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The Shining City and the Fortress: Reflections on the "Euro-solution" to the German Immigration Dilemma†

*Daniel Kanstroom**

INTRODUCTION

The aspiration toward what is generally referred to as a "European solution" of the German asylum/immigration dilemma[1] has long been a *leitmotif* in German politico-legal debate.[2] Recently, as progress toward completion of the European Community (EC or Community) has moved center stage, it has been accompanied by ever increasing German interest in multilateral initiatives relating to asylum in particular and non-EC immigration more generally. There are powerful pragmatic arguments to be made in support of such

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[1] This essay is a continuation of the detailed analysis of the current nature and history of German laws of citizenship, immigration, and alienage which appears in Daniel Kanstroom, *Wer Sind Wir Wieder: Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany*, 18 YALE J. INT'L L. 155 (1993). The reader may find it useful to read that piece first in order to understand more fully the internal German legal system relating to these issues.

[2] The term "politico-legal discourse" means government, political, and scholarly statements that purport to be interpretations of or justifications for specific legal structures as well as statements that implicitly rely upon legal structures for their meaning. This terminology arguably conflates categories which, for other purposes, might usefully be separated. But the basic point is to distinguish broadly between statements that refer (explicitly or implicitly) to law from those which do not, these subtleties are best saved for another day.

supra-national structures. The broad EC goal of free movement and residence surely cannot be realized without at least a substantial coordination of non-EC national immigration.[3] In the highly charged asylum debate, the need for multilateral action seems even greater. German commentators advocate substantive, procedural, and institutional harmonization in order to avoid multiple asylum requests, uneven burdens throughout the Community, and the problems caused by lengthy administrative and judicial procedures.[4]

Despite the functionalist appeal of these arguments, another aspect of this movement toward Euro-immigration and asylum policy is worth considering: its tendency to accept the most restrictive "lowest common denominator" models and to overlook the deep social effects of viewing immigration as primarily an economic question. Among the more subtle matters, these effects include perpetuation of the dangerous notion that asylum seekers are, in essence, a plague. Using Germany as a touchstone, this Article examines, from both a legal and broader social perspective, the most significant European measures taken to date on immigration and asylum.

Its focus is on three related questions. First, to what extent, if at all, might Community rules of free movement for EC workers provide a paradigm or model for EC control of immigration from non-EC states into Germany? Second, how have the most recent and specific multilateral immigration and asylum initiatives—the Dublin Convention[5] and the Schengen Agreement and Convention[6]—affected Germany to date and what will their likely role be in a future Germany with an amended constitutional asylum provision? Finally, how might EC level conceptions of citizenship affect Germany's uniquely strict adherence to the *jus sanguinis* and its rather restrictive naturalization practice?

Some of these questions, especially the first, have been considered

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[3] *See* Kay Hailbronner & Jorg Polakiewicz, *Non-EC Nationals in the European Community: The Need for a Coordinated Approach*, 3 DUKE J. COMP. & INT'L L. 49, 77–79 (1992).

[4] *Id.* at 86–88; *see also* Kay Hailbronner, *Perspektiven einer europäischen Asylrechtsharmonisierung nach der Maastrichter Gipfelkonferenz*, 2 ZAR-ABHANDLUNGEN 51, 51 (1992).

[5] The European Community Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 [hereinafter Dublin Convention].

[6] Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, Agreement June 14, 1985, Convention June 19, 1990, 30 I.L.M. 68 [hereinafter Schengen Agreement and Convention].

separately by German scholars.[7] There is distinct value, however, in considering them together. The reason for this is that the European struggle over immigration and asylum raises much more than technical legal problems. It has focused public attention, if sometimes obliquely, on questions that are fundamental to the soul of the nation-state.[8]

From this perspective, strong German support for EC control of immigration and asylum may represent more than a move to anchor Germany in the west or a pragmatic response to a technically difficult legal problem. It also represents an unfortunate bargain in which the German government rejects a highly protective constitutional system in favor of a regime which seems far less likely to involve effective judicial review or even to compel the German people—as the current system does—to confront refugees and the asylum system daily. By linking this systemic shift to European integration, however, its proponents achieve substantial political legitimacy.

Part I of this Article describes the current rules governing the free movement of EC nationals throughout the Community. The development of these rules illustrates, first, a consistent evolution of the concept of free movement from a primarily instrumentalist, economic idea to a much more expansive general right. The technical difficulties in a regime of free movement across even vestigial national borders are also apparent from this overview. Further, the necessary linkage between internal free movement and external border control becomes clear. In Part II, the question of external immigration and its most potent political aspect—asylum—are considered in more detail. The particular impediments, practical, legal, and political, are analyzed in regard to the current law of the EC, the Treaty on European Union (Maastricht Treaty),[9] the Schengen Agreement and Convention, and the Dublin Convention. The latter two initiatives are interpreted as well in light of the particular problems they raise for German law and society. In Part III, a broader approach is taken which seeks to relate these questions to the concepts of nationalism, immigration, and citizenship in Europe. Fi-

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[7] *See generally* Hailbronner and Polakiewicz, *supra* note 3, *see also* Maryellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights,* 29 VA. J. INT'L L. 33, 64–74 (1988).

[8] *See generally* Kanstroom, *supra* note 1.

[9] Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty].

nally, the interrelationships among these concepts are explored in light of both German and EC politico-legal developments. This Article concludes that a Community-wide vision of immigration as more than an economic question or a practical problem of border control is an essential component of the "Euro-solution." Though this aspiration surely becomes more difficult as Germany moves toward ever more restrictive immigration and asylum policies, that historical trend makes the need for it only greater.

I. FREE MOVEMENT OF EC NATIONALS

Nothing has been more critical to the developing concept of the European internal market than the free movement of persons, goods, and services. Initially, the movement of persons was linked rather closely to specific economic goals. The Treaty Establishing the European Economic Community (EEC Treaty)[10] envisioned "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital."[11] Such freedom of movement, however, was related to the underlying purposes of the Community, described in Article 2 as "a harmonious development of economic activities."[12] Thus, it is black letter law that Articles 48–51 of the EEC Treaty, which govern freedom of movement, confer this freedom upon EC nationals as economic actors, not as citizens per se.[13] The EEC Treaty, even as amended by the Single European Act (SEA),[14] provides no clear mandate for anything other than free movement for economic actors and their families. Article 8a of the EEC Treaty, added by the SEA, simply provides: "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."[15]

A variety of Council Directives, Regulations, and decisions of the European Court of Justice have significantly expanded the class of

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[10] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]. The Single European Act modified the EEC Treaty. 1987 O.J. (L 169) 1 [hereinafter SEA]. Among other things, the SEA envisioned the free movement of people within the Member States without any barriers, in contrast to the EEC Treaty which had limited this freedom to nationals of EC Member States as economic actors. Ricou Heaton, *The European Community After 1992: The Freedom of Movement of People and Its Limitations*, 25 VAND. J. TRANSNAT'L L. 643, 644 (1992).

[11] EEC TREATY, *supra* note 10, art. 3c.

[12] *Id.* art. 2.

[13] Heaton, *supra* note 10, at 647 n.21. Additionally, as is discussed more fully below, the concept of a citizen as it relates to the EC is not so simple as it might appear.

[14] SEA, *supra* note 10.

[15] EEC TREATY, *supra* note 10, art. 8a.

persons who benefit from Community rules of free movement over the years.[16] The first basis for this expansion has involved the definition of the term "worker" under Article 48 of the EEC Treaty. Neither Article 48, nor any applicable directive or regulation fully defines the term worker. Article 48(2), however, by referring to "employment" and "remuneration," sets the broad parameters of a definition, especially when contrasted with Articles 52 and 59.[17]

The European Court of Justice has, over the years, also fleshed out the definition of the term worker considerably. Initially, it must be understood that the term is an EC term of art, not something that can be determined under national law.[18] In 1974, in *Sotgiu v. Deutsche Bundespost,* the Court further stated that the professional title of a particular worker and whether the employment contract was a public or private one were irrelevant under Community law.[19] A series of cases throughout the mid-1970s dealt with a wide variety of questionable employment situations, including au pairs,[20] cyclists,[21] and football players.[22] In 1986, the European Court of Justice attempted to construct a comprehensive definition of the term worker under Community law. In *Lawrie-Blum v. Baden-Württemberg,* the Court held that a worker is "any person performing for remuneration work the nature of which is not determined by himself for and under the control of another, regardless of the legal nature of the employment relationship."[23]

In light of this rather general definition, the decisions of the Court may be summed up as follows. First, a worker under Community law need not be employed full-time. Even a university student who works part-time to support the costs of study has Community law rights to freedom of movement.[24] Moreover, the Court has recognized that a worker under Article 48 does not actually have to be

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[16] *See generally* Marc Van der Woude & Philip Mead, *Free Movement of the Tourist in Community Law,* 25 COMMON MKT. L. REV. 117, 118–22 (1988).

[17] Article 52 of the EEC Treaty addresses self-employed persons and Article 59 deals with the freedom to provide services. *See* G. Frederico Mancini, *The Free Movement of Workers in the Case-Law of the European Court of Justice, in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW 67, 68 (Dierdre Curtin & David O'Keefe eds., 1992).

[18] *See* Case 53/81, Levin v. Staatsecretaris van Justitie, 1982 E.C.R. 1035.

[19] Case 152/73, 1974 E.C.R. 153.

[20] *See* Case 118/75, Watson and Belmann, 1976 E.C.R. 1185.

[21] *See* Case 36/74, Walrave and Koch v. Association Union Cycliste Internationale, 1974 E.C.R. 1405.

[22] *See* Case 13/76, Dona v. Mantero, 1976 E.C.R. 1333.

[23] Case 66/85, 1986 E.C.R. 2121.

[24] Mancini, *supra* note 17, at 69 (citing Case 197/86, Brown v. Secretary of State for Scotland, 1988 E.C.R. 3205).

working at all. A person may be preparing to work[25] or may remain after work to study.[26] Even persons who simply intend to or wish to work have rights under Article 48.

In *Antonissen,* the Court made clear that a Member State could require an unemployed non-national to leave after six months.[27] The affected person, however, has the right to demonstrate that he or she is continuing to seek employment and has a genuine chance of finding a job.[28] Free movement under Article 48(3) thus includes the right of non-nationals from other Member States not only to move freely within the Community to seek employment, but to reside in other Member States for considerable periods of time even if they have not yet found work.[29] The Court, as one commentator has noted, has powerfully diluted the concept of "economic activity" which, under Article 2 of the EEC Treaty was supposed to be the touchstone of free movement.[30] Indeed, to date, the only categorical exclusions of ostensible "workers" from the protections of the Treaty have been drug addicts engaged in public employment the goal of which was rehabilitation.[31]

Beyond the broadened definition of "worker," Community law has developed quite specific and extensive rules governing rights of entry and residence,[32] rights of access to and conditions of employment,[33] and rights to remain in the territory of Member States after employment ends.[34] Though a full explication of this system is beyond the scope of this Article, the basic guidelines may be usefully summarized as follows. EC national workers and their families[35] have the right to leave their country[36] and to enter the territory of a

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[25] *See* Lawrie-Blum v. Baden-Württemberg, *supra* note 23.

[26] *See* Case 39/86, Lair v. Universität Hannover, 1988 E.C.R. 3161.

[27] Case C-292/89, R. v. Immigration Appeal Tribunal *ex parte* Antonissen, (judgment of 26 February 1991), *cited in* Mancini, *supra* note 17, at 69; *see also* Case 48/75, Procureur du Roi v. Royer, 1976 E.C.R. 497.

[28] Mancini, *supra* note 17, at 69.

[29] *Id.*

[30] *Id.* at 70.

[31] Case 344/87, Bettray v. Staatssecretaris van Justitie, 1989 E.C.R. 1621. The Court has also systematically denied claims under Article 48 in so-called "domestic" cases which are deemed not to raise bona fide questions of Community law. *See* Mancini, *supra* note 17, at 70.

[32] *See* Council Directive 68/360, 1968 O.J. SPEC. ED. 485.

[33] *See* Council Regulation 1612/68, 1968 O.J. SPEC. ED. 33.

[34] *See* Council Regulation 1251/70, 1970 O.J. SPEC. ED. 402.

[35] Family is defined by Regulation 1612/68 as the worker's spouse and descendants under the age of 21, as well as certain dependents in the ascendant line of the worker and spouse. Art. 10(1)(a), (b). The Court has recognized rights of co-habitating persons under certain circumstances, Case 59/85, Netherlands v. Reed, 1986 E.C.R. 1283, as well as separated spouses. Case 267/83, Diatta v. Land Berlin, 1985 E.C.R. 567.

[36] Directive 68/360, *supra* note 32, art. 3(1).

Member State simply upon production of a valid identity card or passport.[37] After entry, EC workers and family members have the right to obtain a residence permit consonant with the purposes of their entry.[38] Further, and most broadly, Article 48(2) of the EEC Treaty prohibits any discrimination based upon nationality among EC workers as to employment itself, remuneration, and conditions of employment. Similarly, Regulation 1612/68 mandates full equality of treatment as to the activities of employed persons and the mobility of workers and their families.[39] Workers who are retired have rights to remain in the territory of their state of employment under certain circumstances,[40] as do their families.[41]

The Court has construed these rules broadly. In *Commission v. France*,[42] for example, the Court held that both Article 48 of the EEC Treaty and Regulation 1612/68 had direct effect.[43] For practical purposes, this has meant that the sovereign power of EC Member States to grant or refuse to grant residence permits to EC nationals has been ceded.[44] Thus, the right of entry and residence is a matter of Community law, and "[t]he issue of a [residence] permit is . . . reduced to a mere formality."[45] In fact, in a recent case referred to it by the German Federal Administrative Court, the European Court of Justice held that Member States are obliged to issue a residence permit to a person holding a national identity card from another Member State even if that card did not authorize the person to leave the territory of the issuing Member State.[46]

Community law, however, does recognize important restrictions to the general right of free movement.[47] Article 48(3) of the EEC Treaty

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[37] *Id.* art. 3(2). Entry visas may, however, be required of non-EC national family members.

[38] *Id.* art. 4.

[39] Regulation 1612/68, *supra* note 33, art. 3(1), (2).

[40] Regulation 1251/70 grants this right to a worker who reaches the statutory age of entitlement to an old-age pension if the worker has been employed for at least the previous 12 months and has resided in the state of employment for more than three years. The Regulation also grants rights to incapacitated workers and so-called "frontier workers" (those who work in one state while retaining residence in another). *Id.* art. 2(1)(a)–(c).

[41] *Id.* at pmbl.; Regulation 1612/68, *supra* note 33, art. 10(3). Article 10(3) of Regulation 1612/68 provides a derivative right for family members to remain if the worker is entitled to do so. However, for family members to obtain residence permits, the worker must show that housing is available for them. *See* Case 249/86, Commission v. Germany, 1989 E.C.R. 1263. In addition, the Maastricht Treaty amends the EEC Treaty to provide for a right of residence for EC nationals in any Member State. Maastricht Treaty, *supra* note 9, art. G(c), 8A(1).

[42] Case 167/73, 1974 E.C.R. 359.

[43] *Id.* at 371.

[44] *Id.*

[45] Mancini, *supra* note 17, at 71.

[46] Case C-376/89, Giagourdis v. City of Reutlingen, 1 (CEC(CCH)) 75 ¶ 95,891 (1993).

[47] Article 48(4) of the EEC Treaty, which permits Member States to deny or restrict access

provides that the right may be limited on the grounds of "public policy, public security or public health. . . ."[48] Directive 64/221,[49] which implements this broad mandate, requires that restrictions undertaken pursuant to Article 48(3) must be based upon the personal conduct of the individual.[50] As Directive 64/221 is directly effective, it has led to a rather complex and sometimes inconsistent body of decisional law from the Court.[51]

One basic problem has been the definition of the concept of "public policy" itself in this context. Obviously, the term cannot be defined unilaterally by a Member State if it is to retain validity as an EC standard.[52] In the well-known *Rutili* case,[53] the Court of Justice held that restrictions may not be placed on an EC worker's rights to enter a Member State, and to live and move freely there unless the worker's presence constitutes "a genuine and sufficiently serious threat to public policy."[54] Further, the Court held, under Article 7 of the EEC Treaty, that partial restrictions on the movement of a non-national are only permissible if such restrictions may be placed on nationals as well.[55] The rather vague language of *Rutili* was refined somewhat in *R. v. Bouchereau*[56] where the Court again limited the invocation of the public policy restriction to situations that involve a genuine and serious threat to a fundamental interest of the society.[57]

More recently, a 1990 Council Directive[58] addressing health insur-

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to workers employed in the public service, has been very narrowly construed by the Court and is of little practical importance for most EC nationals. At present the restriction only applies to high level posts and those requiring special allegiance such as the armed forces, police, etc. *See, e.g.*, Case 307/84, Commission v. France, 1986 E.C.R. 1725 (French nurses); Case 33/88, Allué & Coonan v. Università degli studi di Venezia, 1989 E.C.R. 1591 (teachers in state universities not covered).

[48] EEC TREATY, *supra* note 10, art. 48(3). Article 56 contains a similar rule for the self-employed.

[49] Directive 64/221, 1963–64 O.J. SPEC. ED. 117.

[50] *Id.* art. 3(1). Involuntary unemployment or incapacity will not deny a worker the right of residence.

[51] Mancini, *supra* note 17, at 74–76.

[52] Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337 (details may vary from state to state but full scope of term cannot be unilaterally determined).

[53] Case 36/75, Rutili v. Minister for the Interior, 1975 E.C.R. 1219.

[54] *Id.* at 1231.

[55] *Id.* at 1235.

[56] Case 30/77, 1977 E.C.R. 1999.

[57] *Id.* Thus, criminal convictions alone, absent a showing of a present threat, will not be sufficient. *Id.*

[58] Council Directive 90/364, art. 1, 1990 O.J. (L 180) 26.

ance and social assistance, provided another restriction to free movement. It held that applicants for entry must possess health insurance and demonstrate that they have sufficient resources to avoid becoming a "burden on the social assistance system of the host Member State during their period of residence."[59] Though these limitations may be viewed as partial concessions to the sovereign autonomy of the Member States, it is not clear how much practical significance they have.[60]

II. HARMONIZATION OF IMMIGRATION AND ASYLUM POLICIES IN THE EUROPEAN COMMUNITY

A. *Non-EC Immigration*

There has long been a consensus within the EC that a coordinated immigration and asylum policy is a necessary, if not essential, component of the 1992 vision.[61] Few would argue with the assessment of Douglas Hurd of Great Britain, who during a September 1992 meeting of EC foreign ministers, called immigration "the most serious problem facing Europe."[62] The first formal problem for the EC in this arena has been a longstanding question of competence.[63] While rights of free movement for EC nationals have expanded through broad readings of the Treaties and secondary legislation, as noted above, no such development has occurred with regard to non-EC nationals.

In recent years there has been debate over whether the goal of Article 8a of the EEC Treaty—the abolition of internal border controls—can be achieved at all without a coordinated EC external border control regime. The basic problem as one commentator has put it, is that "if one removes border controls for one class of

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[59] *Id.*

[60] It should also be noted that neither the 1990 Directives, nor Community law generally, provide much support for Community nationals who claim a right to reside in their own Member State against the provisions of local law. Indeed, the general rule is that Community law only helps such a person when he or she is returning to the Member State after having exercised freedom of movement under Community law to carry on an economic activity in another Member State. *See* Andrew C. Evans, *Nationality Law and European Integration*, 16 EUR. L. REV. 190, 203 (1992).

[61] *On the Borderline*, ECONOMIST, Nov. 23, 1991, at 58.

[62] *Refugees: Keep Out*, ECONOMIST, Sept. 19, 1992, at 64.

[63] *See* Bertold Huber, *Asyl-und Ausländerrecht in der Europäischen Gemeinschaft*, 7 NEUE VERWALTUNGS ZEITSCHRIFT (NVwZ) 618, 619 (1992).

persons, it becomes impossible to maintain them for another.[64] Full *internal* free movement thus inevitably requires consideration of the thorny questions of non-EC immigration and asylum. Even if the EC could prevent all future immigration into the Community (a patently impossible proposition), the problem of non-EC nationals would remain. There are already more than eight million non-EC nationals in the Community.[65] The Commission, and indeed every Member State except for the United Kingdom, Ireland, and Denmark, now takes the position that Article 8a empowers the Community to adopt rules for the free movement not only of EC nationals, but of non-EC entrants as well.[66]

There has long been agreement on the desirability of harmonization.[67] As early as 1985, the Commission asserted that a harmonization of asylum and non-EC immigration policies was an essential component of the move toward an open area without internal borders.[68] Nonetheless, Member States are not willing to cede completely sovereign prerogative over this most politically charged issue.[69] To date, there appears little likelihood that the Community will be able to develop directly[70] a comprehensive immigration policy.[71]

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[64] David O'Keefe, *The Free Movement of Persons and the Single Market,* 17 EUR. L. REV. 3, 8 (1992).

[65] *Id.* This represents some 2.5 percent of the total population. *Id.*

[66] *See Completing the Internal Market; Removal of Physical Frontiers; Control of Individuals: Current Problems and 1992 Objectives,* Eur. Info. Serv., Jan. 4, 1993, *available in* LEXIS, Europe Library, Info 92 File [hereinafter *Completing the Internal Market*].

[67] *See, e.g.,* Political Declaration by the Governments of the Member States on the Free Movement of Persons, Feb. 17 and 28, 1986, 25 I.L.M. 505.

[68] *Id.*

[69] Association agreements with third states also provide a source of authority for Community control of third state nationals. *See, e.g.,* Case 12/86, Demirel v. Statdt Schwaebisch Gmund, 1987 E.C.R. 3719, 1 C.M.L.R. 421 (1989) (Association Agreement with Turkey and additional protocol not sufficiently precise to grant rights to individual Turkish workers); *see also* Hailbronner & Polakiewicz, *supra* note 3, at 55.

[70] *But see* discussion of the Schengen process, *infra* Part II.C.

[71] Some have argued that EC competence over an immigration policy could be grounded in Article 5(2) of the EEC Treaty, which requires that Member States not jeopardize the attainment of the goals of the EEC Treaty and Article 234(3), which aspires toward eliminating incompatibilities between the EEC Treaty and other prior agreements. *See* Hailbronner, *supra* note 4, at 50–51; (Joined Cases 281/85, 283–285/85, and 287/85, Germany, France, the Netherlands, Denmark and U.K. v. Commission 1987 E.C.R. 3203, 1 C.M.L.R. 11 (1988)) (migration policies of Member States must at least take into account EC objectives, particularly labor market policy). Hailbronner and Polakiewicz also argue that the Community can, under Article 49, regulate the access to the labor market of third country nationals already residing in the territory of a Member State. *See supra* note 3, at 55. It should be noted that such rules would be particularly controversial insofar as they applied to legal residents' right to work within the Member State which granted legal residence.

As a result, developments in non-EC national immigration policy have proceeded sporadically. The Commission acknowledges that the Member States did not abolish controls at internal frontiers by the target date of January 1, 1993.[72] In addition, a recent meeting in Budapest of representatives of thirty-five European countries to debate a convention on immigration made little progress,[73] though general agreement was reached to criminalize "smuggling" of undocumented immigrants and to fine airlines, and land and sea carriers who do not do sufficient checks.[74]

The Maastricht Treaty contains provisions which would grant the Community certain important powers over the entry and residence of non-EC nationals. Article 100C contains specific procedural rules under which the Council can determine which non-EC nationals require visas to cross the external borders of Member States. Article 100 states that the Council, after consultation with the European Parliament, may act "unanimously" on a proposal from the Commission to determine such visa requirements.[75] Title VI, Article K.1 further provides an extensive list of matters deemed to be "of common interest."[76] This list includes asylum policy, control of external borders, immigration policy, and policy regarding third-party nationals. Thus, a unanimous decision by the Council could lead to Community control of at least some aspects of both asylum and immigration policy. Article K.2 also expressly requires that all of the matters referred to in Article K.1 be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention)[77] and the Geneva Convention Relating to the Status of Refugees (Geneva Convention),[78] as amended by the New York Protocol.[79]

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[72] *See Completing the Internal Market, supra* note 66.

[73] *Immigration: 12-Sided Shambles Turning Into 35-Sided Defeat,* Eur. Info. Serv., Feb. 17, 1993, *available in* LEXIS, Europe Library, Alleur File. The main aspects of the debated report of a working party established in 1991 were harmonized penalties for those who "smuggle" illegal aliens into Europe, improved surveillance at borders, development of multilateral deportation agreements, and information exchange. *Id.* As European Commissioner Padraig Flyn noted, however, this agenda seems far too ambitious to tackle simultaneously. *Id.*

[74] Nicholas Denton, *European Ministers Agree to New Anti-Immigration Measures,* FIN. TIMES, Feb. 17, 1993, at 2.

[75] Maastricht Treaty, *supra* note 9, tit. II, art. G(D)(23) (amending EEC Treaty to insert 100(c)(3)). After January 1, 1996, this will be liberalized to a qualified majority. *Id.*

[76] *Id.* tit. VI, art. K.1.

[77] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[78] Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Geneva Convention].

[79] New York Protocol, Jan. 31, 1967, 606 U.N.T.S. 267, 6 I.L.M. 78 (1967).

The Maastricht Treaty further provides that policies undertaken pursuant to Article K.1 must take into account "the protection afforded by Member States to persons persecuted on political grounds."[80] Thus, Member States which, like Germany, have more liberal asylum policies should not be forced by Article K.1 to adopt more restrictive regimes.[81] Further, Article K.7 authorizes "the establishment or development of closer cooperation between two or more Member States" as to matters deemed of common interest, provided such cooperation does not conflict with or impede that provided for by Title VI. As recent events in Budapest[82] indicate, however, serious obstacles remain to a harmonized European immigration regime. Indeed, the Maastricht Treaty recognizes the continuing authority of Member States over "the maintenance of law and order and the safeguards of internal security."[83]

B. *Asylum Policy*

> Rather than an approach to the refugee and asylum issue rooted in human rights strategies, there is a preoccupation with immigration control and the more pressing political

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[80] Maastricht Treaty, *supra* note 9, tit. VI. art. K.2.

[81] *See* Huber, *supra* note 63, at 619.

[82] *See* Maastricht Treaty, *supra* note 9, tit. II, art. G(23), art. 100(c)(5).

[83] *Id.* New Article 100(c)(5) states: "This article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security."

Turkish workers, however, have been a focal point of attention for years. In 1973, the EC and Turkey agreed to work towards the goal of free movement for Turkish workers by 1986. Agreement of 24 December 1973 Establishing an Association Between the European Economic Community and Turkey, 1973 O.J. (C 113) 1, 5. Moreover, the European Commission recently confirmed that Turkish nationals residing legally in countries which are parties to the Schengen Agreement and Convention will have the right to travel without a visa. *EC Talks on Free Movement and Social Rights of Turkish Workers Employed in EC Member States,* Agence Europe, Feb. 4, 1993, *available in* LEXIS, Europe Library, Alleur File.

Agreements between the EC and the European Free Trade Association (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland), as yet unratified, also contain provisions for free movement of persons. *See EC and EFTA Agree on Creation of a European Economic Area,* 4 Common Mkt. Rep.(CCH) ¶ 96,107 (1992). Agreements relating in part to the movement of workers have also been signed between the EC and Hungary, the former state of Czechoslovakia, and Poland. *See* George B. Hefferan III & Joanne Katsantonis, *Movement Towards An Internal Market in 1993: An Overview of Current Legal Developments in the European Community,* 3 DUKE J. COMP. & INT'L L. 1, 45–46 (1993). A recent decision of the European Court of Justice has granted a right of residence to Turkish workers on the basis of the Association Agreement and protocol and two earlier Council Decisions. Case C-192/89, S.Z. Sevince v. Staatssecretaris Van Justitie, 1990 E.C.R. 3461, 3463–65, 2 C.M.L.R. 57, 60–61 (1992) (the right to access to employment implies a right to residence).

> priorities of economic development and security, particularly those associated with the realization of the Single European Act and the creation of a common market of the European Community by or about 1992.[84]

Prior to Maastricht, there was nothing in the Treaties which mandated or even clearly permitted a centralized asylum policy.[85] The historical reasons for this are beyond the scope of this Article. What is important, however, is that throughout the 1980s, there has been a steadily increasing call for a Community asylum system.[86] The main reason for the increased attention paid to this issue has been the sharply increasing number of asylum-seekers within the Community. Starting with approximately 72,000 in 1983, the number rose steadily throughout the decade to some 328,000 in 1990, and has continued to rise in the early 1990s.[87]

A very large number of these asylum-seekers came first to Germany: some 61 percent in 1988, 54 percent in 1989, and 62 percent in 1990,[88] a fact which accounts both for the German government's interest in the issue and its desire for a multilateral solution. The essential problems in achieving such a policy have been due largely to the procedural difficulties inherent in coordinating a regime that is governed both by rather vague international standards and by positive domestic law, including in Germany, constitutional law. Further, the issue is one of deep historical resonance and generates great political controversy.

The German government in recent years has been one of the strongest proponents of a highly coordinated system of both non-EC immigration and asylum within the European Community.[89] In Luxembourg, in June 1991, the German government went so far as to propose that all questions of asylum, immigration, and matters re-

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[84] Philip Rudge, *Europe in the 1990s: The Berlin Walls of the Mind,* WORLD REFUGEE SURVEY—1989 IN REVIEW 20 (1990).

[85] *See supra* notes 61–83 and accompanying text.

[86] *See, e.g., The Resolution of the European Parliament on Asylum Policy Contrary to Human Rights,* Doc. B-2-512/87 of Dec. 1987, 1987 EuGRZ 444; *see also Resolution on the Issues of the Right of Asylum of March 12, 1987,* 1987 EuGRZ 186; "Vetter Report" of September 26, 1986, adopted by the European Parliament on January 29, 1987.

[87] *See* Huber, *supra* note 63, at 619 (citing Vetter ed., Ein Mensch wie Du und ich. Fluchtlinge in der EG (1987) at 8, Table 2); *see also* Report of the European Commission on Immigration Law, PARL. EUR. DOC. (SEC 1857) 5 (1991) [hereinafter Commission Report on Immigration Law].

[88] Huber, *supra* note 63, at 619.

[89] *See infra* notes 135–40.

lating to the status of third-party nationals be covered substantively in the Maastricht Treaty.[90]

C. *Specific Measures Toward A Harmonization of European Immigration and Asylum Law: Schengen and Dublin*

The two most important specific multilateral measures taken to date relating to asylum are the Schengen Agreement and Convention[91] and the Dublin Convention.[92] The Schengen process formally began on June 14, 1985 when Germany, France, and the Benelux countries concluded the Schengen Agreement.[93] The 1985 Agreement was in essence a political agreement under which the parties were to take steps to achieve its aims. The Agreement envisioned the abolition of all border control within the Schengen area. In particular, the parties were concerned with not only the movement of goods and services, but with common security and, most importantly, controls on non-EC immigration.[94] Because it contained relatively few specific obligations, the Agreement was to be applied by the parties on a provisional basis without the necessity of ratification.[95] On June 19, 1990, the original parties to the Schengen Agreement concluded a Convention which furthers the goals of the Agreement and contains detailed rules governing the abolition of internal border checks on persons, and procedures for non-EC immigration.[96] The Agreement and the Convention are considered as likely models, if not substitutes, for future EC legislation in the field of non-EC immigration.[97] To date, there are nine members within the Schengen group. Italy formally joined the group in December 1990.[98] Portugal and Spain joined in June 1991.[99] Greece was granted observer status in June 1991.[100]

The primary goal of the Agreement, as noted above, was the

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[90] Huber, *supra* note 63, at 620. The Treaty, however, as discussed more fully above, with the limited exception of new Article 100(c), does not address these matters beyond terming them "matters of common interest." Maastricht Treaty, *supra* note 9, tit. VI, art. K.1.

[91] Schengen Agreement and Convention, *supra* note 6.

[92] Dublin Convention, *supra* note 5.

[93] Schengen Agreement and Convention, *supra* note 6.

[94] *See* Jean-Francois Bellis, *Introductory Note* to Schengen Agreement and Convention, 30 I.L.M. 68 (1991).

[95] Schengen Agreement and Comvention, *supra* note 6, at tit. I, art. 32.

[96] *See generally id.*

[97] *See* Bellis, *supra* note 94, at 69; *see also* Hailbronner & Polakiewicz, *supra* note 3, at 60.

[98] Mancini, *supra* note 17, at 67.

[99] *Id.*

[100] *Id.*

elimination of all border controls among the parties. Articles 2–6 of the Agreement contained specific guidelines for minimal visual border checks and envisioned virtually complete free movement for EC nationals. Coordination of controls on illicit drug trafficking and other forms of crime was also considered.[101] Title II of the Agreement, which covered "Measures Applicable in the Long Term," simply required that the Parties would "endeavour to abolish the controls at the common frontiers and transfer them to their external frontiers."[102] This transfer of competence, however, focused most clearly on restrictions against illegal immigration, not a coordinated immigration policy of any sort. The language of Article 17 is revealing:

> [the Parties] shall endeavour to harmonize . . . the laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls and to take complementary measures to safeguard security and combat illegal immigration by nationals of States that are not members of the European Communities.[103]

The Schengen Convention contains highly detailed rules for achieving the general goals defined in the 1985 Agreement. In particular, the Convention provides for the crossing of internal borders "without any checks on persons being carried out."[104] This complete freedom of movement, however, is substantially limited for non-EC nationals ("aliens" as defined by Article 1 of the Convention), who must "declare" themselves "in accordance with the conditions imposed by each Contracting Party."[105] Indeed, this obligation of bringing oneself to the attention of local authorities applies even to long-term resident aliens when they travel within the internal territory.[106] The Convention also contains detailed provisions for police cooperation[107] and the development of a massive new information system.[108]

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[101] Schengen Agreement and Convention, *supra* note 6, tit. I, arts. 8–10.

[102] *Id.* tit. I, art. 17.

[103] *Id.*

[104] *Id.* tit. II, ch. 1, art. 2(1). "In the interest of public policy or national security, limited internal border checks may be maintained so long as the party consults with the other parties." *Id.* tit. II, ch. 1, art. 2(2).

[105] *Id.* tit. II, ch. 4, art. 22(1).

[106] *Id.* tit. II, ch. 4, art. 22(2).

[107] *Id.* tit. III.

[108] *Id.* tit. IV.

In order to facilitate free movement across internal borders, the Convention contains highly detailed and rather strict external border control mechanisms.[109] Entry into the territories of the Contracting Parties *must* be refused to any alien who does not possess complete and valid documents.[110] The only exception to this rule is that a Contracting Party may admit an alien "on humanitarian grounds or in the national interest or because of international obligations."[111] In such cases, however, entry and residence rights are limited to the territory of the Contracting Party concerned.[112] Visas for visits of more than three months, however, "shall be national visas issued by one of the Contracting Parties in accordance with its own legislation."[113] Thus, immigration policy should, under Schengen, remain fundamentally an attribute of national sovereignty. There are, however, important limitations. For example, an alien holding a residence permit issued by a Contracting Party may move "freely for up to three months within the territories of the other Contracting Parties. . . ."[114]

Perhaps the most controversial, and ultimately the most significant, aspects of the Schengen Convention concern applicants for asylum. Article 5(2) contains an express exception to the non-entry for aliens rule for "the application of special provisions concerning the right of asylum."[115] Article 23(5), which deals with the movement of aliens generally, restricts the right of the Contracting Parties to expel an alien by express reference to the Geneva Convention, as amended by the New York Protocol.[116] Further, Article 28 reaffirms the commitment of the Parties not only to the Geneva Convention and New York Protocol but to cooperation with the United Nations High Commissioner for Refugees.[117] The Convention specifically requires the parties to "process any application for asylum lodged by an alien within the territory of any one of them."[118]

The Convention, however, also makes abundantly clear that no

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[109] *Id.* tit. II, ch. 2, arts. 3–5.

[110] *Id.* tit. II, ch. 2, art. 4.

[111] *Id.* tit. II, ch. 2, art. 5(2).

[112] *Id.*

[113] *Id.* tit. II, ch. 3, art. 18(2).

[114] *Id.* tit. II, ch. 4, art. 21(1).

[115] *Id.* tit. II, ch. 2, art. 5(2).

[116] *Id.* tit. II, ch. 7, art. 28; Geneva Convention, *supra* note 78; New York Protocol, *supra* note 79.

[117] Schengen Agreement and Convention, *supra* note 6, tit. II, ch. 7, art. 28.

[118] *Id.* tit. II, ch. 7, art. 29(1).

Contracting Party is obligated "to authorize every applicant for asylum to enter or to remain within its territory."[119] From the German perspective, this is perhaps the most important asylum provision in the Convention as it directly contradicts the whole underpinning of Article 16(2) as linked with Article 19(4) of the Basic Law[120] which, taken together, have required a right of entry and judicial review.[121] Further, notwithstanding the general commitment to the Geneva Convention, "[e]very Contracting Party shall retain the right to refuse entry or to expel any applicant for asylum to a Third State on the basis of its national provisions and in accordance with its international commitments."[122] While this is merely a reaffirmation of the national right under the Geneva Convention to decide asylum claims, the retention of a right to expel would seem somewhat problematic under the non-refoulement prohibitions of Article 33 of the Convention.[123]

As to the actual processing of asylum cases, the Convention mandates that it shall be primarily the responsibility either of the State which may have issued the applicant a visa or residence permit, or, if the applicant seeks entry without a visa (as most do), the State into which the applicant seeks entry.[124] The Parties are to decide, "as quickly as possible," which of them is responsible for the processing of a given asylum case.[125] In addition, subject to the above mentioned qualifications, processing shall be done in accordance with national law.[126] Meanwhile, asylum-seekers are generally not free to move within the Schengen countries pending a decision on their case.[127]

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[119] *Id.* tit. II, ch. 7, art. 29(2).

[120] Grundgesetz [Constitution] [GG] arts. 16, 19 (F.R.G.).

[121] *See* Kanstroom, *supra* note 1, at 199.

[122] Schengen Agreement and Convention, *supra* note 6, tit. II, ch. 7, art. 29(2).

[123] Article 33 of the Geneva Convention provides:

> (1) No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> (2) The benefit of the present provision may not, however, be claimed by a refugee when there are reasonable grounds for regarding him as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Geneva Convention, *supra* note 78, art. 33.

[124] Schengen Agreement and Convention, *supra* note 6, tit. II, ch. 7, art. 30.

[125] *Id.* tit. II, ch. 7, art. 31(1).

[126] *Id.* tit. II, ch. 7, art. 32.

[127] *Id.* tit. II, ch. 7, art. 33(1).

Furthermore, relevant to current German practice, an asylum-seeker whose case has been denied may be granted permission to remain in the territory of the state which denied the claim (on humanitarian grounds, for example) but will be returned to that state if found within the territory of any other Party.[128]

In addition to the harmonization of current procedures, the Convention requires reciprocal notification among the Parties of any material changes to their asylum laws.[129] Further, the Parties "guarantee close co-operation in the collection of information on the situation in the countries of origin of applicants for asylum with a view to reaching a common assessment."[130] As to particular cases, each Party must also send to any other Party information in its possession that is necessary either to determine the Party responsible for deciding the case or to decide the case itself.[131]

The Dublin Convention deals exclusively with the examination of asylum claims and has been signed by all of the Schengen parties and is generally regarded as a complement to the Schengen system.[132] Like the Schengen Agreement and Convention, it contains no substantive harmonized rules for asylum applications. The Dublin Convention does, however, contain provisions designed to guarantee that asylum decisions will be made by only one state.[133] As with the Schengen Convention, rather explicit rules are designed to determine exactly which state shall be responsible for deciding the asylum case, the main factors being whether the state has granted the applicant a visa or a residence permit and whether the applicant resides in the territory of a particular state.[134]

One of the most important aspects of both the Schengen and Dublin Conventions is their common principle that states can legitimately rely upon each other's asylum decisions.[135] As noted above, this aspiration raises legal difficulties as to the states' obligations under Article 33 of the Geneva Convention. In addition, the harmonization of national asylum laws involves a wide variety of procedural and substantive questions. In Germany, for example, the most

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[128] *Id.* tit. II, ch. 7, art. 34.

[129] *Id.* tit. II, ch. 7, art. 37(1).

[130] *Id.* tit. II, ch. 7, art. 37(2).

[131] *See id.*

[132] Hailbronner & Polakiewicz, *supra* note 3, at 61.

[133] Dublin Convention, *supra* note 5, art. 3(2).

[134] *Id.* arts. 4–8.

[135] *See* Commission Report onImmigration Law, *supra* note 87, at 5.

important issue is probably that of judicial review and entry rights, though this seems destined for change soon.[136]

Beyond the objections raised by other Member States, Germany has faced significant legal impediments to a fully harmonized asylum regime. Most significant, of course, is the relationship between such proposals and Article 16(2) of the Basic Law. Because Article 16(2) has engendered an asylum system that is substantially more liberal than that of most other EC states, the German government has argued that constitutional changes are necessary[137] to ensure that Germany is not flooded by asylum-seekers who have been denied

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[136] A draft Convention on the Crossing of External Frontiers also provides mechanisms for external border controls and the harmonization of visa policies. However, primarily due to a dispute between the United Kingdom and Spain over Gibraltar, the Convention has not been signed. David Bachan, *European Freedom of Movement May End at Dover: Britain's Row With Its EC Partners on Border Controls,* FIN. TIMES, May 13, 1992, at 2.

[137] *See* BT-Dr 12/2112 (stating the position of the CDU/CSU that a constitutional change must accompany the ratification of the Schengen Agreement) *cited in* Victor Pfaff, *Flucht und Einwanderung: Die Nation im Umgang mit Fremden,* 25 KRITISCHE JUSTIZ 129, 133 (1992).

As a matter of internal German law, the acceptance of European initiatives on immigration will be facilitated by recently approved amendments to the Basic Law.

> On 2 December 1992 the Bundestag adopted several amendments to the Basic Law in connection with the ratification of the Maastricht Treaty. A new Article 23 is to be included, the previous one had been repealed by the Unification Treaty of 31 August 1990. The text of the new article, commonly referred to as the "Article on European Union," reads as follows:
> (1) With a view to establishing a united Europe the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social and federal principles as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by law with the consent of the Bundesrat. The establishment of the European Union as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of this Basic Law or make such amendments or supplements possible shall be subject to the provisions of the paragraphs (2) and (3) of Article 79.
>
> (Those paragraphs read as follows: '(2) Such law must be carried by two thirds of the members of the Bundestag and two thirds of the votes of the Bundesrat. (3) Amendments to this Basic Law affecting the division of the federation into Laender, their participation in the legislative process, or the principles laid down in Article 1 and 20 shall be prohibited.')
>
> (2) The Bundestag and, through the Bundesrat, the Laender shall be involved in matters concerning the European Union. The Federal Government shall inform the Bundestag and the Bundesrat comprehensively and as quickly as possible.
>
> (3) The Federal Government shall give the Bundestag the opportunity to state its opinion before participating in the legislative process of the European Union. The

Federal Government shall take account of the opinion of the Bundestag in the negotiations. Details shall be the subject of a law.

(4) The Bundesrat shall be involved in the decision-making process of the Federation in so far as it would have to be involved in a corresponding internal measure or in so far as the Laender would be internally responsible.

(5) Where in an area in which the Federation has exclusive legislative jurisdiction the interests of the Laender are affected or where in other respects the Federation has the right to legislate, the Federal Government shall take into account the opinion of the Bundesrat. Where essentially the legislative powers of the Laender, the establishment of their authorities or their administrative procedures are affected, the opinion of the Bundesrat shall be given due consideration in the decision-making process of the Federation; in this connection the responsibility of the Federation for the country as a whole shall be maintained. In matters which may lead to expenditure increases or revenue cuts for the Federation, the approval of the Federal Government shall be necessary.

(6) Where essentially the exclusive legislative jurisdiction of the Laender is affected the exercise of the rights of the Federal Republic of Germany as a member state of the European Union shall be transferred by the Federation to a representative of the Laender designated by the Bundesrat. Those rights shall be exercised with the participation of and in agreement with the Federal Government; in this connection the responsibility of the Federation for the country as a whole shall be maintained.

(7) Details regarding paragraphs (4) to (6) shall be the subject of a law which shall require the consent of the Bundesrat.

The following paragraph (1a) shall be inserted after paragraph (1) of Article 24:

(1a) Where the Laender have the right to exercise sovereign powers and perform sovereign tasks they may with the consent of the Federal Government transfer sovereign rights to transfrontier institutions in neighbouring regions.

The following sentence shall be inserted after Article 28, paragraph (1), first sentence:

In county and municipal elections persons who are nationals of member states of the European Community, too, may vote and shall be eligible for elections in accordance with European Community law.

Article 45 has been reinstated with the following wording (the previous Article 45 concerning the status of Bundestag committees having been repealed in 1976): The Bundestag shall appoint a Committee on European Union. It may empower the Committee to exercise the Bundestag's rights in relation to the Federal Government in accordance with Article 23.

Article 50('The Laender shall participate through the Bundesrat in the legislative process and administration of the Federation') shall now read:

The Laender shall participate through the Bundesrat in the legislative process and administration of the Federation and in matters concerning the European Union.

Doc. 4062e/0–2812 (provided by German Information Center and on file with author).

elsewhere.[138] Thus, current legislative attention in Germany has focused on the development of lists of "safe countries" in which there is presumed to be no persecution.[139] Most of eastern Europe will surely be included, along with all EC states, Austria, Poland, Switzerland, and the Czech Republic.[140] These unilateral measures clearly would de-liberalize the German asylum system. Nevertheless, at present, the concern over divergent asylum standards remains a serious one.

D. *The Effect of the Schengen and Dublin Harmonization Measures*

Neither the Schengen Agreement nor the Dublin Convention expressly *requires* multilateral deference to one party's asylum decision.[141] The Dublin Convention does indicate that the decision of one party to decide an asylum case must be recognized by the others and that multiple asylum applications are to be avoided.[142] The EC Commission took the position, in its 1991 Report on Asylum[143] that this duty of recognition meant that no Member State could rely upon a reservation to its own national law in this regard.[144] Thus, an asylum-seeker who was denied, for example, in France could not make a constitutional claim under German law for a reconsideration of his asylum case. Clearly, however, such a regime would raise serious constitutional questions in Germany.

Perhaps the most fundamental impediment to European harmonization of asylum policy is the basic definitional question of who is even eligible for asylum. Neither the Dublin Convention nor the Schengen Agreements define the term "refugee." Both simply rely upon the definition contained within the Geneva Convention.[145] Similarly, the Maastricht Treaty, to the extent that it deals with the issue at all, defers to the Geneva Convention and the European

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[138] Huber, *supra* note 63, at 620. These fears, however, are questionable. It appears, for example, that only some 10–15 percent of the asylum-seekers in other Schengen countries travel to Germany. Further, it is unknown how many of these individuals have previously applied for asylum elsewhere. *Id.* at 621.

[139] *See* Doc. 4062e/0–2812, *supra* note 137.

[140] *See Bundestag (Again) Debates Proposed New Laws on Foreigners and Asylum-seekers; Majority Support Likely*, THE WEEK IN GERMANY, Mar. 5, 1993, at 1.

[141] *See* Dublin Convention, *supra* note 5, art. 15(3); Schengen Agreement and Convention, *supra* note 6, art. 38(3).

[142] *See* Dublin Convention, *supra* note 5, art. 3.

[143] *See* generally Commission Report on Immigration Law, *supra* note 87.

[144] *Id.*

[145] *See* Dublin Convention, *supra* note 5, art. 2; Schengen Agreement and Convention, *supra* note 6, art. 28.

Human Rights Convention.[146] The Commission, in October 1991, recognized the critical importance of achieving a common definition of the term "refugee" throughout the EC.[147] Nonetheless, agreement upon the language of the Geneva Convention does not accomplish this goal. For one thing, many EC states now recognize large numbers of so-called *de facto* or humanitarian refugees who do not fit within the Geneva Convention definition.[148] Many human rights experts are concerned that pressures to adopt a harmonized refugee definition will result in many fewer protections for de facto refugees.[149] The Convention, moreover, does not require the grant of asylum to a refugee. It only mandates that a refugee not be sent back to a place where he or she would have a well-founded fear of persecution.[150] Thus, under current asylum practice, wide differences exist among Member States even though they are all bound by the Convention's definitions. The questions of post-flight grounds for asylum, and the consequences of residence in another state were noted by the Commission as important differences of this kind.[151]

Moreover, asylum adjudication is notoriously political and generally subjective. In the mid-1980's, for instance, some 90 percent of Tamil refugees from Sri Lanka were recognized in Denmark.[152] During the same period in Germany, however, the figures for Tamil refugees were 8 percent for 1984, 37 percent for 1985, and 20 percent for 1986.[153] Figures such as these provide powerful empirical support for the proposition that states presently do not interpret the Convention in the same way. It is even arguable that such a centralized substantive coordination of asylum practice is inherently impossible given the nature of asylum adjudication. By way of comparison to U.S. practice, it is important to note that vast differences exist among different immigration judges, between the immigration judges and the Board of Immigration Appeals, and among the various Circuit Courts that review decisions of the Board.[154] Attempts

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[146] Maastricht Treaty, *supra* note 9, tit. VI, art. K.2(1).

[147] Commission Report on Immigration Law, *supra* note 87, at 6.

[148] *See* O'Keefe, *supra* note 64, at 14.

[149] *Id.; see generally* Gil Loescher, *The Single European Market and the European Community's Asylum Policy*, 13–14 (published as part of the International Conference, Refugees in the World: The European Community's Response, at Hague 7–8 Dec. 1989).

[150] Geneva Convention, *supra* notes 78 and 123, art. 33 (so-called right of non-refoulement).

[151] Commission Report on Immigration Law, *supra* note 87, at 6.

[152] Huber, *supra* note 63, at 621.

[153] *Id.*

[154] *See generally* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433 (1992).

by the Supreme Court and the Board to standardize asylum practice within the United States have been strikingly ineffective.[155] This is not to say that the goal of a standardized system is necessarily impossible. But it is difficult to imagine a point in the foreseeable future when the adjudications of, say, Germany and France, will be more similar than those of the Ninth and First Circuit Courts of Appeal in the United States. The difference, of course, is that denied asylum-seekers in Boston cannot travel to California for a second hearing. Thus, attention in the EC has focused not only upon definitional harmony, (which clearly would require either a dramatic change of national attitudes or an unprecedented cession of national authority), but upon procedural solutions to the problem of multiple applications. Following the suggestions of one German commentator,[156] three basic models are possible:

1. A denied asylum-seeker could, as is presently true, retain the right to enter another EC state and apply again for asylum there. Such a request would be de novo and would be determined by the positive law of the state, as well as its interpretations of the requirements of the Geneva Convention and other provisions of international law.

2. EC states can develop a common policy and system for the definition, admission, and processing of asylum-seekers. Such a solution would, as noted, require an unprecedented cession of sovereign powers relating to border control, judicial review, etc. Suffice to say that this model does not appear to be achievable within the foreseeable future.

3. The signatory states can each agree to admit asylum-seekers as they apply at the borders of each state. The state of entry would then adjudicate the asylum claim under more or less common standards (*e.g.*, the Geneva Convention). The results of the state's decision, whether positive or negative, would then be recognized by all of the other parties. One problem with this solution on the formal legal level, at least as to denied applications, is that it would seem to conflict with the requirement of the Geneva Convention that each state adjudicate asylum applications on its own.[157]

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[155] *See generally* David Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia,* 138 U. PA. L. REV. 1247, 1294–337 (1990).

[156] *See* Huber, *supra* note 63, at 622.

[157] In 1978, the Executive Committee of the United Nations High Commissioner for Refugees expressly stated that a negative decision by one state on any asylum claim should not hinder the adjudication by another state of that claim. *Id.* at 622 n.55 (citing Decision No. 12 (XIX) (1978)).

Beyond the general questions of definitional and admissions policies, harmonization of asylum practice raises special administrative and legal problems for Germany. The EC Commission, in addition to calling for a common admission practice, recognized the critical importance of developing common adjudicatory procedures for asylum-seekers.[158] The Geneva Convention, however, contains no such rules. Thus, at present, procedures are governed for the most part by national law. Most Member States, moreover, view the matter as one of governmental discretion subject to rather limited judicial review. Indeed, Germany is unique in its incorporation of asylum questions into its system of constitutional law subject to extensive judicial review.[159] Although *some* right to review of a denied asylum claim is generally available throughout the EC (but not in Ireland, Italy, and Portugal),[160] Germany's system is uniquely protective of the procedural legal rights of asylum-seekers.[161] Spain, for example, allows administrative review of decisions denying an asylum-seeker the right to enter, but not of the substantive denial of the claim itself.[162]

These differences in administrative and legal practice could present formidable obstacles to multilateral acceptance of each state's asylum decisions. The French administrative legal system, which has strongly influenced that of Portugal, Greece, Belgium, Luxembourg, and Italy, provides a much more limited form of review than the German system.[163] The difference is important; the French system essentially requires a claim by the denied applicant that the decision is a nullity, while the German system offers a substantive review of the decision.[164] As one German commentator has noted, the two systems seem to be virtually impossible to reconcile.[165] The most likely possibility for harmonization, then, would require a radical change in the German system—a considerable retrenchment on legal protections for asylum-seekers with important political and social resonance beyond its specific legal effects.[166] More specifically, harmonization of administrative practice in this regard would re-

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[158] Commission Report on Immigration Law, *supra* note 87, app. 18.

[159] *See* Huber, *supra* note 63, at 622.

[160] *Id.*

[161] *See* Kanstroom, *supra* note 1, at discussion Part 1.

[162] *Id.*

[163] *See* Huber, *supra* note 63, at 622.

[164] *Id.*

[165] *Id.*

[166] *See* Kanstroom, *supra* note 1, at discussion Part 1.

quire not merely an amendment to Article 16(2),[167] but a substantial change in Article 19(4) of the Basic Law as well.[168] Unfortunately, this seems to be the very direction in which Germany is headed.

III. IMMIGRATION, NATIONALISM, AND CITIZENSHIP IN THE EUROPEAN COMMUNITY

As noted, a wide variety of multilateral European initiatives on citizenship, immigration, and asylum have recently been considered if not fully undertaken. These measures have already affected, and will continue to affect the law of Germany and other Member States. This is particularly clear in the case of German asylum law. The move toward a sort of EC citizenship could also mitigate significantly the importance of Germany's restrictive approach to ascriptive citizenship and naturalization.[169] It is therefore important to consider the more general politico-legal impact of multilateral asylum and immigration initiatives on German and European nationalism, especially as that concept is mediated by laws of citizenship.

A. *Nationalism and Citizenship Law*

> The loathsome mask has fallen, the man remains, Sceptreless, free, uncircumscribed, but man, Equal, unclassed, tribeless and nationless.[170]

1. Nationalism and Immigration

The term "nationalism" is used to describe a range of behaviors and attitudes from "ethnic cleansing" to violent attacks on foreigners in western Europe to strict border control measures.[171] This broad

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[167] Even if Article 16(2) were removed entirely from the Basic Law, German law mandates procedural protections based upon German interpretations of Article 13 of the European Human Rights Convention. Huber, *supra* note 63, at 623.

[168] *Id.*

[169] *See* Kanstroom, *supra* note 1, at 172–78.

[170] PERCY BYSSHE Shelley, *Prometheus Unbound*, *in* THE COMPLETE POETICAL WORKS OF PERCY BYSSHE SHELLEY 277 (Cambridge ed. 1901).

171 As to the two European conceptions of the state—that derived from Locke and Rousseau—see Kanstroom, *supra* note 1, at 160 n.35.

As to the state itself, the difference between the two traditions is essentially that between a skeleton and a living organism. More fully developed by Kant, Hegel, and Marx, the distinctively German line of this thought sees the individual as rather more fundamentally situated in the state. Attempts to separate the public and private realm are critiqued as both impossible and, at least by Marx, as dishonest. *See generally* KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Frederick Engels ed., 1967). "The state," wrote Hegel, "is the actuality

usage raises obvious questions about the utility of the terminology. Nationalism, at bottom, means only that a connection has been made between the "nation" and the state. Political legitimacy in post-war Western Europe depends, in large measure, upon the maintenance of a relatively pluralistic (i.e., non-ethnic, non-racial) idea of the nation. But nationalism tends to have pejorative, ethnic/racial connotations. The current utility of the category "nationalism" in the context of citizenship and immigration questions is therefore not clear.

Modern nationalism, as it developed from the writings of Montesquieu and Rousseau, identified the "nation" with a "people" and became a central tenet of both the French and, to a lesser extent, the American Revolutions.[172] Early nationalism, however, was profoundly democratic and only implicitly racial or ethnic.[173] Generations of writers, following the early inquiries of Renan,[174] have sought to achieve a unified field theory of nationalism. One problem is the absence of a true literature of nationalism analogous to that of Marxism, for example. A category of thought sufficiently broad to accommodate Schiller, Mazzini, Toussaint L'Ouverture, Hitler, Bolivar, Sukarno, Emperor Hirohito, Nasser, Arafat, and Begin (to name

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of human freedom." GEORG W. FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 282 (Allen W. Wood ed. & H. B. Nisbet trans., 1991). Underlying this more "organic" view of the state, which does seem to have some similarities to the Athenian conception of the "polis" and American "civic Republicanism" we sometimes find a more problematic idea—the "Volk." As Hegel put it in his inimitable way: "spirit is actual only as that which it knows itself to be, and . . . the state, as the spirit of a nation ['Volk'], is both the law which permeates all relations within it and also the customs and consciousness of the individuals who belong to it. . . . ." *Id.* at 312 (emphasis in original); *see also* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 39 (1989) (citing JOHN GREVILLE POCOCK, THE MACHIAVELLIAN MOMENT (1975); GARY WILLS, EXPLAINING AMERICA: THE FEDERALISTS (1980); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969)).

Modern Germany adopted elements of both state traditions. The Hegelian view is clearly not the dominant one. But, to a much greater extent than in Great Britain or the United States, German law consciously adopts particular social values, embodies a much more paternalistic conception of state duties, and tends towards a more closed perception of the polity. *See* Kanstroom, *supra* note 1, at 167–72. On the other hand, however, West Germany (pre-unification) was often described as a weak "state," at least in the centralized national sense. The reasons for this included West Germany's strong Federalism, lack of a historical center (Berlin), general "dependent sovereignty" within NATO and the Western Alliance generally, and, of course, the basic division of the pre-War state into the Bundesrepublik and the GDR.

[172] *See generally* EDWARD HALLETT CARR, NATIONALISM AND AFTER (1945).

[173] The idea of distinctive national character, however, was quite common among late eighteenth century writers. *See, e.g.*, Emmanuel Kant, *The Sense of the Beautiful and the Sublime, in* THE PHILOSOPHY OF KANT (Carl J. Friedrich ed,. 1949).

[174] Ernest Renan, *What Is A Nation?, reprinted in* NATION AND NARRATION (Homik Bhabha ed., 1990).

just a few) surely begins to appear too general to be useful. Some well-known, meticulous writers have labored to distinguish various sub-categories of nationalism in order to avoid this very problem.[175] On the most functional level, one might start with Ernest Gellner's recent attempt (accepted in substance by Eric Hobsbawm): "Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent."[176] This definition has several virtues. First, it avoids the hypostatizing or "reification" of the "nation" as a starting point. This is a problem with much of the older literature on the subject. Renan, for instance, concludes in his famous essay, *What Is A Nation?* that "a nation is a soul, a spiritual principle. . . ."[177] The more modern view, however, is that "for the purposes of analysis nationalism comes before nations."[178]

This view of the nation as an "imagined community"[179] and nationalism as its theory of legitimacy obviously facilitates a much more nuanced analysis. Consider, by contrast, the alternative more circular approach: "the best definition of a nation is a nationality that has achieved an independent political existence."[180] It is not coincidental that Fairchild's methodology accompanied the normative view that the United States, is, always has been, and should continue to be "a white man's country."[181] Beyond race, in fact, he offered the following incredible partial list of traits "essential to Americanism: . . . such things as business honesty, respect for womanhood, inventiveness, political independence, physical cleanliness, good sportsman-

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[175] *See, e.g.*, ERNEST GELLNER, NATIONS AND NATIONALISM 88–99 (1983) ("a typology of nationalisms"); ERIC JOHN HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780 46 (1991) ("popular proto-nationalism"). Still, the question remains whether there is a lowest common denominator of nationalism which can be used to place the German variant in a broader context.

[176] GELLNER, *supra* note 175, at 1; HOBSBAWM, *supra* note 175, at 9. Hobsbawm adds that nationalism implies that the obligations of nationals ["Ruritanians" per Gellner] override "all other public obligations, and in extreme cases [such as wars] all other obligations of whatever kind. HOBSBAWM, *supra* note 175, at 9.

[177] Renan, *supra* note 174, at 9. Stalin wrote, somewhat more cautiously, in 1912 that "[a] nation is a historically evolved, stable community of language, territory, economic life and psychological make-up manifested in a community of culture." JOSEPH STALIN, MARXISM AND THE NATIONAL QUESTION 8 (1942), *quoted in* HOBSBAWM, *supra* note 175, at 5 n.8. As Gellner correctly notes, however, "[n]ations as a natural, God-given way of classifying men . . . are a myth." GELLNER, *supra* note 175, at 48–49.

[178] HOBSBAWM, *supra* note 175, at 10.

[179] *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (1991). "Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined." *Id.*

[180] HENRY PRATT FAIRCHILD, THE MELTING POT MISTAKE 52 (1926).

[181] *Id.* at 129.

ship. . . ."[182] Fortunately, no one has yet suggested making the lack of these traits bases for deportation from the United States.

There are two very different modern uses of the term "nationalism." This is the distinction between what might be termed "patriotic" and "*völkisch*" nationalism. The first is that of "[t]he revolutionary concept of the nation as constituted by the deliberate political option of its potential citizens. . . ."[183] It is classically represented by revolutionary France and the United States. The second, "*völkisch*" variant of "nationalism" is that which relates to a national myth that is largely defined by race, blood, or ethnicity.[184]

It is important to avoid too general a definition of nationalism.[185] First, any formulation of the term is "parasitic" on definitions of two other terms—"state" and "nation." These terms themselves reflect very different ideas in at least two distinct major traditions. Consider the immense variability even among the four most rudimentary possibilities: the night-watchman state, the Rousseau-Hegelian-Marxist (corporativist) state, the *völkisch* nation, and the nation based on political or economic principles or ideology. Nazi Germany represented the worst possibilities of the combination of the second and third principles, the German Democratic Republic represented the second and fourth. The new Germany remains a fascinating and complex mix of all four.[186]

What then might EC nationalism now mean? Here we must again consider the effects of immigration on what Sally Falk Moore has called the "process of cultural pluralism."[187] Large-scale movements

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[182] *Id.* at 202.

[183] Hobsbawm, *supra* note 175, at 88.

[184] The term "ethnic" straddles the line between race and culture. Ethnicity evokes very similar ideas to those involved with the term "Volk" or "people," the predicate conception for *völkisch* nationalism. Thus, the *völkisch* conception of the nation involves the belief in legitimate, strong ties of both blood and culture.

[185] Gellner is correct to define nationalism as "primarily" a political principle because it is clearly related to basic human desires for community. We gain little if any analytical clarity by simply defining it as the apotheosis of that urge. Gellner seems to recognize this point in his strangely defensive conclusion under the heading "What is not being said." GELLNER, *supra* note 175, at 137. And yet, were we to define nationalism as purely a political principle (like the right to vote) we would risk losing sight of its considerable potential emotional power. This is not to say that the "political" and the "irrational" are exclusive categories. No honest observer of modern politics could sustain such a view. But it is possible to distinguish ideas that make overt appeals to pre-rational bases like blood, land, or race from those that do not. The term "political" seems to have this implication for Gellner, although it is hard to be certain about this.

[186] *See generally* Kanstroom, *supra* note 1, at 164–72.

[187] *See generally* Sally Falk Moore, *The Production of Cultural Pluralism as a Process*, 1 PUB. CULTURE 26 (1989).

of people across the boundaries of nation-states have contradictory effects. In some cases, like that of the United States now, waves of immigration, especially if they are illegal under positive domestic law, may lead to an increasingly rigid conception of borders and sovereignty. Current proposals to build a huge fence or trench along the thousand-mile border with Mexico illustrate the high (or low) point of this mode of thought. Similarly, the idea that Haitian asylum-seekers may be interdicted in the Caribbean so that they achieve no rights under U.S. law represents a rather brittle (and inhumane) idea of natural boundaries. Movements of people across borders, however, also sometimes force reconceptualization of the nation-state itself. The repatriation of ethnic Germans, for example, continually emphasized the nation against the state. It should be apparent, then, that modern discussions of nationalism in the context of immigration inevitably involve not only the vagaries of the first term, but a necessity of understanding the *linkage among* the prevailing nationalist ideology and the legal/political conception of immigration and citizenship. Consider Gellner's use of the term "congruent" in his definition of nationalism. "Congruence" is not really the goal of nationalism so much as dominance. Thus, the nationalist principle is not violated by the presence of "small numbers of resident foreigners."[188] But the key word is "small." This distinction, between congruence and dominance, is particularly important when one tries to reconcile nationalist ideas within an existing state like Germany with liberal principles like basic human rights, the rule of law, etc. This, again, is the basic German and indeed the western European dilemma.[189]

As the current German situation demonstrates, then, another critical term today in ostensibly "nationalist" rhetoric is "foreigners."

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[188] GELLNER, *supra* note 175, at 2.

[189] It must also be noted that the attentions of those whom we may call modern "nationalists" are not exclusively focused on the "political" unit. Non-citizen aliens are not generally a significant political force. They may, however, be extremely important economically and socially. "America First" nationalists in Detroit are not concerned that Japan is taking over America's political system. Street battles in Brooklyn between African-American activists and Korean green-grocers are not about political power. They do, however, seem to be about more than race, often involving what might be described as nationalist rhetoric ("This is our country. They are foreigners."). And applicants for asylum in Europe and the United States are (both per the Geneva Refugee Convention and in the popular imagination) divided between legitimate political refugees and unacceptable "economic" ones. For an interesting analysis in English of the German debate over whether foreigners should be allowed to vote see Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective,* 13 MICH. J. INT'L L. 259 (1992).

The primary victims of nationalist violence in the industrial states of Europe and North America now are the huge numbers of resident "foreigners."[190] This fact forces us to confront the critical role played by law in the internal[191] nationalism we see today. The variety of nationalism which we see throughout Europe today is better defined as primarily a political principle which holds that "foreigners," a category of people defined by law, have (or should have) no right under law to become citizens or to challenge the economic, political, and cultural dominance of citizen/nationals.

Those who desire to give priority to citizens as such, of course, are not necessarily either *völkisch* nationalists, racists, or even mono-culturalists. Many Germans, for example, simply argue that "foreigners" are taking advantage of a society which should legitimately care most for its citizens. This attitude, absent more, might be termed "citizen exclusivism." It is not at all synonymous with *völkisch* nationalism, and indeed is closer to the heart of patriotic nationalism.[192] To understand its full resonance, however, we must consider what it means to be a citizen of either Germany or, more broadly, of the European Community.

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[190] Unfortunately, we also see a resurgence of more classical ethnic nationalism in much of Eastern Europe. During a speech at Harvard Law School, Professor Roger Fisher reported that a Latvian politician informed him that Latvia had a unique "minority" problem because 75 percent of its population was ethnically Russian and it was difficult to deal with a 75 percent minority!

[191] "Internal" means not only the nation-state, but the EC as well, insofar as it defines itself as an entity with external borders.

[192] Similarly, the invocation of equally complex terms like racism or monoculturalism to describe anti-foreigner attitudes must be qualified. Racism, like nationalism, is best defined without the presumption that races exist. Benedict Anderson offers a particularly useful and eloquent distinction of the two concepts:

> The fact of the matter is that nationalism thinks in terms of historical destinies, while racism dreams of eternal contaminations, transmitted from the origins of time through an endless sequence of loathsome copulations . . . (Thus for the Nazi, the Jewish German was always an imposter.) The dreams of racism actually have their origins in ideologies of class, rather than in those of nation: above all in claims to divinity among rulers and to 'blue' or 'white' blood and 'breeding' among aristocracies. No surprise then that the putative sire of modern racism should be, not some petty-bourgeois nationalist, but Joseph Arthur, Comte de Gobineau.

ANDERSON, *supra* note 179, at 149 (footnotes omitted).

Culture is no less difficult to define than nation and equally subject to being viewed monolithically. Doing so, however, invariably leads to normative conclusions about the justice of excluding foreign cultural tendencies. If, on the other hand, culture is seen more as "an assemblage of separable parts," Moore, *supra* note 187, at 38, then a more fluid political theory can be achieved. It follows that those who support highly restrictive immigration policies tend towards more systematized and static definitions of culture.

2. Citizenship

If comparative or cross-cultural studies of citizenship prove one thing, it is the astonishing range of concepts that may be subsumed under this one linguistic heading. At its most basic level, citizenship might be described as "the special status that the law of a particular state accords an individual by virtue of his [or her] connection with that state."[193] Beyond this most general level, however, citizenship becomes a highly ambiguous idea.

Language itself reflects this ambiguity. In France, the term "nationalité" has been used to express membership in the nation-state since the 1789 Revolution. Because the patriotic-nationalist idea is consistent with this technical usage, the term could simultaneously express a socio-political ideal and nation-state membership without engendering cognitive dissonance. Americans generally speak of citizenship law, though the term nationality is also used, as it is in the United Kingdom. But "nationals," under American law, are a broader category of persons than citizens. This has no clear link to nationalism as an ideology, however, and derives more from the historically unique desire to distinguish citizens from non-citizen "nationals" who did not have full political rights but were more than permanent resident aliens.[194] German law generally uses the term "Staatsangehörigkeit," which literally translates as "state membership." The German term "Bürger," which is etymologically related to citizen, is also sometimes used, preceded by "Staats," to describe national citizenship as well. But the most prevalent German legal usage is "Angehörigkeit" or "membership." These linguistic differ-

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[193] Anderson C. Evans, *European Citizenship: A Novel Concept in EEC Law,* 32 AM. J. COMP. L. 679, 679 (1984) (citing OPPENHEIM, INTERNATIONAL LAW 644–45 (8th ed. 1955)) [hereinafter *European Citizenship*]. Considerable theoretical debate has centered on whether the emphasis in this definition should be on the term "status," which might be linked to a "rights" perspective, or on the "relational" aspect of the "connection." Most modern writers tend to emphasize the latter. As Alex Aleinikoff put it: "Citizenship is not a right held against the state; it is a relationship with the state or, perhaps, a relationship among persons in the state. It is membership in a common venture." T. Alexander Aleinikoff, *Theories of Loss of Citizenship,* 84 MICH. L. REV. 1471, 1488 (1985–86). Similarly, one leading German authority, incorporating both terms, writes that citizenship is: "ein Rechtsverhältnis zwischen dem Staat und sein Angehörigen . . . bei dessen Regelung die Eigenschaft der Person als Subjekt dieses Rechtsverhältnisses einen rechtlichen Status dieser Person bildet" ("a legal relationship between the state and its members by whose regulation the attribute of the person as a subject of this legal relationship shapes a legal status"). *See* GERARD-RENE DE GROOT, STAATSANGEHÖRIGKEITSRECHT IM WANDEL 12 (Carl Heymans Verlag: Koln 1989) (quoting Alexander N. Makarov, Allgemeine Lehren at 27, 28).

[194] *See, e.g.,* 8 U.S.C. § 1101(a)(21),(22) (1987) (defining "national" and "national of the United States").

ences clearly reflect deeper underlying traditions of "state" and "nation," though one should not overstate the relationship between these themes and legal language. Convenience, historical accident, and other cultural factors invariably play a role. Nonetheless, the German linguistic concentration on membership is not surprising, and, as shown elsewhere,[195] is consonant with the most distinctive features of German citizenship law.[196] When we consider the words used to describe citizenship, we tend to focus more on the power of the concept as a concept than on its function.[197] The actual content of these rights and duties vary tremendously among states. Indeed, all that is really contained in the term citizenship is the idea that some differentiation is made between citizens and non-citizens.[198]

Recently, the concept of an ideal type of Western national citizenship has been introduced alongside discussions of the "crisis of the nation state."[199] William Rogers Brubaker, for example, asserts that membership in a nation-state, and presumably in Europe, according to this model, "should be egalitarian, sacred, national, democratic, unique, and socially consequential."[200] This approach, though interesting, seems doomed from the start. As Brubaker correctly concedes, the model is "largely vestigial" and "is riddled, moreover, with unresolved internal tensions."[201] For what we see in all these questions of state, nation, membership, and citizenship is never the ideal

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[195] Kanstroom, *supra* note 1, at 172–84.

[196] Scholars often also distinguish among various uses of the term citizen or "Staatsangehörigkeit" in positive law. Makarov, for example, distinguishes "general" ("Allgemein") and "functional" ("funktionel") usage. The former refers to the common practice of defining citizenship generally by statute or constitutional provision. The latter refers to the use by a specific law of a specific definition of "citizen" for purposes of that law. De Groot cites the 19th century Dutch citizenship law as an example of a combination of these approaches. That law differentiated between "Angelegenheiten" and "öffentlichen" questions. *See* DE GROOT, *supra* note 193, at 10.

[197] *Id.* at 13.

[198] On the international level, the functionally empty shell of citizenship may have more common content. Scholars do, in fact, often distinguish the "municipal" or "domestic" indicia of citizenship from the international. Thus, as one writer put it, "[f]rom the aspect of municipal law there is, therefore, no one concept of nationality but as many concepts as there are municipal laws. . . ." PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 239 (1979). This sort of rigid differentiation between domestic and international meanings, however, tends to ignore the important interpenetration of international law into domestic citizenship matters, an issue of increasing importance in post-1992 Europe. Fundamentally, however, it is clearly true that functional analyses of citizenship in the international sphere can more easily find common ground (diplomatic protection, extradition rights, etc.) than we see in comparisons among internal state policies.

[199] WILLIAM ROGERS BRUBAKER, IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 3 (1989).

[200] *See id.*

[201] *Id.* at 4.

but an uneasy reconciliation among quite different urges. Analysis therefore must be more fluid, more focused on processes of reconciliation, and on what might be best termed "consonance and dissonance," than on the postulation of a universal ideal type which inevitably subsumes the very dilemmas it purports to clarify.

B. *Is There A European Community Model Of Citizenship?*

Although, there is no universally acceptable definition of citizenship, one common feature of modern citizenship law has been the linkage between the individual and the nation-state. The emergence of the EC, an entity that does not easily fit within any of the traditional categories of international law, raises obvious questions about how to conceive of "EC citizenship." From the very start, the proponents of the EC recognized that the process depended upon a limitation of state sovereignty and a transfer of those rights to relatively autonomous institutions over which the Member States would have limited power. Moreover, it became clear early on that the development of Community institutions and political/legal structures would have a dynamic of its own and that Community institutions would have powers that no single Member State had or could legitimately covet.[202]

Recent developments have been sufficiently dramatic to inspire one commentator, Joseph Weiler, to speak of a "transformation" in which, among other features, "in public discourse, 'Europe' increasingly means the European Community in much the same way that 'America' means the United States."[203] Nevertheless, as Weiler notes, "[t]he juxtaposition of Community/Member States is problematic. The concept of the Community, analogous to the concept of the Trinity, is simultaneously both one and many."[204] This ambiguity in the nature of the EC both as a present reality and as an aspiration is perhaps most keenly felt in the area of citizenship laws.

Citizens of Member States are direct legal subjects of EC institutions. It has been generally undisputed since 1964 that Community law binds both the nationals of Member States and the states themselves.[205] But EC citizenship law remains a secondary concept to

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[202] *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

[203] *Id.* at 2406.

[204] *Id.* at 2406 n.7.

[205] *See* Case 6/64, Flaminco Costa v. ENEL, 1964 E.C.R. 585. The so-called doctrine of direct effect permits nationals of Member States to invoke Community legal norms that are "clear, precise and self-sufficient" directly in national courts as well. *See* Weiler, *supra* note 202, at 2413.

national citizenship. There is no EC citizenship statute, no EC incorporation of *jus soli* or *jus sanguinis,* and no EC naturalization procedures. Community citizenship follows, like Peter Pan's shadow, as a partly natural, partly sewn-on consequence of national citizenship.[206] This, of course, does not mean that the concept of EC citizenship is meaningless. It does, however, mean that the relationship between, for example, *völkisch* nationalist ideas and citizenship has not yet been worked through on the EC level.[207]

The Treaty of Rome, the founding document of the EC, did not employ the term "citizen." Its grant of certain rights to individuals was dependent entirely upon their status as "nationals of member states."[208] Initially these rights were those of free movement of workers and entrepreneurs and freedom from discrimination.[209] This linkage of rights to national membership does not necessarily mean that Member States are completely free to define such membership for Community purposes in any way they choose.[210] Indeed, since terms like "worker" are Community legal terms of art, the Community cannot logically permit Member States' definitions of "national" to defeat Community rules of free movement.[211]

Harmonization of national citizenship laws raises daunting technical and political problems, however. The differences between *jus soli* and *jus sanguinis,* for example, involve not only procedures but historical and ideological positions that are notoriously difficult to reconcile. Thus, to date, the Community has not crafted any general rules for the granting of national membership. Beginning in the

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[206] Indeed, the German situation calls this formulation into question as Germany recognizes a class of ethnic German non-citizens as nationalists for the purposes of EC law. *See* Kanstroom, *supra* note 1, at 187–88.

[207] It is also important to note that, on the state level, "discrimination is written into the very nature of the European Community, which in each country directly leads to the definition of two categories of foreigners with unequal rights." Etienne Balibar, *Es Gibt Keinen Staat in Europa: Racism and Politics in Europe Today,* 186 NEW LEFT REV. 5, 6 (1991).

[208] *See generally* EEC TREATY, *supra* note 10.

[209] Articles 48–51 require freedom of movement for "workers." Articles 52 and 59–60 mandate, respectively, freedom of movement for self-employed persons and freedom to offer services. Article 7 forbids discrimination on grounds of nationality.

[210] The full extent to which a state may unilaterally determine who is a "national" for purposes of EC law is still not entirely clear. In fact, there seems to be developing a trend toward viewing the term "national of a Member State" as a Community concept. Functionally, however, the status remains derivative from national laws even as the European Court seeks a common denominator. *See, e.g.,* Case 36/75, Rutili v. Minister for the Interior, 1975 E.C.R. 1219.

[211] *See generally* Anderson C. Evans, *Nationality Law and European Integration,* 16 EUR. L. REV. 190, 191 (1991) [hereinafter *Nationality Law*].

mid-1970s, however, both the European Commission and the European Parliament had begun to consider a supra-national approach to EC citizenship.[212] The main components of such citizenship, as noted above, would at least have to be rights of political participation on EC questions, free movement, and equality of treatment.

When direct universal suffrage was instituted for elections to the European Parliament in 1976, the idea of EC citizenship became more understandable and gained a certain momentum.[213] But Member States remained free to prohibit resident nationals of other Member States from participating in such elections.[214] In fact, this is the general practice to date.[215] Participation in domestic elections is even more controversial. The Commission had first advocated the grant of such rights in 1972,[216] but not until 1988 did the Commission submit a draft of a specific proposal.[217] The Maastricht Treaty essentially adopted this proposal and now provides that Community citizens may run for office and vote in municipal elections in the Member States in which they reside.[218] Not only would this provision essentially overrule the decision of the German Federal Constitutional Court (Bundesverfassungsgericht) which had denied this right to aliens in Germany, but it removes part of what has been perhaps the most important "municipal" distinction between national and EC citizenship.[219] Further, in the international realm, the Maastricht Treaty requires Member States to offer diplomatic and consular protections to all EC citizens outside the Community.[220]

The nascent substitution of EC citizenship as an international protection criterion, combined with the right to vote in local elec-

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[212] *European Citizenship, supra* note 193, at 682.

[213] Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, 1976 O.J. (L 278) 5.

[214] *See id.*, art. 7; *Nationality Law, supra* note 211, at 207.

[215] *Nationality Law, supra* note 211, at 207.

[216] *Id.* at 209.

[217] Marcel Zwamborn, The Scope for A Refugee Policy of the European Communitites as Part of an Overall Human Rights Policy, 18 (published as part of the International Conference, Refugees in the World: The European Community's Response, at Hague 7–8 December 1989).

[218] Maastricht Treaty, *supra* note 9, tit. II, art. G(C) (amending EEC Treaty to insert art. 8b(i)).

[219] *Id.* The Maastricht Treaty does not, however, provide for voting rights in national elections. *See id.*

[220] *Id.* tit. II, art. G(C) (amending EEC Treaty to insert art. 8(c)). Maastricht's aspirations are clearly quite bold. Its second article grapples, if obliquely, with the citizenship problem as it speaks of "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen." *Id.* tit. I, art. 2.

tions, can fairly be called a revolutionary change. It is thus extremely important that Title I of the Treaty begins with a resolution by the parties "to establish a citizenship common to nationals of their countries"[221] and that Title II expressly refers to "Citizenship of the Union" granted to "[e]very person holding the nationality of a Member State. . . ."[222] Every such citizen of the Union has, in addition to the voting rights described above, the general right "to move and reside freely within the territory of the Member States."[223] But citizenship remains derivative. By Declaration, the conferees at Maastricht stated: "the question whether an individual possesses the nationality of a Member State shall be settled *solely* by reference to the national law of the Member State concerned."[224]

The *ideological* movement towards EC citizenship remains ambiguous. It is significant, for example, that the Maastricht Treaty does not abjure the so-called "principal of subsidiarity" which essentially requires that decisions should be taken at the sub-Community level if possible.[225] A nation, as Renan once observed, is not a *Zollverein* (customs union).[226] And neither is the EC at this point. But it would be a false syllogism to move from these premises to the assertion that western Europe is anything close to a nation or even that EC citizenship has supplanted in any meaningful way the importance for Germans of calling themselves Germans or even of calling themselves citizens of Germany. In fact, the most popular current idea of EC community still clearly retains many important aspects of state sovereignty but also is premised on "recognizing, and even celebrating, the reality of *interdependence,* and on counterpoising to the exclusivist ethos of statal autonomy a notion of a *community* of states and peoples sharing values and aspirations."[227] It is not at all clear how far this idea can develop, though the vision of a united Europe in which Member States will "wither away" seems the implicit core of the discussion in 1992, even in 1993. Weiler, after all, did not

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[221] *Id.* at pmbl.

[222] *Id.* tit. II, art. G(C) (amending EEC Treaty to insert art. 8).

[223] *Id.* tit. II, art. G(C) (amending EEC Treaty to insert art. 8(a)).

[224] *Id.* at Text of Final Act of Conference, Declaration on Nationality of a Member State (emphasis added).

[225] *See* Commission of the European Communities: From A Single Market to European Union 21 (1992). Indeed, Article 3(b) of the Treaty guarantees that in areas of concurrent jurisdiction, like immigration, the Community will only take action if it can do so more effectively than the Member States.

[226] *See* Renan, *supra* note 174.

[227] Weiler, *supra* note 202, at 2479.

abandon the concept of states alongside that of peoples in his vision.[228]

Raymond Aron long ago expressed well the strong skeptical view of Euro-citizenship as an idea: "'[t]he European idea [of unity] is empty: it has neither the transcendence of Messianic ideologies nor the immanence of concrete patriotism.'"[229] It was created by intellectuals, and that accounts at once for its genuine appeal to the mind and its feeble echo in the heart.[230] Perhaps the strongest response to this critique has been the neo-functionalist[231] faith that ideas will follow functions.[232] Perhaps it is inevitable that the new voting and protection rights of the Maastricht Treaty will eventually combine with the economic union program and be transformed into supra-national membership ideologies centered on the new Euro-citizenship model. There is obvious power to this view, though only time will tell whether ideal form follows mundane function. But we should also consider, if Aron was wrong, how wrong might he be? Nationalism, as we have seen, developed in the nineteenth century either due to a powerful ethnic/racial or political/cultural mythology.[233] Given the cultural and ethnic diversity within the EC, its unifying ideology seems destined either to be essentially racial or, most optimistically, based on something like what Almond and Verba once termed "civic culture."[234] Will Euro-nationalists soon speak as Woodrow Wilson did in 1915 to a group of newly naturalized American citizens:

> You have just taken an oath of allegiance to the United States. Of allegiance to whom? Of allegiance to no one unless it be to God. . . . You have taken an oath of alle-

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[228] *Id.*

[229] MICHAEL CURTIS, WESTERN EUROPEAN INTEGRATION 7–8 (1965).

[230] *Id.* at 8.

[231] Functionalism in the EC context is essentially a pragmatic philosophy which rejects broad, Utopian visions. Its most prominent proponent was Jean Monnet who, as one commentator recently put it, "was almost Anglo-Saxon in his rejection of a visionary approach to the development of the Community." Peter D. Sutherland, *Joining the Threads: The Influence Creating a European Union, in* CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW 11, 13 (Dierdre Curtin & David O'Keefe eds., 1992).

[232] *See, e.g.*, HARRISON, EUROPE IN QUESTION 27–31 (1974).

[233] Is it possible to agree with Rosa Luxemburg that "[t]he national question is, for Social Democracy, exactly like all other societal and political questions, above all a question of class interests[?]" ROSA LUXEMBURG, INTERNATIONALISMUS UND KLASSENKAMPF. DIE POLNISCHEN SCHRIFTEN 260 (Neuwied: 1971), *quoted in* UTE KNIGHT & WOLFGANG KOWALSKY, DEUTSCHLAND NUR DEN DEUTSCHEN? 64 (1991) (author's translation).

[234] GABRIEL ALMOND & SIDNEY VERBA, THE CIVIC CULTURE STUDY (1974).

> giance to a great ideal, to a great body of principles, to a great hope of the human race.[235]

The vagueness of such formulations surely must give pause. But it seems that John Higham is correct to assert that, through the 19th century, American national ideology could best be described as a large, loose faith[236] encompassing such notions as individualism, egalitarianism, democracy, and the like. It seems inevitable, as Higham also noted, that "a decent multiethnic society must rest on a unifying ideology, faith or myth."[237] Absent a conception of immigration as a defining Community ideal, there may be problems for the Community in reconciling what one would hope would be a multi-cultural pluralist sort of ideal with increasingly more closed borders to non-European entrants. The sad fact is that human history has yet to witness a single example of strong nationalism that has not been forged in the crucible of war or at least strong self-definition against some "other."[238] One might also note that the immigration ideal of the United States provided a powerful antidote to this tendency in our own history the importance of which should not be underestimated.[239]

One should also consider the question of ideology in this regard.

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[235] KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 30 (1989) (quoting Mona Harrington, *Loyalties: Dual and Divided, in* THE POLITICS OF ETHNICITY 103 (1982)).

[236] *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 8 (2d ed. 1981).

[237] JOHN HIGHAM, SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA (1984), *quoted in* Karst, *supra* note 235, at 31.

[238] The United States provides an interesting example of this phenomenon. It is not entirely true that U.S. national identity developed immediately out of the Revolutionary War. Indeed, a powerful case can be made that it was not until the War of 1812 that the United States first truly began to conceive of itself and act as a nation. The fact that the foe in both cases was the same is not coincidental. Rather, the 1812 conflict can be understood in this respect as a continuation of the Revolutionary process of American self-identification. *See* KENDRICK CHARLES BABCOCK, THE RISE OF AMERICAN NATIONALITY 1811–19 (1906).

In post-war Europe, the "Iron Curtain" and the Cold War generally were powerful factors in the desire to develop a conception of "Western Europe" versus the communist "East." Though European Community ideology certainly proceeded from an ostensibly non-ideological base of economic efficiency and internal quiescence, its relationship to the horrors of the mid-twentieth century past and the ideological struggles of the Cold War should not be underestimated. *See* WALTER LIPGENS, A HISTORY OF EUROPEAN INTEGRATION 1945–1947 (1982); RICHARD VAUGHAN, POST-WAR INTEGRATION IN EUROPE 17–19 (1976); *see also* Christopher Wendel, *The Dialectic of European Political Integration* (unpublished manuscript on file with author).

[239] For an elegant exploration of this question, see generally LAWRENCE H. FUCHS, THE AMERICAN KALEIDOSCOPE (1990).

Weiler has noted that, at least until the 1992 dynamic began to dominate, a "near absence of overt debate on the left-right spectrum existed" due largely to the allegedly non-ideological character of the original single market idea.[240] Even where there was left-right debate, policies invariably verged toward centrist pragmatic choices. Though in recent years, "the old nationalist rhetoric has become increasingly marginalized and the integrationist ethos has fully ascended,"[241] the underlying ethos and ideology of European integration is still far from clear.[242] Further, as Weiler correctly notes, the ideology of the market is not neutral and the coming years will likely witness increased recognition of and debate over this fact. At present, however, we can see no clear Euro-ideology as such. There is only a general commitment to democracy and market forces, varying conceptions of the rule of law, rather basic notions of human rights, and limitations to state identity and sovereignty. Of course, ideological consensus has never been a pre-condition to nationalist sentiment. As U.S. history demonstrates, a "large, loose faith" can be sufficient. The problem remains, though, to determine against which "other" this faith might be defined? What, in other words, might be the relationship between Europe as a "shining city on a hill" and "fortress Europe?" Can the city truly shine if all the gates are closed?

IV. SOME EFFECTS OF 1992 ON THE GERMAN IMMIGRATION DEBATE

From the early days of the European Coal and Steel Community, the relationship between European integration and German political development was an obvious functional and ideological fact.[243] As Simon Bulmer has argued, with the obvious benefit of hindsight, "there was little real choice about the Europeanization of West German politics."[244] Though inevitability seems a bit strong given the importance of the Atlantic framework to economics and defense policy, Germany's relationship with France in particular and its role in central Europe more generally were clearly given the highest priority by Konrad Adenauer and by all post-war German govern-

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[240] Weiler, *supra* note 202, at 2474.

[241] *Id.* at 2475.

[242] The 1992 turn to majority voting in the Council would seem a harbinger of change in this regard, with current debates over human rights and abortion leading the way. *Id.* at 2477.

[243] *See* Simon Bulmer, *The European Dimension, in* DEVELOPMENTS IN WEST GERMAN POLITICS 211 (Smith, Patterson, Merkl, eds., 1989).

[244] *Id.* at 212.

ments. It is also correct to ascribe much of the German readiness to cede sovereign power to the fact that Germany was "seeking international acceptance and was thus on probation."[245] To this day, the desire of mainstream German politicians, especially those of the Christian Democratic Union/Christian Social Union (CDU/CSU) to "anchor" Germany in the West sometimes strikes this foreign observer as simultaneously confident yet fearful.[246] One sometimes has the sense of a nation/state running away from itself, though, a certain underlying core of nationalism is not and has never been far from the surface. These tendencies are apparent and have often been noted in German foreign policy in recent years, especially in relation to the deployment of German troops abroad. They are equally important in German internal debate over multilateral solutions to the German foreigners problem.

There is no question that the German government now sees multilateral solutions to the immigration and refugee problem as both necessary and desirable.[247] There is, of course, a solid pragmatic reason for this position. Europe seems too small and the refugee problem too large for states to handle it without cooperation. But the relationship between external control and internal politics is complex. The Schengen process is often cited as a model of efficient inter-governmental cooperation.

This author remembers quite clearly the cheerful way in which one German negotiator at Schengen said in 1990 that the Schengen Agreement would not, in his opinion, deteriorate the situation of refugees in Germany. He added that it in no way indicated a "fortress Europe" mentality, and that he had never seen negotiations that were more intense or effective than Schengen, with tremendous unity shown between, in particular, the French and German sides.[248] On the other hand, however, he agreed that were Germany to

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[245] *Id.* at 213.

[246] The SPD initially opposed German membership into the ECSC on the grounds that it would impede German re-unification. It is somewhat ironic, from the perspective of the present, to note how re-unification moved from a leftist to a right/nationalist position in German politics in less than twenty years. When the SPD formally renounced socialism, it joined the integration bandwagon. The FDP expressed support in the late 1960s. *See id.* at 215–16.

[247] Indeed, contrary to the rejection of the Treaty by Danish voters, the one percent margin of French victory, and the three vote margin in the British House of Commons, the German Bundestag voted 543–17 to approve Maastricht on December 2, 1992. Approval in the Bundestag was unanimous. *See* Heffernan & Katsantonis, *supra* note 83, at 7.

[248] Interview with Oberregierungsrat Dr. Nanz, Interior Ministry, Bonn, Germany, June 11, 1990. (Notes of interview on file with author).

continue to undertake a broad liberal reading of its constitutional right to asylum, that reading would likely be seen as incompatible with the goals of other states under the Schengen umbrella. In other words, those who have supported severe restrictions on German asylum law could cite Schengen as a pragmatic reason for such restrictions. Indeed, in April 1992, CSU Chairman Waigel took the somewhat extraordinary step of asserting publicly that his party would not support the Schengen treaty unless its passage was linked to a constitutional amendment limiting the right of asylum.[249] It is important that the recent CDU/CSU proposal to amend Article 16 of the Basic Law[250] was submitted along with legislation implementing the Schengen Agreement.[251]

On the functional level, the immediate impact of Schengen and Maastricht on the German immigration and asylum dilemma is unlikely to be as dramatic as that of the amendment to the Basic Law. Nonetheless, like the internal legal structures discussed elsewhere,[252] external agreements have important effects on public discourse. Schengen has already affected the Article 16 debate. One often hears comments such as, "we should not be unduly liberal so as not to upset our partners in the process" and "the problem requires a multi-national solution so we must compromise"[253] As to the *Aussiedler* programs and the German maintenance of *jus sanguinis* and highly discretionary naturalization practices, the role of Schengen, and 1992 unification generally, appears much less significant. Only the unlikely ascendence of a powerful "unity" version of the EC would affect these matters in any substantial way. Unfortunately, then, the net effect of multilateral European initiatives may be to delegitimate Germany's liberal asylum laws[254] while, to some degree, reaffirms its restrictive and *völkisch* citizenship/naturalization laws at least as to non-EC nationals. This dualistic sort of Ger-

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[249] *Germany: The CSU Wants a Revision of the Constitution to Make Right of Asylum More Restrictive,* Agence Europe, Apr. 16, 1992, *available in* LEXIS, Europe Library, Alleur File.

[250] BT-Drs. 12/2112 v. 18.2. 1992, *cited in* Pfaff, *supra* note 137, at 133.

[251] BR-Drs. 121/92 v. 21.2 1992, *cited in* Pfaff, *supra* note 137, at 133.

[252] *See generally* Kanstroom, *supra* note 1.

[253] Interview with Dr. Nanz, *supra* note 248.

[254] Indeed, as German commentators have noted, the main concerns of law makers in the recent asylum debate, Schengen and Dublin notwithstanding, have not been about fair asylum proceedings so much as border control. Bitterer Larbeer, Suddeutsche Zeitung, Jan. 18, 1993 at 4. Noting the rash (and quickly withdrawn) suggestion of Interior Minister Seisters to place Turkey on the list of "safe" countries, the editors of the Suddeutsche Zeitung noted ominously that "new surprises are certain." *Id.*

man response to the EC has been noted before. As Ralf Dahrendorf put it,

> many Germans use language such as 'German unification must remain firmly embedded in the process of European integration—but do they know what they are saying? And are they acting as if they believe it? . . . my impression is that in an important sense Europe has remained a fair-weather concept for the majority of leading German politicians . . . German professions of Europeanism are not insincere, but when something comes along that is regarded as more important, they are quickly forgotten . . . .[255]

One might add, in light of the CSU's position on Schengen and Article 16, that Europeanism can be a foul weather concept as well as a fair one. The point, however, is that Europeanism does not as yet offer an anti-nationalist, multi-cultural, or humanitarian challenge to the basic orientation of the ruling German parties regarding the questions of immigration, asylum, and citizenship. It thus appears that, at least as to citizenship and immigration, Peter Glotz, a well-known German Social Democrat, was wrong when he wrote that "the nation-state is economically, ecologically, militarily, and culturally out of date."[256]

Meanwhile, the influence on other states of the German approach to citizenship can also be seen. When, for example, Giscard D'Estaing, obviously prompted by the success of Jean Marie Le Pen, proposed that France should adopt the *jus sanguinis,* was he not influenced by German ideas?[257] And, does not this export stand in sharp contrast to the alternative German possibility of influencing other European states to adopt the more liberal German asylum model? Germany, it seems, is destined strongly to influence European attitudes towards the specific problems of citizenship, immigration, and asylum, as well as the general problem of acceptance of pre-political facts as a basis for social identity. One can only hope that, if the lessons of the past are insufficient, the recognition of this

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[255] RALF DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE 135–37 (1990).

[256] *Id.* at 132 (quoting Peter Glotz). But Jurgen Habermas is also correct that the German state *in particular* cannot legitimately rest on prepolitical facts like culture and national history. If anything, the uncontrollable rush to reunify proved the wisdom and necessity for the continual reaffirmation of "liberal institutions" in every forum in which they are challenged.

[257] Ironically, Giscard himself was born in Koblenz, Germany.

responsibility to the future will lead Germany to resist the siren songs of ethnic nationalism, to liberalize its citizenship laws, and to maintain the liberal legal structures upon which so much of its post-war identity has been based. As Willy Brandt once put it:

> If it is to pay more than lip service to the concept of 'responsibility in Europe,' a country has to present an open heart and arms. It has to look upon fellowship with people from other cultures as an enriching experience, and it must develop asylum and immigration policies which can allay its citizens' fears of a threat to their existence.[258]

CONCLUSION

There is no question that the goal of a free internal EC market cannot be achieved fully without extensive cooperation on matters of external immigration and asylum. Controversy to date has centered for the most part on whether harmonization should take place completely at the Community (or Union) level or through inter-governmental initiatives like Schengen. In terms of developing comprehensive structures which incorporate a workable rule of law, it would seem that Community-level approaches are more desirable.[259] More, however, is required of a unified immigration regime than simply functionally effective rules on visas, employment, social benefits, family reunification, and the like. Absent a Community vision on the relationship between immigration and asylum, on the one hand, and xenophobia and racist violence on the other, strategies based on control, information-sharing, and police empowerment are the only things likely to be achieved. Such developments, as the German situation demonstrates, can have harmful social consequences of their own. Beyond the immediate dangers to de facto refugees, they tend to harden the distinction between citizens and foreigners and to capitulate to the most strident voices of resurgent nationalism. Distinctions between asylum-seekers and immigrants can certainly be made, and non-EC immigration can certainly be controlled without the complete jettisoning of Germany's noble experiment in judicial review and individual rights and without rejection of the idea that immigration may be enriching in ways that go far beyond economics.

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[258] *See* Willy Brandt, *A European Germany,* EUR. AFF., Mar. 1992, at 16.

[259] *See* O'Keefe, *supra* note 64, at 18.