

# Wer Sind Wir Wieder?<sup>†</sup> Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany

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## I. INTRODUCTION

Although political liberalism entails freedom of exit for a state's own citizens, it does not entail freedom of entry for others.<sup>1</sup>

Old ghosts linger in the shadows of the new Germany. Nearly half a century after the fall of the Third Reich, amidst the celebration of German

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<sup>†</sup> "Who are we again?"

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1. Aristide Zolberg, *Contemporary Transnational Migrations in Historical Perspective*, in U.S. IMMIGRATION AND REFUGEE POLICY 15, 16 (Mary M. Kritz ed., 1983).

re-unification and a chorus of *wir sind wieder wer*<sup>2</sup>, a resurgence of xenophobia has become a central German political dilemma. Asylum-seekers and, more generally, other "foreigners,"<sup>3</sup> have become the targets of a growing number of physical attacks.<sup>4</sup> More than 2400 such assaults were reported in 1991, including dozens of cases of arson that resulted in severe injuries and deaths.<sup>5</sup> Some 2200 attacks were reported through the first nine months of 1992.<sup>6</sup>

An attack in late August 1992 on a building housing asylum-seekers in the port city of Rostock set off a new round of violence and with it, a heightened degree of German soul-searching.<sup>7</sup> Indeed, although the perpetrators of these attacks have often been right-wing fringe groups of neo-Nazis and "skin-heads," the attacks and ensuing debate have been taken as evidence of a deeper German dilemma.<sup>8</sup> German attitudes towards foreigners have been severely strained and polarized over the course of the last decade. A 1991 poll conducted by the Second German Television channel (ZDF) indicated that a majority of those surveyed felt that the asylum issue was the single most important issue facing Germany.<sup>9</sup> In September 1992 the editors of the *Nürnberger Nachrichten* newspaper expressed a widespread sense that, in the debate over asylum and immigration, "[w]hat's really at stake are the basic values on which the Federal Republic is oriented."<sup>10</sup>

The German government and major political parties have responded to this "foreigner question" with ambivalence and some confusion. The primary government response has been to condemn the attacks while pledging to reform the foreigner and asylum systems. Chancellor Helmut Kohl of the Christian Democratic Party has called the attacks on foreigners "acts of barbarism" and has urged "democratic forces" to make clear that "Germany

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2. "We are somebody again" (author's translation).

3. This term, *Ausländer* in German, applies to anyone who is not a German citizen or a "status-German" (someone of German descent who is entitled to enter Germany). As will be seen throughout this article, the status-Germans and Germany's restrictive ascriptive citizenship laws make the use of this word problematic.

4. See, e.g., *No Solution: Germany's Immigrants*, ECONOMIST, Oct. 19, 1991, at 58; *Attacks On Foreigners Continue, But Support Also Rises*, WEEK IN GERMANY, Oct. 25, 1991, at 1 (published by the German Information Center) [hereinafter *Attacks on Foreigners*]; *Ugly Nationalism*, ECONOMIST, Sept. 28, 1991, at 20.

5. *Attacks on Foreigners Continue, But Support Also Evident*, WEEK IN GERMANY, Sept. 18, 1992, at 1 [hereinafter *Attacks*].

6. *Id.*

7. See *Xenophobia Won't Go Away*, ECONOMIST, Sept. 5, 1992, at 55.

8. See, e.g., Judy Dempsey, *Cracks Behind the Unity*, FIN. TIMES, Nov. 16, 1992, at 14 [hereinafter, Dempsey, *Cracks*].

9. *Attacks on Foreigners*, *supra* note 4, at 1. Meanwhile, the German Information Center has proudly reported that the number of people who approve of foreigners living in Germany increased in 1991 from 44% to 60%. *Id.* A 1992 survey by the Forsa Research Institute revealed that 73% of Germans still consider their relations with "non-Germans" to be at least "good." *Id.*

10. *Violence Against Foreigners*, WEEK IN GERMANY, Sept. 18, 1992, at 3.

is not xenophobic."<sup>11</sup> Government policy has focused recently on proposals to amend Germany's constitutionally-enshrined right to asylum.<sup>12</sup> Opponents of such an amendment, who until recently included the main opposition party, the SPD (Social Democratic Party), resisted the move as a capitulation to the attackers and an unnecessary rejection of Germany's post-war commitment to human rights.<sup>13</sup> As a result, the *Bundestag*'s initial response was to pass a compromise statute. By late 1992, however, mounting pressure had led the SPD tentatively to agree to support a change in the Basic Law, Germany's constitution.<sup>14</sup>

Before the SPD altered its position, however, Chancellor Helmut Kohl made a proposal that stunned many observers. On November 1, 1992, he threatened to declare a state of emergency (*Staatsnotstand*) to override the constitutional protections for asylum-seekers.<sup>15</sup> This would have been the first post-war suspension of the constitution; as such, it indicates how large the asylum issue looms in the German political arena. Another troubling recent action was the special agreement between Germany and Romania to accelerate the deportation of Romanian asylum-seekers, most of whom are Gypsies, from Germany; in the eyes of some, including a leader of the Gypsy community, this is "exactly the same as when the deportation of the Jews started in the 1930s."<sup>16</sup>

The societal tensions caused by recent waves of immigrants and asylum-seekers, as well as by broader social and economic developments, are by no means confined to Germany.<sup>17</sup> Indeed, much of Western Europe has been racked by a deep conflict between humanitarian urges and resurgent nationalism against a backdrop of economic insecurity. Liberal politicians struggle to find a middle ground while maintaining public order.<sup>18</sup>

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11. Kohl Calls for 'Careful Change' of Basic Law in Hanover Speech, WEEK IN GERMANY, Sept. 18, 1992, at 2.

12. See *infra* notes 357-372 and accompanying text.

13. Hans-Ulrich Klose, the SPD parliamentary leader, reminded the *Bundestag* that the liberal asylum provision had been written "because thousands of Germans survived the Nazi times only because they were granted asylum in other countries." Rolf Soderlind, *German Lawmakers Urged to Curb Influx of Foreigners*, Reuters Library Report, Apr. 30, 1992, at 2, available in LEXIS, Nexis Library, Reuters File. Another opponent of the change referred to the government's asylum proposal as "constitutional torture" (*Grundrechts Quälerei*). Victor Pfaff, *Flucht und Einwanderung*, 25 KRITISCHE JUSTIZ 129, 134 (1992); see also Tamara Jones, *Germany Plans Camps to Hold Refugee Flood*, L.A. TIMES, Oct. 11, 1991, at A1 (mentioning split among German liberals over proposed asylum amendment).

14. See *infra* note 366 and accompanying text; see also GERMAN INFORMATION CENTER, AGREEMENT ON ASYLUM AND EMIGRATION [sic] TO GERMANY (1992).

15. Marc Fisher, *Kohl's 'Emergency' Suggestion Raises Questions, Draws Criticism*, WASH. POST, Nov. 3, 1992, at A16; see also *infra* notes 368-369 and accompanying text.

16. Jonathan Kaufman, *Germany Hastens Exit of Gypsies*, BOSTON GLOBE, Nov. 1, 1992, at 1, 32.

17. See *Ugly Nationalism*, *supra* note 4, at 20.

18. For example, then French Prime Minister Edith Cresson, seeking to shore up defenses against the extreme right of Jean-Marie Le Pen's National Front, suggested in 1991 that illegal immigrants should be deported by the plane-load. *Ugly Nationalism*, *supra* note 4, at 20. At a recent meeting of EC foreign ministers, Douglas Hurd of Great Britain called immigration "the most serious problem facing Europe."

Despite some similarities, however, the manifestations of xenophobia, and the debate over how to respond, have been far more extreme in Germany. Germany's history and culture, as well as its present day demographic<sup>19</sup> and economic conditions,<sup>20</sup> have intensified the internal German reaction to foreigners as well as the world's sensitivity to Germany's response.

However, less attention has been paid to the social conceptions implicit in German legal structures, or to the role played by those structures in shaping German discourse about the nation's treatment of foreigners and about what it means to be a German.<sup>21</sup> This article addresses the interplay between contemporary political discourse in Germany and the legal structures governing citizenship, immigration, and the rights of asylum.

Laws of citizenship and immigration<sup>22</sup> do more than regulate the entry and status of non-citizens; they reveal much about how a nation conceives of itself. The United States, for example, generally views itself as a "nation of immigrants,"<sup>23</sup> a view that entails a concomitant, generalized (although certainly idealized) acceptance of freedom of movement, ethnic diversity, and even multi-culturalism<sup>24</sup> as societal desiderata.<sup>25</sup> A German observer of

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

19. Poor conditions in eastern Europe, the war in Yugoslavia, and the 1,300 km open border to the East have led to a sharp increase in the number of those entering Germany to seek asylum over the past three years. Nearly 320,000 asylum-seekers entered Germany over the first nine months of 1992, as compared with some 256,000 in all of 1991 and 193,000 in 1990. In 1991 Germany received more than 60% of all asylum applications filed within the European Community. Dempsey, *Cracks*, *supra* note 8, at 14.

20. The economic effects of reunification, coupled with the world recession, have been enormous. In November 1992, leading German economic officials predicted that western Germany would experience zero real growth in 1993. Unemployment was expected to rise in the west by about 340,000 from a level of 1.8 million, and in the east by 150,000 from a level of 1.1 million. Quentin Peel, *Zero Growth Expected in 1993: Forecast by 'Five Wise Men' Gloomiest Yet Over Economic Prospects*, FIN. TIMES, Nov. 16, 1992, at 1.

21. In this article, the terms "legal structures" and "legal discourse" include law itself (constitutional, statutory, administrative, or judge-made). The term "political/legal discourse" means governmental, 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. While this terminology arguably conflates categories that for other purposes might usefully be separated, the basic point is broadly to distinguish discourse that refers (explicitly or implicitly) to law from that which does not.

22. This article occasionally uses the term "immigration law" to refer to all definitional and procedural categories pertaining to the entry, residence, and status of aliens (or foreigners) and citizens. This has become standard usage in the United States, but in Germany the categories tend to be more distinct. However, German law has no category of *Einwanderungsrecht*, the literal translation for immigration law.

23. While the United States in fact did not become a nation of immigrants (as opposed to colonists) until more than half a century after obtaining independence, Zolberg, *supra* note 1, at 22, the ideal of immigration always had been an important part of the distinctive American psyche. The Declaration of Independence itself complained of actions that impeded immigration and naturalization. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

24. There is, of course, vigorous debate in the United States between proponents of a "melting pot" and those advocating "cultural pluralism." See, e.g., ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 36 (1992).

25. These ideals have hardly been uncontroversial. Indeed, the very idea of the "melting pot" grew

U.S. immigration law might well be struck by a dissonance between ideal and practice. Nonetheless, the same observer would see that when the U.S. government seeks to ban aliens because of their political opinions, to maintain national origin quotas, to enact racial barriers, or to interdict Haitian refugees in the Caribbean, dissenting arguments that such actions are "un-American" resonate powerfully.<sup>26</sup> The situation in Germany is remarkably different. At base, Germans are deeply ambivalent about any form of national multiculturalism. Many Germans believe that:

For Americans to understand the psychological underpinnings of the current debate among Germans on how to deal with immigration, it is necessary to realize that, unlike the multi-ethnic tapestry of the U.S., the nation-states of Europe have traditionally been ethnically homogeneous.<sup>27</sup>

In Germany, there is no assimilationist, unifying ideal that would make "diversity itself a source of national identity and unity."<sup>28</sup>

Rather, German immigration laws reveal a strong tension between two competing social conceptions. One is a post-war vision wedded to ideals of a liberal, open society that is strongly committed to constitutionally-protected human rights. The other is a more restrictive conception that stems from a number of sometimes complementary, and sometimes conflicting influences. These include economic concerns, mono-cultural tendencies, and the remnants of ethnic or *völkisch* nationalism in German thought.

The former conception is evident in Germany's openness to asylum-

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out of a desire to respond to an increasing opposition to further immigration, an opposition that often had ugly racial or ethnic overtones. See, e.g., HENRY P. FAIRCHILD, *THE MELTING POT MISTAKE* 9 (1926). Much modern scholarship has focused on the way in which U.S. immigration law has subverted or at least failed to implement what most scholars see as our better ideals. See, e.g., T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE LAW 5 (1991) (criticizing excessive emphasis on specific causes of persecution); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987) (criticizing continued reliance on "prerights jurisprudence" in modern U.S. Immigration Law); Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599 (1990) (analysis of Immigration Judges' practice of drawing adverse inference from refusal to testify in deportation proceedings); David A. Martin, *Reforming Asylum Adjudication*, 138 U. PA. L. REV. 1247 (1990) (arguing that better functioning adjudication process would solve systemic problems in U.S. asylum law); James A. R. Nafziger, *Review of Visa Denials By Consular Officers*, 66 WASH. L. REV. 1 (1991) (critiquing reliance on ambiguous and often antiquated authority); Ibrahim J. Wani, *Truth, Strangers, and Fiction*, 11 CARDOZO L. REV. 51 (1989) (criticizing judicial use of legal fictions in immigration law). Despite all of this, the "nation of immigrants" ideal is a strong part of the American identity and myth system.

26. Such actions are "un-American" both because they might violate laws such as the First Amendment or the Equal Protection clause, and because they offend the "nation of immigrants" concept. For example, when Harry Truman vetoed the 1952 McCarran-Walter Act (in vain), he said not only that its national origins quotas were unfair, unwise, and even unconstitutional, but also that the concept was "utterly unworthy of our traditions and our ideals" and a denial of "the humanitarian creed inscribed beneath the Statue of Liberty." Immigration Bill Veto, 1952 U.S.C.C.A.N. 921, 923.

27. GERMAN INFORMATION CENTER, PUB. NO. XI/91, FOCUS ON . . . FOREIGNERS IN GERMANY 2 (1991) [hereinafter FOCUS].

28. LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE* 492 (1990). For discussion of the German government's approach to integration, see *infra* notes 385-394 and accompanying text.

seekers and the lengths to which Germany goes to safeguard the rights of foreigners on German soil. Germany boasts a constitutional system of basic human rights as well as administrative and judicial systems that are among the most protective of non-citizens' rights in the world.<sup>29</sup> Most significantly, Article 16 of the German Basic Law explicitly grants the "politically persecuted" a right to asylum.<sup>30</sup>

The latter strain manifests itself most clearly in the German citizenship and naturalization regimes, among the most restrictive in the western world.<sup>31</sup> German law adheres today, as it has since the nineteenth century, to the pure *jus sanguinis* model, which confers citizenship by right to blood relations only, and not to those born on German soil. Therefore, German citizenship is available to most foreigners, including those born and raised in Germany, only through discretionary naturalization proceedings. This, along with a variety of other legal, administrative, and cultural barriers, serves to keep naturalization rates in Germany among the lowest in the western world.<sup>32</sup> Moreover, German constitutional and statutory law grant an automatic right to German nationality to so-called German *Volkszugehörige* (members of the (German) people (*Volk*)). As discussed below, this ethnic-based right of return has long been criticized as betraying a remaining strand of *völkisch* or racial thinking within German law.<sup>33</sup>

The tension between these two ideals — one rather open, multi-cultural, and based on general principles of human rights, the other closed, mono-cultural, and based to some degree on lingering ethnic-nationalism — has been present in German immigration law since the founding of the post-war Federal Republic.<sup>34</sup> Recent immigration pressures and the nationalist sentiments accompanying re-unification have highlighted the conflict significantly. Consideration of these unresolved tensions offers insight into the current social debate raging in Germany over German nationalism,<sup>35</sup>

29. See *infra* notes 121-123, 269-85 and accompanying text.

30. GRUNDGESETZ [Constitution] [GG] art. 16 (Federal Ministries of the Interior, Justice, and Finance trans., 1991) (Editor's note: unless otherwise noted, all references to the *Grundgesetz* are to this edition).

31. See *infra* notes 134-225 and accompanying text.

32. See William Rogers Brubaker, *Citizenship and Naturalization*, in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 99, 118-120 (William Rogers Brubaker ed., 1989) [hereinafter CITIZENSHIP IN EUROPE].

33. See *infra* notes 228-250, 377-379, and 400 and accompanying text.

34. See *infra* notes 91-127 and accompanying text.

35. The problem of attacks on foreigners in Germany and the increasing calls for sharp restrictions on immigration and asylum processes generally are often described as part of a resurgence of "German nationalism." See, e.g., *Ugly Nationalism*, *supra* note 4, at 20; Manfred Zuleeg, *Der unvollkommene Nationalstaat als Einwanderungsland*, 1987 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 188. Despite the emergence of a virtual cottage industry devoted to the study of the subject, nationalism proves remarkably difficult to define. See, e.g., ERNEST GELLNER, NATIONS AND NATIONALISM 88-99 (1983) (discussing "a typology of nationalisms"). The essence of nationalism is the concept of the "nation" and its linkage to the "state." The definitions of both of these predicate terms have, however, also come to be highly refined. One can trace two distinctive European traditions regarding the concept of the state. The first tradition,

xenophobia, and racism. Moreover, the outcome of the debate will have profound implications for the shape and direction the new Germany will take.

Part II of this article describes the current demographic situation in Germany. Part III discusses the history and current status of the most important German legal structures relating to foreigners: the Basic Law, citizenship, alienage, and asylum laws, and the unique regime facilitating the return to Germany of ethnic Germans dispersed across Europe.<sup>36</sup> In so doing, part III attempts to reveal both how German legal structures shape current events and how the law itself reflects conflicting social conceptions. Part IV discusses government and political discourse on immigration law, pointing to policy proposals and political rhetoric that exhibit the powerful effects of the law on popular debate.

## II. FOREIGNER DEMOGRAPHICS IN GERMANY

### A. Non-Ethnic Germans

Germany is presently home to more than five million foreigners, who constitute some seven percent of the population of the former Bundesrepublik, where most of them still live.<sup>37</sup> In some areas, such as metropolitan Frankfurt, foreigners constitute more than twenty percent of the population. Berlin, the former Reich capital, and now once again the great symbol of German power and identity, has the third largest metropolitan Turkish population in the world.<sup>38</sup> The 1.8 million Turks in Germany are Germany's

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which finds expression in Locke's *Second Treatise*, sees the state as existing primarily to protect private interests. See generally JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Reardon ed., 1952). This conception, often linked to natural rights theory, a clear public/private split, and what later came to be called the "night-watchman" state, was powerfully challenged by a view that was first fully expressed by Rousseau's *Social Contract*. The basic building blocks of this challenge were a distinctive idea of "civil liberty" as a positive, substantive, political goal, and the corporativist conception of the state as subject (the "general will"). See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Willmoore Landall trans., 1954). This second tradition tends to be more consonant with closed conceptions of the polity, though this is not inevitable.

There are two very different modern uses of the term "nationalism." Patriotic nationalism denotes "[t]he revolutionary concept of the nation as constituted by the deliberate political option of its potential citizens". See ERIC J. HOBSBAWM, *NATIONS AND NATIONALISM SINCE 1780* at 88 (1990). Revolutionary France and the United States are the classic exemplars. *Völkisch* nationalism relates to a nation myth that is largely defined by race, culture, or ethnicity. See, e.g., Brubaker, *supra* note 32, at 8 (defining *Volk*-centered nationalism).

36. A variety of multilateral European initiatives on citizenship, immigration, and asylum have already significantly affected Germany, a pattern likely to continue in the future. Most generally, the move toward some sort of European Community citizenship could mitigate significantly Germany's restrictive approach to ascriptive citizenship and naturalization. This issue, while important, is beyond the scope of this article. More specifically, the so-called Schengen process, which addresses asylum, tends to support calls for restriction of Germany's liberal constitutional asylum policy. See *infra* notes 343-53 and accompanying text.

37. See Kay Hailbronner, *Citizenship and Nationhood in Germany*, in BRUBAKER, *CITIZENSHIP IN EUROPE*, *supra* note 32, at 71.

38. Letter from Jürgen Haberland, Adviser to the German Federal Ministry of the Interior, to Daniel

largest non-German ethnic group. The other main groups are former Yugoslavians (780,000), Italians (560,000), Greeks (337,000), Spanish (135,000), and Portuguese (93,000).<sup>39</sup>

The vast majority of foreigners in Germany today entered former West Germany. The former German Democratic Republic, however, also had some non-German residents. Government statistics indicate that when the Berlin Wall was opened in 1989 there were 88,100 foreign workers living in East Germany. This workforce was mostly Vietnamese (59,000), Mozambican (15,100), and Cuban (8,000). Most of these workers were strictly controlled by both the East German government and their own governments. They lived in dormitories and were rarely able to bring family members.<sup>40</sup>

Some sixty percent of the foreigners in Germany today have resided there for ten or more years. At least one million are children who were born in Germany. In fact, more than two-thirds of foreign children in Germany were born in Germany.<sup>41</sup> The great majority of these long-term and German-born foreigners entered or were born to those who entered under the ill-fated *Gastarbeiter* labor recruitment program of 1955-1973.<sup>42</sup>

German commentators sometimes note that the link between foreigners and labor is no longer as strong as it once was.<sup>43</sup> By 1983, for instance, only thirty-eight per cent of the foreign population in Germany was employed. The reasons for this, however, are complex. For one thing, many of the foreigners in Germany today are children. Also, the government has not permitted certain groups of foreigners, such as asylum applicants, to work.<sup>44</sup> Nonetheless, the research institute of the Federation of German Industries has concluded that some areas of public life, such as garbage collection, janitorial services, and food services would "collapse" without foreign workers.<sup>45</sup>

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Kanstroom (July 16, 1992) (on file with author) [hereinafter *Haberland Letter*].

39. The Turks in particular present serious cultural problems for Germans. They are generally darker-skinned than Germans, and adhere to what seem to many Germans to be strange religious and family practices. Germans often speak about the strong odors of Turkish cooking, Turks' sometimes violent patriarchal attitudes, their mistreatment of women, etc. Islamic extremism is also often cited by both liberal and conservative Germans as a problem among the Turks. Even those Germans who tend to support multi-culturalism as an ideal often feel deeply troubled by the anti-liberal attitudes of many Turkish residents. See generally JOHN ARDAGH, *GERMANY AND THE GERMANS* 241-42 (1987).

40. FOCUS, *supra* note 27, at 4.

41. Dr. Horst Waffenschmidt, Parliamentary Secretary to the Federal Interior Minister, Address for Bad Bramstedter Lecture Series on the theme "Germany — A Country of Immigration?" (Mar. 2, 1992) (on file with author) [hereinafter *Waffenschmidt Speech*].

42. The Federal Republic of Germany began recruiting guest-workers (*Gastarbeiter*) in the 1960s to fill labor shortages during the post-war "economic miracle." By 1973, the need for foreign workers had diminished and Germany officially ended its recruitment programs. Many of the workers stayed, however, and ultimately brought spouses and started families in Germany. RUSSELL J. DALTON, *POLITICS IN WEST GERMANY* 87-90 (1989).

43. See Hailbronner, *supra* note 37, at 71.

44. But see *infra* notes 338-340 and accompanying text (noting some asylum applicants now granted employment authorization under 1991 change in law).

45. FOCUS, *supra* note 27, at 4.



B. Asylum-Seekers

A second important group of foreigners in Germany are the *Asylanten* who entered the country to take advantage of West Germany's unique constitutional right of asylum.<sup>46</sup> Through the early 1970s the right to asylum was not a major social issue in Germany because the number of applicants was quite small.<sup>47</sup> Beginning in the late 1970s, however, the number of asylum applications rose dramatically — from 51,493 in 1979 to 107,818 in 1980.<sup>48</sup> In the late 1980s and early 1990s, the numbers continued to rise — 103,076 in 1988,<sup>49</sup> 121,318 in 1989,<sup>50</sup> 193,063 in 1990<sup>51</sup> and 256,112 in 1991.<sup>52</sup> In 1992, the figure jumped to 430,191.<sup>53</sup>

Conversations with many Germans reveal a high degree of skepticism about the asylum-seekers. Indeed, though a majority of respondents to a 1992 survey conducted by the Interior Ministry supported the basic constitutional right to asylum, seventy-five percent believed that most asylum-seekers were "misusing the right."<sup>54</sup> The government clearly shares this skepticism. In 1991 the denial rate in the first instance<sup>55</sup> was seventy-six percent.<sup>56</sup> In fact, from 1953 to the end of 1991, the administrative agency in charge of asylum recognized only 156,980 (11.26%) of all asylum-seekers as *bona fide*.<sup>57</sup> However, due to extensive rights of judicial review, the seriousness with which the judiciary takes its role in these cases,<sup>58</sup> and the possibility that a state (*Land*) government will grant residence on humanitarian grounds, only a small percentage of initially-denied asylum-seekers have actually been deported to date.<sup>59</sup>

As in the United States, where long delays in asylum cases are also common, such facts are subject to a variety of interpretations. Kay Hailbronner, a leading German authority on citizens and aliens laws, asserts

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46. See *infra* note 302 and accompanying text (discussing right to asylum).

47. For example, through the mid-1970s there were less than 10,000 asylum applicants per year. FOCUS, *supra* note 45, at 4.

48. *Id.* at 6.

49. *Political Asylum Seekers*, WEEK IN GERMANY, Jan. 15, 1993, at 2.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Attacks*, *supra* note 6, at 1.

55. See *infra* notes 321-329 and accompanying text (discussing administrative procedures).

56. Hans-Ingo von Pollern, *Die Entwicklung der Asylbewerberzahlen im Jahre 1981, 1982* ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK [ZAR] 24, 29.

57. *Id.*

58. One judge in Cologne said that he takes personal responsibility for researching not only the legal issues presented by asylum appeals, but the factual background data as well. Given the enormous complexity of these cases, delays of many months and even years are understandable. Interview with Judge X, in Köln (June 1990) (the judge requested anonymity) [hereinafter Judge X Interview].

59. FOCUS, *supra* note 27, at 5. In 1989, for example, only 6% of denied asylum-seekers were deported, while 15% left on their own, and 18% were "unaccounted for." *Id.*

that "strangely enough [the right of asylum] has been interpreted as an individual right for everybody who claims to be persecuted for political reasons to get a residence permit for the duration of the asylum proceedings."<sup>60</sup> Others allege that asylum applicants are not bona fide political refugees, but are really "economic refugees" who "play the system." As the German Information Center puts it,

[i]t has since become obvious that more and more people are no longer fleeing from individual political persecution, but from war and poverty in Third World countries and from chaos in Eastern Europe . . . . Affluent West Germany, with its generous social services, has become a prime European destination for asylum-seekers.<sup>61</sup>

By contrast, supporters of the asylum-seekers question the validity of the rigid distinction between political and economic refugees and cite the necessity of maintaining a constitutional basis for asylum claims.<sup>62</sup> Nevertheless, a consensus now seems to be emerging in favor of at least expediting asylum procedures to eliminate long delays that asylum-seekers are able to use to "manipulate" the system.<sup>63</sup>

### C. *Ethnic Germans*

The third group important to the foreigners debate are technically<sup>64</sup> not foreigners at all. Nevertheless, because they are not native-born Germans, the so-called *Vertriebene* ("expellees") and *Aussiedler* ("out-settlers")<sup>65</sup> are still potential immigrants, and therefore are very much a part of the immigration debate.

Since at least the thirteenth century various groups of ethnic Germans have emigrated from Central Europe and established communities elsewhere. These communities have tended to be cohesive and durable, and range from the Americas to Eastern Europe and the former Soviet Union. In Europe, the rise of German National Socialism and the Second World War had terrible consequences for many of the German enclaves outside the Reich.<sup>66</sup> After the war millions of people who identified themselves or were identified as Germans faced massive forced resettlement and expulsion from Eastern

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60. Hailbronner, *supra* note 37, at 72.

61. FOCUS, *supra* note 27, at 4.

62. Pfaff, *supra* note 13, at 136-38.

63. Perhaps the most tangible proof of this consensus was the apparent support of the major parties for legislation to amend the Basic Law to limit the right to asylum. See *Coalition Parties and SPD Debate Proposed Asylum Legislation in First Reading*, WEEK IN GERMANY, Jan. 22, 1993, at 1.

64. See *infra* notes 251-52 and accompanying text (giving constitutional and statutory definition of foreigner).

65. The *Aussiedler* are ethnic Germans who wish to emigrate to Germany from across much of Europe.

66. Frequent changes in the territorial boundaries of the German state from 1871 through 1949 render even the basic "inside/outside" distinction problematic.

Europe and the Soviet Union; the generally accepted figure is that some 12.5 million ethnic Germans<sup>67</sup> were driven from or fled their communities in the immediate post-war period.<sup>68</sup> Of this group, some eight million managed to enter the territory of the *Bundesrepublik* (West Germany) by 1949.<sup>69</sup> However, about 3.5 million ethnic Germans remained in Eastern Europe.<sup>70</sup>

The founders of the Federal Republic and the framers of the Basic Law were determined to aid this group of diaspora ethnic Germans, who were called Expellees (*Vertriebene*). The predominant impulse at the time was undoubtedly humanitarian. The argument was generally made<sup>71</sup> that Germany had an historical responsibility to help these people who were perceived as victims of what conservative German historians, following Meinecke, called the "German catastrophe."<sup>72</sup> The government has virtually always downplayed the implicitly *völkisch* aspects of the *Aussiedler* program in favor of this humanitarian focus, and mainstream German politicians have almost never asserted that ethnic Germans were entitled to special treatment solely because of their ethnicity.<sup>73</sup> What most clearly distinguishes *Aussiedler* from other asylum-seekers or immigrants, however, is their ethnicity.

Article 116(1) of the Basic Law provides the *Aussiedler* with a right to resettle in Germany. This article defines Germans to include both citizens and *Volkszugehörige*.<sup>74</sup> A 1953 statute defined *Volkszugehörige* as "whoever in their homeland has acknowledged German nationality and can confirm it through characteristics like parentage, language, upbringing or culture."<sup>75</sup> The statute covered anyone meeting this definition, not just those expelled from their homes at the end of World War II.<sup>76</sup> Those who have entered Germany under the statute but were not expelled from their countries in the

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67. The term "ethnic" does not fully capture the meaning of the German term *Volkszugehörige* used to describe this group of people. See *infra* notes 227-250 and accompanying text.

68. See generally OTTO HÄUBER ET AL., *DIE STATUSFESTSTELLUNG NACH DEM BUNDESVERTRIEBENENGESETZ* (1990).

69. Some 4.1 million entered the DDR (East Germany) and approximately 400,000 went to Austria. *Id.* at 2.

70. *Id.* at 2.

71. *Id.* at 2.

72. FRIEDRICH MEINECKE, *DIE DEUTSCHE KATASTROPHE: BETRACHTUNGEN UND ERINNERUNGEN* (1946).

73. In fact, in a recent speech on immigration CDU Parliamentary State Secretary for the Interior Ministry Dr. Horst Waffenschmidt asserted that post-war Germany had never pursued a *Volkstum Politik* (roughly: a *völkisch* policy agenda). Waffenschmidt Speech, *supra* note 41.

74. GG art. 116(1). Note that only "expellees" have a right to naturalize under Article 116(1). In practice, however, the German government has treated almost all ethnic Germans as expellees in order to allow them to obtain German citizenship under Article 116(1).

75. Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge, May 19, 1953, BGBl. I 201, § 6 [hereinafter BVFG].

76. *Id.* § 1 ("[*Vertriebene* (expellees) include all citizens and *Volkszugehörige* who] after the conclusion of the general [post-war] expulsion measures leave or have left the German eastern territories under foreign administration, Danzig, Estonia, Latvia, Lithuania, the Soviet Union, Poland, Czechoslovakia, Hungary, Romania, Bulgaria, Yugoslavia, or Albania.") (author's translation).

immediate aftermath of World War II are called *Aussiedler*.<sup>77</sup>

In the last twenty years some 1,900,000 *Aussiedler*, mostly from Poland, Romania, and the former Soviet Union, have entered Germany.<sup>78</sup> In 1990, for example, 147,950 entered from the Soviet Union, 133,872 from Poland, and 111,150 from Romania.<sup>79</sup> The numbers declined somewhat in 1991, to about 220,000.<sup>80</sup> Interior Ministry officials who handle *Aussiedler* claims estimate that there may be as many as 3,500,000 or more potential *Aussiedler* still outside Germany, nearly equal to the total number of "foreigners" in Germany today.<sup>81</sup>

Notwithstanding their history and presumptive genetic make-up, many of these people do not, even to many Germans, appear "German." Many speak different languages, dress differently from Germans, and so forth. Like "culture," however, Germanity largely seems to be in the eye of the beholder. Moreover, until quite recently, the German government consistently (and generously) viewed the *Aussiedler* as German. One author summarized the German government's position with the following anecdote:

Francis Josef, a thirty-six-year-old, is not such a clear-cut case. He is a miner and comes from Poland; he speaks, reads and understands only Polish. In the space after the question "Nationality?" on the German form, he has written "Polish." A German interviewer crosses out this *faux pas* and prints in the word "German" instead. Three lines on the miner's forehead come together. But the West German government is so eager to help the settlers that it overlooks such infractions. Francis Josef has Germans in his family — he has passed the test. "There," the official says, and dismisses him. "Now your name is Franz."<sup>82</sup>

The government's hospitality towards the *Aussiedler* has not gone unquestioned by Germans, particularly as the number of *Aussiedler* immigrating to Germany has risen and as the mass exodus of former East Germans has become an important social dilemma in former West Germany.<sup>83</sup> Heinrich Lummer, a conservative politician, said in 1989 that some of the "ethnic" Germans had so little to do with Germany that their closest link was that they "perhaps once owned a German Shepherd dog."<sup>84</sup> In addition, while some Germans occasionally had distinguished the more "German" *Aussiedler* from the less so (on the basis of characteristics like cleanliness, order, or industry), the recent tensions between East Germans and West Germans have rendered such distinctions increasingly problematic and less common.

Germany's reunification has intensified public debate about the *Aussiedler*.

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77. See *infra* notes 227-250 and accompanying text.

78. Statistics provided by the German Information Center, New York (on file with author).

79. *Id.*

80. Haberland Letter, *supra* note 38.

81. See UTE KNIGHT & WOLFGANG KOWALSKY, DEUTSCHLAND NUR DEN DEUTSCHEN? 165 n.3 (1991).

82. AMITY SHLAES, GERMANY — THE EMPIRE WITHIN 23-24 (1990).

83. *Id.* at 152-55.

84. *Id.* at 34.

To some extent the legitimacy of the "right of return" stemmed from its linkage to the somewhat less problematic goal of German re-unification. Permitting the return of dispersed Germans was linked, in the public's mind, to the ideal of a divided Germany made whole once again. Reunification thus diminished the justification for the *Aussiedler* programs. Today, the German government is moving to limit the *Aussiedler*'s return.<sup>85</sup> A 1990 statute requires most *Aussiedler* to apply for admission into Germany from abroad.<sup>86</sup> The number of *Aussiedler* admitted to Germany declined from 397,000 in 1990 to 222,000 in 1991,<sup>87</sup> but there remains a backlog of 700,000 applications.<sup>88</sup> To the extent that official limits on the return of *Aussiedler* are a response to popular demand, it appears that a more state-based nationalism or concern for economic well-being has replaced *völkisch* nationalism.

Whatever the policy on *Aussiedler*, there remains a clear legal distinction between them and other foreigners.<sup>89</sup>

In sum, the German conception of "foreigners" is rather complex. Most of the children and grandchildren of the "guest workers" who formed an indispensable economic foundation of the *Wirtschaftswunder* (economic miracle), people who were born in Germany and have lived their whole lives there, are foreigners. They remain so partly because they lack the proper bloodlines under the German citizenship laws, and partly because German naturalization processes tend to discourage applications for naturalization. On the other hand, millions of people with virtually no practical connection to Germany are Germans by law and in the popular imagination.

### III. THE UNDERLYING STRUCTURES OF GERMAN LAW

Nation-ness is the most universally legitimate value in the political life of our time.<sup>90</sup>

#### A. *Constitutional Ambivalence*

German jurisprudence has interpreted post-war constitutional law<sup>91</sup> and ideology as a reaction against the ideology of Nazism. Thus, the German Constitutional Court has observed that "[u]nderlying the Basic Law are

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85. See Dempsey, *Cracks*, *supra* note 8, at 14.

86. Gesetz zur Regelung des Aufnahmeverfahrens für Aussiedler (Aussiedleraufnahmegesetz - AAG) of June 28, 1990, reprinted in 1990 SAMMELBLATT FÜR RECHTSVORSCHRIFTEN DES BUNDES UND DER LÄNDER 1751 [hereinafter 1990 AAG].

87. See Dempsey, *Cracks*, *supra* note 8, at 14.

88. *Id.*

89. See *infra* notes 227-250 and accompanying text.

90. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 3 (1991).

91. The GRUNDGESETZ was meant to be a transitional document pending re-unification. In 1989, however, East Germany was incorporated into the West through the mechanism of former Article 23,

principles for the structuring of the state that may be understood only in the light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism."<sup>92</sup> Germany is now a stable constitutional democracy with a strong commitment to the rule of law in general and to constitutional law in particular. In the post-war period the new Federal Constitutional Court became one of the world's most powerful and influential courts, and "the principal symbol of the role of law in the eyes of most German citizens."<sup>93</sup> The Constitutional Court withdrew somewhat from the positivism of the earlier German *Rechtsstaat* — which assumed that positive law, enacted by the legislature, defined precisely and fully the rights and duties of all Germans — in favor of a philosophy that allows the Court to review positive law and ensure its conformity to the Basic Law.<sup>94</sup>

The post-war German legal system's recognition of fundamental human rights marks a decisive break with Germany's jurisprudential past. Article 1 of the Basic Law asserts that "the dignity of man is inviolable. To respect and protect it is the duty of all state authority."<sup>95</sup> The Basic Law upholds fundamental rights (*Jedermann Grundrechte* or "rights of everyone") to which all persons in Germany are entitled. These include the right to the "free development" or "unfolding of one's personality" (insofar as this right does not violate the "rights of others or offend against the constitutional order or against morality"),<sup>96</sup> and the right to equality before the law without disadvantage or favor stemming from sex, parentage, race, language, homeland and origin, faith, or religious or political opinions.<sup>97</sup>

In addition to recognizing these elemental rights, the Basic Law also embodies communitarian values. Thus, the *Sozialstaat* (Social State) principle<sup>98</sup> guarantees economic and social welfare rights<sup>99</sup> that go well beyond U.S. constitutional interpretation.<sup>100</sup> The juxtaposition of the

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which applied to the entry of *Länder* into the BRD. GG art. 23. Therefore, it was not necessary to rewrite the Basic Law, and it remains the German constitution.

92. Judgment of Feb. 25, 1975, 39 BVerfGE 1, 67.

93. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* xi (1989) [hereinafter KOMMERS, *CONSTITUTIONAL JURISPRUDENCE*].

94. *Id.* at 42.

95. GG art. 1.

96. GG art. 2.

97. GG art. 3.

98. This principle requires the government to assume a certain responsibility for the needs of the people. Although it does not appear in the Basic Law as such, it is generally held to derive from Article 20, which defines Germany as a "social federal state," and Article 28(1), which mandates a constitutional regime of "social government based on the rule of law". GG arts. 20, 28(1); see KOMMERS, *CONSTITUTIONAL JURISPRUDENCE*, *supra* note 93, at 247.

99. KOMMERS, *CONSTITUTIONAL JURISPRUDENCE*, *supra* note 93, at 34-68, 248.

100. See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976) (evidentiary hearing not required to satisfy requirement of procedural due process in context of termination of disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (hearing required to satisfy procedural due process in context of termination of state welfare benefits).

*Sozialstaat* principle and the human rights principles creates a tension in the Basic Law. Communitarian legal structures, although sometimes argued to be both a metaphysical and political improvement over "rights" discourse,<sup>101</sup> may also highlight the distinction between those who are within the community and those who are outside of it.<sup>102</sup> The more benefits one receives by virtue of membership in the community, the more attractive restrictive membership criteria become.<sup>103</sup> As such, the definition of the German community is critical.

For forty years the Preamble to the Basic Law expressly invoked an extra-territorial conception of the "German people" by stating that "[t]he entire German people are called upon to achieve in free self-determination the unity and freedom of Germany."<sup>104</sup> This passage expressed both ethnic nationalism and the political goal of reunification. After reunification the Preamble was amended to state: "The Germans . . . have achieved the unity and freedom of Germany in free self-determination. The Basic Law is thus valid for the entire German people."<sup>105</sup> This reformulation removes reunification as an issue, but leaves the major question of how to define "the Germans," a question that lies at the core of modern German constitutionalism.

The Basic Law specifically limits certain fundamental rights to "Germans," including the right to assemble peaceably,<sup>106</sup> the right to form partnerships, associations, and corporations,<sup>107</sup> freedom of movement throughout Germany,<sup>108</sup> the right to choose an occupation, place of work, study, or training,<sup>109</sup> the right not to be extradited,<sup>110</sup> the right to resist overthrow of constitutional [state] order,<sup>111</sup> the right to uniform rights and duties in each

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101. See, e.g., MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

102. The combination of communitarian foundations and some remnants of *völkisch* nationalist ideas in German legal structures conflicts sharply with the otherwise contractarian and rights-based nature of the Basic Law. The basic tension, as Donald Kommers has put it, is that: "[t]he Basic Law's] image of man is of a person rooted in and defined by a certain kind of human community. Yet in the German constitutionalist view the person is also a transcendent being far more important than any collectivity." Donald P. Kommers, *The Jurisprudence of Free Speech in the U.S. and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 677 (1980).

103. An example of this phenomenon is the resentment many Germans feel over government provision of housing, stipends, and employment authorization to asylum-seekers, especially in hard economic times. See *infra* notes 337-340 and accompanying text.

104. GG pmbl. (Federal Ministry of Justice and Federal Ministry of Finance trans., 1989). For a discussion of the origins of this phrase in the Preamble, see THEODOR MAUNZ ET AL., *KOMMENTAR ZUM GRUNDGESETZ* B1-10 to B1-12 (1991).

105. GG pmbl. (1991).

106. GG art. 8.

107. GG art. 9.

108. GG art. 11.

109. GG art. 12.

110. GG art. 16.

111. GG art. 20.

*Land*,<sup>112</sup> and eligibility for public office.<sup>113</sup> Only those important rights known as *Jedermann Grundrechte* (rights of everyone) are available to non-Germans. These include most of the general fundamental rights discussed above.<sup>114</sup> Apart from Article 116(1), which covers expellees and (with statutory clarification) *Aussiedler*,<sup>115</sup> however, the Basic Law defines the term "German" only as follows: "[u]nless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship." The definition of citizenship is left to statutory law.

The Basic Law also uses the term *das Volk* (the people). Article 20(2)(1), known as the popular sovereignty clause, provides that "All state power emanates from the people."<sup>116</sup> There has been much debate recently in Germany about who "the people" are.<sup>117</sup> The term encompasses, at a minimum, citizens and those people covered by Article 116(1) (Expellees and *Aussiedler*).<sup>118</sup> The phrase does not include resident foreigners, even those born and raised in Germany; they clearly fall into a category like that of alien in the United States.

In German law, therefore, there are in fact three categories of people: citizens, non-citizen Germans, and foreigners or aliens. Virtually all modern constitutions and legal systems distinguish between citizens and others, and to the extent that the German/alien dichotomy is functionally equivalent to other states' citizen/alien line, the structure of the Basic Law is quite typical of Western liberal constitutional systems. Germany's system is different, however, because the *Aussiedler* provisions give it an inherently *völkisch* content, and because German law and policies discourage naturalization by those not considered to be ethnic Germans.<sup>119</sup>

Post-war German jurisprudence has sought to mitigate the effects of the distinction between Germans (including citizens and non-citizen Germans) and

112. GG art. 33(1).

113. GG art. 33(2).

114. See, e.g., GG art. 1 (dignity of man inviolable); GG art. 2 (right of free development of personality); GG art. 3 (equality before law). For a fuller discussion of the rights of aliens in Germany see *infra* notes 251-301 and accompanying text.

115. See *infra* notes 227-234 and accompanying text.

116. GG art. 20(2) ("Alle Staatsgewalt geht vom Volke aus"); see also GG art. 21(1) ("[t]he political parties shall participate in the forming of the political will of the people"); GG art. 56 (presidential oath of office dedicated to "well-being of the German people"); GG art. 146 ("[t]his Basic Law, which is valid for the entire German people").

117. See Gerald L. Neuman, "We are the People": *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 267-68 (1992) [hereinafter Neuman, *Suffrage*].

118. The Federal Constitutional Court has expressly limited the right to vote in local elections to "the German people" and denied the right to vote to foreigners. In one of the two constitutional decisions on the question, the Court subsumed both German citizens and the so-called *status Deutsche* within the "German people" category. The *Aussiedler* were called an exception to the general principle that citizenship is the key qualification for membership in the people and for voting rights. Judgment of Oct. 31, 1990 (BVerfGE), reprinted in 1990 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 438, 439; see also Neuman, *Suffrage*, *supra* note 117, at 283.

119. See *infra* notes 167-226 and accompanying text.



aliens. Aliens are exceptionally well protected in Germany because the *Jedermann Grundrechte* explicitly and implicitly provide many important protections for aliens<sup>120</sup> and because German courts have generously interpreted and filled in the content of the law.<sup>121</sup> The Federal Constitutional Court has played an essential role in construing aliens' rights as analogous to the rights of Germans. In a famous 1978 decision, for example, the Court ruled that an alien acquires a constitutionally protected reliance interest to remain in Germany as a result of prior routine renewals of his residence permit and his integration into German society.<sup>122</sup> The Court has also held that long residence in Germany is a highly important factor in the calculus of rights due aliens,<sup>123</sup> especially in cases involving residence permits and work authorization.<sup>124</sup> As a result, the German/alien distinction matters functionally in such circumscribed areas such as voting, complete freedom of association, freedom to choose any work place, and freedom to move anywhere in Germany.<sup>125</sup>

Yet even if the German/alien distinction is of limited functional significance, its symbolic significance — the extent to which it shapes German thinking and political discourse about the relationship of Germans to others — is enormous.<sup>126</sup> Moreover, this distinction must be read against the backdrop of the blood-based provisions of German citizenship and naturalization law, and the ethnic conception embodied in the *Aussiedler* provision of Article 116(1) which, while clearly different from much of the Basic Law, has roots

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120. See *supra* notes 114-115 and accompanying text. See also Michael Wollenschlager, *Einführung in das Ausländerrecht*, in EINWANDERUNGSLAND BUNDESREPUBLIK DEUTSCHLAND? 19 (Gerhard Schult ed., 1982) [hereinafter EINWANDERUNGSLAND].

121. Indeed, German courts have been far more protective of aliens' rights than have U.S. courts, which tend to defer to the Executive branch on matters of immigration policy. See Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 N.Y.U. J. INT'L L. & POL. 35, 47-75 (1990) (demonstrating that German Constitutional Court has exercised more oversight of immigration matters than United States Supreme Court) [hereinafter Neuman, *Immigration*].

122. Judgment of Sept. 26, 1978, 49 BVerfGE 168; see also Judgement of May 10, 1988, 78 BVerfGE 179, 196-97.

123. See Gunther Schwertfeger, *Einwanderungsland Bundesrepublik? Tatsächliche, politische und verfassungsrechtliche Grundierungen*, in EINWANDERUNGSLAND, *supra* note 120, at 9, 14-16.

124. *Id.*

125. See *supra* notes 106-118 and accompanying text. Other consequences include lack of protection from extradition and loss of diplomatic protection. It is, however, important to note that the Basic Law's textual limitation of important rights to Germans leaves foreigners in a potentially vulnerable constitutional position; the plain language of the Basic Law offers less protection to non-citizens than do the more fluid interpretations of the Federal Constitutional Court.

126. This point emerged at the November 1992 SPD emergency congress. Several speakers, including Mr. Bubis, suggested that legal reform of asylum and aliens' rights would not tackle the underlying foreigner problem unless more substantial measures were taken to ease and encourage naturalization by the roughly six million foreigners presently living in Germany. The party's deputy leader, Herta Daubler-Gmelin, accused the governing Christian Democratic Union of concentrating on asylum and opposing such reforms because they would threaten the CDU's interpretation of "what was meant by a German." See Judy Dempsey, *Germany Closer to Asylum Reforms*, FIN. TIMES, Nov. 18, 1992, at 2 [hereinafter Dempsey, *Germany Closer*].

that extend back at least as far as nineteenth-century German conceptions of citizenship.<sup>127</sup>

So long as German constitutional law accepts any ethnic or racial criteria for automatic entry into the polity, it steers a path between two different ideals. On the one side, the constitutional definition of "German" is conceived partly in *völkisch* terms, a state of affairs that is exacerbated by a statutory law based exclusively on blood relations. On the other side is the Basic Law's firm commitment to fundamental human rights and basic notions of equality, ideals that the Constitutional Court vigorously oversees which tend to mitigate the potential harshness of being an alien. This dichotomy lies at the core of the current German immigration dilemma, and is reflected in the history and language of German citizenship laws.

### B. Statutory Origins of German Citizenship Law

With the important exception of the *Aussiedler* provision of Article 116, the Basic Law does not define who is a German; this definition, as in most legal systems, is statutory. These German citizenship statutes most clearly reveal the distinctiveness of the current German debate on immigration. The story of modern German citizenship law can be traced at least as far back as the founding of the Reich in 1871.<sup>128</sup> German notions of citizenship and nationhood are different from those of most other nations because German national consciousness emerged long before the modern German political state, and therefore could not look primarily to political status as the defining characteristic of membership in the "nation." "[T]he German idea of the nation was not originally a political one, nor was it linked with the abstract idea of citizenship."<sup>129</sup> Instead, German notions of nationhood were, and remain, tied to the idea of a "cultural nation" in which the group may be defined by ethnicity.<sup>130</sup>

The fact that the late-emerging German nation-state has had a strongly federal nature through much of its history is also significant to German

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127. Commentators have noted that Article 116(1) was an exceptional, transitory provision of the Basic Law. Hans Alexy, *Rechtsfragen des Aussiedlerzuzugs*, 45 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2850. The Federal Constitutional Court also made clear early on that "[e]very constitutional provision must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution." Judgment of Oct. 23, 1951, 1 BVerfGE 14, 32-33; see KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 93, at 52. This may not be possible where important rights turn on a distinction that may be based on ethnicity; the Court, however, has never explicitly addressed this concern.

128. The roots of these issues lie much deeper in German history, see generally ROLF GRAWERT, STAAT UND STAATSANGEHÖRIGKEIT (1973), but this article limits its discussion to national statutory citizenship laws.

129. Brubaker, *supra* note 32, at 8.

130. *Id.*; see also Ulrich K. Preuß, Constitutional Powermaking for the New Polity (unpublished manuscript, on file with author).

citizenship law. Thus, the first comprehensive citizenship law in Germany, the 1870 "Statute Governing the Acquisition and Loss of Bund and State Membership" [RuStAG 1870],<sup>131</sup> derived national citizenship<sup>132</sup> and its loss directly from state (*Bundesstaat*) citizenship.<sup>133</sup> As such, the nation did not control citizenship directly.

The decisive change in German citizenship law occurred in 1913 when the 1870 statute was comprehensively revised.<sup>134</sup> By that time, widespread dissatisfaction had arisen because the 1870 law provided that citizens could lose their citizenship as a result of long-term absence from Germany (the *Auslandsdeutsche* (Germans abroad) question) and because of large-scale immigration. Both explicit *völkisch* nationalism and a more ambiguous nascent patriotic nationalism fueled popular pressure to reform the law.<sup>135</sup> *Völkisch* nationalists, represented by organizations such as the Pan German League, emphasized "the preservation of Germandom abroad" and also argued strongly against the naturalization of so-called *Volksfremde* (foreigners to the people). *Völkisch* nationalists also emphasized the harm that the immigration of both ethnic and "cultural" foreigners would cause to Germany; however, their primary criterion for distinguishing between acceptable and unacceptable immigrants was racial. They expressly argued that only immigrants from *Auslandsdeutsche* and ethnic German communities abroad should be naturalized.<sup>136</sup> Patriotic nationalists, on the other hand, tended to cite the close ties many *Auslandsdeutsche* maintained with the Reich, and their continued importance to the Reich, as reasons for allowing transmission of citizenship to the descendants of *Auslandsdeutsche*.<sup>137</sup>

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131. Gesetz über die Erwerbung und den Verlust der Bundes und Staatsangehörigkeit (des Norddeutschen Bundes) of June 1, 1870, BGBI. 355 [hereinafter RuStAG 1870]. The North-German Bund was a short-lived (1867-1871) confederation of German states that was the immediate predecessor of Bismarck's Reich. The RuStAG 1870 remained in effect after Bismarck founded the First Reich. See KAY HAILBRONNER & GÜNTHER RENNER, STAATSANGEHÖRIGKEITSRECHT 7-8 (1991).

132. The term *Angehörigkeit* literally means "membership," but it is the functional equivalent in this setting of "citizenship."

133. RuStAG 1870, *supra* note 131, § 1. The 1870 law also provided that legitimate children and recognized illegitimate children would achieve citizenship from their father under the *jus sanguinis* principle. Further, a foreign woman who married a German man could obtain German citizenship. Various naturalization provisions were also set forth, particularly relating to service to the Reich, community, schools, and certain religious organizations. *Id.* §§ 8, 9.

134. Reichs- und Staatsangehörigkeitsgesetz, July 22, 1913, RGBI. 583 [hereinafter RuStAG 1913]. This law introduced the use of the term "German" as a category broader than citizen. Section 1 of the new law stated: "a German is one who has citizenship in a federal state or who possesses direct imperial citizenship." *Id.* § 1 ("Deutscher ist, wer die Staatsangehörigkeit in einem Bundestaat oder die unmittelbare Reichsangehörigkeit besitzt.") (author's translation). Direct imperial citizenship might be granted to certain foreigners who lived in German colonies or to former Germans or their descendants living outside of Germany. *Id.* §§ 33-35. The latter provision is similar to GG art. 116, but admissions decisions under these provisions of the 1913 law were expressly discretionary.

135. See WILLIAM ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 115-17 (1992) [hereinafter, BRUBAKER, CITIZENSHIP].

136. *Id.* at 116.

137. *Id.* at 117.

The main question was whether to maintain the *jus sanguinis*<sup>138</sup> model that, for the most part, had been the German norm, or to introduce elements of *jus soli*. The Social Democrats argued that persons born and raised in Germany were German in fact and should have the right to become German in law; therefore, they proposed that the law should provide for the naturalization of those born and residing in Germany.<sup>139</sup> This proposal and the ensuing debate centered solely on the principle of *jus soli* as a justification for naturalization; there was no proposal or debate on the introduction of *jus soli* to grant automatic citizenship to any person born on German territory.<sup>140</sup> Parliamentary debates prior to the revision focused on fundamental questions about the acquisition and loss of citizenship, and resembled those taking place in Germany today.<sup>141</sup> In the end, Germany adopted a strong, descent-based citizenship law designed largely to protect expatriates from losing their German citizenship.<sup>142</sup> So long as an expatriate German neither naturalized to nor served in the military of his country of residence, he could maintain his German citizenship, and transmit it to his descendants, indefinitely.<sup>143</sup> However, the revisions included no right to naturalization for non-Germans born on German soil.

That this was the case is not surprising. From the founding of the German

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138. *Jus sanguinis* is the right of citizenship by blood; *jus soli* is the right of citizenship by birth within the territory of the state. Rolf Grawert has pointed out a number of factors that may have contributed to the German rejection of the *jus soli*: the desire to distance modern German society from what some perceived to be a feudal concept; distaste for the rigid territorial conscription policies of Napoleon; and the small size of the German principalities, the North-German Confederation's grant of reciprocal citizenship privileges, and the ease of movement and mobility had all tended to undercut the ancient idea of a natural tie to the land of one's birth. GRAWERT, *supra* note 128, at 190.

139. BRUBAKER, CITIZENSHIP, *supra* note 135, at 136.

140. *Id.* at 119-20.

141. For a description of these debates and the parties' positions see Bertold Huber, *Die Beratung des Reichs — und Staatsangehörigkeitsgesetzes von 1913 im Deutschen Reichstag*, in AUFENTHALT-NIEDERLASSUNG-EINBÜRGERUNG 181 (Klaus Barwig et al., eds. 1987). Among other things, a representative of the *Deutsch-Konservative Partei* (German Conservative Party), which generally supported the monarchy, Prussian *Junkers*, and big business, also supported the *jus sanguinis*, arguing that it "serves to preserve and protect German *völkisch* character and German uniqueness." *Id.* at 188 (author's translation). On the other side, the left-liberal *Fortschrittliche Volkspartei* (Progressive People's Party) argued in favor of the adoption of *jus soli* naturalization based on birth and residence in Germany. One representative from this party argued that, apart from Swiss Cantons and Austria, the idea of denying citizenship to those born and raised in a nation-state was not generally accepted; that the *jus soli* was not completely unknown in the German principalities and was, at least as regards naturalization, as much a part of German heritage as the *jus sanguinis*; and that many foreign workers in Germany should not be denied rights on purely ethnic or racial grounds since they were *de facto* Germans in all but race. *Id.* 188-89. A representative of the Polish community also pointed out the injustices suffered as a result of Bismarck's deportation policies and argued in favor of the *jus soli*. *Id.* at 190. The representatives of the SPD, the radical ancestor of today's catch-all party, also supported a right to naturalization for foreigners born and raised in Germany. *Id.* at 189-90.

142. The 1913 law eased repatriation provisions for widows and divorced women who had lost their German citizenship due to marriage to a foreigner; it also removed or mitigated other expatriation provisions. See GERARD RENÉ DE GROOT, STAATSANGEHÖRIGKEITSRECHT IM WANDEL 55 (1989).

143. BRUBAKER, CITIZENSHIP, *supra* note 135, at 114-19.

Empire in 1871, there had been significant, uncontrolled, unorganized immigration of workers, largely Poles from Russia and Austria-Hungary.<sup>144</sup> Thousands of agricultural workers entered the East and South, and industrial workers and miners came to the Ruhr region. By 1907, an estimated 800,000 foreigners worked in Germany, comprising some four percent of the population. The 1910 census showed 1,259,880 foreign residents.<sup>145</sup> These workers often lived isolated in accommodations that were overcrowded and "a breeding place for crime, disease and social problems."<sup>146</sup> In addition, they often worked harder, longer, and for less money than Germans. For all of these reasons, local German populations frequently feared and distrusted these foreign workers.

These anti-foreigner sentiments had begun to have an effect on government policy in the early twentieth century. Already in 1899 the Royal Mining Office of Dortmund issued a decree that made command of the German language a prerequisite for senior positions.<sup>147</sup> By 1907 government actions were more direct: in that year the government carried out several mass expulsions of Polish workers.<sup>148</sup> It also forced other foreign workers to leave the country for part of every year to ensure that they could not qualify for permanent residency or citizenship.<sup>149</sup> Other actions were predominantly cultural: laws in 1908 prohibited the use of Polish in public, and made German the official language of all organizations.<sup>150</sup> Against this background, it is not surprising that legislators rejected the naturalization proposals, arguing that they wanted to maintain the "ethno-cultural integrity" of the German nation-state.<sup>151</sup>

### *1. Citizenship Laws under National Socialism*

No other significant changes were made to the German citizenship statute until the Nazi government completely reformed Germany's citizenship laws. Hitler wrote in *Mein Kampf*:

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144. STEPHEN CASTLES & GODULA KOSACK, *IMMIGRANT WORKERS AND CLASS STRUGGLE IN WESTERN EUROPE* 19-20 (1973); RAY C. RIST, *GUESTWORKERS IN GERMANY: THE PROSPECTS FOR PLURALISM* 58-60 (1978).

145. RIST, *supra* note 144, at 58.

146. CASTLES & KOSACK, *supra* note 144, at 19.

147. Bergpolizeiverordnung des Königlichen Oberbergamtes Dortmund, *noted in* Hartmut Esser & Herman Korte, *Federal Republic of Germany*, in *EUROPEAN IMMIGRATION POLICY: A COMPARATIVE STUDY* 165, 167 (Tomas Hammar ed., 1985).

148. RIST, *supra* note 144, at 58.

149. *Id.* This was the *Karenzzeit* (waiting period) from November 15 to April 1. Once the First World War began this changed; during the war, Polish workers were forbidden from *leaving* Germany. As soon as the Poles (some 700,000) crossed the border they lost both the right to leave and the right to change employment in Germany. Esser & Korte, *supra* note 147, at 167-68.

150. *Id.* at 167.

151. Brubaker, *supra* note 135, at 124-35.

It is hardly imaginable that anyone should think that a German could be made out of, say, a Negro or a Chinaman, because he has learned German and is ready to talk it for the rest of his life, and to vote for some German political party. The process would mean a beginning of bastardization of our race . . . . Since nationality, or rather race, is not a matter of language, but of blood, it would be possible to talk about Germanization only if the process could alter the nature of the blood of the person subjected to it . . . . Whenever foreign blood has been introduced into the body of a nation, its unhappy effect has been to break up our national character.<sup>152</sup>

The relationship between citizenship and National Socialist ideology is obvious.<sup>153</sup> In his famous work *Staat, Bewegung, Volk* (*State, Movement, People*), Carl Schmitt asserted that state power comes directly from *das Volk* (defined by racial characteristics) and that the Nazi Party was the embodiment of *das Volk*. For Schmitt, the political status of membership could only be based on race. As Schmitt wrote, "[t]he racial similarity of the united German people . . . is, therefore, the indispensable precondition and foundation for the concept of the political leadership of the German people."<sup>154</sup> Nazi writers traced this view of citizenship linking race, community, and state power back within German cultural history. The leading Nazi commentary on the Nazi citizenship laws discussed them as an outgrowth of "Germanic" thought.<sup>155</sup> In Germanic thought, it was argued, community — meaning family, clan, or *Volk* — subsumed an individual's entire life. In this view, the Reich or state was merely "the exterior structure of the law in which the ordered community of the Germans assumes an external appearance. It is the legal concept of German political unity."<sup>156</sup> Reich citizenship "actualizes the *Volkish* ordering of the German people on the political level."<sup>157</sup>

Pursuant to this philosophy, the Nazis overturned Germany's federalist structure and replaced it with a centralized legal system.<sup>158</sup> In 1934, they amended the 1913 Citizenship Law (RuStAG) by decree to include a first section declaring that "[t]here is only one German Citizenship (Reich Citizenship)."<sup>159</sup> The next year, this new legal framework was modified to include two levels of German citizens: Reich citizens and state citizens (*Reichsbürger* and *Staatsangehörige*). Only Germans or those of other

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152. ADOLF HITLER, *MY BATTLE* 158 (The Riverside Press, 1933).

153. In this context it is ironic that the attempt to deport Hitler to Austria after his 1923 putsch failed because deference was given to the fact that Hitler *thought* of himself as German. PETER GAY, *WEIMAR CULTURE* 21 (1968).

154. CARL SCHMITT, *STAAT, BEWEGUNG, VOLK* 42 (1933) (author's translation); see generally GEORGE L. MOSSE, *NAZI CULTURE* 326 (1981).

155. See Wilhelm Stuckart & Hans Globke, *Civil Rights and the Natural Inequality of Man*, in MOSSE, *supra* note 154, at 328.

156. *Id.* at 329.

157. *Id.* at 331.

158. Gesetz über den Neuaufbau, Jan. 30, 1934, RGB1. I 75, reprinted in UWE BRODERSEN & INGO VON MÜNCH, *GESETZE DES NS-STAATES: DOKUMENTE EINES UNRECHTSSYSTEMS* 48 (1982).

159. Verordnung über die deutsche Staatsangehörigkeit, of 1934, RGB1. I 85, § 1.

"Aryan" blood could be Reich citizens, and only Reich citizens would enjoy full rights.<sup>160</sup>

The Nazi citizenship laws had a number of distinct effects. First, they legitimized and concretized racially-based distinctions by linking them to legal structures. Second, they enhanced tremendously the importance of the federal government by making national citizenship, rather than state citizenship, the highest possible legal status. In so doing, the laws expanded the power of the federal government by leaving determinations of citizenship in the hands of federal government operatives.<sup>161</sup>

## *2. The Post-War Era*

After the collapse of the Nazi regime the Basic Law ushered in a new era in German legal culture. However, this new era did not include a fundamental revision of the citizenship laws; the 1913 statute was simply put back into effect. Thus the basic features of German citizenship law — first standardized under Kaiser Wilhelm II — survived Bismarck, Weimar, and Hitler, and were ultimately accepted by both West<sup>162</sup> and East Germany with little modification.<sup>163</sup> For virtually all non-discretionary claims to birth-right citizenship, Germany continues to rely exclusively on the *jus sanguinis*, as it has since 1913. Ascriptive citizenship is granted only to the children, including adopted children, of a German parent.<sup>164</sup>

Kay Hailbronner and others have long argued that the Federal Republic did not create a new citizenship law because West Germany did not wish to destroy the fiction that a unified Reich continued to exist.<sup>165</sup> According to this view, alteration of the citizenship law would have implicitly rejected the goal of reunification required by the Preamble of the Basic Law. In recent years, however, and especially since reunification, Hailbronner has suggested other justifications for the maintenance of the old law. Hailbronner offers an explicit ethnic and cultural argument that betrays an uneasy historical resonance: "German citizenship law has deep historical roots. The German idea of nationhood is basically not a political one but a cultural, linguistic and

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160. Reichsbürgergesetz, Sept. 15, 1935, RGBl. I 1146.

161. See generally MOSSE, *supra* note 154, at 320-30.

162. HAILBRONNER & RENNER, *supra* note 131, at 8-20. But see Gesetz zur Regelung von Fragen der Staatsangehörigkeit, Feb. 22, 1955, BGBl. I 65 (dealing with problems caused by border changes from 1938 to 1945); Zweites Gesetz zur Regelung von Fragen der Staatsangehörigkeit, May 17, 1956, BGBl. I 431 (dealing with problems caused by 1938 *Anschluss*).

163. See, e.g., Staatsbürgerschaftsgesetz, Feb. 20, 1967, GBl. I, §§ 4-8; Gesetz zur Änderung des Staatsbürgerschaftsgesetz, Jan. 29, 1990, GBl. I. See generally ECKART KLEIN ET AL., *BÜRGER UND STAAT, EINE VERGLEICHENDE UNTERSUCHUNG ZU PRAXIS UND RECHT DER BUNDESREPUBLIK DEUTSCHLAND UND DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK* (1990).

164. RuStAG 1913, *supra* note 134 § 3.

165. HAILBRONNER, *supra* note 37, at 67.

ethnic one. This traditional ethno-cultural conception of nationhood remains alive today."<sup>166</sup> This approach to citizenship reflects a specific attitude towards the character of the German state and German society. It is also central to the approach Germany has taken to naturalization law.

### C. Naturalization

Naturalization is the ceremonial legal process by which foreigners are admitted into the polity as full members. While blood and territory have always been the primary determinants of ascriptive citizenship laws, ideas of merit or value generally play the most important role in naturalization laws.<sup>167</sup> Modern naturalization laws do more than simply "invite" outsiders into the "imagined community."<sup>168</sup> Since they almost invariably involve amorphous, value-based standards, in contrast to the bright line, automatic rules of *jus soli* and *jus sanguinis* ascriptive citizenship, naturalization laws may also more accurately reflect underlying societal values.

Naturalization is discretionary in two ways. First, decisions are made by officials who are empowered to decide whether potential citizens have met legal standards. Second, an individual often has no *right* to naturalize, even if he satisfies all legal criteria.

The Basic Law resolved the question of relative state and federal authority in the realm of naturalization by granting the states the initial authority to process applications; as such, both the state and federal governments set naturalization policy in Germany.<sup>169</sup> As with ascriptive citizenship, the most important legal source on naturalization is the RuStAG 1913, as amended.<sup>170</sup> It remained largely unchanged, except for the period of National Socialism.<sup>171</sup> The statute provides that:

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166. *Id.* at 74.

167. The roots of naturalization may be seen in "totemic" ceremonies that are clearly related to religious conversion practices. Political theorists have long recognized the importance of naturalization. In the *Laws*, for example, Plato describes one of the earliest value-based naturalization policies — for his proposed colony of Magnesia. Plato required that "[t]he citizens who are to form the new Magnesians colony are to be drawn from various quarters, and they must be carefully tested (like streams flowing into a reservoir) before being admitted." PLATO, *LAWS* 352-53 (R.G. Bury trans., 1926). Plato did not provide ascriptive citizenship rules, based on consanguinity or territorial right, in part because he was primarily concerned with community formation, rather than continuity. He seemed, however, to envision a continuing process of assimilation based on values:

for we shall test thoroughly by every kind of test and by length of time the vicious among those who attempt to enter our present State as citizens, and so prevent their arrival, whereas we shall welcome the virtuous with all possible graciousness and goodwill.

*Id.* at 353.

168. ANDERSON, *supra* note 90, at 145.

169. GG arts. 123(1), 124, 73(2), 83.

170. Sections 8 and 9 are the main provisions dealing with naturalization. RuStAG 1913, *supra* note 134, §§ 8, 9.

171. See, e.g., Reichsbürgergesetz, Sept. 15, 1935, RGB1. I 1146.



[A] foreigner who has settled in German territory (*im Inland*) can, upon application, be naturalized by the state in whose territory he has settled, if he or she:

1. has an unlimited right to engage in employment, business and contract according to the laws of the former homeland or under German law (*unbeschränkt geschäftsfähig*),
2. has lived a "clean life" (*unbescholtenen Lebenswandel geführt hat*)
3. has obtained housing,
4. has the ability to support him/herself and the family.<sup>172</sup>

Section 8 delegates discretionary authority to the executive branches of the state governments.<sup>173</sup> Over the years decisions of the Federal Administrative Court and federal regulations issued by the Minister for Domestic Affairs<sup>174</sup> have developed particular naturalization rules that supersede state discretion.<sup>175</sup> The federal regulations fill in statutory gaps and set out additional requirements. Moreover, they set the general policy guidelines for and general characteristics of all German naturalization practice.<sup>176</sup>

Despite the importance of guidelines such as these, traditional German legal theory held that administrative rules were not legally binding. Modern legal theory, however, accepts that at least some administrative rules are as binding as statutes.<sup>177</sup> The naturalization guidelines are "discretion guidelines" (*verhaltenslenkende Verwaltungsvorschriften* or *Ermessensrichtlinien*) that try to standardize the exercise of administrative discretion by providing fixed criteria and examples. The guidelines bind the officers and agencies to whom they are issued.<sup>178</sup> As such, the guidelines bind courts reviewing administrative discretion for error. Thus, even if the guidelines do not confer upon individuals a right to naturalize, they do create a presumption that the government has bound itself by self-imposed rules,<sup>179</sup> and individuals can challenge the government's failure to follow the administrative regulations absent convincing reasons.

The most basic element of the federal naturalization policies contained in the regulations is that "Germany is not a country of immigration; she does not aspire intentionally to increase the number of German citizens through

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172. RuStAG 1913, *supra* note 134, § 8.

173. *Id.*

174. Einbürgerungsrichtlinie, Dec. 15, 1977, 1978 GMBI. 16, reprinted in ALEXANDER N. MAKAROV & HANS VON MANGOLDT, DEUTSCHES STAATSANGEHÖRIGKEITSRECHT (3d ed., 1981, 9th installment, 1987) [hereinafter Naturalization Guidelines].

175. MAKAROV & VON MANGOLDT, *supra* note 174, at RuStAG § 8, cmt. 57.

176. Naturalization Guidelines, *supra* note 174, § 1.

177. On administrative rules in general, see Fritz Ossenbühl, *Die Quellen des Verwaltungsrechts*, in HANS-UWE ERICHSEN & WOLFGANG MARTENS, ALLGEMEINES VERWALTUNGSRECHT 89, 89-101 (8th ed., 1988); HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT § 24 (7th ed., 1990). The main difference between the binding force of statutes and administrative rules is that rules allow deviations, while statutes have to be administered more strictly. ERICHSEN & MARTENS, *supra*, § 7(IV)(4), at 94.

178. MAURER, *supra* note 177, § 24(3).

179. This is the *Theorie der Selbstbindung der Verwaltung*. ERICHSEN & MARTENS, *supra* note 177, § 7(IV)(4), at 94.

naturalization."<sup>180</sup> In addition, naturalization is not a matter of individual right, but one of societal interest to be determined by executive decision-makers. The states can only grant German citizenship if doing so is in the "public interest"; the personal wishes and economic interests of the applicant are of secondary importance.<sup>181</sup>

Applicants must demonstrate "a free-willed and lasting commitment to Germany, a basic understanding of our public order and an acknowledgement of the basic order of our free democratic society."<sup>182</sup> Applicants should normally have a command of written and spoken German appropriate to their situation.<sup>183</sup> Most applicants must have lived in Germany for ten years.<sup>184</sup> The regulations also specify that the statutory "clean life" requirement can be applied to exclude applicants with criminal records, as well as alcoholics, those who fail to support children, and those unwilling to work.<sup>185</sup>

Two requirements in particular create enormous disincentives for foreigners who might otherwise seek to obtain German citizenship. Regulation 4 states a policy against establishing different citizenships within families. The ostensible reason for this policy is that "[d]ifferent citizenship within a family, especially if they live together, brings the danger of legal uncertainty in international private law and of conflicts between family ties and duties to the state."<sup>186</sup> This policy facilitates the naturalization of German citizens' relatives who agree to give up their former citizenship. However, the policy hinders the naturalization of applicants who are the children or grandchildren of foreigners. The regulations exempt former Germans, Expellees, people granted asylum, and certain refugees and stateless persons from this policy; otherwise, an applicant must present "an important reason" for a waiver.<sup>187</sup>

The second major disincentive is the policy against multiple nationality.<sup>188</sup> As with the intra-family policy, the possession of dual or multiple nationality by an individual is said to bring "the danger of legal uncertainty, especially in private international law . . . and conflicting duties to different legal orders."<sup>189</sup> The regulation also notes that Germany is party to the Convention on the Reduction of Cases of Multiple Nationality of May 6,

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180. Naturalization Guidelines, *supra* note 174, § 2.3.

181. *Id.* § 2.2.

182. *Id.* § 3.1.

183. *Id.* § 3.1.1. This may be waived for the elderly.

184. *Id.* § 3.2. Spouses of Germans, German veterans, former Germans, ethnic Germans, and some minor children are subject to shorter requirements. The period can be waived in exceptional cases when required by the public interests. *Id.* § 3.2.3. Moreover, the 10-year requirement no longer applies to some second and later generation foreigners. See *infra* notes 223-225 and accompanying text.

185. Naturalization Guidelines, *supra* note 174, § 3.3.

186. *Id.* § 4.1

187. *Id.* §§ 4.2, 4.3.

188. *Id.* § 5.3.

189. *Id.* § 5.3.1.

1963,<sup>190</sup> and argues that the Convention requires it to adopt this policy discouraging dual nationality.<sup>191</sup> Other signatory states, however, have adopted far less restrictive practices.<sup>192</sup>

A number of exceptions mitigate the effects of the dual citizenship prohibition. These include waivers for applicants who have had most of their schooling in Germany, and for those who have reached the age of military service and whose home country will not allow them to renounce their previous citizenship without having served in the army.<sup>193</sup> Exceptions to the policy may also be made for extreme hardship.<sup>194</sup> The policy against multiple nationality may be waived for people granted asylum, for refugees who have been formally taken under German protection, and for *Volkszugehörige*.<sup>195</sup>

Restrictions on dual citizenship are a major reason why German naturalization rates are low.<sup>196</sup> Many foreigners do not apply for naturalization because they do not wish to give up all ties to their former homeland. The various waivers do make most second-generation Turks and Greeks eligible for naturalization. Nevertheless, those groups continue to naturalize at low rates. It would thus appear that additional factors impede the naturalization of these groups.

Judicial construction of the naturalization statutes and regulations has upheld and strengthened the substantial discretion belonging to government decision-makers. Moreover, in 1983, the highest German Federal Administrative Court held that if there is any doubt about an applicant's commitment to Germany's free democratic constitution, a case can be denied.<sup>197</sup> Courts have held that the government is not required to balance the interests of an applicant against those of the state; the government need only consider the interests of the state.<sup>198</sup> The authorities are not required to grant a natural-

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190. Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, May 6, 1963, 634 U.N.T.S. 221; 36 *Verträge der Bundesrepublik Deutschland* A 483, *ratified by Gesetz zu dem Übereinkommen vom 6. Mai 1963 über die Verringerung der Mehrstaatigkeit und über die Wehrpflicht von Mehrstaatern* of September 29, 1969, BGBl. II 1953.

191. See Naturalization Guidelines, *supra* note 174, § 5.3.1.

192. See *infra* notes 205-217 and accompanying text.

193. Naturalization Guidelines, *supra* note 174, § 5.3.3.6; see also Brubaker, *supra* note 32, at 116.

194. Naturalization Guidelines, *supra* note 174, § 5.3.3.

195. *Id.* § 5.3.3.3. Special provisions are also made for elderly applicants, minor children, those of military age, and those who have been outside their homeland for at least 20 years, have lived 10 years in Germany and are over 40 years old. *Id.* § 5.3.3.4 through § 5.3.3.7. Finally, exceptions can be made in the public interest, *Id.* § 5.3.4, and for certain spouses of Germans and those who have lost German citizenship due to marriage with a foreigner. *Id.* § 5.3.5.

196. Brubaker, *supra* note 32, at 115.

197. Judgment of June 27, 1983 (BVerwGE), *reprinted in* 4 SAMMEL-UND NACHSCHLAGEWERK DER RECHTSPRECHUNG DES BUNDESVERWALTUNGSGERICHTS § 1, at 23 (Karl Buchholz et al., eds.); Judgment of Aug. 24, 1979 (BVerwGE), *reprinted in* 3 SAMMEL-UND NACHSCHLAGEWERK DER BUNDESVERWALTUNGSGERICHTS § 1, at 6 (Karl Buchholz et al., eds.).

198. See, e.g., Judgment of Sept. 30, 1958, 7 BVerwGE 237 ("Accordingly, it is not a matter of a balancing of the interests of the individual with the interests of the receiving state. The interests of the state

ization request if "on political, cultural, or economic grounds, they come to the conclusion that the naturalization is not in the interests of the state."<sup>199</sup> By contrast, although U.S. law contains similar threshold criteria of "good moral character" and "attachment to constitutional principles,"<sup>200</sup> the applicant who satisfies these requirements is not subject to a discretionary denial based on a political or bureaucratic evaluation of the "interests of the state." In Germany, however, the discretionary aspect of Section 8 serves primarily to facilitate a flexible naturalization policy which responds to current state requirements and population policy.<sup>201</sup> Multilateral conventions such as the 1951 Geneva Refugee Convention<sup>202</sup> limit this rather broad discretion somewhat<sup>203</sup> as does Article 6 of the Basic Law, which guarantees special protection for the family.<sup>204</sup> Despite these restrictions, however, the naturalization system remains highly discretionary.

Though it is difficult to separate legal factors from political and cultural factors, the German naturalization laws clearly have played a role in maintaining one of Europe's lowest naturalization rates. According to a 1986 study, naturalization rates in Germany were substantially lower than those of France, Sweden, Great Britain, the United States, and Canada.<sup>205</sup> Thus, although Sweden has an ascriptive *jus sanguinis* system not unlike that of Germany, Sweden naturalizes approximately 5.1% of the population that is eligible to apply per year.<sup>206</sup> By contrast, Germany naturalizes only about 0.3% of the people eligible to apply per year.<sup>207</sup>

A brief survey of neighboring European countries illuminates some of the differences from the German approach. Although many states rely primarily on the *jus sanguinis* notion of citizenship, virtually all mitigate its potential exclusivity with a qualified right to naturalize. For example, Belgium's 1984 revision of its citizenship laws<sup>208</sup> grants children born in Belgium the right to naturalize.<sup>209</sup> Even if neither parent was born in Belgium, a child born and raised on Belgian soil can choose Belgian citizenship between the ages of

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have to be taken into consideration in every case of naturalization.").

199. Hans Dieter Rauscher, *Deutsches Staatsangehörigkeitsrecht — Gesetzliche Grundlagen und Rechtsprechung zur Einbürgerung*, in BARWIG ET AL., *supra* note 141, at 134.

200. 8 U.S.C. § 1427(a)(3) (1988).

201. MAKAROV & VON MANGOLDT, *supra* note 174, at § 8 RuStAG, cmt. 7 (author's translation).

202. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 8 U.S.T. 6260; T.I.A.S. No. 6577; 189 U.N.T.S. 137.

203. See, e.g., Judgment of Aug. 18, 1981, 64 BVerwGE 29.

204. Spousal applications under Section 9 of the RuStAG will only be denied after a showing of "considerable" state interests. Here, influenced by Article 6, the courts have required a more particularized balancing process. See Judgment of May 7, 1983, 67 BVerwGE 177.

205. Brubaker, *supra* note 32, at 118.

206. *Id.*

207. *Id.*

208. See generally MICHEL VERWILGHEN, LA CODE DE LA NATIONALITÉ BELGE: LOI DU 28 JUIN 1984 (1985).

209. LA CODE DE LA NATIONALITÉ BELGE, arts. 10, 11.

eighteen and twenty-two.<sup>210</sup>

France relies on what amounts to a hybrid *jus sanguinis/jus soli* system. Children of two French parents are French. If only one parent is French, the child has a right to naturalize at age eighteen.<sup>211</sup> A French-born child of foreign parents receives French citizenship if one parent was born in France.<sup>212</sup> Like the new German law, the French Code also provides that a French-born child of foreign-born parents can obtain French citizenship at majority if she has lived in France for at least five years before application. Unlike the German law, however, this right is virtually automatic.<sup>213</sup> Indeed, since 1977, some 75,000 persons have been naturalized in France each year.<sup>214</sup>

Austria's naturalization system is most similar to Germany's. Indeed, following the 1990 German revisions, Austrian law is more restrictive than German law. Austrian statutory law relies almost exclusively on the *jus sanguinis* principle.<sup>215</sup> Naturalization may be granted at the discretion of the government to applicants who have at least ten years of residence<sup>216</sup>. People born and raised in Austria do not have the right to naturalize, but the statute grants applicants who accrue thirty years of residence in Austria and meet other conditions the right to naturalize.<sup>217</sup>

In 1990, as part of a comprehensive revision of the Aliens Law,<sup>218</sup> important changes were made to the German naturalization laws. The Federal Government "deem[ed] it necessary to appeal to those aliens who have been resident . . . for many years and who wish to stay. . . permanently to apply for German citizenship."<sup>219</sup> The new law provides that foreigners who have resided in Germany for eight years, are between the ages of sixteen and twenty-three, have attended school in Germany for six years (at least four of which must be in a school of general education), have no serious criminal record, and who relinquish their former citizenship should be naturalized; this law trumps all other regulations.<sup>220</sup> Exceptions to the renunciation of

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210. *Id.* art. 14.

211. C. CIV. art. 21(17).

212. C. CIV. art. 21(23).

213. C. CIV. art. 21(44). This right may be denied under unusual circumstances if the government can demonstrate "lack of assimilation" or a significant defect in the applicant's past (*indignité*).

214. See Rainer Hofmann, *Einbürgerungspraxis und-probleme ausgewählter Staaten und die jeweilige Anwendung des Übereinkommens über die Verringerung der Mehrstaatigkeit* 6 (1989) (unpublished paper, on file with author).

215. Bundesgesetz über die Österreichische Staatsbürgerschaft, July 15, 1965 BGBl. 1171 (Aus.).

216. *Id.* § 10(1)(1).

217. *Id.* § 12.

218. See *infra* notes 286-300 and accompanying text.

219. Statement of Legislative Intent Accompanying the Bill for the Revision of the Aliens Law (English translation distributed by Federal Interior Ministry, June 1990), at 21 (on file with author).

220. Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz), July 9, 1990, BGBl. I 1354, §§ 85 *et seq.* [hereinafter 1990 AuslG].

citizenship can be made for persons whose home country will not allow renunciation, or who would face particular hardship or persecution if they were to renounce their former citizenship.<sup>221</sup> In addition, the law also provides that aliens who have lived in Germany for fifteen years and who apply before December 31, 1995 may be naturalized if they have no serious criminal record, can support themselves and their families, and relinquish their former citizenship.<sup>222</sup> The fee for this special naturalization has been reduced to 100 marks.<sup>223</sup>

These provisions mark a substantial change from Germany's restrictive naturalization history. However, they do not constitute a right to naturalize in any sense. The statute uses the phrase "as a rule" to describe the basic standard; thus, the new naturalization standard lies somewhere between the unfettered discretion of pre-1990 naturalization practice and ethnic Germans' right to citizenship. Still, although the 1990 revisions moved Germany closer to the mainstream of European citizenship and naturalization practice, they did not alter those fundamental aspects of German naturalization that serve to keep applications low. These include the exclusive reliance on the *jus sanguinis* principle for ascriptive citizenship, the generally discretionary nature of the system, and the requirement to relinquish foreign citizenship in many cases. Taken together, these elements dissuade people from seeking citizenship while erecting barriers against anyone who tries.<sup>224</sup> The various waivers do, however, make most second-generation Turks and Greeks eligible for naturalization.<sup>225</sup>

The current political and social climate undoubtedly still discourages foreigners in Germany from attempting to naturalize. As William Brubaker notes:

The barriers to naturalization lie not only in the restrictiveness of legal provisions but equally in the political culture of naturalization, embodied in attitudes of Germans and immigrants alike. Without a changed understanding of what it is to be — or to become — German, the liberalization of naturalization policy will not produce a dramatic surge in naturalization.<sup>226</sup>

Ironically, the liberal legal protections granted to foreigners in Germany have also deterred naturalization. As noted above, foreigners in Germany are entitled to wide-ranging social benefits and receive important legal protections.

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221. *Id.* § 87.

222. *Id.* § 86. Aliens for whom it is absolutely impossible to relinquish citizenship may be excused. *Id.* § 87.

223. *Id.* § 90.

224. Not all commentators agree with this assessment. Hailbronner, for example, argues that most foreigners decline to naturalize because the advantages of German citizenship over residency are not so great, and because the foreigners wish to return to their countries of origin. Hailbronner, *supra* note 37, at 67, 76.

225. CITIZENSHIP IN EUROPE, *supra* note 32, at 116.

226. BRUBAKER, CITIZENSHIP, *supra* note 135, at 79.

Citizenship is thus not nearly as important to the day-to-day life of a foreigner in Germany as it might be elsewhere.

### D. Post-War Provisions for Ethnic Germans

The Basic Law largely leaves the definition of who is a German to statute. Articles 73(2) and 124 simply provide that substantive citizenship questions are within the federal government's competence.<sup>227</sup> Article 116, however, contains a specific provision that has become important to the foreigner debate: in addition to German citizens, a German is a person who "has been admitted to the territory of the German Reich within the frontiers of December 31, 1937 as a refugee or expellee of German stock (*Volkszugehöriger*) or as the spouse or descendant of such person."<sup>228</sup>

Some commentators note that the word *Volkszugehörige* was used in a 1939 Nazi citizenship decree.<sup>229</sup> Thus Article 116(1), the primary source of rights for the *Aussiedler*, uses a phrase that some believe to be evocative of Nazi views of ethnicity and blood.<sup>230</sup> As such, it is important to ask whether Article 116 expresses a *völkisch* ideal or a transitory, pragmatic, humanitarian response to a unique problem.

Article 116(1) contains a number of legal ambiguities that have been resolved through statutory law and judicial interpretation. The first and most important statute was the 1953 Federal Expellee Law,<sup>231</sup> which replaced a number of separate state laws and which controls many aspects of the acceptance of potential *Aussiedler* into Germany. The most important statutory change concerned the very definition of "expellees" (*Vertriebene*).<sup>232</sup> The Federal Expellee Law first defines *Vertriebene* as persons who were forced to give up their residence in German communities between 1943 and 1949

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227. See HANSJÖRG JELLINEK, ENTWICKLUNGSTENDENZEN UND PROBLEME DES DEUTSCHEN STAATSANGEHÖRIGKEITSRECHTS 9-10 (1986).

228. GG art. 116(1). In addition to this provision, Article 116(2) grants rights to the victims of Nazi policies:

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

Note that these probably non-ethnic Germans must clear an additional hurdle — they must not have expressed a "contrary intention."

229. Alexy, *supra* note 127, at 2857.

230. *Id.* At the SPD's emergency congress in November 1992, Ignatz Bubis, a leader of Germany's Jewish community, made this argument on the basis that German law continues to grant citizenship along blood lines. See Dempsey, *Germany Closer*, *supra* note 126, at 2.

231. BVFG, *supra* note 75. The BVFG has been amended many times: a major revision was passed on Sept. 3, 1971, BGBl. I 1565; the most recent passed on Dec. 20, 1991, BGBl. I 2317. See also 1990 AAG, *supra* note 86.

232. See HAÜBER ET AL., *supra* note 68, at 3.

because of the common measures taken against Germans after the war. This is clearly the group for whom Article 116(1) was crafted.<sup>233</sup> The statute goes on to recognize a group who have "experienced a comparable fate up to the present" (*Auchvertriebene* or "also-expellees") and to list a number of specific areas from which they may come.<sup>234</sup>

Since the BVFG derives from Article 116, the acceptance into Germany of all Expellees is not discretionary in the strong sense discussed above.<sup>235</sup> The interests of the state do not trump those of an applicant under the BVFG as they do those of an applicant for naturalization. As one German commentator has put it: "[t]he acceptance of an expellee . . . can basically not be denied by the administrative authority. These persons thus possess in this regard a constitutional right to be admitted into Germany."<sup>236</sup> Some commentators believe that the main purpose of the *Aussiedler* system was "to facilitate the admission into Germany of Germans who lived under communism."<sup>237</sup>

The judiciary has also played a role in the evolution of this body of law. The Federal Constitutional Court has held that an "expellee" can also be "whoever during the time of the common expulsion measures was not physically present but still had his residence there and could not return without facing measures taken against him because he was a German *Volkszugehöriger*."<sup>238</sup> This reasoning applies to virtually any German *Volkszugehöriger* who lived in an affected area at the relevant time. Similarly, an Expellee could be a person who left an affected region even before the war, even if he left for other reasons.<sup>239</sup> Moreover, *Aussiedler* generally have not been strictly compelled to prove that their flight was solely due to their status as German *Volkszugehörige*.<sup>240</sup> One leading German commentary has summed up the German case law relating to expellees and *Aussiedler* as follows:

This case law . . . produces a uniform picture of legal expellee status: . . . neither by the original flight or expulsion . . . nor the giving up of residence, nor loss of homeland through failing to return because of fear of political persecution to a

233. See MAKAROV & VON MANGOLDT, *supra* note 174, Anhang 2, at 4.

234. The most important categories, apart from the *Aussiedler*, are (1) whoever, as a German citizen or *Volkszugehöriger*, has lost his residence in the currently occupied German eastern territories or in the regions outside the German borders after December 31, 1937 as a result of the Second World War; and (2) whoever, as German citizen or *Volkszugehöriger*, after January 30, 1933 took up residence outside the German Reich because of political opposition to National Socialism or threats or actions taken on account of race, religion, or world view. BVFG, *supra* note 75, § 1.

235. While Expellees have the right to enter Germany, they may not enjoy full constitutional rights to travel within Germany. See *infra* note 245 and accompanying text.

236. HAÜBER ET AL., *supra* note 68, at 3.

237. See Alexy, *supra* note 127, at 2855.

238. Judgment of Feb. 12, 1964, 17 BVerfG 224.

239. See Judgment of Apr. 26, 1967, 26 BVerwGE 352 (plaintiff, born in Austria-Hungary and of Polish nationality in 1939, entitled to Expellee status in 1967 despite fact that he left Poland on business trip and had U.S. citizenship in 1967).

240. Judgment of Apr. 26, 1967, 26 BVerwGE 352, 358.



region where Germans were later expelled nor in the case of *Aussiedler* . . . does it depend upon whether reasons other than German *Volkszugehörigkeit* (ethnicity) were ultimately determinative in the loss of his homeland. It is enough that he came from the described regions and that he is a German *Volkszugehöriger*.<sup>241</sup>

The Courts have also grappled with the question of how one determines who is a *Volkszugehöriger*. In 1981, the highest Federal Administrative Court, following a decision of the Federal Constitutional Court, held that even a person who did not consider himself to be a *Volkszugehöriger* (e.g., a Jew) could possibly be recognized as one under the BVFG.<sup>242</sup> However, such applicants, especially Jewish ones, would face significant problems. For example, they would have to prove that others identified them, their parents, or their grandparents as German *Volkszugehörige* from before the beginning of the common expulsion measures. For Jews who lived in multi-ethnic societies like Romania, where they are and were primarily identified as Jews, not Germans, this could be difficult.<sup>243</sup>

While it is beyond the scope of this article to undertake a detailed analysis of the Federal Expellees Law (BVFG), it is important to consider the relationship between the terms "German" (within the meaning of the Basic Law) and "citizen" (*Staatsangehöriger*). As noted, an ethnic German who has been accepted as an Expellee/*Aussiedler* is a German under Basic Law Article 116(1). To differentiate such persons from *de jure* citizens, German commentators refer to the *Aussiedler* as *status Deutsche* (status Germans). They are not treated as foreigners under the Aliens Laws, need no special residence permits, are free to work and travel, and in general have most of the rights of citizens, including the right to a passport and the right to vote.<sup>244</sup> They have a right to free movement under Article 11 of the Basic Law, although this right may be limited by the *Länder*.<sup>245</sup> The BVFG itself also grants rights to housing<sup>246</sup> and social help.<sup>247</sup> Germany considers status-Germans to have the same rights as citizens vis-à-vis third countries,

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241. MAKAROV & VON MANGOLDT, *supra* note 174, GG art. 116 cmt. 19, at 14.

242. Judgment of Dec. 16, 1981, 59 BVerfGE 128; *see also* Judgment of Sept. 27, 1982, 66 BVerfGE 168 (regarding constitutional requirements for nationality of non-resident ethnic Germans). The Court stated "religious affiliation is neutral with respect to membership in the *Volk*." 59 BVerfGE at 154-55.

243. *See* 59 BVerfGE at 155.

244. HAÜBER ET AL., *supra* note 68, at 17. Status-Germans do not, however, receive the protections of GG art. 16(1) against the deprivation of citizenship. *Id.* at 9. The categories of German citizen and status-German under Article 116 are mutually exclusive, and while it is possible for a status-German to naturalize and become a full citizen, a status-German who obtains and then for some reason relinquishes German citizenship does not revert to Article 116 status. MAKAROV & VON MANGOLDT, *supra* note 174, GG art. 116 cmt.6.

245. *See, e.g.,* Gesetz über die Festlegung eines vorläufigen Wohnortes für Aus- und Übersiedler, July 6, 1989, BGBl. I 1378 (empowering *Länder* temporarily to regulate place of residence of new *Aussiedler* and *Übersiedler*).

246. BVFG, *supra*, note 75, § 80.

247. *Id.* §§ 90, 91.

and they are entitled to full German diplomatic protection. They are also entitled to protection against extradition under Article 16(2)(1) of the Basic Law.

In the past few years, new restrictions have been placed on benefits for *Aussiedler*. Since January 1, 1990, for example, *Aussiedler* are no longer entitled to full unemployment benefits, but get monetary help (*Eingliederungsgeld*) for twelve months after entry, as well as language courses for a ten-month period.<sup>248</sup> Also, since mid-1990, potential *Aussiedler* must be in possession of a special permit to enter Germany.<sup>249</sup> As a result, most applicants must now pursue their applications from abroad. These restrictions may reflect a hardening of attitudes towards the *Aussiedler* in light of the massive numbers of new entrants due to re-unification and the changes in Eastern Europe. Nevertheless, the *Aussiedler* remain a special group. They attain the legal status of "Germans" within the meaning of the Basic Law and are referred to as *status-Deutsche*, not foreigners. They are not automatically citizens, but they have a statutory right to naturalization if they meet certain minimal criteria.<sup>250</sup>

### E. Aliens Laws

An "alien" or "foreigner" (*Ausländer*) is defined today, as it has been since 1965, as "whoever is not a German within the meaning of Article 116(1) of the Basic Law."<sup>251</sup> Status-Germans are not aliens under the 1965 Aliens Act<sup>252</sup> or the 1990 revisions to the Aliens Act. The primary purpose of the 1965 Act was to authorize the promulgation of administrative regulations,<sup>253</sup> ostensibly to achieve "a liberal and open foreigner policy which facilitates entry and residence."<sup>254</sup> However, the 1965 Act left executive decision-makers a great deal of discretion and did not grant foreign workers a right to residence. That present-day Germany is extremely protective of aliens' rights is in large measure a result of judicial aggressiveness in construing the rights provided to foreigners in the Basic Law.<sup>255</sup>

The current debate over German Aliens Law began in 1962 when the government introduced a legislative proposal to replace the 1938 law

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248. Gesetz zur Anpassung von Eingliederungsleistungen für Aussiedler und Übersiedler, Dec. 22, 1989, BGBl. I 2398 [hereinafter *Eingliederungsanpassungsgesetz*].

249. See 1990 AAG, *supra* note 86.

250. See Gesetz zur Regelung von Fragen der Staatsangehörigkeit of February 22, 1955, BGBl. I 65, § 6.

251. 1990 AuslG, *supra* note 220, § 1(2).

252. Ausländergesetz, April 28, 1965, BGBl. I 353 [hereinafter 1965 AuslG].

253. See, e.g., 1965 AuslG, *supra* note 252, §§ 2(3), 2(4), 3(2), 5(2), 51.

254. KAY HAILBRONNER, AUSLÄNDERRECHT: EIN HANDBUCH 4 (1984) (quoting Bundestagsdrucksache IV/868, at 10).

255. See *supra* notes 268-285 and accompanying text.

governing foreigners in Germany.<sup>256</sup> The most significant problem with the 1938 law was its subjective test for granting residence permits: the question was whether "according to [the alien's] personality and the purpose of his visit . . . he is worthy of the requested hospitality."<sup>257</sup> The proposed changes, incorporated into the 1965 Act, substituted a more objective standard: a residence permit "may be issued . . . if the presence of the alien does not prejudice interests of Germany."<sup>258</sup> This change increased the government's control over the duration of an alien's residence, since the government could look to state interests, such as the needs of the labor market, to limit an alien's stay.<sup>259</sup> Indeed, the first comprehensive regulations passed under the law expressly required that "a Residence Permit for a foreign worker . . . as a rule should be granted for at most one year."<sup>260</sup>

The government argued that the goal of this law was to achieve a "liberal and open policy towards foreigners."<sup>261</sup> Others, however, have argued that the Act's true purpose was to control and regulate the flow of immigrant labor as an economic resource.<sup>262</sup> Under the 1965 Act, workers were permitted to enter Germany as needed, and would leave, either voluntarily or by deportation, when Germany no longer needed their services or when other German interests so required.<sup>263</sup> The official perception of the role of workers, as embodied in the 1965 Act, has persisted. Today, the German government perceives foreigners in Germany to be laborers who, in essence, broke an agreement and overstayed their welcome:

Our recruitment policies for foreign workers in the 1950's and 1960's were not aimed at bringing people here as long-term residents . . . The main idea was that relatively young workers in Germany would gain professional experience and put away some savings in order ultimately to return home to build a better future. This did not work out that way in practice . . . The workers were satisfied with the work and the pay . . . They were not inclined to give up that position after a

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256. Fritz Franz, *Zwischenbilanz des deutschen Ausländerrechts*, 1992 ZAR 154, 155 (1992).

257. *Ausländerpolizeiverordnung*, Aug 22, 1938, RGBl. I 1053, § 1 ("nach ihrer Persönlichkeit und dem Zweck ihres Aufenthalts. . . daß sie der ihnen gewährten Gastfreundschaft würdig sind.") (author's translation).

258. 1965 AuslG, *supra* note 252, § 2(1) ("darf erteilt werden . . . wenn die Anwesenheit des Ausländers Belange der Bundesrepublik Deutschland nicht beeinträchtigt") (author's translation).

259. Franz, *supra* note 256, at 155.

260. *Allgemeine Verwaltungsvorschrift zur Ausführung des Ausländergesetzes*, July 7, 1967, GMBI. 231, No.4 on § 7 of the 1965 AuslG, reprinted in Franz, *supra* note 256, at 155.

261. Bundestagsdrucksache IV/868 A.3, cited in Franz, *supra* note 256, at 155.

262. E.g., Franz *supra* note 256, at 155 (arguing 1965 Act "tailored to the potential use of foreign workers") (author's translation); see also Knute Dohse & Klaus Groth, *Ausländerverdrängung*, 16 KRITISCHE JUSTIZ 231 (1983). Major economic actors sometimes support this argument: recently Ulrich Freiherr von Gienath, of the German Employers Federation, wrote, "[i]n case of a decline in the employment situation . . . the foreigners would therefore have to expect to be the first to lose their jobs. For this reason it would be absurd to encourage Utopian ideas about the large scale settlement of foreign families." CASTLES & KOSACK, *supra* note 144, at 98.

263. 1965 AuslG, *supra* note 252, § 10(1) (listing ten specific grounds for deportation and including final provision covering "other substantial interests of the Federal Republic of Germany.") (author's translation).

short while in return for an uncertain future in their homelands.<sup>264</sup>

This view that foreigners are largely an economic resource is an important backdrop to any discussion of German treatment of aliens.<sup>265</sup>

The 1965 Act did not address many subjects of concern to aliens, including such important questions as immigration of dependents and procedures for obtaining permanent residence,<sup>266</sup> leaving the government to adopt regulations to address these topics. As with naturalization law, the *Länder* implement the Aliens Act under federal supervision; as a result, a bewildering array of federal and *Land* administrative regulations and judicial decisions have come to control German aliens law. Judicial review follows a pattern similar to that found in naturalization: state administrative courts review agency actions under the Federal Administrative Court's supervision. In addition, in appropriate cases a constitutional complaint may be brought to the Federal Constitutional Court.<sup>267</sup> Due to the wide array of governmental actors involved in the implementation of the aliens laws, there has been a considerable amount of legal unpredictability and flexibility in government policy and protections for aliens on humanitarian grounds.<sup>268</sup>

In this area, as elsewhere, the German judiciary generally has protected the rights of foreigners in the post-war era. The Federal Constitutional Court has held that judicial review under Article 19(4) of the Basic Law is available for cases involving the deportation of foreigners.<sup>269</sup> This approach comports with the longstanding German tradition of close judicial review, both factual and legal, of administrative decisions.<sup>270</sup> In the post-war period the courts have combined this tradition with a new emphasis on rights to create a far more substantial system of judicial review.<sup>271</sup>

Under the 1965 Aliens Act, a foreigner who wished to live in Germany had to apply for a one-year residence permit (*Aufenthaltserlaubnis*).<sup>272</sup> Aliens who could prove at least four years of residence in Germany and who were "economically and socially integrated" could obtain a long-term residence permit roughly analogous to U.S. permanent resident status.<sup>273</sup> A 1978 administrative guideline had encouraged the issuance of such permits to

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264. Waffenschmidt Speech, *supra* note 41, at 4 (author's translation).

265. See generally CASTLES & KOSACK, *supra* note 144; HOMZE, FOREIGN LABOR IN NAZI GERMANY (1967); RIST, *supra* note 144.

266. Other statutes cover related questions. Help in securing employment, for example, is governed by the Arbeitsförderungsgesetz of June 25, 1969, BGBI.I 582 (as amended).

267. GG art. 93(1)(4a).

268. The government itself conceded in 1990 that this unpredictability was a serious problem. Gesetzentwurf der Bundesregierung, Entwurf für ein Gesetz zur Neuordnung des Ausländerrechts, Bundesratsdrucksache 11/90 (1990) (author's translation).

269. Judgment of Sept. 26, 1978, 49 BVerfGE 168.

270. *Id.* at 180-81, 184-85; see also Neuman, *Immigration*, *supra* note 121, at 49.

271. Neuman, *Immigration*, *supra* note 121, at 52.

272. 1965 AuslG, *supra* note 252, § 2.

273. *Id.* § 8.

former guestworkers with at least eight years of residence.<sup>274</sup> Also in 1978, the Federal Constitutional Court held that an alien had a constitutional interest in continued residence in Germany after years of routine renewal of his residence permit, an interest that limited somewhat the government's discretion in handling further renewal applications. The Court held that general policy interests were insufficient to outweigh the personal interest created by such a history, and ordered administrators to take the applicant's residence history into account.<sup>275</sup>

Earlier, the Federal Constitutional Court had held that the "principle of proportionality," which requires that any restriction on individual liberty be carefully weighed against serious public interests, should also apply to cases involving foreigners in Germany.<sup>276</sup> The Court has also determined that Article 6 of the Basic Law, which mandates that the state give "special protection" to marriage and the family,<sup>277</sup> protects foreigners to some degree in Germany. In 1979, the Court refused to hold that Article 6 gives the alien spouse of a citizen a right not to be deported; all that was required was for the administrator to balance the interests of the individuals and the state.<sup>278</sup> In 1987, the Federal Constitutional Court again considered Article 6 when it addressed the difficult question of what legal standard an issuing agency should use when considering whether to grant initial residence permits to the relatives of legal resident aliens, an issue of great importance to the entrenched population of foreigners in the Federal Republic. Administrative guidelines had adopted threshold requirements of age, length of marriage, and pre-application residence periods.<sup>279</sup> The Court found that while Article 6's family protection guarantee must be considered in determining whether to grant family members of resident foreigners permission to reside in Germany, Article 6 does not establish a fundamental right for these family members to enter Germany.<sup>280</sup>

As regards discrimination against foreigners due to their citizenship status, the Federal Constitutional Court has adopted a standard that lies somewhere

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274. See Guidelines No. 2 & 4 to § 8 of the *Ausländergesetz*. Allgemeine Verwaltungsvorschrift zur Ausführung des *Ausländergesetzes* (AuslVwV) of July 7, 1967, amended by Bekanntmachung of May 10, 1977, GMBL 202, and of July 7, 1978, GMBL 268, Cited in 49 BVerfGE 168, 177.

275. Judgment of Sept. 26, 1978, 49 BVerfGE 186; see also Neuman, *Immigration*, *supra* note 121, at 49 (discussing Court's reasoning more fully).

276. See, e.g., Judgment of July 18, 1973, 35 BVerfGE 382, 401-07 (public and private interests must be weighed with exceptional care in deportation proceedings, which are means of last resort).

277. GG art. 6(1) ("Marriage and family shall enjoy the special protection of the state.").

278. Judgment of July 18, 1979, 51 BVerfGE 386, 397.

279. One federal guideline recommended denial of first-time residence permits to spouses of second generation resident aliens unless the resident was at least eighteen, had lived continuously in Germany for eight years, and had been married for at least one year. See Judgment of May 12, 1987, 76 BVerfGE 1, 4.

280. 76 BVerfGE at 1. In addition, the Court ruled that a three-year post-marriage requirement which had been adopted in Baden-Württemberg was unacceptable under GG art. 6. 76 BVerfGE at 5-7.

between the strict scrutiny approach that the U.S. Supreme Court takes in discrimination cases, and the great deference that the U.S. Supreme Court shows in cases involving federal immigration policy.<sup>281</sup> The Federal Constitutional Court has ruled that Article 3(1) of the Basic Law, which states that "[a]ll persons shall be equal before the law"<sup>282</sup> protects aliens.<sup>283</sup> However, Article 3(3), which states that "[n]o one may be disadvantaged or favoured because of . . . his language, his homeland and origin,"<sup>284</sup> does not apply to aliens.<sup>285</sup>

In 1990, the federal government undertook a comprehensive revision of the 1965 Aliens Law.<sup>286</sup> The government's stated goal was to limit discretion, clarify residence statuses and visa and passport requirements, and liberalize naturalization requirements for young "foreigners" born and raised in Germany.<sup>287</sup> In addition to the naturalization revisions discussed above,<sup>288</sup> the primary change brought about by the new law was the creation of four resident alien categories to which the states would be forced to adhere, thereby limiting their administrative leeway.<sup>289</sup> The *Aufenthaltserlaubnis*<sup>290</sup> is a general residence permit which may be extended; the *Aufenthaltsberechtigung*<sup>291</sup> is the rough equivalent of U.S. permanent resident alien status; the *Aufenthaltsbewilligung*<sup>292</sup> is a specific, short-term residence permit, which requires a specific purpose; and the *Aufenthaltsbefugnis*<sup>293</sup> is a residence permit based on humanitarian or political grounds.

In fact, these revisions did little to limit administrative discretion.<sup>294</sup> Grounds for deportation are still fairly fluid; government officials may order deportation whenever "public security and order or other significant interests

281. Compare *Bernal v. Fainter*, 467 U.S. 216 (1984) (discrimination under state law based on alienage subject to strict scrutiny review under equal protection clause) with *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding limit on enrollment of aliens in Medicare program to permanent residents who have at least five years residence in U.S.); see also Neuman, *Immigration*, *supra* note 121, at 66.

282. GG art. 3(1).

283. Judgment of March 20, 1979, 51 BVerfGE 1, 30.

284. GG art. 3(3).

285. 51 BVerfGE at 30 (invalidating social insurance law which suspended payments to non-Germans during periods of voluntary residence outside of Germany).

286. 1990 AuslG, *supra* note 220.

287. Statement of Legislative Intent, *supra* note 219, at 11, 14-16, 21.

288. See *supra* notes 218-225 and accompanying text.

289. Statement of Legislative Intent, *supra* note 219, at 14-16.

290. 1990 AuslG, *supra* note 220, § 15.

291. *Id.* § 27.

292. *Id.* § 28.

293. *Id.* § 30.

294. Germany authorizes courts to review administrative action as regards the legal limits of discretion and compliance with the purpose of the law. An agency may generally adopt necessary and appropriate means to achieve authorized ends, and exceptionally broad delegations of discretion, like those of the Alien's Law, confer extremely wide latitude to the agency. Erhard Denninger, *Judicial Review Revisited: The German Experience*, 59 TUL. L. REV. 1013, 1023 (1985).

of [Germany] are impinged upon."<sup>295</sup> In addition, the 1990 reforms did nothing to change the essentially discretionary nature of the granting of residency permits. As in the 1965 law,<sup>296</sup> the 1990 revisions grant the Interior Ministry the authority to draft regulations controlling the grant of residence permits for foreign workers.<sup>297</sup> Under Sections 6 and 7 of the new law, a residence permit is to be granted only if the alien's stay "neither negatively affects nor poses a threat to the interests (*Interessen*) of the Federal Republic of Germany."<sup>298</sup> This change marks little more than a linguistic alteration of the 1965 Act, which stated, "[t]he residence permit may be granted if the presence of the foreigner does not prejudice interests (*Belange*) of Germany."<sup>299</sup> Thus, if anything, the new law seems more discretionary than the old law as it applies to residence rights for foreign workers.<sup>300</sup>

German aliens law thus reflects the tensions discussed throughout this article. Government decision-makers historically have viewed aliens law as a matter of economics and labor policy rather than as a matter of cultural integration or human rights. As one German writer has noted, "[i]n the middle point of foreigner politics stand the interests of the German labor market."<sup>301</sup> Immigration has never been the government's goal. Liberal constitutional legal structures mitigate the discretionary and instrumental nature of aliens statutes. Without the societal goals of immigration, multi-culturalism, and ethnic diversity, however, society will not lend practical support to judicial intervention on behalf of foreigners. Lawmakers attuned to popular opinion probably will consider public reaction in drafting any future revisions to the aliens laws. A popular backlash thus develops which affects not only foreigners but the law itself. There is no better example of this phenomenon than the German asylum debate.

#### F. Asylum Laws

The legal structures defining the right to asylum have affected the political debate in Germany on both immigration in general and asylum in particular.

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295. 1990 AuslG, *supra* note 220, § 45.

296. 1965 AuslG, *supra* note 252, § 2.

297. 1990 AuslG, *supra* note 220, § 10(2).

298. *Id.* § 7(3).

299. 1965 AuslG, *supra* note 252, § 2(1) ("Die Aufenthaltserlaubnis darf erteilt werden, wenn die Anwesenheit des Ausländers Belange der Bundesrepublik Deutschland nicht beeinträchtigt."). Some German commentators have noted the continuity of the term *Belange* from § 10 of the Nazi Decree on the Treatment of Foreigners of 1939, Verordnung über die Behandlung von Ausländern of September 5, 1939, RGB1.I 1667, to 1965, and argue that this grant of tremendous government power served interests in 1965 that were uncomfortably similar to those of 1939. *See, e.g.,* Dohse & Groth, *supra* note 262, at 232 (referring primarily to use of foreign laborers); *see also supra* notes 262-264 and accompanying text (discussing foreign labor in German history).

300. Franz, *supra* note 256, at 159-60 (referring to 1990 law as "the emperor's new clothes" and noting, among other problems, continuing role played by discretion).

301. KARL-HEINZ MEIER-BRAUN, GASTARBEITER ODER EINWANDERER? 23 (1980).

Basic Law Article 16(2) provides that "persons persecuted on political grounds shall enjoy the right of asylum."<sup>302</sup> The drafters of the Basic Law saw this provision as an important statement of their commitment to a strong human rights policy in the aftermath of the war.<sup>303</sup> Article 16(2) is therefore emblematic of the rejection of National Socialism which lies at the core of the Basic Law; in addition, it reflects the drafters' concerns about political persecution in Soviet-occupied countries.<sup>304</sup>

The asylum provision was controversial even in 1948, and there was significant debate over the language of the provision.<sup>305</sup> These debates clearly indicate the drafters' awareness of the political importance of the asylum guarantee.<sup>306</sup> Among their specific concerns were two that have become major problems in Germany today: the danger of giving border police too much power to make threshold decisions,<sup>307</sup> and the question of the right to work.<sup>308</sup> The sparse phrasing the drafters finally adopted for Article 16(2), has left many gaps in German asylum law. The result is that this constitutional right, the central provision in the current immigration debate, is itself largely an empty arena in which highly contradictory goals and ideals clash.

The first important elaboration of the constitutional right to asylum occurred when Germany signed the 1951 Geneva Refugee Convention.<sup>309</sup> As a result of this accession, German courts have construed Article 16(2) to include persons persecuted on account of race, religion, nationality, or membership in a particular social group, thus tracking the Convention's definition of a "refugee."<sup>310</sup>

Until the mid-1970's, asylum was not a controversial political or legal issue in Germany. Applications were handled by administrative agencies without explicit statutory guidance. As applications began to rise precipitously

302. GG art. 16(2). Article 16(3) prevents the extradition of German citizens, and regulates denaturalization and expatriation. GG art. 16(3).

303. See generally, HELMUT QUARITSCH, EINWANDERUNGSLAND BUNDESREPUBLIK DEUTSCHLAND? AKTUELLE REFORMFRAGEN DES AUSLÄNDERRECHTS 28-40 (1981).

304. *Id.*

305. HANS KREUZBERG, GRUNDRECHT AUF ASYL 21-25 (1984).

306. See QUARITSCH, *supra* note 303, at 28-40. The debates also suggest that the drafters did not foresee that hundreds of thousands of asylum-seekers would enter Germany pursuant to this provision.

307. Dr. von Mangoldt pointed this out, and proposed a formulation that would in essence have granted a right of entry to permit adjudication of claims. *Id.* at 34, 63.

308. Two of the strong supporters of the asylum provision, Renner of the KPD and Wagner of the SPD, both of whom had sought asylum during the Nazi period, stressed the importance of linking the right to work to the asylum provision itself. It appears, however, that this did not pass because the drafters believed that GG art. 2 (the "free development of personality" clause) protected asylum-seekers' right to work. *Id.* at 44, 49.

309. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137. The Federal Republic of Germany signed the convention on November 19, 1951 and ratified it on December 1, 1953. BGBl. II 559.

310. See Mary Ellen Fullerton, *Persecution Due To Membership In A Particular Social Group: Jurisprudence in the Federal Republic Of Germany*, 4 GEO. IMMIGR. L.J. 381, 389 n.30 (1990).



through the 1970's, however, the government concluded that it had to centralize applications processing in order to handle the load.<sup>311</sup> In the early 1980's, the government changed its policy in order to hinder entry by applicants with frivolous claims, expedite the adjudication process, and limit both employment authorization for applicants and their access to social welfare benefits.<sup>312</sup> In 1980, for instance, the government adopted visa requirements to impede applicants from the main sending countries — Turkey, Afghanistan, India, Sri Lanka and Bangladesh — from travelling to West Germany.<sup>313</sup> The visa measures failed to stem the flow of asylum-seekers, in part because many applicants discovered they could easily travel to East Berlin and then secure permission to enter West Berlin.<sup>314</sup>

German asylum practice is now governed primarily by an elaborate Asylum Procedures Law passed in 1982.<sup>315</sup> The basic procedural feature of the system is its high degree of centralization and bureaucratization. The law contains a specific mechanism for the allocation of asylum-seekers among the *Länder* based on a percentage formula that roughly tracks the population and resources of each *Land*. Asylum-seekers are not entitled to choose their place of residence.<sup>316</sup> The 1982 law also adopted controversial guidelines for "collective accommodations for asylum-seekers."<sup>317</sup> Most state governments supported this idea in hopes of saving money and deterring asylum seekers.<sup>318</sup> Critics, however, saw disturbing similarities between the mandatory group housing and detention camps.<sup>319</sup> In addition, the segregation of asylum-seekers clearly contributes to the public perception of asylum-seekers as social outcasts.

Applications for asylum are first made to local "aliens authorities," who forward the applications to a centralized federal agency,<sup>320</sup> which employs approximately 1,000 workers.<sup>321</sup> Decision-makers are divided into special-

311. See T. Alexander Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 MICH. J.L. REFORM 183, 197-203 (1984). Applications rose from 5,595 in 1973 to over 9,000 in 1974 and 1975 and from 51,493 in 1979 to over 100,000 in 1980. The numbers temporarily declined in 1981-2 before beginning to rise dramatically again. *Id.* at 197.

312. *Id.* at 211.

313. *Id.* at 201.

314. Mary Ellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands*, 29 VA. J. INT'L. L. 69 (1988) [hereinafter Fullerton, *Restricting the Flow*].

315. Gesetz über das Asylverfahren, July 16, 1982, BGBl. I 946 [hereinafter 1982 AsylVfG]. The specific procedures of German asylum law have been well described in a number of recent articles in English and will not be repeated here. See, e.g., Aleinikoff, *supra* note 311; Fullerton, *Restricting the Flow*, *supra* note 314; Neuman, *Immigration*, *supra* note 121.

316. 1982 AsylVfG, *supra* note 315, § 22.

317. *Id.* § 23.

318. Aleinikoff, *supra* note 311, at 203.

319. *Id.* at 204.

320. Bundesamt für die Anerkennung ausländischer Flüchtlinge (Federal Office for the Recognition of Foreign Refugees) [BAF].

321. Interview with Wolfgang Weickhardt, Section President for the BAF, in Zirndorf, Germany

ized working groups to achieve greater knowledge of particular sending regions. As in the United States, advocates for asylum-seekers have charged that political considerations have played an improper role in German asylum determinations.<sup>322</sup> Government decision-makers, however, proudly proclaim their expertise and independence from explicit political control.<sup>323</sup> Nevertheless, judicial review has become a major issue in the German asylum debate.<sup>324</sup>

Asylum cases are reviewed initially by administrative law courts located in the state in which the applicant resides.<sup>325</sup> The judges in these courts take this review very seriously but face a staggering case load. For more than a decade, many judges have chosen not to decide cases, knowing that declining to reach a decision will allow the alien to remain in Germany.<sup>326</sup> After a number of years, such asylum applicants may become eligible for residence permits under the Aliens Law.<sup>327</sup> The 1982 Asylum Law was designed to expedite some cases by creating a sub-category of "obviously unfounded" cases in which appeals must be filed within seven days to avoid the possibility of deportation.<sup>328</sup> If the court upholds the agency determination, the asylum seeker has no further appeal under the statute.<sup>329</sup>

By the mid-1980's, it became apparent that these restrictions<sup>330</sup> were not reducing the tide of asylum-seekers because the judicial system seemed incapable of rendering quick decisions to expedite the deportations of initially-denied asylum-seekers.<sup>331</sup> As the numbers continued to rise, legislative attention turned again to the issue of border control.<sup>332</sup> The ease with which asylum-seekers received transit visas to West Berlin from the East German government was a major point of contention until the GDR agreed to limit transit visas on October 1, 1986. The immediate result was dramatic, but short-lived.<sup>333</sup> Thus, in January 1987, the government passed a new asylum

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(June 1990) [hereinafter Weickhardt Interview].

322. Aleinikoff, *supra* note 311, at 205.

323. Weickhardt Interview, *supra* note 321.

324. *See supra* notes 55-56 and accompanying text.

325. Aleinikoff, *supra* note 311, at 207.

326. *Id.* at 208.

327. Under the 1965 Aliens Law the *Länder* developed flexible policies that allowed aliens denied asylum to remain if they presented compelling humanitarian claims; this was known as *Duldung* ("tolerance"). 1965 AuslG, *supra* note 252, § 17. The 1990 law eliminated this category, but provides for the granting of an *Aufenthaltsbefugnis*, a residence permit granted for humanitarian reasons. 1990 AuslG, *supra* note 220, § 30(2).

328. 1982 AsylVfG, *supra* note 315, § 11(1) (German phrase *offensichtlich unbegründet*).

329. An asylum-seeker might still make a constitutional claim under GG art. 19(4) ("Should any person's rights be violated by public authority, recourse to the court shall be open to him.").

330. Relatively minor changes were made to the Asylum Procedure Law in 1984. *See Erstes Gesetz zur Änderung des Asylverfahrensgesetzes*, July 11, 1984, BGBl. I 874.

331. In 1990 the BAF took an average of 9-11 months to decide on an application. Appeals to the courts often took another 2-3 years. Weickhardt Interview, *supra* note 321.

332. Fullerton, *Restricting the Flow*, *supra* note 314, at 64-70.

333. *Id.* at 69.

law to address the problems of border controls, employment authorization, and asylum procedures.<sup>334</sup> This law expressly authorized border police to deny entry to an asylum-seeker who has "found protection elsewhere,"<sup>335</sup> who has spent more than three months in a European Community country or other "safe state" (the law lists Austria, Switzerland, Sweden, and Norway), or who already possesses a refugee travel document. However, even those denied at the border retain the constitutional right of judicial review and must be allowed to enter Germany to pursue their appeals.<sup>336</sup>

The 1987 law lengthened the employment ban for asylum-seekers from two years to five years.<sup>337</sup> This change was implemented to protect German jobs, but it also increased asylum-seekers' dependence on government stipends. Neo-Nazis argued that the "lazy" asylum-seekers should not be supported by hard-working Germans, and the stipends even troubled many mainstream Germans. As a result, on July 1, 1991, the government lifted the employment ban.<sup>338</sup> Work applicants must now show that neither a German nor a European Community citizen is available to do a particular job.<sup>339</sup> Despite this restriction, public attention has focused once again on whether or not asylum-seekers take jobs away from Germans.<sup>340</sup>

The 1987 amendments also dealt quite specifically with the substantive grounds for asylum. Applicants who come to Germany fleeing armed conflict or general conditions of upheaval may now see their cases denied as "manifestly unfounded."<sup>341</sup> Furthermore, post-flight grounds for asylum (grounds that arise after the applicant has left his or her country of nationality) are now precluded as a basis for seeking asylum.<sup>342</sup> However, these changes have barely dampened the influx of asylum-seekers.

The German government has also pursued multilateral solutions to the asylum crisis. The Schengen Convention,<sup>343</sup> which Germany, France and the

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334. Gesetz zur Änderung asylverfahrensrechtlicher, arbeitserlaubnisrechtlicher und ausländerrechtlicher Vorschriften, Jan. 6, 1987, BGBl. I 89 [hereinafter 1987 Asylum Law].

335. *Id.* at § 1(2). This is defined as a three-month stay without threat of political persecution.

336. This right is based on GG art. 16(2). See Pfaff, *supra* note 13, at 131.

337. 1987 Asylum Law, *supra* note 334, § 2(1). From 1980 to 1987 applicants from countries other than those of Eastern Europe had to wait two years before receiving work authorization; those from Eastern Europe had to wait one year. Sechste Verordnung zur Änderung der Arbeitserlaubnisverordnung, of 1981, BGBl. I 1042, § 1(2). Even after 1987, this one year period for those from Eastern Europe remained in effect. See Fullerton, *Restricting the Flow*, *supra* note 314, at 72.

338. Haberland Letter, *supra* note 38.

339. *Id.*

340. The German Information Center responds to this perception by reminding the public that asylum seekers can only work in a job that no German or European Community member wants. *Some Asylum Seekers Get Temporary Work Permits, Jobs*, WEEK IN GERMANY, Jan. 22, 1993, at 4.

341. 1987 Asylum Law, *supra* note 334, § 1(8); see also Fullerton, *supra* note 314, at 70 n.179.

342. 1987 Asylum Law, *supra* note 334, § 1(1).

343. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, and Convention Applying Their Agreement, June 19, 1990, 30 I.L.M. 68 [hereinafter Schengen Agreement and Convention].

Benelux states signed in 1990, is the most specific and significant current European legal response to non-European Community refugees.<sup>344</sup> The important provisions of the Convention aim to standardize border controls among the parties;<sup>345</sup> make special provisions for cooperation in the areas of drugs, arms, third country nationals, and refugees;<sup>346</sup> and institute a computerized information system to facilitate the controls of criminals and terrorists.<sup>347</sup> Although the European Community has not yet adopted the Convention,<sup>348</sup> there are still reasonably good prospects that it will do so.

The asylum provisions have generated the most controversy of any of the Schengen provisions. To prevent the circulation of asylum applicants, the state of first application remains responsible for an asylum-seeker.<sup>349</sup> That state must evaluate the application in accordance with the Geneva Convention on the Status of Refugees and the New York Protocol.<sup>350</sup> The responsible state must also re-admit an applicant found to be illegally present in another state, and must expel applicants not admitted to residence.<sup>351</sup> This system will almost inevitably lead to a more restrictive asylum model for relatively liberal asylum states like Germany as the members search for an acceptable common denominator;<sup>352</sup> in fact, the existence of the Agreement may legitimate restrictions to Germany's asylum law. In the final analysis, the Schengen Agreement may not be sufficiently comprehensive or flexible enough to deal with current realities, but its existence makes it a critical part of the German asylum debate.<sup>353</sup>

There is a wide-spread perception in Germany that asylum cases are prolonged by asylum-seekers, their advocates, and the legal system gener-

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344. The Agreement grew out of the 1984 Saarbrücken Agreement on abolishing border controls signed on June 14, 1985 by the Federal Republic of Germany, France, and the Benelux countries. *Id.* pmbl.

345. *Id.* arts. 2, 3, 6.

346. *Id.* arts. 4, 5, 28-91.

347. This is called the "Schengen Information System." *Id.* arts. 92-119.

348. Some of the original parties have not yet ratified the Agreement, and it has encountered serious opposition in the Netherlands. Bertold Huber, *Asyl- und Ausländerrecht in der Europäischen Gemeinschaft*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT, July 1992, at 618, 620. Italy joined the group in December 1990, and Portugal and Spain joined in June 1991. J.P.H. Donner, Abolition of Border Controls 1, 2 (unpublished manuscript, printed by T.M.C. Asser Institut, The Hague, in Free Movement of Persons in Europe, Asser Institute Colloquium on European Law (Sept. 12-13, 1991), on file with author).

349. Schengen Agreement and Convention, *supra* note 343, arts. 29-30.

350. *Id.* arts. 28, 29.

351. *Id.* arts. 33, 34.

352. Strict use of the Geneva Convention's definition, for example, excludes the "humanitarian" or "de facto refugees" that currently enter Germany in some cases. Dr. Eckart Nanz, a German negotiator at Schengen, has noted that if Germany continues to give a broad reading to its constitutional right to asylum, that reading will likely be seen as incompatible with the goals of the other Schengen states. Interview with Dr. Eckart Nanz, in Bonn, Germany (June 11, 1990).

353. To illustrate, CSU Chairman Waigel asserted in April 1992 that his party would not support the Schengen Agreement unless its passage were linked to a constitutional amendment to limit the right to asylum. *Kohl Allies Threaten EC Border Deal Over Asylum*, Reuters Library Report, Apr. 15, 1992, available in LEXIS, Nexis Library, Alleur File.

ally.<sup>354</sup> Critics of asylum law argue incorrectly that Basic Law Article 16(2) is the reason for judicial delay. The real cause of judicial delay is the intricate protective review procedures mandated by German law for administrative decisions involving basic rights generally,<sup>355</sup> and by the extraordinary care that German judges, who are responsible for an independent, de novo review, often give to these cases.<sup>356</sup> It is thus the underlying German commitment to the rule of law that prolongs asylum review. As such, strict adherence to the rule of law in asylum cases has become an important issue in the asylum debate.

While some critics argue that the government has devoted too few resources to developing a workable asylum system within the framework of the Basic Law, the louder call is for a far more drastic change — a revision of Article 16(2) itself. For example, in October 1992 members of the CDU/CSU coalition and the FDP passed a non-binding *Bundestag* resolution calling for the striking of Article 16 entirely and its replacement with a passage declaring that the Federal Republic of Germany grants asylum on the basis of the Geneva Convention alone.<sup>357</sup> Such a change would render the status of asylum-seekers in Germany more precarious than it currently is, since the protections of the Geneva Convention are not nearly as extensive as those provided by current German law.<sup>358</sup> The CSU voted in October 1992 to support striking the asylum article from the Basic Law and replacing it with a provision that reads "asylum is provided for; prerequisites, content and limits are laid down by law."<sup>359</sup> The SPD, however, had resisted these moves, insisting on a statutory approach to asylum reform rather than a constitutional one.

The government drafted a compromise statute,<sup>360</sup> which the *Bundestag* passed on June 26, 1992.<sup>361</sup> By the time it passed, however, the hope that

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354. The asylum statute passed in 1992 therefore contains a number of provisions designed to speed up asylum cases. See *infra* note 361 and accompanying text.

355. See, e.g., GG art. 19(4).

356. See Aleinikoff, *supra* note 311, at 207. One judge in Cologne reported that he spends approximately half of his time dealing with asylum cases. However, the same judge also estimated that of some 4,000 attorneys in the Cologne area, only 30-50 might handle asylum cases, of whom perhaps ten really care and do a thorough job. Judge X Interview, *supra* note 58.

357. *Governing Coalition Passes Resolution Calling for Change of Asylum Law: SPD Boycotts the Vote*, WEEK IN GERMANY, Oct. 16, 1992, at 1.

358. See generally Huber, *supra* note 348.

359. *Governing Coalition Passes Resolution Calling for Change of Asylum Law*, WEEK IN GERMANY, Oct. 16, 1992, available in LEXIS, Nexis Library, Allert File.

360. *Number of Asylum-Seekers Rose in February*, WEEK IN GERMANY, Mar. 6, 1992, available in LEXIS, Nexis Library, Allert File. This bill shifted responsibility for housing and caring for asylum-seekers from local communities to the federal government. Despite terrible historic resonances, asylum seekers are to be detained in special "camps" or "centers" while awaiting decisions in their cases; however, movement in and out of the centers is not to be restricted. *Id.*

361. Gesetz zur Neuordnung des Asylverfahrens, June 26, 1992, BGBl. I 1126 [hereinafter AsylVfNG]. To date, the impact of this law is unclear.

it could afford a solution was already dim. This law went into effect on July 1, 1992; its most important provisions relating to speeding up asylum procedures, however, are not scheduled to go into effect until April 1, 1993.<sup>362</sup>

As violence against foreigners continued over the summer of 1992, pressure increased on the SPD to agree to a constitutional amendment. For example, Federal Interior Minister Rudolf Seiters stated that the right to asylum was being used primarily as an instrument of uncontrolled economic migration, and that "[w]e will not solve the problem without an amendment to the Basic Law."<sup>363</sup> In his eyes, the SPD (and the Free Democratic Party [FDP]) should agree to a constitutional amendment to ensure that the *Rechtsstaat* ("state based on law") remains effective while ending the misuse of the right to asylum.<sup>364</sup> Finally, after chairman Björn Engholm threatened to resign if the SPD did not change its position, the party agreed at an emergency meeting in mid-November to open negotiations with the ruling coalition on amending the constitutional right to asylum.<sup>365</sup> On December 15, 1992, the SPD parliamentary group voted 101-64 (with five abstentions) to approve the CDU/CSU proposal to amend the constitutional asylum provision.<sup>366</sup> This amended provision will bar asylum applications from anyone seeking to enter Germany from "safe third countries," a category that includes every state bordering Germany.<sup>367</sup>

By far the most radical suggestion for stemming the influx of asylum-seekers was Helmut Kohl's November 1, 1992 threat to declare a legislative state of emergency under Basic Law Article 81<sup>368</sup> and to seek to pass laws restricting the right to asylum by simple majority vote in the *Bundestag*. No government has ever invoked this provision, and German constitutional experts hurried to state that Kohl was on shaky legal ground at best.<sup>369</sup>

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362. *Id.* art. 5.

363. *Asylbewerberzahlen gegenüber 1991 verdoppelt*, 1992 ZAR 98, 98.

364. *Id.*

365. Dempsey, *Germany Closes*, *supra* note 126, at 14.

366. *Opposition Approves Germany's Asylum Deal*, Reuters Library Report, Dec. 15, 1992 available in LEXIS, Europe Library, Alleur File [hereinafter *Asylum Deal*]. Many SPD members have expressed outrage over this move. In a highly publicized move, Günter Grass accused the party of "hypocrisy" and formally resigned. *German Writer Quits Party on Asylum Issue*, BOSTON GLOBE, Dec. 30, 1992, at 10.

367. *Coalition Parties and SPD Debate Proposed Asylum Legislation in First Reading*, WEEK IN GERMANY, Jan. 22, 1993, available in LEXIS, Nexis Library, Alleur File. The deal, however, seems extremely fragile: the two groups had begun to quarrel over technicalities by early January 1993. Tom Heneghan, *Bonn Steps Up Pressure for Quick Asylum Reform*, Reuters Library Report, Jan. 12, 1993 available in LEXIS, Nexis Library, OMNI File.

368. GG art. 81. Kohl argued that the government had become gridlocked over asylum within the meaning of GG art. 81(2), and challenged the SPD to cease its opposition to "a reasonable and effective solution." *Das ist der Staatsstreich*, DER SPIEGEL, Nov. 2, 1992, at 18 [hereinafter *Staatsstreich*]. Even members of Kohl's own party publicly questioned his position; as Rupert Scholz, a prominent CDU legal expert, put it: "[t]he asylum-seekers are surely not an invasion." *Id.* at 19.

369. For example, constitutional law expert Jürgen Kuhlmann stated that the Basic Law did not contemplate this sort of state of emergency. Moreover, in his opinion Kohl's suggestion was a "dangerous game" that suggested that a change in the Basic Law could solve the problems with asylum cases, when

The current call to amend the Basic Law's right to asylum is problematic in part because more than the right to asylum is at stake. The ostensible goals of such an amendment include limiting the right of entry and limiting judicial involvement by simplifying procedures for rejecting applications and stripping away "ponderous formalities" for certain frivolous categories such as economic refugees.<sup>370</sup> The current proposals for reforming administrative asylum proceedings could accelerate asylum cases without changing the Basic Law, although this may diminish the attention administrators provide each individual case.<sup>371</sup> A change in the constitution, however, would represent a capitulation to the radical right and a rejection of one of the humanitarian centerpieces of the post-war Federal Republic. Such a move, especially if unaccompanied by changes to citizenship law and the *Aussiedler* provisions, will tilt Germany toward a restrictive, mono-cultural, and *völkisch* model of society.<sup>372</sup> Thus, German policy-makers should ask themselves not merely how important Article 16 is to the legal system, but also how important it is to post-war Germany's self-understanding.

#### IV. GOVERNMENT AND PUBLIC DISCOURSE

##### A. *The Kein Einwanderungsland Principle*

In the poison cupboard of contemporary taboos stands a flask with the label 'Country of Immigration.' Within it squats a spirit. Whoever frees him, so goes the political wise talk . . . will be lost, and with him the nation and the people.<sup>373</sup>

The most venerable and famous German government postulate about immigration is that Germany is now (and has always been) *kein Einwanderungsland* ("not an immigration country").<sup>374</sup> Kay Hailbronner, for

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in fact the problem lay neither with the constitutional right to asylum nor with judicial review, but rather with the length of the proceedings. DER SPIEGEL, Nov. 16, 1992, at 53; see also Fisher, *supra* note 15, at A16. One obvious problem is that GG art. 81(4) precludes amendment, repeal, or suspension of the Basic Law by a statute enacted pursuant to GG art. 81(2). If a move such as proposed by Kohl were to succeed, it would enable the Chancellor to achieve by legislation (which requires only a majority in the *Bundestag*) that which he originally sought to accomplish by constitutional amendment (which requires a two-thirds majority). See *Staatsstreich*, *supra* note 368, at 18.

370. See Eckhardt Schiffer, *Refugee Status in Germany*, GERMAN COMMENTS 78, 79-80 (1992).

371. In addition, the removal of GG art. 16(2) could also introduce discretion into the German asylum calculus.

372. President Richard von Weizsäcker recognized this when he called in his Christmas Eve speech on Germans to broaden the definition of citizenship as part of the response to what he called Germany's "fall of unrest." *Leader Asks Germans to Embrace Foreigners*, BOSTON GLOBE, Dec. 25, 1992, at 29.

373. KNIGHT & KOWALSKY, *supra* note 81, at 17, quoting KLAUS J. BADE, DIE EINWANDERUNGSSITUATION: ERFAHRUNGEN — PROBLEME — PERSPECTIVEN ("Im Giftschränk amtlich tabuisierter Zeitbegriffe steht eine Flasche mit der Aufschrift 'Einwanderungsland.' Darin hockt ein Geist. Wer ihn befreit, so geht die Rede Politischer Weisheit . . . der ist verloren und mit ihm Land und Leute.") (author's translation).

374. Germany is not the only nation to use such a phrase. The Swedish government, for example,

example, cites it as one of the three fundamental principles that characterize the field of German immigration law.<sup>375</sup> The German government uses *kein Einwanderungsland* to mean that Germany does not consider itself to be a "classical" immigration country like Canada or Australia, which pursue an active immigration policy to fill territorial space or meet demographic need. It is true, of course, that there are today millions of foreign-born persons in Germany who could fairly be called immigrants, people who have given up their former homes or have even been born and raised in Germany, attended school there and are, in most respects, fully integrated into German culture. Yet, in the government's eyes this situation is basically a mistake:

Germany has never pursued an active immigration policy. We are one of the most thickly settled countries in the world. We have never sought people from other countries to settle here permanently . . . . We have never had the need to fill unpopulated regions with immigrants . . . . Our recruitment of workers in the 50's and 60's did not have the goal of bringing people here as immigrants . . . . But the workers we employed were satisfied with their work and the wages which were offered them. They were not ready to abandon their positions . . . in favor of an uncertain future in their homelands. Also, German employers did not want to lose good workers either. In 1965, the German government itself agreed to permit these workers to bring their spouses and children here. More and more children were born and raised in Germany since then. The source of this immigration was therefore not so much intentional immigration policy as the unforeseen consequences of labor policy.<sup>376</sup>

Germany did not intend to attract *immigrants* in the past, nor does it now aspire to do so.

The *kein Einwanderungsland* principle has a clear ring to it and both historic and legal resonance that undoubtedly account for its frequent invocation. Yet a closer look reveals that this principle is troubling and seriously flawed. Many Germans who embrace the *kein Einwanderungsland* principle, like Kay Hailbronner, speak of a dichotomy between the "classical" immigration countries and Continental European states. In their eyes the latter can, and perhaps should, use race or ethnicity to mold their immigration policies because "every nation, on the basis of its own history, tradition, and contemporary situation, has to decide what citizenship policy would best accord with its own interests."<sup>377</sup> In this view ethnic ties provide both an

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has invoked it as well. See Brubaker, *supra* note 32, at 117.

While the exact origin of this phrase in Germany is unclear, it seems to have come into common usage around 1970 in conjunction with the debate over the decision to stop the recruitment of guestworkers and the attendant controversy about their status in Germany. A 1978 court decision mentioned the slogan but deemed it insufficient as a justification for the government's decision to reject a foreigner's application to prolong his stay. Judgment of Sept. 26, 1978, 49 BVerfGE 168, 186; see also *supra* note 275 (discussing decision). The phrase also appears in the naturalization regulations. Naturalization Guidelines, *supra* note 174, § 2.3. It has, however, become a part of political discourse as well as a legal guideline, see, e.g., Waffenschmidt Speech, *supra* note 41, and should be analyzed as such.

375. Hailbronner, *supra* note 37, at 67.

376. Partial translation, summary and paraphrase of Waffenschmidt Speech, *supra* note 41.

377. Hailbronner, *supra* note 37, at 75.



objectively legitimate and popularly accepted gauge of "solidarity", "loyalty," and "common interests."<sup>378</sup> The treatment of the *Aussiedler* reflects this belief. If ethnic Germans abroad are still members of *das Volk* and not foreigners, then the *Volk*-based laws governing the return of the *Aussiedler* are not laws of immigration. This conception of the role of ethnicity is troubling given its historic resonances within Germany, and is also problematic as a depiction of reality. Other than as an acceptance of "blood" bonds, there is absolutely no reason to believe that *Volkszugehörige* from Russia or Romania, people who may have been separated from the "Fatherland" for hundreds of years, speak little or no German, and have hundreds of years of non-German history immediately behind them, have more in common with Berliners than do third-generation descendants of guest-workers. Thus opponents of government policy can pointedly note that the *kein Einwanderungsland* principle rests on the *völkisch* conception of the German nation.<sup>379</sup>

The second major problem with the principle is that the underlying view of what makes an "immigration" country is unrealistic. Rather than something a country "is" or "is not," this is a question of where a country falls on a continuum based on a variety of factors: border controls, citizenship policies, multicultural aspirations. Ironically, for example, rules of free movement for persons in the European Community have rendered German borders more porous, at least for EC nationals, than U.S. borders.<sup>380</sup> In addition, a sizeable percentage of the German population, some seven percent in the former *Bundesrepublik*, consists of people who have come from outside Germany's borders or their descendants.<sup>381</sup> Unlike the government of the United States, however, the current German government does not consider immigration to be a defining national ideal. On the other hand, the United States, which is perhaps the most famous *Einwanderungsland* and prides itself on that characterization, has never in fact fit the model.<sup>382</sup> Rather than being

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378. Hailbronner writes:

Political communities formed for self-preservation or the protection and advancement of common interests or united by shared historical experience will entrust power only to those persons from whom they can expect a feeling of solidarity and loyalty, only to those who can be expected to share common interests. The United States and Canada, basically nations composed of immigrants from a variety of cultures, have conceptions of citizenship differing sharply from those prevailing on the Continent.

*Id.*

379. See, e.g., AXEL SCHULTE ET AL., *AUSLÄNDER IN DER BUNDESREPUBLIK* (1985) (containing left-wing theoretical essays on subject); Zuleeg, *supra* note 35, at 1.

380. See KAY HAILBRONNER, *AUSLÄNDERRECHT: EIN HANDBUCH* 22-31 (1989).

381. See *supra* notes 37-42 and accompanying text.

382. Since at least the late nineteenth century, the United States has restricted immigration by, among other categories:

(1) race (Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *amended by* Act of July 5, 1884, ch. 220, 23 Stat. 115, *amended by* Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504, *repealed by* Chinese Exclusion Acts Repeal Act, ch. 344, 57 Stat. 600 (1943));

(2) national origin (quota laws based on national origins were first instituted in 1921, Quota Act, ch.

a reflection of reality, then, whether a nation has the status of "immigration country" is often more a question of national myth than reality.

The *kein Einwanderungsland* principle is thus disturbing for two reasons. First, it rests largely on the *völkisch* reasoning that has had such awful results in Germany's past. Wide acceptance of the principle, even if unconscious of the racist basis, tends to validate this kind of thinking, and makes it more likely that purely *völkisch* positions may again become acceptable in the future. Second, it tends to obscure the real issue facing Germany. This is not whether Germany is an "immigration country" — it both is and economically needs to be<sup>383</sup> — but how political and legal practice should respond to that fact.<sup>384</sup>

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8, § 2; 42 Stat. 5 (1921) (limiting annual immigration to three percent of "foreign-born persons of such nationality resident in the United States [in] 1910."), amended by Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159, repealed by Act of Oct. 3, 1965, Pub. L. No. 89-236, § 1(e), 79 Stat. 911. *But cf.* the new "Diversity Visa" program, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359, 3439 (providing 5,000 visa numbers in each of fiscal years 1987 and 1988 for persons "adversely affected by the enactment of Public Law 89-236"); Immigration Amendments of 1988, Pub. L. No. 100-658, §§ 2, 3, 102 Stat. 3908 (extending § 314 of 1986 amendments and providing "10,000 visa numbers in each of fiscal years 1990 and 1991" for persons from "underrepresented countries"); Immigration Act of 1990, Pub. L. No. 101-649, §§ 131-33, 104 Stat. 4978, 4997-5001, amended by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232 title III, § 302(b)(6), 105 Stat. 1743 (making 40,000 visas per year available in each of fiscal years 1992, 1993 and 1994 to certain aliens from "adversely effected" foreign states));

(3) ideology (Act of June 25, 1798, § 1, 1 Stat. 570, 571 (authorizing President "to order aliens as he shall judge dangerous . . . to depart"); Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (making ineligible for admission "anarchists, or persons who believe in or advocate overthrow by force or violence of the Government of the United States or of all governments or forms of law"); Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012 (expanding and further specifying bar on subversives); Immigration and Nationality Act of 1952, ch. 477, § 212(a)(28), 66 Stat. 163, 184; 8 U.S.C. § 1182(a)(3)(Supp.III 1991) (current ideological exclusion provisions));

(4) sexual preference (Immigration and Nationality Act of 1952, ch. 477, § 212(a)(13), 66 Stat. 163, 183 ("[a]liens coming to the United States to engage in any immoral sexual act"); Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending § 212(a)(4) mental health provisions to include "sexual deviation")).

Thus, Aristide Zolberg's contention that only the United States, Canada, Australia, New Zealand, and South Africa (the traditional "immigration lands") "remain open to general immigration" requires substantial qualification. Zolberg, *supra* note 4, at 41. Family relationships similar to those in fact required in the United States will also admit an immigrant into Germany since marriage to a German leads quickly to citizenship. RuStAG, *supra* note 134, § 9.

383. Germany needs labor from outside, see *supra* notes 43-45 and accompanying text, and therefore cannot shut its borders. Given this, the only way Germany could stop de facto immigration in the future would be to insist that workers enter only for a set time, and must leave at the end. This was, in fact, the idea behind the *Gastarbeiter* program, which illustrates the problems with the approach. The first is political: a government is unlikely to be willing or able to carry out the widespread deportations such a policy would require. The second problem is legal: the Basic Law and the German Constitutional Court's interpretations have set precedents that would limit significantly the government's ability to so act. Any actions to change this would create the same problems: Germany would either have to reject the *Verfassungsstaat* or alter the Basic Law in such a way as to weaken or reject post-war Germany's commitment to civil and human rights.

384. Schwerdtfeger, *supra* note 123, at 11.

**B. The Integration Question**

Criticism of German naturalization policy has also been based on the assumption that claims to citizenship should not depend upon cultural assimilation. This is a criticism that comes especially easy to North Americans . . . . It is doubtful, however, whether the "melting pot" model is suitable for relatively small and overcrowded European states like the Federal Republic of Germany.<sup>385</sup>

For the past two decades the German government has officially proclaimed a policy that long-term resident foreigners (especially those born and raised in Germany) should be "integrated" into German society.<sup>386</sup> This policy derives largely from government recognition of problems caused by the end of the guest-worker program in 1973. As it became increasingly clear that many foreign residents in Germany wanted to remain and even to bring their families, the government began to use the term "integration" to describe its policy that "foreigners who live and work here should be dealt with so that they feel included and at home."<sup>387</sup> As a general policy goal virtually no one other than the far right disagrees with the idea of integration, but there are significant debates over what the meaning and content of the policy are and should be.<sup>388</sup>

In the government's eyes this policy "requires" aliens "to accustom themselves above all to the values, norms and ways of living prevailing here. Respect for our culture and the principles of our constitution . . . abandonment of excessive national [and] religious behaviors . . . are the prerequisites which have to be fulfilled."<sup>389</sup> The government defends this view of the integration policy by proclaiming that the tolerance of the German people for diversity is limited. According to this view, "the hospitality of our people and the capacity of our society to accept integration of people from other countries should not be overtaxed. Both have limits and these limits must be respected."<sup>390</sup> As a result, integration depends on "uncompromising restrictions on further immigration from non-EC member states."<sup>391</sup>

The argument that this official pessimism about German tolerance derives from the fact that Germany is too crowded is not necessarily persuasive.<sup>392</sup>

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385. Hailbronner, *supra* note 37, at 72.

386. *E.g.*, THE FEDERAL MINISTRY OF THE INTERIOR, PUB. NO. VII 1-937 020/15, SURVEY OF THE POLICY AND LAW REGARDING ALIENS IN THE FEDERAL REPUBLIC OF GERMANY 1 (1989) ("Aliens living permanently in our country are to be integrated into our economic, social and legal system and may rest assured that they shall be given the opportunity to participate to the maximum extent possible in the social life in the Federal Republic of Germany.") (Federal Ministry of the Interior trans.) [hereinafter 1989 SURVEY].

387. Verhandlungen des Deutschen Bundestages, 9. Wahlperiode, Stenogr. Berichte [Official Records of the German Parliament, 9th Period, Stenographer's Report] 35-36.

388. Schwerdtfeger, *supra* note 123, at 12.

389. 1989 SURVEY, *supra* note 386, at 2-3.

390. Eckhard Schiffer, *Vor der Neuregelung des Ausländerrechts*, 1990 ZAR 51, 52 (author's translation).

391. 1989 SURVEY, *supra* note 386, at 3.

392. In 1989 the former Federal Republic had a population density of 249 per square kilometer,

Integration of non-ethnic Germans has long been a fundamental dilemma for Germany, even before it was exacerbated by demographic or economic factors. Thus, contrary to popular belief, Jews were highly integrated into German society before the rise of Nazism;<sup>393</sup> however, integration of the type proposed above was always problematic.<sup>394</sup> Finally, the official pessimism about German tolerance fails to account for the continuing presence in German law of provisions based on *völkisch* conceptions. *Aussiedler* are admitted into Germany on the basis of ethnicity despite the real possibility of cultural differences, while naturalization laws make it difficult for foreigners, even those who may be culturally quite assimilated, to obtain citizenship. Instead, they remain as a resident "foreign" group. These factors mean that the federal government's policy of integration is unlikely to be taken seriously by those to whom it matters most.

Some oppose the government's view. These opponents argue that Germany should allow non-Germans to maintain their own cultures even while living in Germany. They express their aspiration to this pluralistic ideal not only as the result of necessity, but as a positive good.<sup>395</sup> One German commentator has noted that "culture is always hard to define and certainly not static," and argued that CDU/CSU style cultural integration may even be unconstitutional.<sup>396</sup> German commentators describe these two views as "full integration" or complete assimilation, which is the CDU ideal, and "pluralistic

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making it one of the most densely populated states in Europe, and the former German Democratic Republic had a density of 154 per square kilometer, meaning that after reunification Germany arguably has more open territory for settlement. U.N. DEP'T OF ECONOMIC AND SOCIAL DEVELOPMENT STATISTICAL OFFICE, 1988/89 STATISTICAL YEARBOOK, U.N. Doc. ST/ESA/STAT/SER.S/13, U.N. Sales No. E/F.91.XVII.1, at 69 (1992).

393. As Hannah Arendt has noted:

In no other country had there been anything like the short period of true assimilation so decisive for the history of German Jews, when the real vanguard of a people not only accepted Jews, but was even strangely eager to associate with them. Nor did this attitude ever completely disappear from German society. To the very end traces of it could easily be discerned.

HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 65 (3d ed., 1966).

394. See *id.* at 64.

395. Dieter Oberndörfer, for example, points out that "culture" grows and develops from pluralistic contact. He concludes rather optimistically that

The preconditions for a politically and socially integrated multi-ethnic society in the Federal Republic of Germany are better than many believe. After two murderous World Wars and the catastrophe of 1945, which mark as deep an impression in German history as the Reformation and the Thirty Years War, *völkisch* nationalism in the BRD has lost its intellectual strength and ideological legitimacy. Its myths have broken down. Its goal, the unity of German-speaking peoples in one state is Utopian. The oft-cited hatred of foreigners in the BRD finally today has primarily economic and group-specific sources.

Dieter Oberndörfer, *Die Verfassungsprinzipien der Republik und des Nationalstaates* 11-12 (author's translation) (unpublished paper on file with author).

396. Oberndörfer argues that government pressure to conform to German religious or cultural models violates GG arts. 4(1) ("freedom of faith, of conscience, and freedom to profess a religion or a particular philosophy [Weltanschauung] shall be inviolable") and 4(2) ("the undisturbed practice of religion shall be guaranteed."). *Id.* at 12. See also *ASYLRECHT & FREMDENFEINDLICHKEIT* [Green Party magazine], May 16, 1992, at 3-9.

integration," which they perceive as the U.S. ideal.<sup>397</sup>

The German integration debate takes place against the background of the *kein Einwanderungsland* principle which completely fails to support immigration as an ideal. Given this, German opponents of pluralistic integration cannot assert, as American opponents of U.S. multiculturalism can, that "[t]he genius of America lies in its capacity to forge a single nation from peoples of remarkably diverse racial, religious, and ethnic origins. . . . The American Creed envisages a nation composed of individuals making their own choices . . . not a nation based on inviolable ethnic communities."<sup>398</sup> Whatever the truth of this position, it certainly adds a strong historical resonance to the assimilationist argument in the United States, one not available in Germany. What, then, is the basis of the German argument for assimilation? German supporters of multi-culturalism argue that assimilation policy is primarily a belief that foreigners are a threat. They charge that the government is not in fact genuinely committed to the very integration it espouses. Thus, in a published response to the government's new Aliens Law proposal in 1990, a church and labor coalition wrote that "the proposed law still sees foreigners as a potential danger and hardly bears the traits of a new partnership . . . . It is neither 'open' nor 'liberal.'"<sup>399</sup>

### C. The "First Commitment" Toward Ethnic Germans

The *Aussiedler* program presents unusual conceptual difficulties for German policy towards "foreigners." The government stresses ostensibly objective reasons for limiting the entry and naturalization of foreigners while welcoming the *Aussiedler*. For example, the Interior Ministry distributes slick, glamorous brochures with catchy titles like *Ihre Heimat Sind Wir* ("We Are Your Homeland"). One question and answer excerpt is especially illuminating:

Are settlers foreigners?

All of these groups — foreign workers, applicants for asylum, German *Aussiedler* and *Übersiedler* — come from 'without,' from outside Germany — but the similarity ends there. For they came for different reasons, with different intentions and expectations. *Aussiedler* are not foreigners. Foreign workers even if they stay a long time maintain the option of return to their homeland. . . . [political refugees] want to return if political conditions in their homelands change. With German *Aussiedler* from the east however, the situation is different: they have come to stay.<sup>400</sup>

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397. See, e.g., QUARITSCH, *supra* note 303, at 46-66 (1981) (criticizing pluralistic integration); Schwerdtfeger, *supra* note 123, at 12-13 (championing pluralistic integration). Note, however, that this debate in Germany, while similar in some ways to current U.S. debates, is framed in its own unique terms and does not replicate that in this country.

398. SCHLESINGER, *supra* note 24, at 134.

399. ÖKUMENISCHER VORBEREITUNGS-AUSSCHUSS ZUR WOCHEN DER AUSLÄNDISCHEN MITBÜRGER UND DER BUNDES-VORSTAND DES DEUTSCHEN GEWERKSCHAFTSBUNDES (DGB), FÜR EIN HUMANES AUSLÄNDERRECHT (author's translation) (on file with author).

400. AKTION GEMEINSINN, IHRE HEIMAT SIND WIR 5 (1989) (author's translation).

This argument is faulty. The fundamental difference between the two groups cannot be based solely or even primarily on intention. It is obvious that many former guest workers (let alone their children and grandchildren) have no intention of "returning" (or going) anywhere. *Aussiedler* also "maintain the option" to return to their non-German "homeland" as long as they are status Germans rather than full German citizens. Moreover, German law itself generally requires applicants for naturalization to renounce other citizenships. Political refugees' desire to return to their homeland varies greatly among groups and may diminish over time. In any case, while the intention of entering aliens may be a criterion for distinguishing *among* "foreigners" such as resident aliens and immigrants who seek citizenship, it can hardly be the *sine qua non* of "foreignness."

The brochure from the Interior Ministry also makes the circular argument that *Aussiedler* are not foreigners under German law because German law does not categorize *Aussiedler* as foreigners. However, the pamphlet also offers a more candid reason for the distinction between *Aussiedler* and foreigners: "Every nation, whether English or Spanish, French, Polish or Italian, feels for its own people a special responsibility — so do we." This statement expresses openly the opinion which seems to have lurked beneath the surface of many of the legal distinctions and policy formulations presented so far — the *völkisch* conception of the German people and nation. Despite the transitory, historically unique characterization of Article 116(1), much German discourse about immigration implicitly contains a restrictive, mono-cultural, *völkisch* conception which Germans usually are unwilling to express in too clear or strong a form. A widespread reluctance to discuss the distinction between *Aussiedler* and foreigners reflects the deep tension between the *völkisch* idea and that of the Constitutional state (*Verfassungsstaat*) and impedes clear debate over the deepest political questions facing Germany today. Perhaps it is unfair to expect more from what are essentially political slogans. However, these slogans are powerful because they present the essence of subtle and complex ideas in a way that appeals to the German public without being overtly dissonant with other important values held by German culture.

On the other hand, the fact that "Germany for Germans" or *Ein Volk-Ein Reich-Ein Führer* are not acceptable phrases in current public discourse demonstrates that much in the constitutional, legal, ideological, and cultural make-up of Germany today is antithetical to *völkisch* nationalism. This, ultimately, is the reason that the asylum and foreigners issues are among the most important facing Germany today.

V. CONCLUSION

Post-war German immigration law embodies a deep tension between a mono-cultural, *völkisch* conception of Germany and a broader vision based upon general human rights principles. On the one hand, the combination of Article 16 (the asylum clause), assiduous review of asylum cases, and the Federal Constitutional Court's expansion of aliens' rights has made Germany a state remarkably protective of non-citizens. Article 16, in particular, has come to signify a general societal commitment to human rights and openness to foreigners, even if many believe that this openness has been abused. On the other hand, Article 116(1) (the ethnic German expellee clause) represents an implicitly *völkisch* vision, even if it is viewed in increasing measure as a transitory provision that arose from a unique historical situation. In addition, the statutes governing citizenship, aliens, and the *Aussiedler*, both as written and as applied, reflect this more traditional ethno-cultural conception of the German nation-state.

The German dilemma over asylum,<sup>401</sup> immigration, and citizenship is deep and poignant. Generous legal structures crafted in the post-war period as both atonement for and prophylaxis against National Socialism seem now to contribute to its resurgence. While it is important not to overstate the current *völkisch* threat to post-war German constitutional democracy, the rising political power of the right<sup>402</sup> and the tendency of even the SPD to capitulate to the growing political power of the extreme right<sup>403</sup> are significant. One can hardly imagine a worse response to the situation, however, than Chancellor Kohl's threat to declare a state of emergency and suspend the constitution. Apart from potential jurisprudential defects, such an approach conjures up painful echoes of the 1930s by its sweeping rejection of the asylum clause, regular legislative and judicial mechanisms, and the *Verfassungsgstaat* ("constitutional state") itself.

The agreement between the major parties to amend Article 16 at least

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401. It would be a serious mistake to deny the reality of the German asylum crisis: the numbers are staggering, the costs immense, and the political and social pressures real. It would be an equally serious mistake, however, to view this crisis as simply an administrative or legal one; it has significant political and social aspects.

402. A number of recent events illustrate this. Helmut Kohl's hints in early 1990 that he might not accept Germany's Oder-Neisse border with Poland as final, for example, was undoubtedly aimed at shoring up support on the right; similarly, Kohl shocked foreign observers early in 1992 by meeting with Kurt Waldheim to gain right-wing support in state elections in Baden-Württemberg and Schleswig-Holstein. Marc Fischer, *Kohl's Party Veers Right in Bid to Hold Key State in Sunday's Vote*, WASH. POST, Apr. 3, 1992, at A26; John Tagliabue, *Waldheim is Given Welcome by Kohl*, N.Y. TIMES, Mar. 28, 1992, at 1.

403. In Bremen, for instance, the SPD ultimately agreed to support limiting the number of asylum applicants, in light of the strong showing by the right-wing extremist parties. Gerard Braunthal, *Right Wing Extremism in Germany Today* 14 (1992) (unpublished manuscript on file with the *Yale Journal of International Law*).

maintains the general commitment to the rule of constitutional law. The question is, however, whether such an amendment is necessary to address the asylum problem. It is far from clear that statutory solutions have been funded or pursued with sufficient government vigor. More expeditious administrative proceedings are not beyond the capacity of the German state. If, as the government argues, the real problem lies with judicial review of administrative denials, those proceedings could also be accomplished more quickly. In light of these issues, the SPD was correct in its prior insistence on legislative solutions in this area.

The call to amend the Basic Law is based less on pragmatic legal reality than on political discourse. Amendment of Article 16 will send a clear message that German asylum law was too liberal and that large numbers of people abused the system. If the amendment of Article 16 is the only response to the crisis, the response will signify the rejection of an important pillar of Germany's post-war commitment to human rights, and will tilt the balance in public discourse in favor of the ethno-cultural conceptions of state embodied in Article 116 and the citizenship statutes.

A more coherent and appropriate long-term policy is possible. The asylum crisis can serve as a catalyst for a resolution of the deep tensions that have characterized post-war German immigration law. If Article 16 is amended, that profound change should be balanced by changes in the statutory schemes governing citizenship and the *Aussiedler*. Such changes would recognize the demographic and historical reality that "Germany has never belonged only to the Germans and will not in the future,"<sup>404</sup> and would make an important statement about post-reunification Germany's perception of itself. The citizenship laws' legal disenfranchisement of the millions of foreigners in Germany has isolated foreigners and has contributed to their being targeted for right-wing violence. Furthermore, given the dramatic decline in the German birthrate and the consequent "greying" of the population, all Germans have a strong pragmatic interest in encouraging further immigration.<sup>405</sup> Indeed, German commentators have noted that immigrants are already crucial to the German labor force.<sup>406</sup>

Three changes to the statutory law are the best way to begin. First, Germany should loosen its strict reliance on the *jus sanguinis* principle, at the very least granting German-born foreigners the right to naturalize upon

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404. KNIGHT & KOWALSKY, *supra* note 81, at 37 ("Deutschland hat nie nur den Deutschen gehört und wird es auch nicht im Zukunft.").

405. The German birthrate sank from 2.5 to 1.4 children per woman by 1990; some projections indicate a possible population decline to under 40 million by the year 2030. *See id.* at 30.

406. Martin Frey of the *Bundestag*'s research service recently stated that Germany needs 300,000 new foreigners annually to sustain its labor force. He also reported that 33,000 Turkish-owned business in Germany generated some 700,000 jobs in 1991. *German Economy Dependent on Foreigners, Study Says*, WEEK IN GERMANY, Sept. 18, 1992, at 4.



majority. This would place Germany in the European mainstream, and send an important signal to the current foreigner population. The 1990 amendments to the Aliens Law suggest that the prospects of such a change are good. Second, Germany should loosen the strict rules against dual nationality to allow, and more importantly to *encourage* foreigners to naturalize. Again, there seems to be some movement in this direction as the major parties discuss how to replace the *ad hoc* approach of the last three decades with a more systematic one. Finally, Germany should reclassify the *Aussiedler* as just another class of immigrants. Their historical and cultural ties to Germany might remain a factor in immigration decisions, but they would no longer be a special category of people derived from implicit *völkisch* assumptions. This final proposal is critical: without it, recent proposals to amend Article 16 will reduce the number of non-ethnic German asylum seekers without changing the number of ethnic Germans who enter Germany despite their meager cultural ties to 1990s Germany. Such a situation would send the worst possible signal both to the German people and to all others who see resurgent ethnic and *völkisch* nationalism as perhaps the most important political question of the post-Cold War era.

While the political debate over these proposals would undoubtedly be great, the result would be worth the fight. German immigration law and policy would recognize demographic and historic reality while at the same time rejecting lingering *völkisch* assumptions. Discourse on immigration and citizenship questions could then be more open and honest and immigration law could provide a public forum for debate on the soul of the post-war German constitutional state.

