits of free speech and assembly for Neo-Nazis and right-wing extremists is exemplary.[83] The dispute was drawn out in a series of decisions between 2001 and 2004.[84] In the first half of 2001 alone, the Federal Constitutional

78. *Id.* at 369.

79. *Id.*

80. Bundesverfassungsgericht, *supra* note 70, at 369.

81. *Koalition will keine neue Initiative für NPD-Verbot*, DIE WELT, Nov 14, 2006, at 1.

82. Markus Decker, *Gewaltbereitschaft von rechts* [Violence -Proneness From the Right], KÖLNER STADT-ANZEIGER, May 15, 2007, at 2.

83. This conflict between the courts is the subject of several recent books. GISO HELLHAMMER-HAWIG, NEONAZISTISCHE VERSAMMLUNGEN: GRUNDRECHTSSCHUTZ UND GRENZEN [Neo-Nazi Assemblies: Constitutional Protection and Limits] (2005); RALF RÖGER, DEMONSTRATIONSFREIHEIT FÜR NEONAZIS? [Freedom to Demonstration for Neo-Nazis?] (2004). *See also* JÖRG ANDREAS HADER, EXTREMISTISCHE DEMONSTRATIONEN ALS HERAUSFORDERUNG DES VERSAMMLUNGSRECHTS [Extremist Demonstrations as a Challenge for the Law of Assembly] (2003).

84. *See, e.g.*, Oberverwaltungsgericht für das Land Nordrhein-Westfalen [OVG NRW] [State Administrative Court of North Rhine-Westphalia] Mar. 23, 2001, 54 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2111 (2001); NEUE JURISTISCHE WOCHENSCHIFT [NJW] 2069 (2001); Oberverwaltungsgericht für das Land Nordrhein-Westfalen [OVG NRW] [State Administrative Court of North Rhine-Westphalia] Apr. 12, 2001, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2113

Court reversed five decisions of the administrative court.[85]

At the core of this quite extraordinary exchange was the question of the content and scope of "public safety and order" as limits on free speech and assembly.[86] The underlying question, however, was whether right-wing extremist and Neo-Nazi ideas can—and should be—excluded from public discourse.

The Federal Constitutional Court is comprised of two Senates exercising mutually exclusive jurisdiction, each staffed with eight judges elected by the federal legislature for nonrenewable twelve year terms.[87] The Senates form several chambers at the beginning of every court term consisting of three judges each.[88] The Court is a specialized court of constitutional review; it is the only court in Germany that can declare statutes as well as other government acts unconstitutional.[89] Under section 39 of the Code of Procedure of the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz, BVerfGG*), decisions of the Federal Constitutional Court bind all other courts as well as the state and federal legislatures and executives.[90] Decisions of the chambers, however, do not have the same binding effect.[91]

The intensity of this dispute is likely unprecedented in the history of exchanges between a state court and the Federal Constitutional Court.[92] The debate is so intense that it has not only been waged in stinging court opinions, but also in the news media, as Federal Constitutional Court Judge Wolfgang Hoffmann-Riem, a member of the First Senate and its First Chamber, and Michael Bertrams, President of the State Administrative Court of North Rhine-Westphalia (and as such by law also

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(2001); Federal Constitutional Court, Apr. 12, 2001, at 2075 (Ostermontags-Demonstration); State Administrative Court of North Rhine-Westphalia, Apr. 30, 2001, at 2114; Federal Constitutional Court, May 1, 2001, at 2076 (1. Mai Demonstration). *See also* HELLHAMMER-HAWIG, *supra* note 83, at 9-26; RÖGER, *supra* note 83, at 21-32 (for an event-by-event account of the controversy).

85. HELLHAMMER-HAWIG, *supra* note 83, at 3-4.

86. *Id.*

87. Peter E. Quint, *Leading a Constitutional Court: Perspectives from the Federal Republic of Germany*, 154 U. PA. L. REV. 1853, 1855-58 (2006).

88. *Bundesverfassungsgerichtsgesetz* [*BverfGG*] [Code of Procedure of the Federal Constitutional Court] July 16, 1998, as amended art. 15(a).

89. Kommers, *supra* note 24, at 840.

90. *Id.*

91. RÖGER, *supra* note 83, at 18-19.

92. Michael Kniesel & Ralf Poscher, *Die Entwicklung des Versammlungsrechts 2000 bis 2003* [The Development of the Law of Assembly 2000 to 2003], 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 422, 425 (2004).

President of the State Constitutional Court of North Rhine-Westphalia[93]), exchanged blows in the daily newspaper *Frankfurter Rundschau*, bringing the dispute to a wider audience.[94] It seems quite remarkable that two sitting judges of such stature went head-to-head in this fashion, thus underscoring the importance of the issue at hand. Nonetheless, it took until 2004 for the full First Senate to decide this issue, despite calls to do so well before then. Perhaps the most notable call was from Ernst Benda, former President of the Federal Constitutional Court, who in 2001 suggested that in light of the importance of the issue a Senate decision might be desirable.[95]

The sequence of events was the same in each case. Local authorities would prohibit planned right-wing assemblies.[96] The state administrative court, as the highest court in the state's administrative system, would uphold the ban.[97] The organizers would seek to enjoin the local authorities before the Federal Constitutional Court, whose First Chamber of the First Senate would strike down the ban.[98]

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93. Section 2(2) of the Gesetz über den Verfassungsgerichtshof für das Land Nordrhein-Westfalen (VGHG NW) [Law of the State Constitutional Court of North Rhine-Westphalia] Dec. 14, 1989, § 2(2) states that the president of the state constitutional court is the president of the state administrative court.

94. Wolfgang Hoffmann-Riem, *Die Luftröhre der Demokratie* [The Windpipe of Democracy], FRANKFURTER RUNDSCHAU, July 11, 2002, at 14 (expressing the central claim that freedom of assembly is essential for a functioning democracy); Michael Bertrams, *Die Renaissance des Rechtsextremismus wird verharmlost* [The Renaissance of Right Wing Extremism is Being Trivialized], FRANKFURTER RUNDSCHAU, July 16, 2002, at 14 (accusing Hoffmann-Riem and the First Chamber of underestimating the "renaissance" of Neo-Nazism in Germany).

95. Ernst Benda, *Kammermusik, schrill* [Chamber Music, Shrill], 54 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2947, 2948 (2001).

96. *Id.*

97. *Id.*

98. *See also* RÖGER, *supra* note 83, at 16-18. Procedurally, the administrative agency's ban was effective immediately pursuant to section 80(2)(1) No. 4 of the Code of Administrative Procedure (*Verwaltungsgerichtsordnung, VwGO*). The initial challenges consisted of (a) the appeal to the administrative agency ordering the ban according to section 68 of the Code of Administrative Procedure and (b) the request to the administrative court to reinstate the suspensive effect of the appeal pursuant to section 80(5) of the Code of Administrative Procedure. Before the administrative court, either the NPD or the state prevailed, so that either one applied to the state administrative court, depending on the outcome. The state administrative court routinely proceeded to deny applications by the NPD or grant applications by the state. Seeking an injunction from the Federal Administrative Court, under section 32 of the Code of Procedure of the Federal Constitutional Court, the NPD then submitted an application based on a violation of Articles 5 and 8 by the preceding decisions.

A. *Constitutional and Statutory Background*

Freedom of Assembly is guaranteed in Article 8 of the Basic Law, which states "(1) All Germans have the right, without prior notification or permission, to assemble peaceably and unarmed. (2) With regard to openair assemblies, this right may be restricted by or pursuant to a statute."[99] The leading case in the area of freedom of assembly is the Federal Constitutional Court's 1985 *Brockdorf* decision.[100] The *Brockdorf* decision dealt with the constitutionality of an assembly ban at the site of a planned nuclear power plant and its surrounding area that aimed to prevent protests by several citizens' and environmental protection groups.[101] The Federal Constitutional Court, in emphasizing the important role of freedom of assembly in a democracy, stated:

> [The] stabilizing function of the freedom of assembly for the representative system is rightly described as allowing dissatisfaction, discontent and criticism to be brought out openly and worked off, and as operating as a necessary condition for the political early-warning system that points to potential disruption, making shortfalls in integration visible and thus also allowing course corrections by official policy . . . .[102]

Section 15 of the Federal Law of Assembly (*Versammlungsgesetz, VersG*) regulates the prohibition of assemblies held outside, pursuant to the limitation clause of Article 8(2).[103] While section 15 of the Federal Law of Assembly refers to both public safety[104] as well as public order,[105] the Federal Constitutional Court in *Brockdorf* held that, generally, a mere danger to public order is insufficient to justify the prohibition of an

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99. Tschentscher, *supra* note 23, art. 8.

100. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1985, 69 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 315, (F.R.G.) [hereinafter Brockdorf decision]. Translated in Brockdorf Decision of the First Senate 1 BvR 233, http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=656.

101. *Id.*

102. Brockdorf decision, *supra* note 100, at 347, translated in Brugger, *supra* note 6, at 8.

103. Versammlungsgesetz [VersG Federal Law of Assembly] § 15, *available at* http://www.lexsoft.cle/lexisnexis/justizportal_ nrw.cgi.

104. "Public safety" is defined as all written and unwritten legal norms, the whole legal order, the existence of the state and its institutions and activities and all individual rights. *See, e.g.*, Brockdorf decision, *supra* note 100, at 352.

105. "Public order" is defined as the unwritten rules that, according to the prevalent local social and ethical standards compatible with the constitutional value order, are the indispensable basis of orderly human coexistence. *See, e.g., id.*

assembly.[106] This is based on the constitutional principle of minimum intervention: if the danger can be averted with less intrusive instruments, such as placing conditions on the assembly, a prohibition is not necessary.[107] Conditions frequently implemented on Neo-Nazi and right-wing extremist assemblies target the participants' appearance; common prohibitions include, for example, prohibitions on wearing uniforms or uniform parts, carrying flags, and carrying drums.[108]

For the ensuing discussion it is crucial to note that the contentious issue is always the banning of the demonstration as a preventive measure, based on the expected threat to public order.[109] The threat to public order, as opposed to the threat to public safety, does not require the violation of, or expected violation of, a criminal prohibition. Prohibiting an assembly, or forcing it to disband as a repressive measure, when a violation of a criminal prohibition is imminent, or has in fact occurred, provided the measure is proportional, is not disputed. In the context of a right-wing extremist assembly, infringements or bans meeting the proportionality requirement are not controversial where there are violations or impending violations of the Criminal Code, such as the incitement to hatred provision of section 130.[110] In fact, the Federal Constitutional Court has repeatedly

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106. *Id.* at 353.

107. Friedrich Schoch, *Die Neuregelung des Versammlungsrechts durch § 15 II VersG* [The Revision of Law of Assembly by § 15 II VersG], 28 JURA: JURISTISCHE AUSBILDUNG 27, 28-29 (2006). *See also* Brockdorf decision, *supra* note 100, at 353.

108. Wolfgang Leist, Zur Rechtmäßigkeit typischer Auflagen bei rechtsextremistischen Demonstrationen [On the Legality of Typical Conditions on Right Wing Extremist Demonstrations], 22 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NvwZ] 1300 (2003); Wolfgang Hoffmann-Riem, *Demonstrationsfreiheit auch für Rechtsextremisten?—Grundsatzüberlegungen zum Gebot rechtsstaatlicher Toleranz* [Freedom of Demonstration also for Right Wing Extremists? Fundamental Thoughts on the Command of Tolerance in Accordance with the Rule of Law], 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2777, 2781 (2004) (discussing also the constitutionality of these measures). *See also* HELLHAMMER-HAWIG, *supra* note 83, at 115-17.

109. Ulrich Battis & Klaus Joachim Grigoleit, *Neue Herausforderungen für das Versammlungsrecht?* [New Challenges for the Law of Assembly?] 20 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 121, 125 (2001).

110. Such as section 86 and 86a (dissemination of propaganda by unconstitutional organizations, use of symbols of unconstitutional organizations). *See, e.g.*, Brugger, *supra* note 6, at 14-17 (discussing criminal provisions protecting collective defamation); Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 5 (2002) [hereinafter Brugger, *Ban On*] (discussing section 130 and individual defamation or insult punishable under sections 185-200 of the Criminal Code).

stated that in such cases, a ban may be justified.[111] Finally, if such criminal acts are committed during an assembly, the assembly can be disbanded.[112]

B. *Ongoing Disagreement Over Assembly Bans and the 2004 First Senate Decision*

The sequence of events in the case that led to the 2004 Senate decision followed the sequence of previous cases. In December 2003 the North Rhine-Westphalian NPD announced plans to hold two marches in the city of Bochum in March 2004.[113] The motto was "*Stoppt den Synagogenbau—4 Millionen für das Volk!*" ("Stop the building of the synagogue—4 million for the people!").[114] The local authorities prohibited the march and all substitute events on this or any other day within the entire jurisdiction.[115] Initially, the NPD successfully appealed the decision before the local administrative court.[116]

1. Decisions of March 2004

The state administrative court ruled that the planned assemblies posed a threat to public safety.[117] According to the court, the motto itself would already be punishable as incitement to hatred (*Volksverhetzung*) under section 130 No. 1 and 2 of the Criminal Code, because it displayed an obviously anti-Semitic message.[118] The motto singled out the Jewish population as not being part of "the people," it violated the Jewish population's claim to respect. Further, it disturbed the peaceful coexistence of Jews and non-Jews in Germany. Consequently, the state administrative court found a ban under the protection of public safety provision of section

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111. Kniesel & Poscher, *supra* note 92, at 425; Donat Wege, *Präventive Versammlungsverbote auf dem verfassungsrechtlichen Prüfstand* [Preventive Prohibitions of Assembly on the Constitutional Test Stand], 24 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 900, 902 (2005).

112. Wege, *supra* note 111, at 902.

113. Oberverwaltungsgericht für das Land Nordrhein-Westfalen [OVG NRW] [State Administrative Court of North Rhine-Westphalia] Mar. 2, 2004, docket no. 5B 393/04, ¶3.

114. Verwaltungsgericht Gelsenkirchen [VG Gelsenkirchen] [Administrative Court of Gelsenkirchen Feb. 18, 2004, docket no. 14 L 252/04, ¶ 9; OVG NRW, *supra* note 113, ¶ 4.

115. OVG NRW, *supra* note 113, ¶ 10.

116. Verwaltungsgericht Gelsenkirchen [VG Gelsenkirchen] [Administrative Court of Gelsenkirchen] Feb 18, 2004, docket no. 14 L 252/04, *available at* http://www.justiz.nrw.de/nrwe/ovgs/vg_gelsenkirchen/j2004/14_L_252_04beschluss20040218.html.

117. OVG NRW, *supra* note 113, ¶ 23.

118. *Id.* ¶ 24.

15 of the Federal Law of Assembly to be justified.[119] The First Chamber of the Federal Constitutional Court's First Senate upheld the decision insofar as it based the ban on a threat to public safety.[120] As already mentioned, if violations of criminal provisions are imminent in the context of a right-wing extremist assembly, a ban that satisfies the general proportionality requirement is uncontroversial.[121] The First Chamber further accepted the state administrative court's assessment that conditions in this case could not be implemented by less restrictive means.[122]

Additionally, and more controversially, the state administrative court found that a threat to public order supported the prohibition of the assembly as well.[123] The court reasoned, in line with its previous decisions, that the Constitution does not legitimize extremist ideologies like Nazism. The value order of the Constitution, the court argued, establishes internal limits stemming from an overall rejection of National Socialism, that are sufficient to constitute limits on the freedom of assembly.[124] These internal limits must also be considered below the threshold of criminal prohibitions or constitutional provisions regarding association or party bans or forfeiture of rights. The immediate threat to public order cannot be averted by placing conditions on the assembly.[125] Even though this specific part of the decision was not upheld by the First Chamber, the ban stood nonetheless, having been sufficiently justified by the threat to public safety.[126]

2. Decisions of June 2004

In March 2004, the North Rhine-Westphalian NPD announced a demonstration to be held in Bochum in June. The motto this time was "*Keine Steuergelder für den Synagogenbau. Für Meinungsfreiheit.*" ("No tax money for building the synagogue. For freedom of expression").[127] The local authorities considered this a substitute event falling within the prior

119. Oberverwaltungsgericht für das Land Nordrhein-Westfalen [OVG NRW] [State Administrative Court of North Rhine-Westphalia] Mar 2, 2004, docket no. 5 B 392/04, ¶¶ 22-41, *available at* http://www.justiz.nrw.de/nrwe/orgs/org_nrw/j2004/5_B_392_04beschluss20040302.html.

120. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Mar. 12, 2004, 23 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 1111, 1111 (2004).

121. Kniesel & Poscher, *supra* note 92, at 425.

122. Bundesverfassungsgericht, *supra* note 120, at 1112.

123. State Administrative Court, *supra* note 119, ¶ 42.

124. *Id.* ¶¶ 43-45.

125. *Id.*

126. *Id.*

127. HELLHAMMER-HAWIG, *supra* note 83, at 24.

prohibition.[128] Again, the NPD initially appealed the decision to the local administrative court and was successful.[129] The state administrative court then overruled the local administrative court and reinstated the ban based on a threat to public order pursuant to section 15(1) of the Federal Law of Assembly.[130] The court argued that merely changing the assembly's motto did not eliminate the provocation aimed at the Jewish population.[131] Instead, the court noted that the old motto's divisive and agitating intention persisted in the public consciousness.[132] The changes were only cosmetic in order to avoid punishment for incitement to hatred under section 130(1) of the Criminal Code. Beyond the cosmetic change, the NPD's intent, according to the court, was to continue to publicly disseminate its anti-Semitic message which was "no synagogue in Bochum."[133]

The Federal Constitutional Court's full First Senate unanimously overruled the state administrative court and granted the NPD an injunction against the ban.[134] It rejected the state administrative court's opinion that Neo-Nazi demonstrations can be prohibited because of the public articulation of Neo-Nazi ideology based on either internal constitutional limits or public order even if the content is not criminally prohibited.[135] The Court noted that content of speech is protected under Article 5(1) and limited only by Article 5(2), even if voiced in an assembly.[136] Thus, according to the Court, a limit on the content of speech is only permissible under Article 5(2) if it is a general, that is, content-neutral law, or if it protects the right to personal honor or serves the protection of the youth.[137] The state administrative court based its decision exclusively on the content of expected speech.[138] Limits on the content of speech pursuant to Article 5(2) are found in the Criminal Code, barring recourse to the threat to

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128. *Id.*

129. Verwaltungsgericht Gelsenkirchen [VG Gelsenkirchen] [Administrative Court of Gelsenkirchen], June 9, 2002, docket no. 14 L 1286/04.

130. Oberverwaltungsgericht für das Land Nordrhein-Westfalen [OVG NRW] [State Administrative Court of North Rhine-Westphalia], June 21, 2004, docket no. 5 B 1208/04, ¶ 5.

131. *Id.*

132. *Id.*

133. *Id.* ¶ 7.

134. Bundesverfassunsgericht [BverfG] [Federal Constitutional Court], 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2814 (2004) [hereinafter First Senate decision].

135. *Id.* at 2815.

136. *Id.*; *see also* Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Apr. 13, 1994, 90 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 241, 246 (F.R.G.) [hereinafter Holocaust Denial decision] (concerning section 5 of the Federal Law of Assembly).

137. Bundesverfassungsgericht, *supra* note 134, at 2815.

138. BverfG, *supra* note 136, at 2815.

public order provision.[139] The Court repeated the fundamental presumption that the expression of opinions in a pluralistic democracy is generally free, unless the legislature has limited freedom of expression according to Article 5(2).[140] According to the definition of public order, minority speech would only be protected if it did not offend the current social and ethical community standards.[141] This, however, contradicts the nature of the right to freedom of speech. As far as the Criminal Code protects against anti-Semitic or racist speech, a violation of these provisions would constitute a threat to public safety. The limitation possibility contained in section 15(1) of the Federal Law of Assembly refers only to the scope of constitutional protection awarded under Article 8(1), and may not be used to limit the content of speech.[142]

Public order can still be violated, regardless of the content of opinions, by the manner in which the assembly is conducted. For example, aggressive, provoking, and intimidating conduct that creates an atmosphere conducive to violence may violate the public order. Similarly, holding a right-wing extremist assembly on a day specifically dedicated to commemorating Nazi terror and the Holocaust,[143] or intimidating citizens through the overall appearance of a demonstration or assembly with Nazi rites and symbols may violate the public order.[144] In such cases the assembly may be prohibited if, after considering the particular circumstances, less restrictive measures to avert the threat to public order do not exist.

Colliding fundamental rights of others can only pose a limit to free speech if they are enshrined in a law. There is no internal constitutional limit on proclaiming a Neo-Nazi ideology. Agreeing that the Basic Law established a militant democracy, the Federal Constitutional Court stated that the legal order protects the free democratic basic order in the provisions of the Criminal Code, as well as constitutional provisions in Articles 9(2), 18, and 21(2).[145] These provisions preclude a justification based on internal constitutional limits for other infringements in order to protect the free democratic basic order.[146] The state administrative court's assessment that the Basic Law's mechanisms for averting right-wing

139. *Id.*
140. *Id.*
141. *Id.*
142. First Senate decision, *supra* note 134, at 2815.
143. *See infra* Part V (discussing the Holocaust Memorial Day decision).
144. First Senate decision, *supra* note 134, at 2815-16.
145. *Id.*
146. *Id.*

extremist and Neo-Nazi dangers to the free democratic basic order are insufficient does not justify the creating of new limits by way of judge-made law since only the limitation provisions contained in the Basic Law constitute necessary limitations.[147]

3. Summary of the Conflicting Positions of the Courts

The back and forth between the Federal Constitutional Court and the state administrative court, culminating in the 2004 decision, highlights two fundamentally opposite positions. On the one hand is the militant democracy position that believes in tolerating the views of its enemies because it trusts the courage of its citizens to protect it. On the other hand, a second Weimar Republic that played into the hands of its enemies while the courts were merely spectators is to be prevented.

In between, many questions of constitutional doctrine remain.[148] According to the state administrative court, an ideology like National Socialism cannot be legitimized under the Basic Law.[149] The values laid down in the Basic Law establish an internal constitutional limit that has to be respected when interpreting Articles 5(1) and 8(1), even short of the militant democracy provisions allowing association and party bans as well as forfeiture of individual rights.

Assemblies that are defined by a commitment to National Socialism thus can be prohibited as a threat to public order under section 15(1) of the Federal Law of Assembly.[150] Public order itself is decidedly shaped by the canon of values established in the Constitution, especially the commitment to peace, human dignity, democracy, federalism, and the rule of law.[151] The Federal Constitutional Court, however, distinguishes between the content of opinions, subject to protection under Article 5(1), and the manner in which the opinion is articulated, subject to Article 8.[152]

As far as the content of speech is concerned, only Article 5(2) imposes a limit.[153] Opinions that cannot be limited under that provision cannot be limited by Article 8(2) either.[154] The Federal Constitutional Court finds

147. *Id.* at 2816.

148. Ulrike Lembke, *Grundfälle zu Art. 8 GG*, 45 JURISTISCHE SCHULUNG [JuS] 1081, 1083 (2005).

149. *Cf.* State Administrative Court of North Rhine-Westphalia decisions dated Mar. 23, 2001, Apr. 12, 2001, Apr. 30, 2001, *supra* note 84.

150. *Supra* text accompanying note 139.

151. Lembke, *supra* note 148, at 1082.

152. HELLHAMMER-HAWIG, *supra* note 83, at 29.

153. *Id.*

154. Lembke, *supra* note 148, at 1082.

that the content of opinions, as opposed to the manner of articulation, cannot be prohibited because of an imminent danger to public order.[155]

The criminal prohibitions are finite as far as the content of opinions is concerned, and a threat to public order cannot be substituted as a basis for content prohibitions.[156] The Basic Law further, in Articles 9(2), 18, and 21(2), provides mechanisms to protect democracy. The existence of these mechanisms prohibits the recourse to public order. Moreover, the content of an assembly may not be changed by conditions. If the content of an assembly creates a threat to public safety, however, the assembly may be prohibited.[157]

IV. LEGISLATIVE ACTIVITIES

The debate over the scope of public discourse was further fueled by changes to the Federal Law of Assembly and the Criminal Code in anticipation of right-wing extremist activity in connection with the 60th anniversary of the end of World War II in 2005. In March 2005, after legislative proceedings that lasted less than three weeks,[158] the federal legislature amended section 15 of the Federal Law of Assembly and section 130 of the Criminal Code.[159] The changes were triggered by outrage among leading politicians and the public alike when the NPD announced plans to hold a rally at the Brandenburg Gate in Berlin on May 8, 2005, the 60th anniversary of the capitulation of Nazi Germany.[160] The new legislation was intended to effectively address the steady increase of

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155. *Id.*

156. HELLHAMMER-HAWIG, *supra* note 83, at 29; Lembke, *supra* note 148, at 1082.

157. HELLHAMMER-HAWIG, *supra* note 83, at 29; Lembke, *supra* note 148, at 1082.

158. Ralf Poscher, *Neue Rechtsgrundlagen gegen rechtsextremistische Versammlungen—Zu den verfassungsrechtlichen Grenzen der Entpolitisierung der Versammlungsfreiheit* [New Legal Bases Against Right Wing Extremist Assemblies—On the Constitutional Limits of De-Politicizing Freedom of Assembly], 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1316 (2005).

159. Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuchs, Mar. 24, 2005, Bundesgesetzblatt [BGBl] I, 969 (F.R.G.).

160. Schoch, *supra* note 107, at 27; Wolfgang Leist, *Die Änderung des Versammlungsrechts: ein Eigentor?* [The Change of the Law of Assembly: An Own Goal?], 24 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 500, 500 (2005); Christoph Enders & Robert Lange, *Symbolische Gesetzgebung im Versammlungsrecht?* [Symbolic Law Making in the Law of Assembly?], 61 JURISTENZEITUNG [JZ] 105, 105 (2006); *see also* Günter Bertram, *Der Rechtsstaat und seine Volksverhetzungs-Novelle*, 58 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1476, 1477 (2005); Claudia Nelles, *Die Bedeutung des neuen § 15II VersG in der Rechtsprechung von Berlin und Brandenburg—ein Jahresrückblick* [The Meaning of the New § 15II VersG in the case law of Berlin and Brandenburg—A Year in Review] 16 LANDES—UND KOMMUNALVERWALTUNG [LKV] 403, 403 (2006).

right-wing assemblies whose themes, locations, and appearances were increasingly similar to the assemblies of the Nazi regime.[161] In German legal literature, the effort was sharply criticized as an apparently activist show of strength,[162] which resulted in merely symbolic[163] ad-hoc[164] legislation. Again, however, the fundamental questions posed were: Which political challenges must a society deal with? Which political disputes can be avoided by employing legal force, such as the criminal law, and which disputes do the state have to engage in using only political weapons?[165]

A. *Changes to the Federal Law of Assembly*

A new second paragraph was added to section 15 of the Federal Law of Assembly which now allows the prohibition of or placement of conditions on an assembly if it is held at a place that serves as a memorial of historically outstanding, supra-regional, significance commemorating the victims of National Socialist violence and tyranny.[166] At the time of the state action, there must be concrete circumstances making an infringement on the dignity of the victims likely. Only the Holocaust Memorial in Berlin is explicitly mentioned in the Federal Law of Assembly. The states are authorized to identify further memorial places. To the extent that the locations are designated as memorials, the legislative materials state that this would apply, for example, to the sites of former concentration camps.[167]

One commentator noted that the vagueness of the language used in the provision might be problematic, leaving open the question regarding whether section 15(2) would pass constitutional muster or, if it does, would prove workable.[168] The new provision raises a number of practical problems as well. It has been argued, for instance, that smaller and less well-known former concentration camps would not fall under the provision since they are not memorials of historically outstanding, supra-

161. Schoch, *supra* note 107, at 27; Nelles, *supra* note 160, at 403.

162. Poscher, *supra* note 158, at 1316.

163. Enders & Lange, *supra* note 160, at 112.

164. Schoch, *supra* note 107, at 31.

165. Poscher, *supra* note 158, at 1316.

166. Federal Law of Assembly § 15(2).

167. Poscher, *supra* note 158, at 1317; Enders & Lange, *supra* note 160, at 106; Klaus Stohrer, *Die Bekämpfung rechtsextremistischer Versammlungen durch den neuen § 15II VersG* [Fighting Right Wing Extremist Assemblies with the New § 15II VersG], 46 JURISTISCHE SCHULUNG [JuS] 15, 16 (2006); HELLHAMMER-HAWIG, *supra* note 83, at 248-49.

168. HELLHAMMER-HAWIG, *supra* note 83, at 249. *See also* Lembke, *supra* note 148, at 1083 (expressing doubt regarding the constitutionality of the provision).

regional significance.[169] Moreover, other locations that have a connection with National Socialism, and as such would be desirable rally sites for Neo-Nazis, are completely outside the scope of the law as they are not designated memorial sites, such as the Feldherrenhalle in Munich. Likewise, the location that triggered this legislation, the Brandenburg Gate in Berlin, is not within the scope of the new law.[170] At such locations that do fall within the scope of the law, freedom of expression is limited in a way that is not content-neutral. Therefore it is not a general, that is, content-neutral, law under the limiting provision of Article 5(2).[171] However, limits that are not content-neutral can be imposed on freedom of expression under Article 5(2) if they protect personal honor.[172] Although the limitation on freedom of expression does not explicitly connect to a specific opinion, it encompasses only right-wing extremist opinions, as intended by the legislature.[173]

Both the Federal Constitutional Court and the Federal Court of Justice (*Bundesgerichtshof, BGH*) have stated that there is a link between the genocide of Jewish citizens and the personal honor of the survivors and their descendants:

> The historical fact alone that human beings were singled out . . . and robbed of their individuality with the goal of exterminating them puts the Jews who live in the Federal Republic of Germany into a special personal relationship *vis-à-vis* their fellow citizens; the past is still present in this relationship today. It is part of their personal self-perception and their dignity that they are comprehended as belonging to a group of people who stand out by virtue of their fate, and in relation to whom all others have a special moral responsibility. Indeed, respect for this self-perception is for each of them one of the guarantees against a repetition of such discrimination, and it forms a basic condition for their life in the Federal Republic.[174]

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169. Leist, *supra* note 160, at 502. *But see* Schoch, *supra* note 107, at 29 (stating that while these memorial places would not fall under the new section 15(2), they would still be covered under section 15(1) as they were in the past.)

170. Leist, *supra* note 160, at 502; Stohrer, *supra* note 167, at 16.

171. Poscher, *supra* note 158, at 1317; Enders & Lange, *supra* note 160, at 110; Stohrer, *supra* note 167, at 17.

172. Poscher, *supra* note 158, at 1317; Schoch, *supra* note 107, at 30.

173. Stohrer, *supra* note 167, at 17.

174. Holocaust Denial decision, *supra* note 136, at 251-52, *translated in* Brugger, *Ban On*, *supra* note 110, at 17.

The courts point out that the Holocaust has fundamentally shaped the identity of the Jewish population and the claim to respect arises out of the immeasurable suffering and injustice.[175] Having become part of their dignity, the claim to respect has also become part of personal honor.[176] The Holocaust Memorial in Berlin testifies to this claim to respect of the Jewish population. The new provision codifies its territorial protection and therefore is a law protecting personal honor. For other memorials a similarly close relationship between the claim to respect and the personal honor of the victims has to be present.[177] A similar protection has been acknowledged by the Federal Constitutional Court for the Holocaust Memorial Day.[178] In its Holocaust Memorial Day decision, the First Chamber upheld a restriction on an assembly, requiring the organizers to reschedule for the following day, because a demonstration by right-wing extremists on this particular day would cause provocation and thus would lead to the danger of a substantial infringement on the moral sentiments of other citizens.[179] By allowing content-based restrictions on the freedom of assembly, the First Chamber followed the path the Federal Constitutional Court paved with regard to the Holocaust in general.[180] The constitutional basis of the Holocaust Memorial Day decision, too, is the protection of personal honor under Article 5(2), which poses a limit on freedom of expression. The Holocaust Memorial Day was instituted specifically to pay respect to the personal dignity of the victims of the Holocaust.[181] To protect the dignity of the victims, assemblies connected to National Socialism may be prohibited on this day. This is intended to underscore symbolically the claim to respect of the victims of the Holocaust. As long as a connection with personal dignity in the sense of Article 5(2) can be made, this justification can be transferred to other memorial days or

175. Stohrer, *supra* note 167, at 17; Kniesel & Poscher, *supra* note 92, at 428; *see also* Brugger, *Ban On*, *supra* note 110, at 15-21; Brugger, *supra* note 6, at 32-38; Krotoszynski Jr., *supra* note 50, at 1593-95; Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 892-94 (1997) (discussing the Holocaust Denial case).

176. *See supra* note 175.

177. Poscher, *supra* note 158, at 1317; Enders & Lange, *supra* note 160, at 107.

178. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan. 26, 2001, 56 Juristenzeitung [JZ] 651 (2001) [hereinafter Holocaust Memorial Day decision].

179. *Id.* at 652.

180. Kniesel & Poscher, *supra* note 92, at 428.

181. *Id.* Holocaust Memorial Day is January 27th, the day Auschwitz was liberated by allied forces in 1945. President Roman Herzog declared the Holocaust Memorial Day to be a national day of remembrance in 1996. *Id.* Incidentally, prior to his election as President of the Federal Republic of Germany in 1994, Herzog was the President of the Federal Constitutional Court and Chief Judge of the First Senate.

places.[182] The Federal Constitutional Court's Holocaust Memorial Day decision, however, has been criticized, as the court departed from its own requirement of content-neutrality.[183]

A further problem raised in connection with the decision was the exclusive reference to victims of National Socialism. Since other victims of tyranny, such as those during the forty years of dictatorship in the German Democratic Republic (GDR), are not mentioned, this poses the question of a possible violation of the general equality clause of Articles 3(1) and (3).[184] The exclusivity, however, might be sufficiently justified based on the heightened need for protection of the victims. While the victims of the GDR system have suffered unjust treatment, they have not been subjected to systematic public disrespect of their dignity; by contrast, right-wing extremists strip the victims of National Socialism of their dignity by denial, relativization, and derision.[185] Additionally, an argument could be made based on the extent of the terror experienced by the victims, which in the GDR did not amount to the level of industrialized mass murder akin to that of the Nazi regime. Nonetheless, it was suggested that it might have been more prudent to include the victims of all tyrannies in section 15 of the Federal Law of Assembly to protect their dignity equally.[186]

B. *Changes to the Criminal Code*

Following the Federal Constitutional Court's jurisprudence that the content of speech cannot be prohibited based on public order, the legislature consequently widened the scope of the criminal prohibition in section 130 which, as a written legal norm, is part of public safety.[187] Section 130 was originally introduced into the criminal code to address increased anti-Semitic agitation in the late fifties to punish inciting the populace to hatred.[188] Intended to protect the public peace, the provision is based on the assumption that hate speech leads to hate crimes, and the incitement to hatred provision is intended to diminish this "danger of a

182. Kniesel & Poscher, *supra* note 92, at 428.

183. *See infra* Part V.B.2 (discussing the criticism).

184. Leist, *supra* note 160, at 502.

185. *Id.*

186. *Id.*

187. Lembke, *supra* note 148, at 1083.

188. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1337-38 (2000).

danger."[189] Section 130(4) now criminally prohibits disturbing the public peace by publicly or in assembly approving of, glorifying, or justifying the National Socialist violence and terror regime in a manner that violates the dignity of the victims.[190]

The new section 130(4) primarily protects the public peace.[191] The provision not only raises concerns regarding possible unconstitutional vagueness;[192] it also has to conform to Article 5. Defining the "public peace" as the protection of the public from opinions expressing hostility toward the Constitution would not be in compliance with Article 5; neither could "public peace" be defined as the democratic consensus, thus protecting the public from right-wing extremist challenges. Voicing hostility toward the constitution and potentially causing outrage at home and abroad is not a concern of the "public peace" construed in a constitutional manner. "Public peace" can be a constitutional limit on freedom of expression if it is understood to protect the intellectual battle of opinions from illegitimate, non-intellectual attempts of intimidation or threat. Protecting the intellectual battle of opinions against non-intellectual forces does not target the content of opinions. Rather, the protection is aimed at illegitimate, non-argumentative influences, such as economic pressure. This was the content of the Federal Constitutional Court's *Blinkfüer*[193] decision. In its more recent jurisprudence, the Federal Constitutional Court not only upheld, but also formulated conditions that can be placed on assemblies to avoid the danger of intimidation or threat from right-wing extremist assemblies.[194]

Like the new section 15(2), section 130(4) is not content-neutral, and therefore does not constitute a general law under Article 5(2).[195] The component "in a manner violating the dignity of the victims" establishes the connection to the limit of freedom of expression in the laws protecting

189. Winfried Brugger, *Hassrede, Beleidigung, Volksverhetzung* [Hate Speech, Insult, Incitement to Hatred], 38 JURISTISCHE ARBEITSBLÄTTER [JA] 687, 691 (2006) [hereinafter Brugger, *Hassrede*]; Brugger, *Ban On*, *supra* note 110, at 13.

190. Criminal Code § 130(4).

191. Poscher, *supra* note 158, at 1317; Enders & Lange, *supra* note 160, at 107; Kristian Kühl, § 130, No. 8b, *in* STRAFGESETZBUCH MIT ERLÄUTERUNGEN (Karl Lackner & Kristian Kühl eds., 26th ed. 2007).

192. Kristian Kühl, § 130, No. 8b, *in* STRAFGESETZBUCH.

193. BverfG [Federal Constitutional Court], Feb. 26, 1969, 25 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 256 (holding that a call for an economic boycott of the press is not protected by the right to freedom of expression and violates the freedom of the press). *See also* Eberle, *supra* note 175, at 830-33 (discussing the case).

194. Poscher, *supra* note 158, at 1317-18.

195. HELLHAMMER-HAWIG, *supra* note 83, at 251-52.

personal honor under Article 5(2) and accounts for the need to construe the provision in a constitutional manner by clarifying that the claim to respect of the victims of the Nazi regime has to be targeted.[196] As a law protecting personal honor under Article 5(2) it would only be a permissible limit if the honor of the victims would be protected beyond public peace and if every violation of dignity would also be a violation of the honor of the victims.[197]

The honor of the victims is violated if the approval concerns a violation of dignity by the National Socialist terror regime. Only approving of conduct that does not include a violation of dignity cannot trigger another violation of dignity. Approving of other aspects of the Nazi regime does not fall under the new provision and its penalization would not be justified under Article 5(2).

The legislature's intent, however, was that a violation of dignity can also be achieved by conclusive approval, such as the glorification of individual representatives of the Nazi regime. This might be possible if figures of the Nazi regime who prominently organized or executed systematic violations of dignity are revered with a discernible connection to these acts. But the more indirectly the approval is connected to the violation of dignity, the more important the context is to ensure that a violation of dignity and, therefore, a violation of personal honor under Article 5(2) is at issue.[198]

Even if these constitutional requirements are met, the new provision's impact should not be overestimated. On the one hand, sections 130(1) No. 2 and 130(3) already protect against violations of dignity.[199] As far as a protection of the public peace is concerned, the new provision raises the bar compared to the other provisions contained in section 130, requiring not only a danger, but a certain result.[200] On the other hand, the changes in the criminal code do not necessarily have a great effect on the law of assembly. Although the Federal Constitutional Court has repeatedly stated that the Criminal Law is a limit to the freedom of assembly, infringements still have to be measured against Article 5(2).[201] Further, while the Federal Constitutional Court repeatedly stated that dangers for the public order

196. Kristian Kühl, § 130, No. 8b, *in* STRAFGESETZBUCH; Poscher, *supra* note 158, at 1318.

197. HELLHAMMER-HAWIG, *supra* note 83, at 251-52; Poscher, *supra* note 158, at 1318.

198. Poscher, *supra* note 158, at 1318.

199. *Id.*; Detlev Sternberg-Lieben, § 130, No. 22d, *in* STRAFGESETZBUCH KOMMENTAR 5(Theodor Lenckner et al. eds., 27th ed. 2006).

200. Poscher, *supra* note 158, at 1318; Kristian Kühl, § 130, No. 8b, *in* STRAFGESETZBUCH; Sternberg-Lieben, *supra* note 199.

201. Poscher, *supra* note 158, at 1318.

generally only justify conditions, but not bans, on assemblies, this does not mean that, vice versa, dangers for public safety always justify an assembly ban.[202] Rather, the requirements of proportionality must still be met so that—under current doctrine—even if violations of public safety are expected, placing conditions on the assembly as the less intrusive measure comes before banning the assembly.[203] As in the past, these conditions would, for example, include the prohibition of wearing uniforms or uniform-like clothing.[204]

Finally, and as a more practical matter, it is increasingly improbable that right-wing extremist or Neo-Nazi group would publicly approve of, glorify, or justify National Socialism. This is due to a change in appearance and thinking in the right-wing extremist scene in the past years.[205] While Neo-Nazis and right-wing extremists in the past were freely displaying "*Heim ins Reich*" ideology, today's right-wing extremist themes are more subtle, in part based on tactical calculations, in part because a change of mind.[206] In the past, a preferred slogan was "*Deutschland den Deutschen, Ausländer raus*!" (Germany for Germans, out with the foreigners!) which constituted incitement to hatred under section 130.[207] Today, however, many slogans are not punishable under section 130, for example: "Gegen *Arbeitslosigkeit—mehr Arbeitsplätze für Deutsche*" (against unemployment—more jobs for Germans), or, "*Für Meinungsfreiheit, gegen Vereinsverbote*" (for freedom of speech, against association bans).[208] As a result, it is increasingly difficult to clearly identify the right-wing extremist agenda. Right-wing extremists and Neo-Nazis deliberately choose not to approve of the National Socialist regime, or glorify or justify it at their assemblies, at least not with such clarity that would trigger punishment for incitement to hatred and thus justify a prohibition of the assembly as a danger to public safety.[209]

As in the past, only certain types of right-wing extremist assemblies can be placed under conditions or can be prohibited, and the new provisions do not spare the state from a political confrontation of right-

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202. *Id.*

203. *Id.*

204. *Id.*

205. Leist, *supra* note 160, at 502; *see also* Marianne Quoirin, *Markenschuhe statt Bomberstiefel* [Designer Shoes Instead of Combat Boots], KÖLNER STADT-ANZEIGER, May 16, 2007, at 2 (describing changes in the appearance of Neo-Nazis but asserting that their ideology remains unchanged).

206. Leist, *supra* note 160, at 502; Bertram, *supra* note 160, at 1477.

207. Leist, *supra* note 160, at 503.

208. *Id.*

209. *Id.*

wing extremism.[210] The federal legislature, it has been asserted, hurriedly changed section 130 to address perceived issues of the day, but these latest changes only obscure even further not only the subject of the protection but also, perhaps more importantly, its limits.[211] It is an attempt to gain control in public discourse over certain topics; at the extreme, critics assert that this control could be extended over any issue somehow connected to Nazi ideology by adding new levels to the criminal prohibitions according the needs of the day.[212] A leading criminal law commentary raises the question whether employing criminal law via section 15(2) was necessary, especially with respect to the subsidiarity of criminal law in general.[213] This aspect would be an argument favoring the priority of education and discussion before turning to criminal prohibitions.[214] As a political matter, irrespective of the possible unconstitutionality of the new provisions, the federal legislature—despite its good intentions—has created new problems. The goal to fight the media-savvy public agitation of right-wing extremists is manifested in expansive prohibitions; meeting fundamental criticism of the foundations of state and society primarily with criminal prohibitions does not reinforce the persuasiveness of the constitutional commitment to freedom, equality, and social justice.[215]

V. DELINEATING THE SCOPE OF DEMOCRATIC PUBLIC DISCOURSE

The discussion regarding the scope of permissible public discourse was shaped by a number of notable key elements. The Federal Constitutional Court and the State Administrative Court of North Rhine-Westphalia positioned themselves as opposites in the discussion over the role of public order and the exclusion of Neo-Nazi ideas from public discourse. The federal legislature followed the general direction of the Federal Constitutional Court, basing assembly bans on a threat to public safety, and widened the scope of the criminal code. The following part will

210. Poscher, *supra* note 158, at 1318; *see also* HELLHAMMER-HAWIG, *supra* note 83, at 249; Leist, *supra* note 160, at 503; Schoch, *supra* note 107, at 30; Stohrer, *supra* note 157, at 17 (concluding that the new section 15(2) does not contain new limiting possibilities). *But see* Sternberg-Lieben, *supra* note 199 (pointing out that simple Holocaust denial, previously only punishable under section 185, can now also violate section 130 if committed in a way that can disturb the public peace).

211. Bertram, *supra* note 160, at 1476; *see also* Lembke, *supra* note 148, at 1083.

212. Bertram, *supra* note 160, at 1478.

213. Kühl, *supra* note 200, § 130 No. 8.

214. *Id.* § 130, No. 8b.

215. Enders & Lange, *supra* note 160, at 112.

examine how the different approaches fit into German free speech doctrine.

Another particularly interesting element of the discussion over the role of the freedom of assembly in a liberal democracy and the role of freedom of speech in the democratic process was the repeated invocation of U.S. First Amendment doctrine on both sides of the debate. The Federal Constitutional Court looks back on a long tradition of referencing U.S. legal discourse in its opinions elaborating on the importance of free speech.

A. *Not Skokie: References to U.S. First Amendment Doctrine*

Quite notably, parallels to U.S. First Amendment discourse have been raised repeatedly within the German debate. Establishing a connection between the current debate in Germany and U.S. First Amendment discourse, Federal Constitutional Court Judge Hoffmann-Riem traces parallels of the free speech development in the United States and Germany to this day.[216] Post-war German society, he asserts, largely failed to come to grips with its past as old notions of submissiveness to state authority, prominently exploited by the Nazi regime, were shed slowly.[217] A case in point is the at-times helpless and disproportional state reaction to the student protests of the 1960s.[218] Judge Hoffmann-Riem traces the origins from Berkeley in 1964 to Germany, pointing out that the student protests soon merged with the civil rights movement and anti-Vietnam protest, creating a free speech movement.[219] The student protest of the 1960s, he asserts, struck a nerve that extended into other societies, including Germany.[220] In fact, until the student protests swept across Germany in the sixties, freedom of assembly had received little attention.[221] Together with the later anti-nuclear-power protests, however, the movement brought freedom of assembly to the forefront, demanding acceptance of freedom of assembly as a liberty right and at the same time forcing the state to protect the countervailing rights of others.[222]

Those arguing in favor of further limiting or in fact excluding the articulation of Neo-Nazi ideas in public discourse cited, as an extreme and obviously undesirable example, the well-known case involving a Nazi

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216. Hoffmann-Riem, *supra* note 108.
217. *Id.* at 2778.
218. *Id.*
219. *Id.*
220. *Id.*
221. Hoffmann-Riem, *supra* note 108, at 2778.
222. *Id.*

march in Skokie, Illinois, in 1978.[223] The Federal Court of Appeals for the Seventh Circuit in *Collin v. Smith*[224] found that, under First Amendment standards, there was no reason to deny a Nazi march in the village of Skokie, Illinois.[225] The ordinance[226] invoked by the town to prohibit the march was invalidated because of its overbreadth.[227] While content legislation is not per se invalid, the Court stated, there are only a limited number of established exceptions in which it is permissible, such as obscenity, fighting words, and, under *Brandenburg*, the imminent danger of a grave substantive evil.[228] The Court, however, did not find an exception that would support a prohibition of the planned march.[229] Addressing the alleged "infliction of psychic trauma on resident holocaust survivors and other Jewish residents," the Court agreed that "the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village's residents."[230] Nevertheless, the Court found it "perfectly clear that a state many [sic] not make criminal the peaceful expression of unpopular views. Likewise, mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms."[231] On appeal, the Supreme Court denied certiorari.[232]

The relevance of the Skokie decision in this context is revealed in the Court of Appeals' statement that "[i]t is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or

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223. Ulrich Battis & Klaus Joachim Grigoleit, *Rechtsextremistische Demonstrationen und öffentliche Ordnung—Roma locuta?* [Right Wing Extremist Demonstrations and Public Order—Roma Locuta?], 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3459, 3462 (2004).

224. Collin v. Smith, 578 F.2d 1197, 1209-10 (7th Cir. 1978).

225. *Id.*

226. Village Ordinance No. 77-5-N-994 is

> a comprehensive permit system for all parades or public assemblies of more than 50 persons. It requires permit applicants to obtain $300,000 in public liability insurance and $50,000 in property damage insurance. One of the prerequisites for a permit is a finding by the appropriate official(s) that the assembly will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

Id. at 1199.

227. *Id.* at 1202.

228. *Id.*

229. *See id.* at 1202-05.

230. *Id.* at 1205-06.

231. Village Ordinance No. 77-5-N-994, *supra* note 226, at 1206 (internal citation omitted).

232. *See* Smith v. Collin, 439 U.S. 916 (1978) (denying certiorari).

place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich."[233]

Invoking U.S. First Amendment doctrine, as done in several commentaries involving the debate between the state administrative court and the Federal Constitutional Court, demonstrates a certain level of awareness regarding other constitutional solutions to a similar question. The Basic Law itself was drafted and adopted to distinguish the new Federal Republic of Germany from the Third Reich.[234] The reference to the U.S. case within German legal discourse, though, highlights the importance of free speech in a liberal democracy.[235]

Unsurprisingly, it has been pointed out that German courts would have decided the Skokie case differently.[236] Battis and Grigoleit stress that the National Socialist regime eliminated democracy in Germany and Auschwitz became the founding myth of the Republic, posing a stark contrast to the freedom fight that made possible the founding of the United States.[237] These origins, they submit, shape identities, and the historically influenced collective identity finds its way into the legal realm; in Germany, the result was a loss of freedom.[238] The resulting limits on the freedom of speech, however, have to be justified beyond merely pointing to domestic criminal prohibitions in international constitutional law discourse.[239]

B. *Finding a Workable Balance: Social Costs and Benefits of Free Speech*

The Federal Constitutional Court has been engaging in a quite intricate balancing effort, constantly stressing the benefits of free speech. Interestingly, as will be shown, it has referred to underlying principles familiar from U.S. First Amendment discourse validating the important role of free speech in a liberal democracy.

1. Emphasizing the Benefits of Free Speech

The German Federal Constitutional Court has consistently emphasized the role of free speech as a pillar of democracy, since the landmark 1958

233. *Collin*, 578 F.2d at 1201.
234. *See, e.g.*, Krotoszynksi Jr., *supra* note 50, at 1552-54; Eberle, *supra* note 175, at 800.
235. *See, e.g.*, Krotoszynksi Jr., *supra* note 50, at 1552-54; Eberle, *supra* note 175, at 800.
236. Battis & Grigoleit, *supra* note 223, at 3462.
237. *Id.*
238. *Id.*
239. *Id.*

decision in *Lüth*,[240] which has been characterized as "the foundational case for interpretation of freedoms of opinion."[241] In *Lüth*, the Court found the right to free speech to be fundamental:

> The fundamental right to free expression of opinion is, as the most direct expression of human personality in society, one of the foremost human rights of all . . . For a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible . . . It is in a certain sense the basis of every freedom whatsoever, "the matrix, the indispensable condition of nearly every other form of freedom" (Cardozo).[242]

The decision established the basic structure of public discourse in presumptively protecting those types of communication that add to the formation of public opinion. The balancing took into consideration the significance of the public issues addressed.[243] The Federal Constitutional Court's current free speech doctrine still is within the doctrinal arrangement established in the *Lüth* decision.[244] As Brugger points out, the Federal Constitutional Court refers to well-known American rationales illustrating the importance of speech, recognizing the special importance of free speech in the formation of opinions, the importance of the free exchange of ideas in a quest for the truth, legitimizing democracy, aiding decision-making in personal and public matters, and eliminating the necessity for recourse to physical violence.[245] Likewise, Professor Dieter Grimm, a former Constitutional Court judge, stresses the special importance of free speech articulated by the Federal Constitutional Court,

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240. Lüth decision, *supra* note 4; *See also* Eberle, *supra* note 175, at 808 (for an in-depth discussion of the case); Claudia E. Haupt, *Regulating Hate Speech: Damned If You Do and Damned If You Don't. Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT'L L.J. 299, 323-24 (2005); Krotoszynski Jr., *supra* note 50, at 1585-90 (for further discussion of the case); David Weiss, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany while Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899 (1994).

241. Eberle, *supra* note 175, at 827; *see also* Krotoszynski Jr., *supra* note 50, at 1585 (stating that the *Lüth* decision "serves as the foundation for German free speech doctrine more generally.").

242. Lüth decision, *supra* note 4, at 208, translation quoted from Brugger, *Ban On*, *supra* note 110, at 14; *see also* Eberle, *supra* note 175, at 817.

243. Haupt, *supra* note 240, at 323-24.

244. Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts* [Freedom of Speech in the Case Law of the Federal Constitutional Court], 48 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1697, 1697 (1995).

245. Brugger, *Ban On*, *supra* note 110, at 7-8; Brugger, *supra* note 6, at 7-8.

referring to French and American sources. Solving the dichotomy of individual self-determination and collective self-government in favor of a combined approach, the Court sees free speech both as an expression of individual human personality within society and at the same time as a constituting element of a free democratic social order.[246]

Brugger, however, rightly warns of the potentially misleading sound of the "strong, libertarian words used by the German Federal Constitutional Court in carving out an expansive definition of constitutionally protected opinion."[247] The fundamental issue not yet addressed in this definition is the balancing of competing constitutional interests.[248] For a number of reasons, the Basic Law protects the freedom of speech, but to a much more limited degree than the First Amendment.[249] As both the supreme constitutional principle and a fundamental right, human dignity rather than free speech is the most important constitutional value; when the two collide, free speech usually must yield.[250] Seen from a U.S. perspective, this has led to such assertions as free speech in Germany "does not get much respect."[251] Instead, it "is a (very) poor cousin of human dignity."[252]

In Germany, as in the United States, freedom of expression is a core issue of the constitutional order and structure of society, but unlike freedom of speech in the United States, German rights are subject to textual, legal, cultural, and civility limits.[253] Thus, Germany is committed to free speech, albeit within carefully circumscribed limits and only to the extent that the commitment to free speech does not conflict with other constitutional values; most notably, human dignity and the preservation of the democratic order.[254] This approach to freedom of expression, however, should not be easily dismissed as evidently misguided or insufficiently sensitive to the value of free speech in a democratic society.[255] On the

246. Grimm, *supra* note 244, at 1698.

247. Brugger, *Ban On*, *supra* note 110, at 4-5; Brugger, *Hassrede*, *supra* note 189, at 688.

248. Brugger, *Ban On*, *supra* note 110, at 5.

249. Krotoszynski Jr., *supra* note 50, at 1553-54.

250. *Id. See also* Brugger, *Ban On*, *supra* note 110, at 5 ("The effect of this balancing is profound, as the German Constitutional Court has never struck down any of the many criminal, administrative, and civil prohibitions of 'constitutionally protected' hate speech in Germany."); Wise, *supra* note 25, at 325.

251. Krotoszynski Jr., *supra* note 50, at 1552.

252. *Id.*

253. Eberle, *supra* note 175, at 798-99.

254. Krotoszynski Jr., *supra* note 50, at 1554. *But see* Whitman, *supra* note 188, at 1312 ("This is a body of law that shows, in many of its doctrines, a numbness to free-speech concerns that will startle any American.").

255. Krotoszynski, *supra* note 50, at 1554.

contrary, Germany is oftentimes cited admiringly as an example of a liberal democracy limiting free speech.[256] Germany and the United States have weighed the social costs and benefits of free speech differently.[257]

2. The Cost: Limits on Free Speech and Assembly

The Basic Law establishes limits on the freedom of speech and the freedom of assembly. The Federal Constitutional Court must decide whether freedom of expression takes priority over countervailing constitutional interests.[258] Among the content-based exceptions from the freedom of expression that are most relevant in this context are hate speech, group defamation, and incitement to hatred. These exceptions can be attributed to Germany's desire to prevent the rise of extremist groups and ultimately the recurrence of a totalitarian regime.[259]

An example of such a decision in which the Federal Constitutional Court found the countervailing interests of others to trump the interest in free speech and assembly was the Holocaust Memorial Day decision.[260] To recall, the First Chamber of the Federal Constitutional Court upheld the condition to reschedule for the following day based on a threat to public order. Although the outcome of the Holocaust Memorial Day decision may have been welcomed by some,[261] the reasoning is criticized chiefly for two reasons. First, the question is raised why conditions may be placed on the assembly based on public order, but bans are not justified.[262] The distinctions between conditions and bans, it is asserted, are fluid.

Second, the jurisprudence of the Federal Constitutional Court is found to be inconsistent with regard to government neutrality in restricting freedom of expression. In the Holocaust Memorial Day case, the Court's First Chamber of the First Senate itself based the decision on the right-wing extremist content of the assembly.[263] As a result, it remains unclear why, based on the content of the opinions articulated, right-wing extremist demonstrations are only found provocative on the Holocaust Memorial Day and other symbolic days but not in general.[264] A final concern raises

256. Whitman, *supra* note 188, at 1282; Krotoszynski Jr., *supra* note 50, at 1551.

257. Krotoszynski Jr., *supra* note 50, at 1554.

258. Brugger, *supra* note 6, at 9.

259. Eberle, *supra* note 175, at 806-07.

260. *See* Part IV.B.2; Holocaust Memorial Day decision, *supra* note 178.

261. RÖGER, *supra* note 83, at 14.

262. *Id.*; Christoph Enders, *Anmerkung zu 1 BvQ 9/01*, 56 JURISTENZEITUNG [JZ] 652, 654 (2001).

263. Kniesel & Poscher, *supra* note 92, at 428; Enders, *supra* note 262, at 654.

264. RÖGER, *supra* note 83, at 14.

the question why the provocative opinions voiced during the assembly justify any state action at all, because the First Senate of the Federal Constitutional Court explicitly said in its "Soldiers are Murderers" ("*Soldaten sind Mörder*")[265] decision of 1995 that intentionally polemic and hurtful—and as such provocative—statements do enjoy Article 5(1) protection.[266] The tension between the Soldiers are Murderers decision and the Holocaust cases, in fact, has already been pointed out in the past.[267]

Federal Constitutional Court Judge Hoffmann-Riem addresses these criticisms in explaining that the National Socialist past creates a special status of the Holocaust Memorial Day as a day of remembrance that is unequivocal in its symbolism, commemorating grave violations of human rights. As such, he asserts, it is not comparable to other holidays.[268] Provocative actions on this particular day would cause serious harm to the moral sensibility of the citizens remembering the immeasurable injustice of National Socialism and especially of the Holocaust.[269] Nonetheless, doubts regarding the Court's treatment of its own doctrine of content-neutrality remain. In the context of the Holocaust Denial case, Professor Brugger summarized the issue of limits on expression as follows:

> intellectual honesty requires one to point out that in Holocaust cases, the German Constitutional Court departs from its usual doctrines concerning freedom of speech. The Court and German jurisprudence tend not to see or discuss this divergence in terms of what exactly the difference is, to what extent a divergence from the usual doctrines is appropriate, and how long one should accept such a divergence. The best explanation and, possibly, justification for the special treatment of the Holocaust cases is the singularity of the Holocaust in German and global history; from this singularity result comprehensive prohibitory statutes and expansive interpretations leading to prohibitions in the Holocaust lie cases. The moral,

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265. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 10, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 266, 289 (F.R.G.); *see also* Krotoszynski Jr., *supra* note 50, at 1581-83; Brugger, *Ban On*, *supra* note 110, at 12 (discussing the "Soldiers are Murderers" case).

266. RÖGER, *supra* note 83, at 14-15.

267. Brugger, *Ban On*, *supra* note 110, at 18 ("This imbalance and divergence from the Court's own free speech doctrines becomes especially striking when one compares the treatment of the Holocaust Denial Case, where the Court took great pains to interpret a historical claim as punishable speech, with the Soldiers-are-Murderers Case, where the Court worked hard to find a speech-friendly interpretation.").

268. Hoffmann-Riem, *supra* note 26, at 262.

269. *Id.*

> political, and legal singularity of the Holocaust certainly stands out in recent history, and the memory of the Holocaust has served as a catalyst for the global concern for human rights. Yet, as terrible as the Holocaust was, it should not distract from the necessity to allow open and unfettered discussion in all matters of public interest, especially when our resolve is tested by messengers or messages we dislike—or hate.[270]

C. *Public Discourse at the Fringes*

Beyond the issue of limits on free speech imposed by criminal prohibitions, two key questions remain. The first question concerns how to react to antidemocratic, intolerant, and offensive opinions below the level of criminally prohibited speech. In this context, it is important to reiterate the rather limited area of controversy. It is, as previously emphasized, the banning of demonstrations based on a threat to public order as a preventive measure that is subject to debate. The expected acts remain below the threshold of criminally prohibited speech. The second question concerns the extent of criminal prohibitions on speech, such as the widening of section 130 of the Criminal Code in the most recent legislative changes described in Part IV. Although limits on the expression of certain opinions may be historically justified, the question arises how far the criminal prohibitions can be stretched while still maintaining the necessary level of justification required for infringing on free speech.

1. Defending Democracy: Public Discourse and State Intervention

The state administrative court picked up an argument made in legal literature, primarily articulated by Professor Ulrich Battis and Klaus Joachim Grigoleit,[271] departing from the traditional understanding of "public order," suggesting that the term exceeds extralegal community standards, such as ideas of morals and decency. Rather, it is argued, the term signifies a basic constitutional consensus rejecting Nazi ideology. In an attempt to implement this interpretation into practice, the state administrative court decided that assemblies with typical Neo-Nazi

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270. Brugger, *Ban On*, *supra* note 110, at 21.

271. Battis & Grigoleit, *supra* note 223, at 121; Ulrich Battis & Klaus Joachim Grigoleit, *Die Entwicklung des versammlungsrechtlichen Eilrechtsschutzes—Eine Analyse der neuen BverfG-Entscheidungen* [The Development of Law of Assembly Preliminary Injunctive Relief: An Analysis of the New Decisions of the Federal Constitutional Court], 54 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2051 (2001) [hereinafter Battis & Grigoleit, *Die Entwicklung*]; Battis & Grigoleit, *supra* note 223, at 3459.

appearance and content such as racism, anti-Semitism and xenophobia are not merely politically unwanted or objectionable but instead violate basic ideals essential to the value order of the Basic Law and therefore could be prohibited as a threat to public order.[272]

a. Critique of the Functional Approach and Appeal to the Memory of a Nation

The point of departure is the question whether all contributions to public discourse and the process of democratic opinion formation, due to their functional component, are equally legitimate.[273] While the permissibility of excluding certain political opinions from the democratic process as being illegitimate is often regarded as the litmus-test of an open society, Battis and Grigoleit assert that it in fact provides clues as to the nation's stability and self-confidence.[274] Their argument primarily centers on the possibility of actually implementing the opinions expressed in Neo-Nazi and right-wing extremist demonstrations.

The fundamental assumption is that, functionally, communication rights are deemed essential for a pluralistic process of public discourse. This being the case, they ask whether the content communicated should be protected even if it can never actually be implemented. In the case of Neo-Nazi ideology, they state, actual implementation would be preempted by several provisions of the Basic Law, especially Articles 26 and 139, and made permanently impossible by the so-called "eternity clause" (*Ewigkeitsklausel*) of Article 79(3)[275] and the right to resistance of Article 20(4).[276] The Basic Law—and specifically its preamble, the fundamental rights, the eternity clause, and the concept of militant democracy—is rightly considered a response to the experiences of the Weimar democracy and its demise in National Socialism.[277] Precisely because of these specific

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272. Ulli F.H. Rühl, *„Öffenltliche Ordnung" als sonderrechtlicher Verbotstatbestand gegen Neonazis im Versammlungsrecht?* ["Public Order" as Specialized Prohibition Against Neo-Nazis in the Law of Assembly?] 22 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 531, 531 (2003); Kniesel & Poscher, *supra* note 92, at 427.

273. Battis & Grigoleit, *supra* note 223, at 122.

274. *Id.*

275. Translated, Article 79(3) states: "Amendments of this Constitution affecting the division of the Federation into States [Länder], the participation on principle of the States [Länder] in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible." *See* Tschentscher, *supra* note 23.

276. Battis & Grigoleit, *Die Entwicklung*, *supra* note 271, at 2051.

277. Battis & Grigoleit, *supra* note 223, at 123-24; Battis & Grigoleit, *Die Entwicklung*, *supra* note 271, at 2051.

historical experiences, the Basic Law limits the process of opinion formation more than any other constitution in a western democracy.[278]

The rejection of National Socialism is displayed in the Basic Law's design. Battis and Grigoleit identify one such historically motivated provision in the peace principle of Article 26. Under Article 26(1)[279] all actions that potentially endanger the peaceful coexistence of nations and that are conducted with the intention to disturb the peaceful coexistence of the people are unconstitutional and subject to criminal punishment.[280] Though this provision primarily is an outwardly- directed commitment demanding a contribution to peace beyond the prohibition of aggression under international law, it is also asserted to contain an introversive component. With its clearly stated legal consequence, its material core can be inwardly operationalized.[281] In this provision, the Basic Law itself refutes a fundamental basis of Nazi ideology.[282] Article 26 is blind to the political content of opinions as it eliminates all belligerency from the democratic process, irrespective of its political origin.[283]

Aside from the commitment to peace, the concept of human dignity is the focal point of all state action, and this concept in particular counters the National Socialist idea of ranking the community above the individual. Nazi ideology is fundamentally incompatible with the constitutional concept of human dignity. An ideology that is based on racism, collectivism, and the principle of supreme leadership and unconditional obedience is not to be legitimized in any way under the Basic Law and permanently preempted by the "eternity clause" of Article 79(3) and the right to resistance in Article 20(4). The special stance toward Nazi ideology, they further assert, is displayed in the SRP decision of the Federal Constitutional Court. The party ban was justified because the SRP was constituted as a haven for old Nazi followers and put itself into the tradition of the Nazi party, both in membership and party structure. This, the Court asserted, was enough to conclude that the goal of the party and its adherents was eliminating the free democratic basic order.[284]

Further, they claim that the denazification reference in Article 139, the only provision in the Basic Law that explicitly mentions National

278. Battis & Grigoleit, *Die Entwicklung*, *supra* note 271, at 2051.

279. Translated, Article 26(1) states: "Acts with the potential to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare war or aggression, are unconstitutional. They have to be made a criminal offence." *See* Tschentscher, *supra* note 23.

280. Battis & Grigoleit, *Die Entwicklung*, *supra* note 271, at 2051.

281. Battis & Grigoleit, *supra* note 223, at 123.

282. Battis & Grigoleit, *Die Entwicklung*, *supra* note 271, at 2051.

283. Battis & Grigoleit, *supra* note 223, at 124.

284. *Id.*

Socialism, is significant in this context: "The legislation enacted for the 'Liberation of the German People from National Socialism and Militarism' is not affected by the provisions of this Constitution."[285] This transitional provision, they claim, reveals the historical awareness of the Basic Law and provides the normative goals of the militant democracy.[286] Whether Article 139 contains an explication of the architecture of the Basic Law and an anti-Nazi tendency that can be operationalized, they assert, seems unclear.

They concede, however, that both text and original intent suggest a narrowly tailored range of application. Thus, the predominant interpretation suggests that with the conclusion of denazification, Article 139 became obsolete. Battis and Grigoleit, however, do not view this to be a necessary conclusion, specifically pointing out that Article 139 has not been repealed in the meantime; this would have been the logical consequence if it were devoid of any normative content.

Until its repeal, they argue, it seems peculiar to choose an interpretation that would render the provision devoid of any meaning. Even if the conclusion of denazification eliminated the immediate application of Article 139, its systematic interpretation suggests that there may well still be some relevance to the provision. Its existence as a special provision against right-wing activity is to be seen in context with the militant democracy scheme.

It signifies as a transitional provision the special, historically determined, sensitivity of the Basic Law toward Nazi ideology. If a constitution embodies the historical memory of a nation, they assert, this would certainly be the case in Article 139. It provides insight why the Basic Law has limited the pluralistic process of democratic opinion formation more extensively than any other western-style democracy.[287]

Thus, they conclude that the exclusion of Nazi ideology from the democratic process of opinion formation is traceable in the constitution and specifically embodied in the historically motivated element of militant democracy. As a legitimate constitutional concern the principle of militant democracy limits the freedom of expression beyond the scope of the prohibitions of Articles 9(2) (association bans), 18 (forfeiture of individual rights), and 21(2) (political party bans). This constitutionally required limitation on the content of opinions, they assert, refutes the functional argument in favor of communication rights in a democracy as made by the Federal Constitutional Court. The public dissemination of Nazi ideology

285. Tschentscher, *supra* note 23.

286. Battis & Grigoleit, *Die Entwicklung*, *supra* note 271, at 2051.

287. *Id.*

is not a relevant contribution to public discourse because its implementation is constitutionally impossible. Consequently, Nazi ideology cannot perform a democratic function; therefore, the protection of Nazi opinions cannot be based on the significance of freedom of expression in the democratic process.[288]

Applying the Basic Law's rejection of Nazi ideology to the Federal Law of Assembly brings the term "public order" into play, signifying a basic consensus that normatively forms the content of the term.[289] Judge Bertrams, chief judge of the administrative court, extensively restates the positions articulated by Battis and Grigoleit, which the court picked up in its decisions.[290] The exclusion of Neo-Nazi ideology from democratic public discourse, he asserts, is a constitutional interest based on the historically founded value order of the Basic Law that justifies a limit on the freedom of speech.[291] Although the state administrative court appears to connect to the traditional understanding of the term "public order" based on the current community standards, it views the term as fundamentally influenced by the value order of the Basic Law. Again, looking at provisions such as Article 26 and Article 139 leads to the conclusion that Neo-Nazi ideology is rejected by the Basic Law and therefore precluded from the democratic process of opinion formation. Thus, even Neo-Nazi demonstrations articulating opinions that do not cross into the realm of criminally prohibited speech can be prohibited. This approach can be summed up in the hypothesis that the Basic Law contains special provisions against right-wing extremism that are embodied in the term "public order,"[292] infusing the Federal Law of Assembly with the constitutional rejection of fascism.

b. Underestimating the Threat

A core criticism of Judge Bertrams is that the First Chamber of the First Senate in its interpretation of "militant democracy" fails to pay sufficient attention to what he characterizes as a previously unthinkable resurgence of right-wing extremist tendencies. The state administrative court repeated this claim in several decisions.[293] The "militant democracy" precautions of the Basic Law, namely the ban of associations and political

288. Battis & Grigoleit, *supra* note 223, at 125.

289. Rühl, *supra* note 272, at 531; Kniesel & Poscher, *supra* note 92, at 427.

290. Bertrams, *Demonstrationsfreiheit für Neonazis?* [Freedom of Assembly for Neo-Nazis?], *in* PFLICHT UND VERANTWORTUNG 19, 31-32 (Bernd M. Kraske ed., 2002).

291. Bertrams, *supra* note 94.

292. Rühl, *supra* note 272, at 531.

293. OVG NRW, *supra* note 84.

parties, and the forfeiture of individual rights, are neither adequate nor intended to prevent public appearances of Neo-Nazis that offend basic social and ethical standards. To address such cases, Article 8(2) empowers the legislature to limit the freedom of assembly. Thus, section 15 of the Federal Law of Assembly was enacted; the provision regarding dangers to public order is also a form of militant democracy. However, it has to be applied in a manner that appropriately addresses contemporary reality. As the primary guardian of the Constitution, the Federal Constitutional Court bears a special responsibility which, according to Judge Bertrams, it has not met with its dogmatic adherence to the 1985 *Brockdorf* precedent which, in his view, dealt with an entirely different set of problems. Continuing this jurisprudence, he insists, ignores the rise of right-wing extremism in Germany. The phenomenon, he asserts, is trivialized if the First Chamber of the First Senate speaks of Neo-Nazis as if they were just another unpopular minority.[294]

Judge Bertrams concludes that, for the democratic opinion formation process, the views of Neo-Nazis, shunned by the Basic Law, are devoid of any significance. The protection of such views would merely serve communicative personal freedom, but this interest is countered by the interest in eliminating such ideas from the public discourse. These opinions have been rejected by the Basic Law in its historical memory. In other words, while the freedom of dissenters is a high value, it must find its limits in the militant democracy where the attempt is made to revive the inhuman ideas of the Third Reich. The term "public order" provides the place to make this distinction. The threat to public order by the presence of Neo-Nazis outweighs the infringement on their fundamental rights. As the First Chamber of the First Senate continues to force liberal ideas, Judge Bertrams asserts that it is unlikely the Federal Constitutional Court will agree – thus, he calls for statutory and constitutional changes.[295]

2. Tolerating Intolerance

The constitution envisioned by the state administrative court would cleanse public discourse by excluding Neo-Nazi ideology from the democratic process of opinion formation, but as a consequence, excluded ideologies would relocate elsewhere. Having gone underground, public opposition to such ideologies can no longer be voiced. Such a constitution based on the repression of undemocratic ideas perhaps might find support,

294. Bertrams, *supra* note 290, at 36-37; Bertrams, *supra* note 94.

295. Betrams, *supra* note 290, at 38.

but better reasons can be provided in favor of the approach taken in the Basic Law.[296]

a. Internal Constitutional Limits and Public Order Revisited

Two key arguments in favor of a position of the Basic Law excluding Nazi ideology hinge on the interpretation of Articles 26 and 139. The interpretations offered by Battis and Grigoleit and, by extension, the state administrative court, are not shared by a large majority of scholars and courts. Extensive studies concerning the origins of Article 139 yield the result that the transitional provision was included because the Parliamentary Council (*Parlamentarischer Rat*) thought the denazification legislation to be in conflict with the new Basic Law and therefore needed constitutional legitimization.[297] The quotation marks surrounding the phrase, "Liberation of the German People from National Socialism and Militarism" were consciously added. The term references the denazification legislation in place at the time, that was then known as the "Law Concerning the Liberation of the German People from National Socialism and Militarism." The reference denotes a finite norm complex and is not designed for the future.[298] Thus, the vast majority of Basic Law commentators on Article 139 agree that it is a limited provision that references a specific body of legislation. With the conclusion of denazification, the provision has become obsolete.[299] There is no historical evidence that Article 139 was intended to establish an anti-fascist constitutional principle.[300]

Article 26 is one of the few provisions directly addressing individuals.[301] However, an assembly would only violate Article 26 if individuals were to hold an assembly capable of disturbing the peaceful coexistence of the people. This requires a foreign policy connection as well as a degree of intensity of the danger to peace akin to the example in Art 26(1)(1), the preparation of an invasion. These conditions would only exist in extremely exceptional situations.[302]

The Federal Constitutional Court refused proposals suggesting internal constitutional limits and interpreting the term "public order" to signify a

296. Kniesel & Poscher, *supra* note 92, at 427.

297. Rühl, *supra* note 272, at 533; HELLHAMMER-HAWIG, *supra* note 83, at 98.

298. Rühl, *supra* note 272, at 533.

299. *Id.*; HELLHAMMER-HAWIG, *supra* note 83, at 99.

300. Rühl, *supra* note 272, at 533.

301. Kniesel & Poscher, *supra* note 92, at 426; Rühl, *supra* note 272, at 534.

302. Kniesel & Poscher, *supra* note 92, at 426; *see also* Rühl, *supra* note 272, at 535 (discussing foreign policy implications and international law).

basic consensus shaped by the Basic Law, although it does agree that the Basic Law contains the rejection of National Socialism. The rejection of National Socialism, however, is documented in the establishment of general constitutional provisions containing guarantees against the resurfacing of a totalitarian regime.[303] Insofar as the state administrative court suggests that the constitutional provisions are insufficient to combat right-wing extremism, the Federal Constitutional Court has stressed that the state administrative court is not competent to remedy perceived shortcomings of the Constitution.[304]

b. Outlining and Preserving a Wider Scope of Democratic Public Discourse

On the contrary, the design of the Basic Law provides a number of arguments for keeping the scope of prohibited speech narrow, for excluding only few opinions, and for keeping a wide scope of public democratic discourse. The militant democracy provisions and the protection of dignity and honor exclude the most extreme opinions. The remainder has to be confronted and refuted in open public debate. The Basic Law presumes that exposure to the process of public discourse will wear down extremist opinions.[305] The Federal Constitutional Court consequently asserted that open discussion is the true foundation of a free and democratic society.[306] The process of public discourse itself, provided that it is only concerned with the intellectual impact of opinions, is said to have a strengthening influence on the formation of opinions in general.[307] However, the trust the Basic Law places in the pluralistic process of opinion formation is not unlimited as it allows state intervention, recognizing that the demands of the democratic process and reality can differ. When freedom of expression is abused by individuals, and especially when such actions are taken by associations or even institutionalized by political parties, the constitution allows the state to intervene.[308]

The challenge of the Basic Law lies in the fact that it also grants freedom to its enemies.[309] The First Chamber of the First Senate states that

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303. Kniesel & Poscher, *supra* note 92, at 426-27.

304. *Id.* at 427.

305. *Id.*; Poscher, *supra* note 158, at 1316.

306. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Jan. 11, 1994, 90 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 20-21 (F.R.G.).

307. Kniesel & Poscher, *supra* note 92, at 427.

308. *Id.*

309. Poscher, *supra* note 158, at 1316.

citizens are not legally forced to personally share the value decisions of the constitution. The Basic Law builds on the expectation that the citizens accept and realize the basic value determinations of the Constitution, but it does not force their loyalty.[310] Therefore, citizens are free to challenge basic value determinations of the Constitution, as long as they do not endanger the rights of others. The pluralist democracy of the Basic Law trusts in the ability of the citizens to tolerate criticism of the Constitution and to defend it.[311] The Basic Law does not permit state intervention unless and until the hostility to the Constitution is institutionalized in associations and political parties and thus poses a real danger. In those instances, it provides the instruments of association and political party bans, and forfeiture of individual rights, to protect democracy. But until such institutionalization takes place, the Basic Law envisions only political debate with the enemies of the Constitution. Right-wing extremist and Neo-Nazi assemblies do not amount to such an institutionalization. Thus, in the case of a right-wing extremist assembly at the Brandenburg Gate on May 5th, 2005, the primary expectation of the Basic Law would not be the prohibition by way of state authority, but politically claim the location with democratic forces.[312]

Federal Constitutional Court Judge Hoffmann-Riem engaged in an analysis of some basic questions following the 2004 Senate decision.[313] Contrary to criticism, he, too, points out that right-wing extremism is not merely a memory of the past.[314] As already stated prior to the 2004 decision, the continuing wave of right-wing extremist demonstrations poses a challenge for democracy.[315] While the Basic Law can defend itself against the enemies of freedom, it also builds on pluralistic tolerance and limits itself in the interest of liberal democracy and the rule of law; therefore, the fundamental rights also apply to those who fight the normative ideal of the Basic Law.[316] The Basic Law extends civil rights and liberties to all and cannot deny them to those who oppose its fundamental values. It can only infringe on their rights if the rights of others are threatened.[317]

310. Bundesverfassungsgericht, *supra* note 306, at 2069.
311. Poscher, *supra* note 158, at 1316; Hoffmann-Riem, *supra* note 26, at 265.
312. Poscher, *supra* note 158, at 1316.
313. Hoffmann-Riem, *supra* note 108, at 2777.
314. *Id.*
315. Hoffmann-Riem, *supra* note 26, at 265.
316. *Id.*
317. Hoffmann-Riem, supra note 108, at 2777.

As desirable as it might seem to stifle right-wing extremist tendencies before they grow, the neutrality of the state has to be maintained. An assembly cannot be prohibited merely because of expected right-wing extremism without criminally relevant propaganda.[318] Right-wing extremist assemblies can only be prohibited as a preventive measure when the organizers indicate that criminally prohibited opinions will be voiced. Certainly, if preventive measures are impossible, it becomes even more important to intervene if criminal acts are, in fact, committed. Right-wing extremist ideology must be met with determination. Right-wing extremist assemblies therefore cannot be banned as a preventive measure solely based on the expected content of opinions to be articulated.[319]

With regard to the stance taken by the state administrative court, it has been pointed out that if, based on historical experiences, the notion arises that engaging Neo-Nazism and right-wing extremism is unreasonable, a serious constitutional debate must follow.[320] Should the negative historical imprint on German collective identity gain such a dynamic that Neo-Nazi opinions—as opposed to all other political opinions—are no longer tolerable in public discourse, the place in which to anchor and document this special historical imprint on German political identity would not be yet another change to the Federal Law of Assembly or its interpretation.[321]

While these arguments support a wider scope of public democratic discourse than the one outlined by the state administrative court, the latest legislative activities, particularly the change to section 130 of the Criminal Code, suggest a different direction. Instead of political engagement with the enemies of democracy, the state is further limiting political speech. With respect to the most recent changes in the Criminal Code, there have been calls for the legislature to change its course; more than sixty years after the end of the "Third Reich," it is argued, it is time to leave the long-pursued special path and to return to the "normal" standards of a liberal democracy.[322] If one follows the argument that section 130 is primarily historically justified, it is argued that sixty years after the end of National Socialism it might carefully be considered that at some point in time, Germany might slowly leave its special path. The legislative activities, however, reveal the opposite.[323] Thus, it has been asserted that the path the Basic Law paved to deal with enemies of the constitution below the

318. Wege, *supra* note 111, at 900.
319. *Id.* at 903.
320. Poscher, *supra* note 158, at 1318-19.
321. *Id.*
322. Bertrams, *supra* note 290, at 1476.
323. *Id.* at 1478.

threshold of militant democracy-style protective measures has been abandoned.[324]

One important aspect has to be emphasized. The realization of a peaceful civil society requires a lively and energetic contribution of citizens and politicians alike; not least, it requires a certain amount of monetary expense. A particularly alarming example cited the unwillingness of established democratic parties to financially contribute to a counter-demonstration opposing an NPD assembly.[325] The costs, however, are far less than the loss of freedom that would be suffered if the principle of equal freedom for all was abandoned.[326] This connects to the danger of complacency of the democratic polity. Opposing antidemocratic tendencies requires the population to maintain a vigilant stance. But democratic vigilance, it has been pointed out, requires profound democratic education.[327]

VI. CONCLUSION

Antidemocratic ideas create a dilemma for democratic states: suppression of such ideologies offends the democratic principle while at the same time their presence threatens the very system institutionalizing the principle of tolerance itself.[328] Even though the state administrative court's stance was one of futile defiance, a positive aspect to be taken from this debate is that it renewed the discussion in German legal scholarship and among the courts regarding the extent to which freedom of speech is protected. The 2004 Senate decision was another step in the debate, although it did not resolve all underlying doctrinal questions.[329]

While there is no debate on the possibility to prohibit an assembly based on a threat to public safety if the proportionality of the measure is ensured, there is still room for debate below the level of criminally prohibited speech. The State Administrative Court of North Rhine-Westphalia certainly wants to take a stand against Neo-Nazis, but limiting the scope of democratic public discourse, even if antidemocratic ideas are articulated, is not productive. Demonstrating the strength of democracy by allowing its enemies to march, however, achieves the exposure of antidemocratic ideas to democratic discourse. Letting the enemies of

324. Enders & Lange, *supra* note 160, at 112.
325. *Id.* at 112 n.107.
326. *Id.* at 112.
327. Wise, *supra* note 25, at 331-32.
328. *Id.* at 304.
329. Battis & Grigoleit, *supra* note 223, at 3462.

democracy march certainly requires a high level of vigilance, and the authorities have to intervene immediately if a threat to public safety occurs.

Dislike of certain persons and disapproval of their goals cannot guide state actions, and Neo-Nazis, too, can claim their civil rights and liberties.[330] Protecting the democratic order of the Basic Law can involve protecting the freedom of persons who display fundamentally objectionable ideas. Judge Hoffmann-Riem portrays tolerance toward the intolerant as a hallmark of a free democratic state. In more than fifty years, the state has proven strong enough to extend its freedom guarantees to all citizens, regardless of their opinion of the state. Finally, Judge Hoffmann-Riem points out that times can change, and anyone can potentially be in a position requiring the protection of fundamental rights—protecting the fundamental rights of enemies of freedom at the same time protects the fundamental rights of those who fight for them.[331] As a philosophical matter liberal states generally value the protection of speech, but, perhaps somewhat inconveniently, in practice it is usually only offensive speech that requires protection.[332]

Democratic public discourse extends to the fringes, but under German free speech doctrine ends where the rights of others are endangered. The decisions of the Federal Constitutional Court, both by its First Chamber and the Senate, show that public discourse in Germany will be found permissible unless criminal prohibitions, reflecting appropriate historically motivated policy choices in line with Germany's post-war self-understanding and carried by the vast majority of German citizens, are violated. Prohibiting certain types of speech is not self-serving, and therefore, merely referencing the criminal prohibitions is not a genuine justification. Making a historically motivated policy choice, however, constitutes such a justification. At the same time, speech falling short of criminally prohibited speech is to be permitted and criminal prohibitions are to be kept to a minimum. Otherwise, this valid justification would be undermined.

330. Hoffmann-Riem, *supra* note 108, at 2779.

331. *Id* at 2782.

332. Brugger, *Ban On*, *supra* note 110, at 1.