Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party

Judith Wise
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"This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."

—Joseph Goebbels1

"[I]n a democracy, the government should make use of all available legal measures to protect the liberal democratic basic order."

—Manfred Kanther2

I. Introduction

More than 30 people have been killed in racist attacks by right-wing extremists in Germany since reunification in November 1989.3 In 1990, incidents of right-wing violence in Germany surpassed incidents of left-wing

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2. Germany Bans Two Neo-Nazi Groups, Police Carry Out Raids, Deutsche Press Agentur (Feb 24, 1995) (quoting a ruling by the German Interior Minister).

violence for the first time since World War II. Likewise, that year the membership of right-wing organizations first exceeded that of left-wing organizations. In 1993, the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz) estimated the total membership of extreme right groups at 41,900 (not including the approximately 25,000 members of the far right Republikaner Party), a 30 percent increase from the 1990 estimate of 32,200. Recognizing that a growing extreme right posed a serious threat to Germany’s reputation, then-Chancellor Helmut Kohl (Christian Democratic Union, or “CDU”) called for the use of the law to combat neo-Nazism “in all severity.” Widespread accusations of police inaction and judicial leniency—a “blind right eye”—in the face of the neo-Nazi threat led to the eventual banning of more than ten right-wing organizations.

To respond to the neofascist threat, the German government did not need to enact new legislation. Through the design of what has come to be called the militant (streitbare) democracy, provision for this type of crisis was made at the time the Basic Law (Grundgesetz) was written. Conscious of Germany’s fascist past, the drafters of the postwar German Constitution crafted the Basic Law as the foundation of a “militant democracy,” an embodiment of substantive, rather than procedural, democratic constitutional theory. In this conception, democracy is based on a constitution with an unamendable core of precepts so fundamental that even other constitutional provisions might be held unconstitutional by the Constitutional Court if found to conflict with these. The German democracy is thus not an unspecified abstraction, but a concrete body of principles set forth in and ordered by the Basic Law. The militant democracy, as found in Article 9 and Article 21, Section 2 of the Basic Law, both permits and requires the state to protect the democracy through the apparent paradox of intolerance of intolerance. These Articles provide, respec-

4. See Appendix A.
5. Id.
6. Germany’s internal security service, the Federal Office for the Protection of the Constitution, is widely referred to by Germans as simply the Verfassungsschutz, although strictly speaking this term does not distinguish the Federal and State Offices. I assume this convention, as I refer only to the Federal Office or to action by the State Offices coordinated or directed by the Federal Office.
8. Id at A1.
9. Id at A10.
10. By the November 1992 banning of the National Front, the first party banning of the neofascist crisis, 16 people had been killed in nearly 1,800 right-wing attacks that year. Germany Bans Extremist Right-Wing Group, St. Louis Post-Dispatch (Nov 28, 1992).
12. See subsection II.A.1 for an introduction to these concepts.
tively, for the banning of antidemocratic associations by the executive branch and of antidemocratic political parties by the Constitutional Court.

In its first two applications of Article 21, Section 2, the Constitutional Court specified what constitutes bannable conduct. After brief use in the 1950s, however, these provisions remained marginal, until recent events in German politics led to their renewed use and re-opened debate about the actual and ideal nature of the postwar German democracy. Critics fear that, in the face of a threat grave enough, a formally democratic but overly militant German state could protect itself out of existence, destroying the very democratic character it seeks to preserve by aggressively banning parties perceived to be undemocratic. In a recent banning-related announcement, the Constitutional Court itself addressed the line between parties and associations, further distinguishing its jurisdiction to ban parties from the executive’s power to ban associations.

After introducing the constitutional structure of the militant democracy, this Comment focuses on the case from which that judicial clarification arose, the banning of the right-wing extremist Free German Workers Party (Freiheitliche Arbeiter Partei, or “FAP”), using its details as a starting point to illustrate broader themes regarding the political context of party bannings. I will argue that the constitutional structure of the militant democracy, which was based on immediate postwar political sensibilities, sets up a dichotomy between political parties and associations which has now outlived its utility in achieving the drafters’ intent. This effect can be seen in postwar political changes, specific aspects of the neofascism crisis, and the strained and problematic findings underlying the Constitutional Court announcement. To challenge the party-association dichotomy is not a small matter, given the importance of political parties to the postwar Germany democratic order, which is conceived as a party-based democracy (Parteienstaat). The challenge is nonetheless empirically supportable.

In the first half of the Comment, I introduce the militant democracy theoretically and historically and describe its constitutional moorings. I address the specific provisions for the banning of political parties, linking these with the conception of the postwar party-based state. Turning to the case of the FAP, I describe the organization, the political crisis in which the executive branch requested its banning, and the press announcement issued by the Constitutional Court in response.

In the second half of the Comment, I examine the consequences of the ban and question the relevance of the Constitutional Court’s response to the neofascist crisis. I first consider intrinsic problems with the test set forth in the

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15. See 5 BVerfGE 85 (1956) and 2 BVerfGE 1 (1952), discussed in subsection II.A.3.
17. Announcement of the Press Office of the Federal Constitutional Court, Nr. 13/95. See appendices B and C.
press announcement, questioning whether the party-association distinction stressed by the Constitutional Court corresponds any longer with the realities of the neofascist movement. I then move beyond the party-association distinction to a broader discussion of the wisdom of bannings. In this light, I examine the particular structure of the neofascist movement, the state’s nonbanning enforcement repertoire and its use, and some potential adverse effects of bannings.

I conclude by asking what relations bannings have to democracy. I propose an alternative to what I call the static models of democracy, suggesting that a dynamic, discursive evaluation of militant democracy would render a more complete, more complex, and therefore more fruitful portrait of the democratic worth of the militant democracy. The continuing relevance of these issues is unfortunately underscored by the resurgence of extreme right electoral and extraparliamentary activity in Germany after a period of remission. The extreme right German People’s Union took 13 percent of the vote in recent elections in Saxony-Anhalt. Alongside this news came a warning from the Verfassungsschutz that acts of far right violence were rising dramatically (up 27 percent in the last year) and could soon threaten the public order.

II. The Militant Democracy

A. The Law of Banning

1. History

How can a democracy be intolerant toward antidemocratic actors without relinquishing its claim to democratic legitimacy? Does the militant democracy, by depriving some antidemocratic actors of their civil rights, destroy, rather than protect, the democratic state? In considering these questions, I turn for assistance to democratic political theory. Gregory Fox and Georg Nolte characterize the problem of tolerance as the central paradox of democratic regimes. A fundamental principle of liberal democratic theory is the requirement of diversity of public opinion as a minimum condition of political life, society being best served by equal competition between factions. Thus, the presence of antidemocratic ideologies creates a dilemma for the democratic state. Suppression of these ideologies offends the democratic main principle, yet their presence threatens the survival of a system in which the principle of tolerance is institutionalized. Fox and Nolte describe two approaches democracies take to resolving this dilemma, one they call the procedural model, the other substantive.
Procedural democrats view democracy as a set of institutional arrangements, a framework for decision-making which does not prescribe the content of the decisions. Rooted in Enlightenment opposition to traditional authority, procedural democracy rests on faith that rational discourse ensures liberty. The social contract is not a priori; democracy means actual majority rule of the people. A procedural democracy thus exists only so long as there is a political will to be democratic. Proceduralists rely on free speech to counter antidemocratic speech.

The substantive democrat rejects the proceduralist claim that a democracy must allow itself to become undemocratic if the majority so desires. Substantive democrats find it contradictory to say tolerance is the fundamental organizing principle of government and to preserve the possibility of intolerant government. Thus, substantive democrats prioritize the long-term survival of the democratic form over the political rights of antidemocratic actors.

In Fox and Nolte's terms, the militant democracy is a substantive democracy. By contrast, the Weimar Republic, Germany's first constitutional state based on the principle of popular sovereignty, reflected the influence of procedural, or liberal, democratic theory. In his 1932 essay Legalität und Legitimität, Carl Schmitt attacked liberal constitutional democracy as vulnerable, recommending in its place a constitution with an unalterable core. On the eve of Nazi rule, he challenged the procedural positivism and relativism of the late Weimar Republic. He argued that elected representatives should not sweep away fundamental decisions of the people, even by constitutional amendment procedures. He found implied limitations in procedural rules, because they could not be meant to destroy the essence of that which they were designed to effect. Schmitt's theory also legitimized the existence of legal institutions designed to prevent a democratic constitution from being turned against itself.

The Allied democratic impulse in Germany did not derive from pure democratic evangelism but also served as ideological legitimization for the otherwise

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24. Id at 15.
25. Id at 15 n 57.
26. Id at 16.
27. Id at 17.
31. Fox and Nolte, 36 Harv Intl L J at 19 (cited in note 1).
32. Id.
33. That Schmitt was the best known legal defender of the Nazi regime once Hitler was in power suggests that his is not a theory of democracy, but rather a theory of state preservation. See Fox and Nolte, 36 Harv Intl L J at 19-20 (cited in note 1).
problematic provision of massive aid to the recent enemy, a policy which reflected underlying military, economic, and anti-Communist Allied interests. After an initially vigorous denazification effort, the Western Allies discovered that Nazism was so prevalent among highly skilled and administratively capable members of society that to remove Nazis from key government and civic positions would have an overall adverse effect.

Thus, from the perspective of the Allies immediately after World War II, allowing West Germany to construct a liberal regime slowly was unacceptable. The weak Weimar Constitution had permitted the electoral assumption of power by the National Socialist, or “Nazi” Party, despite the party’s clearly antidemocratic means and aims. The postwar constitution, the Basic Law, was intended to prevent this history from repeating itself. Therefore, after World War II, Germany “crafted” a “negative revolution opposing all utopian schemes for rebuilding the political order.” The postwar German state was established as a conservative regime, one meant to be insulated at once from radical or extreme political movements of any kind and from excesses of state power.

2. The Basic Law

In 1949, Germany adopted the Basic Law, which defined the democracy and provided for its defense. The Basic Law describes the Federal Republic of Germany as a “democratic and social federal state.” Certain fundamental
rights are protected by affirmatively requiring the state both to respect them and to provide the conditions for their enjoyment. The Basic Law enumerates certain rights, such as free expression (Article 5), and suggests other more general principles such as equality and the right to the free development of personality (Article 3) which guide their application. These are not absolute rights, but may be limited by each other, by the courts, and by statute. They may not, however, be absolutely eclipsed or amended away, and, in this sense, they represent the unalterable core of a substantive democracy.

The other sense in which the Basic Law establishes a substantive democratic order is in its provisions for the defense of the democracy. The Basic Law allows the Constitutional Court to suspend the individual rights of those who "abuse" their freedom of expression; provides for certain restrictions on expression; guarantees a right of resistance in defense of the democracy in the absence of an alternative; restricts amendment of the Basic Law itself; and allows for the banning of antidemocratic political parties and associations. Taken together, these provisions form the constitutional basis of what the Constitutional Court, in 1956, christened the "militant democracy."  

43. Id at 11-12.
44. Id at 13.
45. "Whoever abuses his freedom of expression, in particular freedom of the press (paragraph (1) of Article 5), freedom of teaching (paragraph (3) of Article 5), freedom of assembly (Article 8), freedom of association (Article 9), privacy of correspondence, posts and telecommunications (Article 10), property (Article 14), or the right of asylum (Article 16a) in order to undermine the free democratic basic order shall forfeit these basic rights. Such forfeiture and its extent shall be determined by the Federal Constitutional Court." Basic Law, Art 18. This provision has never been used. Weiss, 27 Vand J Transnatl L at 939 (cited in note 34).
46. "These rights are subject to limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizen's right to personal respect." Basic Law, Art 5, § 2. "Art and scholarship, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the constitution." Basic Law, Art 5, § 3.
47. "All Germans have the right to resist any person or persons attempting to do away with this constitutional order, should no other remedy be possible." Basic Law, Art 20, § 4. This comports with the power vacuum argument of the militant antifascist revival, discussed below.
48. "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited." Basic Law, Art 79, § 3.
49. "Parties which by reason of their aims or the conduct of their adherents seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality." Basic Law, Art 21, § 2.
50. "Associations whose aims or activities contravene criminal law or are directed against the constitutional order or the notion of international understanding shall be banned." Basic Law, Art 9, § 2.
51. Communist Party Case, 5 BVerfGE 85 (1956) (holding translated in Donald P.
The Basic Law represents a conscious effort to achieve a synthesis between the principle of tolerance with respect to all political ideas and certain inalienable values of the political system. Article 21(2) ... expresses the conviction of the [drafters], based on their concrete historical experience, that the state could no longer afford to maintain an attitude of neutrality toward political parties. [The Basic Law] has in this sense created a "militant democracy," a constitutional [value] decision that is binding on the Federal Constitutional Court.

3. Party Bannings and the Parteienstaat

In establishing the militant democracy, the drafters of the Basic Law tried to incorporate lessons from Weimar. In what had been seen as a bold move toward government accountability, the Weimar Constitution had entrusted the executive branch, as elected by the people, with the task of defending the democracy. The Weimar Constitution fatally provided the executive with the power to dissolve the legislature and declare a state of emergency in the name of protecting the democracy. Article 48 of the Weimar Constitution, the "suicide clause," allowed the executive to make law in case of emergency ostensibly to defend the Constitution and constitutional rights. Soon after Hitler was elected chancellor in 1933, he called for parliamentary elections. When the results were not overwhelmingly supportive, he had the Reichstag burned and used its destruction as an excuse to ban all opposition political parties on July 14, 1933.

Bearing this stark history in mind, the drafters of the Basic Law granted the judiciary exclusive jurisdiction to ban antidemocratic political parties. Political parties were widely seen as particularly vital to democracy and, as a result, needy of greater protection. Thus, while the Basic Law permitted the executive to ban associations under Article 9, only the relatively more politically insulated Constitutional Court could declare parties unconstitutional under Article 21, Section 2. The drafters' focus on the protection of political parties thus reflected two of their guiding beliefs: that the Nazis had won power principally through the suppression of opposition political parties and that the protection of political parties would ensure the protection of the democracy. After experiencing single-

Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 228 (Duke 1989)).
52. Id at 141-42.
54. Id.
party rule under the Nazis, and with an eye toward the single-party socialist states forming to the east, the drafters of the Basic Law departed from the more traditional German view of parties as sources of dissent or, at best, a necessary evil, and invested political parties with a quasi-institutional status. Parties were conceived as the primary vehicle for uniting voters in politically active and operational groups and for enabling citizens to influence political events. The Basic Law contemplated a party-based state (Parteienstaat) premised on the inability of the public to act politically without collective structures.

The Basic Law makes clear that political parties have no monopoly of influence; they share this right with associations and other groups and organizations. However, the concept of the party-based state at once affirms the greater importance of the political party structure for the democracy and denies the significance of political groupings outside the electoral system. Thus

58. 44 BVerfGE 125 (1977) (Rottman dissenting) (translated in Kommers, "Constitutional Jurisprudence at 182-184) (cited in note 51)).

The introduction to the Law on Political Parties (Parteiengesetz) reads:

"Competing political parties form the basis of modern parliamentary constitutional systems; they perform functions of political leadership and control for specified periods and are answerable to the people. As organized groupings, they provide alternatives upon which the life of the State can be molded and shaped. Through their mediatory function, the state is cast in the role of the subject of political rule. Today, political parties are among the decisive elements of the democratic State. Their freedom to function is an essential component of the democratic order."

Article I of the Law on Political Parties, on the "Constitutional Status and Functions of Parties," sets forth the functions of parties under the authority granted by Article 21, Section 1 of the Basic Law:

(1) Political parties form a constitutionally integral part of a free and democratic system of government. Their free and continuous participation in the formation of the political will of the people enables them to discharge the public tasks which are incumbent upon them pursuant to the Basic Law and which they undertake to fulfill to the best of their ability.

(2) The parties shall participate in the formation of the political will of the people in all fields of public life, in particular by: bringing their influence to bear on the shaping of public opinion, inspiring and furthering political education; promoting an active participation by individual citizens in political life; training talented people to assume public responsibilities; participating in Federal, Land and Local Government elections by nominating candidates; exercising an influence on political trends in parliament and the government; initiating their defined political aims in the national decision-making processes; and ensuring continuous, vital links between the people and the public authorities.


59. Basic Law, Art 21, § 1.

60. Article 2 of the Law on Political Parties provides:

(1) Parties are associations of citizens who set out to influence either permanently or for a lengthy period of time the formation of political opinions at Federal and Land level and to participate in the representation of the people in the Federal Parliament (Bundestag) or regional parliaments (Landtage) provided that they offer sufficient guarantee of the sincerity of their aims in the general character of their circumstances and attendant conditions, particularly in regard to the size and strength of their organization, the number of registered members and their public image. InterNationes, Documents on Politics and
according to the model of the party-based state, protecting the democracy is accomplished by protecting political parties more than political groupings outside the party system, because parties facilitate wider electoral participation by individuals and shape the political will into electable choices. The *Parteienstaat* conceives of both majority and minority legitimate political opposition as manifested entirely within political parties. The militant democracy affords more protection for political parties than do associations. As of the commencement of the recent set of bannings, the Federal Republic had banned approximately 250 groups but only two political parties.

The Constitutional Court has also developed a framework for deciding whether or not to use its power to ban political parties. In the Communist Party case, the Constitutional Court protected against an overly broad application of the judicial party-banning provision by adopting a high standard of proof of a party’s antidemocratic character, demanding a showing of a “fixed purpose to combat the free democratic basic order constantly and resolutely” manifested “in political action according to a fixed plan.” This test does not require imminent harm or even actual danger to the democratic system. The focus is on the party’s attitude as revealed by its conduct. While there is no need to prove a

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61. Because the Basic Law makes meager reference to parties, leaving their regulation to federal law (see Basic Law, Art. 21, § 3), the state’s relation to political parties has been elaborated through a series of Constitutional Court decisions (see Currie at 207-08, cited in note 14). First, the Constitutional Court has found that disfavored parties have the same rights to free use of public broadcast media as others (see 14 BVerfGE 121, 131-37 (1962) and Currie at 209). Second, the state cannot directly or indirectly discriminate in party subsidization (see 20 BVerfGE 119, 133 (1966), 6 BVerfGE 273, 279-81 (1957), Currie at 209), but may fund parties in proportion to size (see 20 BVerfGE 56, 117-19) in order not to squander funds on splinter parties (see Currie at 209). This latter ruling further cements the conservative stability of the state, reinforcing the status quo configuration of established parties and limiting volatility in the electoral process. The Greens’ shift from opposition movement to coalition partner remains the sole counter-example.


64. In its first decision to protect the democracy by banning a party, the Court defined the “free democratic basic order” of Article 21, Section 2 of the Basic Law as “an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; popular sovereignty; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties.” Socialist Reich Party Case, 2 BVerfGE 1, 12-13 (1952) (translated in Kommers, *Constitutional Jurisprudence* at 223-27) (cited in note 56).

"concrete undertaking," merely advocating the overthrow of the government is insufficient.66

Therefore, party bannings are neither a pure restriction on speech nor a simple application of conspiracy theories against criminal combinations. To be banned, a party's conduct must go beyond expression of antidemocratic views. At the same time, when the Court refers to its examination of the conduct of the party members, the question the Court is asking is not whether the members are committing crimes for which a kind of group culpability should exist,67 but whether their conduct demonstrates the seriousness of their efforts to destroy the democratic order and their capacity to do so. The Constitutional Court's recognition of authoritarianism in German history and its obligation to balance the Basic Law's hierarchy of individual rights against the state's duty to protect the democracy do mitigate the danger of renewed tyranny in the name of the militant democracy.68

The division of banning authority between the judiciary and the executive is more than a formality. As an example, the Constitutional Court rejected an executive ban of political activity by two neo-Nazi leaders, Thomas Dienel of the German National Party and Heinz Reiss of Adherents of the New Front.69 The ban would have barred the men from publicly expressing their political views, organizing or participating in political meetings, or being elected to public office.70

Similarly, a lower court initially determined that a planned far-right National Democratic Party (NPD) demonstration in Leipzig could proceed because the NPD was not banned.71 The demonstration was only prevented upon the presentation of new evidence that the group intended to use violence.72 Likewise, when the city of Dresden tried to ban a demonstration of the far-right National Party against an historical exhibit on the German army's role in World War II, a court ordered the demonstration to proceed because the party was legal.73 In the course of the resulting demonstration, eight people were injured and a train car was demolished in clashes between neo-Nazis and antifascists.74

66. Id.
67. In the civil context, see the American example of Berbanu v Metzger, 850 P2d 373 (Or 1993) (defendant Tom Metzger held liable, as an individual and as the president of the White Aryan Resistance, for wrongful death in the killing by skinheads of Ethiopian Mulugeta Seraw in Portland, Or).
68. Id.
69. Court Rejects Government Ban on Neo-Nazis, Deutsche Presse Agentur (Jul 30, 1996).
70. Id. The Court reasoned that, upon arrest, a lower court had given the men only probation, which indicated a belief that they would cease their fascist activities.
71. Court Bans Planned Far-Right Rally in Leipzig, Deutsche Presse Agentur (Apr 30, 1997).
72. Id.
73. Deidre Berger, Exhibits on World War II Spark Conflict in Germany, Jewish Tele- graphic Agency 8 (Jan 27, 1998).
74. Id.
B. BANNING THE FREE GERMAN WORKERS PARTY

Having introduced the key concepts and historical context of the militant democracy, I now turn to the case of the banning of the Free German Workers Party (FAP). I describe the FAP, the political context in which the Interior Minister asked the Constitutional Court to ban it, the Court's response, the eventual ban, and its results.

1. The FAP

There has never been much doubt about the antidemocratic character of the FAP. Founded in Stuttgart in 1979 by former Hitler Youth leader Martin Pape, the FAP had grown by 1993 to be the largest extreme right organization active in Germany. At the time of the activity which led to its banning, the FAP was led by Friedhelm Busse, a prominent neo-Nazi with previous criminal convictions for possession of arms and explosives and for receiving stolen goods. Busse had also gone to prison in 1971 for inciting racial hatred after the banning of another party he had founded. Friedhelm Busse was arrested with 200 others on charges of building a terrorist organization at a November 6, 1994 meeting to form a new extreme right political party. Police confiscated 15 copies of Hitler's banned book Mein Kampf. Despite his predilection for fascist propaganda, Busse has attempted to distance the FAP from the rampant anti-foreigner violence and promised ominously that after the FAP seizure of absolute power, "[t]here will be no concentration camps . . . but rather work camps where enemies of the German people, especially foreigners, will perform useful tasks."

2. The Political Crisis

From the beginning, I have said that there is no need to pass any new laws for Germany to deal with neo-Nazi terror. The Federal Republic has established the toughest anti-racist and anti-hate laws in Europe. It is a model postwar democracy. What has been lacking until recently is the

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76. Id at 19. At an FAP conference the same month, delegates waved swastika banners and gave the Hitlergruß, prompting nationwide raids of 66 FAP homes and offices, the seized material from which provided the basis to initiate criminal proceedings against 57 members in nine states.
79. Id.
81. Henry Bailey, Briefly, Commercial Appeal (Memphis) 2A (Feb 25, 1995).
82. Germany Bans Two Neo-Nazi Groups, Deutsche Presse Agentur (cited in note 2).
political will and collective consciousness to deal with the extremist movements and marginalize their ideas.
—Simon Wiesenthal

By 1993, Germany was under intense pressure to do something about the rise of the extreme right, in part due to heightened international scrutiny resulting from its fascist past. Then-Chancellor Kohl's CDU was accused of not responding to the neofascist rise as quickly or strongly as it had responded to left-wing radicalism in the 1970s and 1980s. The rise of the right had disrupted traditional voting patterns, and the election of fascist delegates to the Bundestag seemed probable. Though the CDU had already banned ten right-wing groups, the FAP, which called itself a political party, remained legal.

In August 1993, the FAP defied a general ban on events marking the suicide in prison of Hitler's deputy, Rudolf Hess, as well as a specific ban against a proposed FAP demonstration on that day. A great embarrassment to the government, a "Rudolf Hess Memorial March" took place in the town of Fulda, near Germany's financial center, Frankfurt am Main. Approximately 500 neo-Nazi skinheads and other FAP members and followers gathered on the market square, crossed police cordons, and moved out into the town streets, shouting Nazi slogans and taunting foreigners. The demonstrators were not arrested, and the march was not blocked, despite laws barring slogans "hostile to the constitution." A heated debate about the role of the police followed the demonstration, in response to which the Federal Government promised to bring the state more into line with the efforts of the nongovernmental antiracist movement to halt the development of the neo-

83. Svoray and Taylor, In Hitler's Shadow ix (cited in note 77).
86. Tom Shanker, German Voters Shun Mainstream Parties in Sign of Discontent, Ft Worth Star-Telegram (Sept 22, 1983).
87. Mary Williams Walsh, Germany Bans Two Neo-Nazi Groups, LA Times A5 (Feb 25, 1995).
88. Id.
89. Id. See Strafgesetzbuch, §§ 86 and 86(a) (hereinafter, "StGB"). The Strafgesetzbuch is Germany's Criminal Code. All references are to the translation in Gerold Harfst and Otto Schmidt, German Criminal Law: the Criminal Code and the Narcotics Law (Harfst Verlag 1989).
90. Walsh, Germany Bans Two Neo-Nazi Groups, LA Times at A5 (cited in note 87).
Nazi movement. Interior Minister Manfred Kanther emphasized the sincerity of this promise by calling for a ban of the FAP. Banning the FAP took longer than expected. When the first extreme right party, the National Front, was banned in 1992, imminent banning of the considerably larger FAP was expected, but that did not actually occur until 1995. Because the FAP called itself a political party and was legally registered as one, it appeared that its banning would have to be accomplished under the authority of Article 21 of the Basic Law, which grants exclusive jurisdiction for banning political parties to the Constitutional Court. Thus, in September 1993, the Federal Government and the Federal Council (Bundesrat) asked the Constitutional Court to declare the FAP unconstitutional (verfassungswidrig) as an antidemocratic party.

3. The Press Announcement

On February 24, 1995, the Press Office of the German Constitutional Court announced that it did not recognize the FAP as a party as that term is defined either in the Basic Law or the Law on Political Parties (Parteiengesetz), and, consequently, because the Constitutional Court may only ban parties, it lacked jurisdiction to ban the FAP. The announcement included a discussion of the

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93. A 1994 poll by the Allensbach research institute revealed the 43% of Germans believed Jews were in great danger in Germany, and nearly half believed banning far-right political parties would protect them. Rich Atkinson, *Art of Darkness: Berlin's Holocaust Reminder: Exhibit on Nazi Persecution of Jews Offers a Walking Tour of History*, Wash Post Foreign Service D1 (Apr 15, 1994).

94. Id. At the same time, the Hamburg Senate asked the Court to ban the National List (NL). Although the Court considered and decided on the banning requestions together, I will focus only on the FAP because of its larger size, its geographically broader political and criminal presence, and its greater resemblance to the NSDAP of the 1930s. Michael Lindemann, *Germany Outlaws Nazi Groups*, Financial Times (Feb 25, 1995).


97. Christian Worch, leader of National List, aware that the effort to ban the group could take years because of the jurisdictional divide, noted the legal challenge brought by the three banned groups which argued that they were, in fact, parties, not associations. Elizabeth Sullivan, *Hamburg's Neo-Nazi is Skilled Fanatic: Political Skills Make Neo-Nazi Dangerous*, Cleveland Plain Dealer 1A (Jan 25, 1993).

98. See appendices B and C. The Basic Law, Article 21 (Political Parties) provides as follows:

1. The parties shall help form the political will of the people. They may be freely established. Their internal organization shall conform to democratic principles. They shall publicly account for the sources and the use of their funds and for their assets.

2. Parties which by reason of their aims or the conduct of their adherents seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

3. Details shall be the subject of federal laws.
constitutive characteristics of parties and the reasons the FAP did not qualify. 99 Using the language of the Basic Law almost verbatim, the Court defined a party as an

... association of citizens who set out to influence either permanently or for a lengthy period of time the formation of political opinions and want to play a part in the representation of the people in the German Parliament or a State Parliament, provided that they offer sufficient guarantee of the sincerity of their aims in the general character of their circumstances and attendant conditions, particularly in regard to the extent and strength of their organization, the count of their members and their public image. 100

The Court clarified that an association's intent to be a party is insufficient if the association neither possesses nor is advancing toward possessing three objective criteria: sufficient size, organizational strength, and public presence. These factors demonstrate a group's capacity to fulfill the functions of a party, and thus, determine whether it is worthy of the greater protection afforded by judicial, rather than executive, bannings. Thus, the Court explained that these "realities must stand behind the stated claim of a developing organization, which was founded as a party" to prevent the dilution of the market for voters by "short-lived accidental associations" without the capacity to "participate in the formation of the political opinion of the people." The Court concluded that the FAP was not a party, because it showed "unsatisfactory preparation for the seriousness of [its] purpose," due to its "lack of organizational density, insufficient ability to act as a viable party organization, insignificant steady membership, the absence of continuous public presence, and the lack of any resonance in the population." 101

4. The Ban and the Raids

By the time the Constitutional Court clarified that the FAP could only be banned by the executive branch, there was no doubt that the banning would occur, as the political crisis had, if anything, only deepened. 102 On February 25, 1995, the day after the press announcement, the FAP was banned by Interior Minister Kanther under Article 9 of the Basic Law, which provides for the banning of antidemocratic associations (Vereinigungen) by the federal government. 103 Kanther told the press,

We must fight extremism from the right as well as the left with determination... The FAP... resembled in its nature the Nazi party, revered

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99. Id.
100. Id.
101. Id.
102. See subsection II.B.1. See also Kabel, Fight Neo-Nazis (cited in note 3).
103. Basic Law, Art 9.
Nazi leaders and fostered Nazi rites . . . . It scorned human rights, de-
famed democratic institutions and spread racist and anti-Semitic ti-
rades.104

Kanther gave the order for the Verfassungsschutz to conduct dawn raids on
40 FAP homes and offices, to dissolve FAP structures, to confiscate its wealth
and property, and to detain its organizers for questioning.105 Together the
Verfassungsschutz and the police confiscated Nazi books, flags, and World War
II weapons, including six rifles with bayonets.106 Members were arrested for
their affiliation with the banned group and for promoting Nazism with symbols,
inflammatory speech, or gestures.107 But the purpose of the raids was not
merely to collect evidence. They also represented an attempt to destroy the FAP
infrastructure in order to forestall its reorganization. Thus, the items seized also
included bank accounts, membership files, computer disks, mobile phones,
documents, and other equipment.108 The ban meant the end of the FAP as a
formal institution, but it has not kept former FAP members or leaders from con-
tinuing their neo-Nazi activities.109

III. The Politics of Banning

I now turn to the practical political considerations raised by the banning of
political parties, using the banning of the FAP to illustrate several of these. I first
identify a fundamental problem with the line between parties and associations as
drawn by the Constitutional Court and set forth in the press announcement. I
then ask, in light of the actual functioning of the neofascist movement, whether
the party/association distinction continues to make sense as a tool for protecting
the democracy, asking, in effect, if the Parteienstaat really functions as the
drafters of the Basic Law imagined. In the next section, I examine more generally
whether the particular character of the neofascist movement argues for the use
of bannings, concluding that the argument is really one for the use of conspiracy
theories of criminal culpability, not for the banning of extremist political organi-

104. Christie, Germans Outlaw Two Neo-Nazi Groups, Reuters N Am Wire (cited in
note 96).
105. Gedye, Germany Outlaws Neo-Nazi Group, The Daily Telegraph at 14 (Feb 25,
106. Id.
(Mar 16, 1995).
108. Germany Outlaws, Raids Two Neo-Nazi Groups, Houston Chron A24 (Feb 25,
1995).
109. In October of 1995, for instance, 800 skinheads from all over Germany gathered
for a fascist concert on land owned by former FAP leader Thorsten Heise in Northeim
(near Göttingen). The concert itself was effectively banned, but the skinheads gathered
anyway, leading to clashes with 300 riot police in which two police officers and six
skinheads were injured. Sixty-five skinheads were detained, and police found clubs, gas
pistols, and far-right propaganda at the site. German Police Detain 65 Skinheads After
zational efforts. This introduces a short discussion of the state’s enforcement repertoire and its use. Finally, I examine some adverse consequences of political bannings.

A. THE GAME THEORETICAL PROBLEM OF SIZE AND SURVEILLANCE

As the largest extreme right group in Germany at the time, the FAP clearly had a public presence and resonance. Without one, the march in Fulda would have been an annoyance, not a major embarrassment to the Federal Government. Verfassungsschutz statistics make clear that extreme right views do have a public resonance in Germany. Some of the smaller cell-like groups with more esoteric ideologies could arguably fail to meet the “public presence and resonance” prong of the test, but the FAP, with its standard, old-school Nazi ideology, should have met that test.

The Constitutional Court attached great import to the size of the FAP in determining that it was not a political party. Here the Court’s application of its rule seems accurate, but the value of the rule itself is questionable. In comparison to mainstream parties like the Christian Democratic Union (CDU) or the Social Democratic Party (SPD), the FAP was not large. Using the word “party” to refer only to these giant structures suits the Basic Law drafters’ aim of social stability, but sits less well with current political realities.

The FAP’s diffuse organizational structure was not oriented toward an imminent electoral assumption of power. To the extent that the Court’s narrow definition of a political party is meant to prevent such a group from being swept upward toward electoral viability on a wave of state election funding, the designation of the FAP as a nonparty makes sense. Assuming the information available to the Court about the FAP was valid, the Court accurately found the FAP too small, diffuse, and not sufficiently oriented toward electoral victory to constitute a party. But what if the FAP had adapted its self-portrayal and structure to its quasi-legal condition? And what if the state had adapted its portrayal of the FAP to its own political circumstances?

Even if we accept the Court’s implicit premise that antidemocratic groups are more dangerous to the constitutional order when they are larger, more electorally successful, and hold views which resonate with the population, a contradiction results. Because size and organizational strength determine whether an organization is a party or an association, the smaller, weaker anti-democratic organization is easier to ban than the larger, stronger one, though the latter represents the greater threat to the democratic order. Likewise, a small and weak, democratic organization pretextually labeled antidemocratic by its opponents is less protected from banning, due to its lack of electoral success. This would presumably favor the majority parties in a crisis. In sum, it is easier to ban anti-democratic groups when they represent the least threat, and democratic minority views receive less protection than majority views overall. This is a potentially dangerous

110. See Appendix A.
arrangement, given the broad repressive powers granted the state upon a finding of unconstitutionality.

There is an inherent game theoretical problem with the use of size to determine when a political organization is a party. A fringe political group may, at times, wish to portray itself to itself as larger than it actually is. FAP leader Busse repeatedly claimed the group had more than 1,000 members nationwide and was expanding, while the Interior Ministry consistently reported only a few hundred members.\textsuperscript{111} Even if Busse's count was more accurate, his repetition of the claim is also telling. A group can gain legitimacy and adherents either by claiming to be small and suppressed or large and viable. Alternately, to be larger than the state thinks (i.e., to credibly claim to be fewer than the actual member count) is to be capable of surprise attack.\textsuperscript{112} On the other hand, a party which is small and claims to its members and its recruits to be big may build a following on the false pretense of advanced preparedness for power. Statements about the group's size may be false or inconsistent as the result of either deliberate disinformation, disorganization or internal conflict. By contrast with Busse, who is usually thought to exaggerate the group's numbers, Norbert Weidner, FAP District Leader from Bonn, told reporters that the far right has a level of national organization that belies its fragmented outward appearance.\textsuperscript{113} He noted the example of Köln, where the German League, the German People's Union, the Republikaner and the FAP are all working together. The opposition is not unaware of these dynamics. Michael Henke, a member of the left-wing Green Party, agreed, characterizing the appearance of disorganization as conscious dissembling by the far right: "I think it's a very sophisticated tactic, to make the neo-Nazis seem divided and fragmented when in fact they're actually quite coordinated."\textsuperscript{114}

The actual count of FAP followers or the group's organizational strength is not easily ascertainable, in part due to the practical difficulties of conducting surveillance on partially clandestine, diffuse social movements.\textsuperscript{115} Because of its

\textsuperscript{111} Whitney, Germans Begin to Recognize Danger, NY Times at A10 (cited in note 7).

\textsuperscript{112} See Id. Yaron Svoray, an Israeli free-lance reporter who spent seven months among underground neo-Nazis working undercover for the Los Angeles-based Simon Wiesenthal Center, testified before the U.S. Congress that the German government underestimates the depth and power of the movement.

\textsuperscript{113} Whitney, Germans Begin to Recognize Danger, NY Times at A10 (cited in note 7).

\textsuperscript{114} Id.

\textsuperscript{115} At one point, the German government denied the existence of anything but small groups. Karen Y. Crabbs, Resurgence of Nazism, 8 Fla J Intl L 33, 51 (1993). Some neo-Nazi groups organize on a small scale to avoid surveillance and to better maintain anonymity. Id. The model of a network of small cells capable of surprise attack, destabilizing German society to prime it for fascist overthrow, fits the strategy of American neo-Nazi Gary Lauck perfectly. Paul Lansing and John D. Bailey, The Farmbelt Führer: Consequences of Transnational Communication of Political and Racist Speech, 76 Neb L Rev 653, 657-58 (1997). This is further reflected in fascist fantasy literature; see, for example, Andrew MacDonald, The Turner Diaries (Barricade Books, 1996) (the right-wing
political investment in the answer, the state cannot necessarily be relied upon to express accurately its estimate of extremist groups' size and strength, notwithstanding its privileged position in command of the surveillance agencies. This is all the more true when, as in the neofascist case, the state is under attack for allowing a movement to grow too big and is being questioned about the accuracy of its estimate of the threat to the democracy posed by extremist organizations. If the state exaggerates, it admits its own failure to have acted earlier. If the state responds to this pressure by understating the size of the threat, it risks more political pressure if its count is later shown to have been wrong. Either way, the state takes a risk, because the inaccuracy of its count reflects back on its duty to maintain a militant defense of the democracy, so that error can be cast as neglect. Perhaps in a perfect world, these reasons would counterbalance each other and encourage the state to report accurately extremist group activities and to promptly fulfill its protective duties under the Basic Law. In practice, however, political considerations may distort the state's behavior, rendering the state's own account less trustworthy.

These dangers and limitations notwithstanding, the state cannot escape the numbers game when choosing its responses to extremist mobilizations. Because it may not be possible to preserve a democracy once anti-democratic parties are in a position to exert pressure on democratic parties to cede power "voluntarily," democratic states must apply precautionary measures.

B. NEOFASCISM AS A NEW SOCIAL MOVEMENT

In this Section, I argue that the character of the neofascist movement defies and transcends the hard distinction drawn by the Constitutional Court and the Basic Law between political parties and associations. The drafters of the Basic Law sought to defend democracy by affording political parties robust protection from potential abuses of power by the executive. Political practices have changed so much since the 1940s, however, that providing only political parties protection against banning may no longer effect the drafters' intended purpose. Prior to World War II, the most significant political pressure came from the labor movement, which expressed its state-level goals through various parties with mass followings. By contrast, the Cold War period was characterized by corporatist unions and the emergence of new political actors. These "New Social Movements" ("NSMs"), as they came to be called, organized themselves not into political parties, but into diffuse social networks and single-issue campaigns. Such movements are characterized by a multiplicity of short-lived apocalyptic novel widely believed to have inspired the Oklahoma City bombing. Police perceive risk not from legally registered right extreme parties, but from networks of undergrounds neo-Nazi groups. Roger Boyes, Bonn Seeks to Reassure Turks with Crackdown on Neo-Nazis, The Times of London Overseas News (Jun 8, 1993).

institutions, loose associations of individuals, and quasi-legal action (e.g., squatting, civil disobedience). NSMs generally conceive of politics as including issues traditionally regarded as extrapoltical "social" issues. The modern view that associations are potentially just as powerful, or political, as political parties has developed through 40 years of experience with these movements.

In many ways, the neofascist movement fits the model of an NSM. Neofascists orient themselves to both electoral and extraparliamentary politics. They achieve major political change by exerting pressure on the state but without substantial electoral success. Consider the example of the change in the asylum law. Neofascists (and their allies in the established parties) achieved a constitutional amendment largely basing their power on a surfeit of street demonstrations, racist attacks, graffiti, and monument desecrations. These thuggish protest politics, along with the fascists' diffuse and multifaceted organization and the cultural character of the skinhead and right-wing music scenes, combine to form the picture of a classic NSM. In this light, one must ask whether fascists really care about the party-association designation. What protection from banning fascists might lose by not organizing as proper parties may be more than compensated for by the strategic advantages of the social movement form.

For a time, legal registration as a political party had sheltered the FAP from the executive power of the state. Though the ban had been contemplated as early as 1992, it did not occur until 1995. Right-wing groups were aware that calling themselves a party would delay the banning process. Nevertheless, throughout the Article 21 banning process—which took more than one year—the FAP was on notice of impending investigative and banning raids. The Constitutional Court's announcement in the FAP case is a clear statement, though, that neither self-designation as a party nor legal registration will protect a group from banning by the executive. If the announcement was meant to signal the executive to use its own judgment regarding associations posing as parties, it was unnecessary as this was already state practice. By December of 1992, the executive had banned three extreme right self-proclaimed "parties" (the National Front, the German Alternative, and the National Offensive) without petitioning the Constitutional Court. The German Alternative and the National Offensive

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117. Id.
118. When Amendment 39, June 28, 1993 reformed the asylum provision of the Basic Law Article 16a (effective July 1, 1993), Germany changed from having the most liberal European asylum law to one of the most restrictive. The new law provided automatic denial to refugees arriving from countries deemed safe from political persecution, which at the time included all of Germany's bordering states. Thus, no asylum-seekers could arrive by land. Svoray and Taylor, In Hitler's Shadow at 263 (cited in note 77).
119. Lindemann, Germany Outlaws Nazi Groups, Financial Times (cited in note 94).
120. Sullivan, Hamburg's Neo-Nazi is Skilled Fanatic, Cleveland Plain Dealer at 1A (cited in note 97).
121. Court Backs Ban on 3 Nazi Groups, St. Louis Post-Dispatch (Apr 8, 1993).
sive had appealed by the time of the press announcement, but the appellate court affirmed the bans, rejecting the argument that only the Constitutional Court could ban parties.123

Why did Interior Minister Kanther elect to apply to the Constitutional Court for the banning if the FAP was more like an association than a party? His decision was probably guided by political as well as legal considerations. The Constitutional Court is relatively insulated from the political process.124 The rise of extreme right-wing violence after reunification125 brought with it intense criticism of the CDU. Under these conditions, the executive could gain legitimacy with the Left by applying to the Court, but retain support from the Right by avoiding responsibility for the actual outcome of the Court's decision.

Did the Court protect the democracy by naming the FAP not a party and denying its own jurisdiction to ban it? The Court defined the term "party," according to the civil law tradition, with a strict reading of the Basic Law and the Law on Political Parties. Had the Court taken a purposive rather than a strictly textual approach to constitutional and statutory interpretation, it could have better accounted for evolving norms of political practice and the immediate political context. The Court’s rigid understanding of the political process failed to link the drafters’ intent with the practices of modern extremists.

C. LAW ENFORCEMENT AND THE AGE STRUCTURE OF THE NEOFASCIST MOVEMENT

Many leaders of the postwar neo-Nazi movement were active participants and leaders in the Third Reich.126 Membership in current fascist organizations includes both older fascists, or Faschos, who want to end bourgeois democracy and return to the militarized German Reich, who operate more secretly and about whom less is known, and the younger (13-20) skinheads and neo-Nazis, who are more clearly identified by their clothing style, wearing of banned fascist symbols, distinctive haircuts and musical taste.127

123. Court Backs Ban, St. Louis Post-Dispatch (cited in note 121).
125. See Appendix A.
127. Crabbs, 8 Fla J Intl L at 49-50 (cited in note 115). When the Bavarian Interior Ministry banned the 50-member neo-Nazi group Skinheads Allgeau, two-thirds of the group’s members had criminal records for offenses ranging from possession of Nazi publications to causing grievous bodily harm. As Bavarian Interior Minister Günther Beckstein stated “[t]he danger was that more and more youths could have been drawn into the right-wing extremist struggle and for this reason as well we had to ban the club.” (See Court Rejects Government on Neo-Nazis, Deutsche-Press Agentur (Jul 30, 1996). Indeed, according to social researcher Bernd Wagner 30 percent of young people (under 25) in eastern Germany subscribe to extremist views. See Drozdiak, Right-Wing Extremist Violence Surges in Germany, Wash Post (cited in note 18).
Young people play an important role in right-wing terror. For example on May 29, 1993, a 16 year old, who later implicated two other young people in his confession, carried out the arson attack in Solingen that killed five Turkish women and girls.\(^{128}\) Likewise, two young people were found guilty of the fatal November 1992 residential firebombing in Mölln. One was sentenced to life imprisonment and the other to ten years imprisonment in consideration of his age. More characteristically, two 14 year-olds from Frankfurt am Oder confessed to charges of vandalism and graffiti at a Jewish cemetery on October 6, 1993. Their writing included the words, “Die, Jews!” and “FAP.” Both admitted to being members of far right groups, and both received suspended sentences.\(^{129}\)

Under the German Criminal Code, individuals under 14 have no criminal responsibility.\(^{130}\) Both juveniles aged 14 to 17 and young adults (Heranwachsende) aged 18 to 21 are covered by the Youth Court Law (Jugendstrafrecht).\(^{131}\) German juvenile criminal law is particularly lenient.\(^{132}\) Juvenile offenders’ first penalties are “educational measures,” then fines. Only where these fail in severe cases do courts impose brief sentences.\(^{133}\) Juveniles found guilty of felonies do not go to adult prisons but can be remanded to juvenile detention centers for a maximum of ten years, and that only provided the adult penalty is longer than 10 years.\(^{134}\) The insulating importance of juvenile penalties can be seen clearly in the case of a December 1992 murder in Siegen.\(^{135}\) There, in a politically motivated attack, two neo-Nazi skinheads, aged 17 and 21 (and with ties to the FAP), kicked to death an almost blind man.\(^{136}\) The maximum sentence allowed for the younger of the two was ten years. The older faced either life or ten years, depending on whether he stood trial as an adult or a juvenile, a matter of judicial discretion.\(^{137}\) The stark difference between juvenile and adult sentences adds fuel to the public discussion of juvenile culpability as pertains to right radical attacks.

More concerned with protecting young people from Nazism than protecting society from Nazi youth, the approach to the nazification of German youth has been paternalistic in tone. Bans on neo-Nazi music, for example, are effected under the Youth Protection Act (Gesetz über die Verbreitung jugendgefährdender Schriften).\(^{138}\) The Act established a federal office to examine materials “endan-
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This is consistent with the image of a sheltered and naive young person, an image which animates arguments against youth imprisonment: unwillingness to reinforce in youth a negative criminal self-image, reluctance to grant neophytes an opportunity to learn from more experienced criminals, a social interest in averting or postponing an individual’s integration into the prison subculture, and awareness of youth sensitivity to imprisonment. Youth punishment is, as a result, somewhat rare and lenient. In 1990, for instance, 77,274 individuals (34,684 juveniles and 42,590 adults) were convicted in western Germany. Of the juveniles, only 2,103 (6 percent) received prison sentences.

A 1991-93 evaluation by the German Office on Crime (BKA) of 500 militant right extremists arrested for violent action noted the following composition: 33.6 percent pupils (Schüler), students, and apprentices, 28.75 percent skilled workers and craftsmen, 11.3 percent unskilled workers, 5.6 percent office workers, 7.9 percent soldiers, and 11.3 percent unemployed. In the case of right radical extremism and the FAP, although the organizational age range is quite broad, much of the violent criminal activity is perpetrated by individuals who fall below the criminal law’s age of majority. The Verfassungsschutz reports far right leaders as saying skinheads and other violence-prone youth carry out most of the thousands of acts of violence while informal group leaders coordinate the attacks. The involvement of both first-generation Nazis and youth in current right extremist organizations creates an


139. Id.

140. German Information Center, The German System of Criminal Law (German Information Center 1994).

141. Id.


143. These numbers are somewhat deceptive, since German educational subsidies mean that youth unemployment is masked by prolonged student status.

144. Includes numbers of “former Nazis” and those who spent their early childhoods in Nazi Germany.

145. The significant involvement of young people in militant right politics in Germany is neither a new development nor a coincidence. Youth form the army of most militant social movements. In this particular case, there is also a specific bond between these youth and right radical politics. Young people in both East and West Germany are the first generation since World War II to face profound job insecurity. Just as the youth of the East watched the socialist safety-net disappear, the youth of the West began to feel the first failures of the welfare state economic miracle (Wirtschaftswunder) in the form of rising unemployment. For an in depth discussion of the relationship between the end of the era of expanding industrial production and the rise of neo-fascism in Germany, see George Steinmetz, Fordism and the (Im)moral Economy of Right-Wing Violence in Contemporary Germany, in Frederick D. Weil, ed, 277 Research on Democracy and Society (Jai 1994).

environment conducive to the use of the criminal law to control the activities of these groups. Members of the older generation play more organizational and ideological roles, leaving much of the direct brutality to the younger generation.\textsuperscript{147} Thus the state must aim at two receding targets: the almost unreachable leaders and the almost unpunishable followers.\textsuperscript{148}

The legal condition of juvenile offenders cannot alone account for the low levels of punishment for right-wing attacks. Certainly, judicial leniency, prosecutorial reluctance, and police bias and inaction are also factors. If the insulation of youth from punishment is influencing extreme right planning, then it should also affect the state’s strategy in protecting high-risk members of German society from attack. This division of fascist labor means the enforcement of certain criminal provisions against individuals (perpetrators of arson and assault, for instance) may be ineffective at destabilizing extremists. From an organizational perspective, fascist youth are relatively expendable, as new members can be drawn from the ranks of unemployed youths to replace those jailed in the service of the association.

Given the age structure of the movement, it is tempting to look to the political conspiracy sections of the criminal code, §129 (formation of criminal associations) and §129a (formation of terrorist associations).\textsuperscript{149} These may appear more destructive to extremist organizations than mere enforcement of ordinary criminal provisions against individual perpetrators or criminal conspiracies. Yet use of these provisions may run the risk of glorifying extremist organizations and further enticing marginal youth adherents.

\textsuperscript{147} Weiss, 27 Vand J Transnatl L at 900 (cited in note 34). There may be an element of wish fulfillment in the relationship between the World War II Nazis and the younger generation, as the older generation seeks an opportunity to see validated the role for which they were once praised and are now told they must be ashamed. Those who participated in the Hitler state and who are still around to organize were young enough to have been members of Hitler Youth, the organization of the promising generation of Nazi hope in the Third Reich. There may also be an aspect of the age hierarchy which replicates the homoerotic cult of the young Nazi male. As this paper does not attempt to describe the rise of the neo-Nazi movement, these possibilities must for the moment remain simply suggestions.

\textsuperscript{148} It is not at all clear who is following whom. To some extent, the older generation organizes and recruits the young. Another way to view it is to see sophisticated ideologues acting strategically to capture and channel the energies and dissatisfactions of a displaced generation. The older generation supports the right-wing music scene partly as entry. The FAP finances the skinhead magazine *Querschläger* and strongly influences another called *White Power*. The first major right-wing concert after reunification was organized in 1990 by Thorsten Heise, FAP leader in Nordhausen. Anti-Defamation League, *The Skinhead International: A Worldwide Survey of Neo-Nazi Skinheads* at 39, 41 (1995) (cited in note 142).

\textsuperscript{149} StGB, Sec 129-129a.
D. THE STATE'S ENFORCEMENT REPETOIRE AND ITS USE

The ban of the FAP has given the state a broader range of criminal penalties to use against FAP participants. Extremist attempts to form new organizations using the networks established by the FAP also face closer scrutiny. The Criminal Code (Strafgesetzbuch) prohibits forming "substitute organizations," violating the ban on an organization found to be a substitute organization of a banned party, propagandizing for unconstitutional groups, or using the insignia of banned groups. The law also prohibits specific acts of banned organizations such as crimes against the peace and endangering the democratic constitutional state.

In comparing German and American hate speech/crime legislation, Bradley Appleman notes that "[t]he German experience illustrates that the preservation of the freedom of expression is possible without abandoning community values." German hate speech legislation ranks human dignity highest in the hierarchy of fundamental rights. Thus the right to free expression gives way when its exercise would violate a superior interest of others. German law cognizes racial attacks as an affront to a person's core identity, so the dignitary interest supercedes the right of expression. For example, the German government uses the constitutional provision for the protection of youth (Article 5) to regulate right-wing extremist hate speech. The Board of the Federal Office for the Examination of Materials Endangering Youths creates a list of dangerous items which cannot be sold to those under eighteen. Purely political, social, religious, or philosophical reasons are insufficient grounds for inclusion in the list.

150. StGB, Sec 84.
151. StGB, Sec 85.
152. StGB, Sec 86.
153. StGB, Sec 86a.
154. These are distinct from the general criminal provisions against disruptions of the public order which also include articles of particular relevance to neo-Nazi movements, banned or not: dissemination of propaganda that supports the ideas of the Nazi regime, unconstitutional parties, or prohibited associations (StGB Sec 86); use of insignia including flags, badges, uniforms, passwords, and salutes (StGB Sec 86a); disturbing the public peace by threatening to commit criminal acts (StGB Sec 126); formation of armed mobs (StGB Sec 127); formation of criminal associations (StGB Sec 129); formation of terrorist associations (StGB Sec 129a); incitement of the people (StGB Sec 130); instructional guidance to commit criminal acts (StGB Sec 130a); production or dissemination of writing that incites people to race hatred or that describes cruel or otherwise inhuman acts of violence (StGB Sec 131); description of violence or incitement to race hatred (StGB Sec 132); nondisclosure of planned criminal acts (StGB Sec 138); insult as an offense against persons (the hate speech provision) (StGB Sec 185); and denial of the existence of the Holocaust (StGB Sec 194). Additionally, StGB Section 220a provides a life sentence for genocide. See Harfst and Schmidt, German Criminal Law (cited in note 91).
155. Bradley A. Appleman, Hate Speech: A Comparison of the Approaches Taken by the United States and Germany, 14 Wis Intl L J 422, 422 (1996).
156. Id at 430-31, 434.
The Board has banned neo-nazi music because it was deemed to be directly linked to the increase in youth violence.\[^{157}\]

The regulation of expression in the German system goes beyond the “negative liberty” ensured by the U.S. constitution.\[^{158}\] In the 1958 Lüth case, the Constitutional Court interpreted the Basic Law’s Article 5 affirmation of free expression to encompass state and private action. Thus the Basic Law not only forbids the government from infringing on basic rights but also obligates the German state to provide the conditions under which they can be realized. As in the United States, speech is a highly protected constitutional right in the German democratic system, valued in part for its contribution to public discourse (Meinungskampf, literally, opinion-struggle), particularly over fundamentally questions. (wesentliche beruhrende Frage). Unprotected speech includes depictions of violence, hate speech, threats to the democratic order, and incitement to hate.\[^{159}\]

Renounced fascist Ingo Hasselbach, accused German politicians (especially Kohl) of late and soft response, calling the justice system “blind in the right eye,” by comparing its treatment of the radical left.\[^{160}\] Against this kind of accusation, the executive was eventually pressured to express a strong antifascist policy, for example announcing its intent to prosecute those inciting acts of racial violence to the same extent as those perpetrating the crime.\[^{161}\]

The accusation, however, encompasses not only the conservative executive branch, whose hesitation in enforcing the law against the radicals of its own political direction might more easily be expected, but also judges, who in Germany have great sentencing discretion, and who were slow to impose serious sanctions against fascists.\[^{162}\] Sentencing remains uneven. A 25 year-old who beat a 55 year-old Albanian refugee to death with a baseball bat in Stuttgart received a life sentence, and a 19-year old participant received nine years for attempted murder. Skinheads in Frankfurt received only four year sentences in a multiple beating with one fatality, because the judge could not prove the defendants were “directly involved.” By contrast, a less lenient judge allowed a case to proceed against a police officer who watched 50 skinheads beat a foreigner.\[^{163}\]

IV. Adverse Banning Effects: Going Underground (and Elsewhere)

According to the Verfassungsschutz, at the time of the banning of the FAP, the agency had “evidence that (underground) networks [were] being established

\[^{157}\] Id at 431, 433.
\[^{159}\] Id.
\[^{160}\] Rick Atkinson, Violence Brewing in Germany, Cleveland Plain Dealer 3C (Jan 2, 1994).
\[^{161}\] Crabbs, 8 Fla J Intl L at 60 (cited in note 115).
\[^{162}\] Id. at 53
\[^{163}\] Id at 53-54.
They felt that bans were nevertheless advisable because they might discourage young people with mild right-wing tendencies from joining. Norbert Weidner, FAP district leader in Bonn, claimed that if "the authorities ban all the organizations, it'll backfire on them. We'll just go underground." This specter may have already occurred. Does banning far-right groups and seizing their tools really curtail their activity, or are the organizations just driven underground and into cyberspace, making them harder to monitor and therefore less predictable and more apt to use illegal tactics? David Weiss argues that neo-Nazi organization is informal, that groups maintain close contact with one another through the "movement" (die Bewegung), which is controlled by a network of leaders who can escape state monitoring with encrypted software and private computer mailboxes. Parties that cease operating as vote-garnering organizations may focus instead on covert activities (violence and illegal propaganda) by using electronic media to disseminate outlawed literature and evading surveillance with untraceable or encrypted computer network transmissions. The tone of this debate is pragmatic, more concerned with enforcement efficacy than free speech.

Concern with the non-speech, unintended consequences of party bannings can be summarized by warnings that banning drives fascists somewhere else, out of the public view. There is fear that banning drives neo-Nazis underground, out of sight, where they transmit their ideas via channels such as the Internet, which are harder to track. Alternately, there is fear that neo-Nazis will be seen and heard but not recognized as they become, or affiliate with, more mainstream groups where they transform their explicitly hateful rhetoric into palatable euphemisms which may be distributed in that form through the mass media and the powerful and legal channels for disseminating mainstream parties’ programs. Central to both concerns is the idea that fascists will relate to the banning law as a road-map for evasion, responding to their repression by slightly altering their symbols and terms, by naming their groups "party" to stall the system, and by using encryption software to plan attacks and demonstrations from inaccessible positions in cyberspace.

The government’s long pursuit of the Republikaner easily illustrates the danger of fascists disappearing from the public view by slipping right into the light. The Republikaner, or “Reps” are the most prominent and most politically successful of the legal parties. Led by Franz Schonhuber, former SS member, the Republikaner focus on asylum and housing politics, expressing the political

165. Whitney, Germans Begin to Recognize Danger, NY Times at A10 (cited in note 7)
166. Germany Outlaws, Raids Two Neo-Nazi Groups, Houston Chron at A24 (cited in note 108).
168. See, for example, Martha Crenshaw, Unintended Consequences: How Democracies Respond to Terrorism, 21-FALL Fletcher F World Aff 153, *157-58.
agenda of the extreme right electorally while avoiding Nazi symbols the direct fascist expressions which might invoke the militant democracy. For example, Schonhuber called for an asylum quota system under which Jews, ethnic Germans, and “trained Europeans” would be granted asylum, and “the unwashed” would be excluded.170 Former Chancellor Kohl began public efforts to reach the Republikaner as early as 1992.171 Unlike the tiny banned groups, the Reps are an established party with seats in local legislatures and a consistent 5 percent in public opinion polls.172 Despite intensive surveillance,173 the government claims it lacks sufficient evidence linking the organization to racist propaganda and anti-foreigner violence to ban the party.174

The other fear, that fascists will slink underground is equally well founded. German neo-Nazis use bulletin-board networks with elaborate identity checks, using encryption software including Pretty Good Privacy (“PGP”).175 One example is the bulletin board “Kraftwerk” on the Thule Network,176 which Germany has been thus far unable to close.177 German bulletin boards have been shut down, but the fact that neo-Nazis can access materials which are illegal in Germany on the borderless Internet challenges the enforcement of national laws.178

In theory, materials lacking national constitutional protection could be likewise banned in cyberspace.179 In practice, however, the technologies of the Internet (e.g. mirror sites and encryption software) severely impair such efforts once the material is “up” on the Internet. Even a regulatory focus on the Internet provider as gateway and thus gatekeeper, requires a degree of uniformity in international law enforcement efforts which is itself confounded by constitutional regimes with fundamentally different approaches to free expression.180 The result is uneven. While Germany has been unable to stop the propaganda efforts

170. Crabbs, 8 Fla J Intl L at 48 (cited in note 115).
172. Id.
173. Id.
174. The Verfassungsschutz has come under attack for failing to produce this evidence. An editorial in the Süddeutsche Zeitung remarked, “For these results you do not need a security agency . . . it would have been enough to set up an office for clipping newspaper articles.” Marcus Kabel, Kohl Opposes Ban on German Far-Right Republicans, Reuters World Service (Apr 15, 1995).
of Ernst Zundel,\textsuperscript{181} on August 22, 1996, a Hamburg court did convict Nebraskan Gary Lauck for incitement to violence and incitement of racial hatred, over his lawyers' argument that his activities were legal in the U.S. and protected by the First Amendment.\textsuperscript{182}

To the list of unintended banning consequences, I would add the danger that national regulation of fascists has an effect parallel to national regulation of just about anything else: an incentive to globalize. Parties that are banned in Germany have sought funding, weapons, and propaganda materials from sources outside Germany.\textsuperscript{183} German emigrant and Canadian resident Ernst Zundel is world famous for his publications denying the Holocaust.\textsuperscript{184} Zundel is more insulated from the state than any extreme right German party, as he is not only located abroad, but in 1992 successfully defended his fascist publishing and broadcasting on free speech grounds before the Canadian Supreme Court.\textsuperscript{185}

Until the recent arrest and extradition of Gary Lauck to Germany (by Denmark, where he was avoiding U.S. authorities), the banned Nazi Party was kept alive in Nebraska in the form of its international affiliate, the NSDAP/AO.\textsuperscript{186}

These examples represent more than straightforward evasion of German law; they illustrate the way state-level bannings have a globalizing effect on extremist political parties, as international networks are developed and strengthened out of practical necessity. On the most mundane level, banned fascist propaganda can be printed by compatriots in Sweden and Denmark. To take another example, when the political climate in Germany was too hot for the FAP in September 1993, after the demonstration in Fulda that led Kanther to call for their ban, FAP leaders simply held their meetings in Moscow, where they, like other far-right groups, maintained a good relationship with extremist Russian nationalists.\textsuperscript{187} Former neo-Nazi Ingo Hasselbach reports that right computer networks

\begin{itemize}
  \item \textsuperscript{181} Chris Cobb, \textit{Internet Censorship is Not Possible, Computer Expert Says}, The Vancouver Sun A11 (Sept 19, 1997).
  \item \textsuperscript{183} Ingo Hasselbach, \textit{Führer Ex: Memoirs of a Former Neo-Nazi} VIII-IX (Random House 1996).
  \item \textsuperscript{184} Andrew Brown, \textit{Whether to Censor Rising Neo-Nazism on the Internet; EU Commends Suppression of Porn in Cyberspace}, Minneapolis Star Tribune 9A (Feb 5, 1996).
  \item \textsuperscript{185} Daniel Howard Cerone, \textit{Neo-Nazi 'Voice' Finds a Forum on Public-Access Television; Wiesenthal Center Criticizes Airing of the Series But Some Cable Operators are Bound by Franchise Agreements}, Los Angeles Times F1 (Apr 15, 1995). This did not stop someone from burning down his house on May 8, 1995, the anniversary of the German surrender. Bob Brant, \textit{Some Cheer Zundel Home Blaze But Many Condemn 'Vigilante Justice'}\textsuperscript{[187]}, Toronto Star A7 (May 8, 1995). Nor has that deterred Zundel's publishing efforts. \textit{Zundel Fights Over Restrictive Wb Attempts}, Internet Business News (Feb 1, 1997).
  \item \textsuperscript{186} \textit{U.S. Neo-Nazi Loses Another German Appeal}, Deutsche Presse Agentur (June 13, 1997).
  \item \textsuperscript{187} See Rick Atkinson, \textit{Violence Brewing in Germany}, Cleveland Plain Dealer 3C (Jan 2, 1994) (Munich meeting of Russian nationalist Vladimir Zhirinovsky and Gerhard Frey,
link right radicals in Spain, Austria, Denmark, Netherlands, Russia, Finland, South Africa, and the U.S. In his role as founder and leader of the National Alternative, Hasselbach met with Dutch and Spanish fascists and with Gary Lauck of Nebraska who "remain[ed] constantly in touch with all of the most important Nazi leadership cadres throughout Germany."\textsuperscript{188}

There are several problems with the debate about banning and going underground. First, whether a group is banned or not, the involvement of the fascist movement in conventionally illegal activities (e.g. racist attacks and paramilitary training) renders it semi-clandestine as a matter of ordinary movement security. Second, the same concerns apply whether a banning law exists at all. Third, the advent of cyberspace has rendered the distinction between legality and clandestinity a false dichotomy. In other words, it is nonsensical to speak of the danger that banned parties will go underground as if they were not already there.

V. Banning and Democracy

A. THE NOT-SO-MILITANT DEMOCRACY

The militant democracy is designed to correct for democracy's inability to ensure its own survival. Even if the militant democracy may have been necessary in the early years, when recent mass participation in the fascist state left no democratic political culture to defend, why should Germany's more mature democracy continue to need the democracy-compromising measures of the militant democracy?\textsuperscript{189} The rise of the fascist right certainly shows that the German democracy still needs protection, but in what form?

The state's initially sluggish response to the rise of the extreme right has been roundly criticized.\textsuperscript{190} In August 1992, while police stood idly by, more than 800 right-wing demonstrators with Molotov cocktails, shotguns, and clubs attacked an apartment complex for refugees in Rostock.\textsuperscript{191} Uniformed on-duty police actually participated in the attacks on foreigners in Dresden and Eisenhuttenstadt. In the latter case, attacks by police continued even after neo-Nazis left the scene. The higher proportion of supporters of the Republikaner Party in the police than in the general electorate perhaps explains police reluctance to crack down on neo-Nazi groups.\textsuperscript{192}

\textsuperscript{188} Id.
\textsuperscript{189} David P. Currie posed this question in his Seminar on Comparative Constitutional Law, The University of Chicago Law School, Autumn 1995.
\textsuperscript{190} "But in the past months not even the most insignificant use has been made of this arsenal of repression. Indeed, the police and the courts have responded to the mass-scale appearance of gangs of thugs with a previously unheard of restraint." Hans Magnus Enzensberger, The Great Migration, 42 Granta 15, 50 (Granta Publications, 1992).
\textsuperscript{191} Martin Lee, Hitler's Offspring, The Progressive 31 (Mar 30, 1993).
\textsuperscript{192} Id.
Such events do not bode well for the defense of a democratic order, even one with elaborate constitutional protections against anti-democratic movements. Without the cooperation of the coercive arm of the state, the militant democracy is an empty concept. It was not until November 1992 that the government expanded its application of the law banning symbols of the Third Reich to include the modified symbols used by neo-fascists and created special police units to combat right-wing violence. Bundestag President Rita Süssmuth admitted publicly that "we politicians must ask ourselves if we didn’t talk too long instead of acting."

What insures that the state will mobilize the militant democracy? What happens to the democracy when the state fails to act against extremists? The Introduction to the Law on Political Parties announces that filing for a ban is within the state’s discretion, but that while “the State — which is under obligation to take action — does not passively observe activities hostile to the law and to democracy; however, it has a special duty to respect the constitutionally safeguarded freedom of political parties.” Whether the state is deemed to have performed its duty to protect the democracy is ultimately a political question.

The substantivist’s characterization of the vulnerabilities of proceduralist democracy is actually a caricature. It is a myth that the Nazi party won through purely electoral means; they were violent in the streets and won by intimidation. There is a real basis for a critique of procedural democracy, but the substantivists misstate the fault. When thugs appear at the polls and in the parliament to intimidate voters and their representatives, it is inaccurate to fault the proceduralists for simply allowing an antidemocratic candidate or party to run for office, when the failing also lies in having tolerated all the specific acts of threat and intimidation that permitted electoral victory. The greater danger lies in the complacency of the democratic polity than in the formal possibility to extinguish the democratic form of the state electorally. Provided the population maintains a vigilant posture responsive to the rise of antidemocratic violence, a state without the capacity to ban could conceivably maintain its legitimacy and its democratic character. Democratic vigilance requires profound democratic education, and the question remains from where the public democratic lesson is

196. Id.
197. For a preliminary exploration of whether this duty is understood to include the defense only of political parties or also of foreigners and a tolerant society, see Jacobs, 34 Harv Int'l L J at 576-579 (cited in note 193).
to come. Neofascism in the former East Germany and in the West show equally
well how inadequately direct antifascist education meets that challenge. 198

B. NON-STATE ANTIFASCISM

Even the most stupid person, however, should grasp one thing: renouncing
the state's monopoly of force has consequences which might harm the
political class itself. One consequence is the necessity for self-protection. If
the state refuses to protect threatened individuals or groups, the threatened
individuals or groups will have to arm themselves. And, as soon as the
resistance has adequately organized itself, there will be gang wars (a
development that can already be observed in Berlin and Hamburg). We will
all recognize the political conditions: they are the same that Germany
experienced towards the end of the Weimar Republic. 199

I have focused thus far on the state's use of the banning provisions in the
Basic Law, suggesting a political terrain in which the only key actors were the
state (domestic and international forces included only to the extent they exert
pressure on it) and the fascists (the population at large included only to the
extent its members are potentially harmed or convinced by fascists). In so doing,
I have left out a key sector: non-state antifascist opposition. There have been two
principle types of anti-fascist reaction: (1) mainstream displays, which include a
broad range of protest politics (demonstrations and candlelight vigils), direct
assistance to asylum seekers and non-ethnic

200. Nationwide non-governmental antifascist demonstrations included a Nov. 8, 1992
Berlin demonstration with 350,000, at which President Richard von Weizsacker spoke
about the threat of right-wing violence. In December 1992, 300,000 participated in a silent
Munich Lichterkette (chain of lights) or Lichtermeer (sea of lights). Unions, intellectuals,
and industry have spoken out against fascist renewal. Crabbs, 8 Fla J Intl L at 59-60
201. See, for example, Roger Boyes, Bonn Seeks to Reassure Turks with Crackdown on
Neo-Nazis, The Times of London Overseas News (Jun 8, 1993) (four Turks set fire to
office of Christian Social Union party in Aschaffenburg). Consider also organizations such
as Antifas Genflk, a Turkish/Kurdish identity-based faction of the militant antifascist
202. Indeed, the American response to the German bannings has often taken a
proceduralist tone. For example, a letter to the editor imputes to German youth a sense
of the "blatant hypocrisy of democratic liberalism . . . where unpopular views (at least to
those in power) are regularly suppressed in the name of protecting the 'Basic Law,'
which guarantees freedom of expression." Joseph Bates, The Register's Readers Say, Des Moines
Register 12 (Dec 7, 1992). Another writer continues in the same vein that "[f]ree speech
response require a bit more clarification. The militant antifascist response has particular significance in German history, and the state’s response to the neo-fascist crisis should be considered in that light.

In November 1993, left radicals in Bonn kicked out FAP leader Friedhelm Busse’s teeth and broke his bones when he approached an antifascist table at a street fair set up in a shopping district and was recognized. On June 4, 1994, 1,500 German leftists in Northeim threw bottles at police as they tried to reach local FAP leader Thorsten Heise’s house where 150 neo-Nazis had barricaded themselves. These are only two relatively mild examples of the extensive non-state militant response to the rise of the extreme right. Not since the Weimar Republic has Germany experienced the level of political violence between non-state actors that obtained in 1993. The willingness of non-state antifascist militants to take matters into their own hands forced the state to adopt its own version of militant anti-fascism in part through bannings of anti-democratic parties and organizations. State repression of the right is driven in part by a need to reestablish the state’s monopoly on legitimate violence in response to the legitimacy challenge presented by non-state militant antifascist reaction.

includes free speech for viewpoints that you hate as well as those with which you agree,” concluding that “Germans have learned nothing from history.” Dean E. Strand, The Register’s Readers Say, Des Moines Register 12 (Dec 7, 1992). One editorial displayed procedural democratic theory in the guise of pragmatism: “Driving a political party underground will not necessarily eliminate it. There is a better chance of suffocating that party by exposing it to the marketplace of ideas.” Editorial, Antidote to Xenophobia, The Hartford Courant B12 (Jan 20, 1993). Another editorial found it “troubling” to see the constitutional banning provisions used because they “miss the point,” maintaining that “[a]uthorities should worry less about the existence of such groups and focus more sharply on the criminal acts their members commit, as well as those committed by extremists who are not members of organized groups. The best way to protect a rule of law is to make sure that those who violate the law are punished.” Editorial, Arrest the German Thugs, The Asian Wall Street Journal 10 (Dec 3, 1992). A noteworthy exception is the American Jewish Congress, which lauded the German government on the occasion of its first party banning in 1992. AJC president Robert K. Lifton told the press, “The escalation of violence against foreigners in Germany needs to be dealt with both forcefully and swiftly. The fact that the German government has finally banned a neo-Nazi political party and taken action against those whose racist ideology has led to violence should be commended.” AJCongress Commends German Initiative Against Nazism but Recommends more Vigorous Action, PR Newswire (Dec 3, 1992).

204. Leftists Protest at Neo-Nazis Barricaded House, Reuters World Service (June 4, 1994).
205. Enzensberger, The Great Migration 42 Granta at 48 (“At stake is the monopoly of force which the state claims for itself.”) (cited in note 199).
206. Sociologist Max Weber defined the State as the set of institutions with an effective monopoly on legitimate violence. Max Weber, Economy and Society V. II 903-04 (1956).
C. THE MILITANT DEMOCRACY

One reason to grant the Constitutional Court exclusive jurisdiction to ban political parties was to insulate the process from party politics. Ironically, the banning of the FAP is best understood in the political context, in terms of the intense international pressure on the CDU to suppress the extreme right. Germany’s central role in the European Union only heightened the world’s scrutiny of the former fascist state. Had the CDU accidentally let the situation get out of control, or did it see a benefit in letting the extremists rise so that it could establish its own credibility by suppressing those farthest right while retaining support for its own right-creeping policies, particularly the reform of the asylum law? According to the latter explanation, the bannings were strategic state action, more influenced by Realpolitik and less by democratic ideals.

Even from this perspective, the slow CDU response does not necessarily reflect a failure of democracy. Given that it is a constitutional obligation of the federal government to oppose the rise of antidemocratic movements, there should be nothing particularly disturbing about incumbent parties following through with this obligation for strategic rather than ideological reasons. CDU sluggishness can be viewed not as the mark of an ill democracy, but as evidence of the healthy dialectical functioning of the militant democracy and party-based state as conceived by the Basic Law. A dynamic democracy is enhanced rather than threatened by the political-cultural struggle to compel a reluctant ruling coalition to mobilize the repressive apparatus of the state to protect the survival of the democratic order. Sincerely or cynically, by banning the FAP, the CDU signaled its practical commitment to democracy.

Whether banings actually do protect democracy depends on the state’s success at balancing individual and collective rights. A democratic state runs the risk that it will protect itself out of existence, that through its state preservation efforts, it will remain a state but cease to be democratic. The extensive FAP raids show how a banning regime can augment state power, for example, by justifying extensive surveillance during banning investigations and enforcement. Given the loose organizational structure of the neofascist movement and the continuum between its legal and illegal political activities, banning-related raids and arrests are inevitably over-inclusive. Surgical strikes against antidemocratic actors also threaten legally acceptable protest and speech, a danger only partially offset by the availability of a remedy at law against excessive state encroachment on speech or privacy. The state has a constitutional duty to balance individual rights against its obligation to protect the democracy, but the balancing concept is “no more protective of expression than the judges who administer it.” The degree of threat to the constitutional order factors into the balance

207. InterNationes, Documents on Politics and Society at 11 (cited in note 58).
208. Private citizens and organizations whose rights are infringed can bring complaints, or Verfassungsbeschwerde, before the Constitutional Court.
209. See the Luth Case, 7 BVerfGE 198 (1958) (holding translated in Kommers, Constitutional Jurisprudence (cited in note 51).
of individual rights against the protection of the democracy. This highlights another paradox: the more threatened the democratic order, the easier it becomes to restrict individual rights.\textsuperscript{211} The danger in relying on a balancing test to limit a banning regime is that a crisis can propel the state into an anti-democratic tailspin, where the state becomes ever more restrictive and loses an ever greater claim to its own democratic character as the threat to democracy increases.

Whether it takes banning to protect the democracy depends on the characterization of that goal. If the target is hate speech, Germany's ranking of dignity above expression in the balancing process renders banning unnecessary (but simultaneously argues for its clear constitutionality). If the aim is the suppression of racist attacks, normal criminal law (if used) could serve adequately, provided that judges more seriously consider the political context during sentencing. Only if the purpose is halting extremist political organizing itself is banning a necessary tool.\textsuperscript{212}

VI. Conclusion

Neither a formal democracy nor a formal substantive democracy itself protects democratic freedom; the survival of a democracy depends on the perpetuation of a robust democratic political culture. Democratic discourse in Europe developed from the struggle of Enlightenment secularism/rationalism against the authority of a single moral order in traditional society. While traditional society\textsuperscript{213} was certain and stable, modern society is highly uncertain and dynamic\textsuperscript{214} giving rise to fundamentalisms.\textsuperscript{215} Thus democracy is a disconcerting system without the comfort of central organizing truths. This leads groups to agitate for the return to some kind of orthodoxy (whether political, ethnic, religious, or charismatic).\textsuperscript{216} Under circumstances of insecurity, the same

\textsuperscript{211} See Weiss, 27 Vand Transnatl L J at 920, 927, 938 (cited in note 34).
\textsuperscript{212} There are also good arguments for maintaining the legality of unpopular antidemocratic parties. The practices of legal parties can be regulated and fine-tuned. Provisions such as the prohibition against anonymous contributions or donations from abroad affirm transparency as an extant value in German law. Part G. Art 25, Sec 1. The defense of the free democratic basic order without party bannings would require comprehensive and even-handed enforcement of criminal statutes and stringent controls against criminal activity by participants in the state apparatus itself.
\textsuperscript{213} I use the term “tradition” to indicate long-practiced social patterns, “orthodox” to mean tightened traditional authority in reaction to progressive threats to those patterns, and “fundamentalist” to refer to strict reworkings of traditional and orthodox forms in nostalgic retreat from modernity.
\textsuperscript{214} The relationship between reunification and unemployment certainly confirms the correlation. Indeed, the German government blames the rise of extremist violence on social instability, namely that youth feel frustration, ideological confusion, and uncertainty about the future. See Andrew Borowiec, Germany Seeks to Downplay Neo-Nazism, Wash Times A8 (Dec 23 1992).
\textsuperscript{215} Fox and Nolte, 36 Harv Intl L J at n 57 (cited in note 1).
\textsuperscript{216} Id.
desire for absolutes which drives the fundamentalist (here, fascist) opposition can also give rise to a public desire for security (experienced diffusely and diversely as the fascist threat, the immigrant “hordes,” the economic threat, the specter of Weimar, etc.) which leads to the embrace of authoritarian tendencies in the state, even as they are invoked against authoritarian forces outside the state.\textsuperscript{217}

At such a point, the society needs a good lesson in democracy. Where does that come from? To the proceduralist, to employ undemocratic tools (such as bannings) against ideological enemies is to become the enemy, as democracy becomes its own fundamentalism.\textsuperscript{218} Proceduralists place their faith in rational discourse to counter fundamentalist reaction to the insecurity modernity brings.\textsuperscript{219} Substantivists would credit the use of repressive force by the state in the name of democracy. A third, less static view of the militant democracy might look to the state’s own paradoxical character as a source. Banning creates a dynamic didactic moment, refreshing public democratic discourse through the resulting conflict about the political character of the state.

The militant democracy embodies a contradictory aspect; its operation contributes to the preservation of a non-complacent democratic culture. The substantive democracy functions as a democratic fundamentalism against which a more dynamic democracy renews itself discursively. Democracy thus exists not in the state, nor in its opponents, but in the discursive interstices between them. The militant democracy forces the state to express its support for democracy, opening and ever reopening parliamentary and public debate about the at-any-given-point arguable hypocrisy of this position. A state with an affirmative duty to protect the democracy has a built in mechanism for generating democratic critique by its opposition. The paradox of democratic intolerance of intolerance is a powerful catalyst within state action against extremists, producing a multi-phase reaction. Action taken against the extremists can have a direct deleterious effect on the efficacy of their opposition to the state. The repressive act also functions as a public democratic affirmation. Alone, these two effects could render the democracy-protecting state itself an enemy of democracy, but there is a third effect. The undemocratic nature of state intolerance of intolerance propels a reaction to the state as a conservative (i.e. status quo preserving) force, subject-

\textsuperscript{217} Examples include early fascist rhetoric against the communist threat in Weimar, the red scare and McCarthyist witch hunts and the draconian immigration rules in the anti-terrorism bill on the heels of the World Trade Center bombing.

\textsuperscript{218} Thomas Emerson, \textit{The System of Freedom of Expression} 51 (Random House 1970) (“Even if we consider freedom of expression an absolute value . . . nevertheless it is important that it remain open to challenge. Otherwise it becomes a ‘dead dogma,’ ill-understood, lacking in vitality, and vulnerable to erosion or full-scale attack.”).

\textsuperscript{219} Jurgen Habermas contemplates a multivocal expression. See John P. McCormick, \textit{Max Weber and Jurgen Habermas: The Sociology and Philosophy of Law During Crises of the State}, 9 Yale J L & Human 297, 312 (1997) (Habermas’ reworking of Weber’s concepts of legitimacy). For Habermas, discursive political development explains the content of the norms envisioned by Weber and takes the place of the single, uniform, Hegelian “popular will” imagined and desired by Schmitt. Id. at 316-317.
Dissent and the Militant Democracy  

...ing the state to democratic scrutiny, the public expression of which has a didactic function, renewing the democratic culture.

How bannings function depends on the political culture in which they are received. As a social event, a banning may function as a ritual of state legitimation, an affirmation of the democratic order, or a delineation of the limits of acceptable political activity. The law of banning affects those with different relations to democracy differently. Crudely, toward fascists, banning laws work through what Habermas would call their factual validity, as a set of rules structuring behavior, whether the effect of that structuring is deterrence or manipulative evasion. Toward democrats, those who believe in democracy normatively and, more or less, empirically, banning laws work through their normative validity, because they resonate with democrats' subjective beliefs about the state's use of legitimate coercion. Toward critical democrats, those who believe in the democratic ideal but question its empirical manifestation in the German state, banning laws work dialectically, reviving democratic beliefs through critical opposition to undemocratic state practices.

Recent elections in Saxony-Anhalt, in which far-right German People's Union took 13 percent of the vote, led to calls to ban the party from participating in future elections. The government's response reflects an approach quite inconsistent with that taken toward the FAP and the numerous other parties and associations now banned as antidemocratic. Expressing concern that banning the German People's Union risks enhancing their appeal, in opposing a ban, Interior Minister Kanther told the press, "These parties have to be stigmatized. They have to be beaten politically; they have to be beaten in elections."

The "protection of the democracy" is a contradictory concept, requiring a balancing of the needs of the state and society for security and the rights of individuals and groups to political expression. The highly politicized designation of groups as antidemocratic illuminates developing concepts of democracy in Germany. The inadequacy of the initial police/state response to extreme right activity brings to the fore the question of the state's affirmative duty to protect the constitution. Abstractly, a banning regime appears the opposite of democratic. In political context, the party bannings may serve a dynamic democratizing function; we might find democracy in the discursive field created by the banning state and its democratic opposition.

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220. For discussions of ritual as structuring event, see Emile Durkheim, The Elementary Forms of the Religious Life (The Free Press 1997); Emile Durkheim and Marcel Mauss, Primitive Classification (Chicago 1990); Marcel Mauss, The Gift: Forms and Functions of Exchange in Archaic Societies (W.W. Norton & Co. 1990); Claude Levi-Strauss, The Savage Mind (Chicago 1972); or Clifford Geertz, The Interpretation of Cultures (Basic Books 1977).


222. Id. at 312.

223. Id.


225. Id.
If contemporary German society is what we call democratic, that is not purely the result of a carefully crafted imposed democratic form. Nor is it a stable enlightened state achieved by an advanced people; rather it is the outcome of ongoing conflict in German society in the post war period between center and left, center and right, right and left. Democratic culture is maintained through discourse and conflict with non-democratic and more democratic forces. German democracy is constantly threatened not only by extremists to the right and left of the state but by tendencies within the state itself which would destroy the democracy in collusion with a complacent population. Paradoxically, the existence of only any one of these forces would be frightening. Existing together in dynamic opposition, and under international scrutiny, we need fear only the disappearance of the struggle for democracy.

Appendix A

**Ideologically-Motivated Crimes by Extremist Organizations**

<table>
<thead>
<tr>
<th></th>
<th>1990 Number</th>
<th>1990 Percent</th>
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<td>1,848</td>
<td>69%</td>
<td>3,884</td>
<td>76%</td>
</tr>
<tr>
<td>Left</td>
<td>757</td>
<td>28%</td>
<td>1,063</td>
<td>21%</td>
</tr>
<tr>
<td>Foreigners</td>
<td>80</td>
<td>3%</td>
<td>142</td>
<td>3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>2,685</strong></td>
<td><strong>100%</strong></td>
<td><strong>5,089</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

**Estimated Membership of Extremist Organizations**

<table>
<thead>
<tr>
<th></th>
<th>1990 Number</th>
<th>1990 Percent</th>
<th>1991 Number</th>
<th>1991 Percent</th>
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<tbody>
<tr>
<td>Right</td>
<td>32,300</td>
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<td>39,800</td>
<td>36%</td>
</tr>
<tr>
<td>Left</td>
<td>29,500</td>
<td>27%</td>
<td>26,500</td>
<td>24%</td>
</tr>
<tr>
<td>Foreigners</td>
<td>49,350</td>
<td>44%</td>
<td>42,980</td>
<td>40%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>111,150</strong></td>
<td><strong>100%</strong></td>
<td><strong>109,280</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>


227. Id.
### VIOLENT OFFENSES WITH PROVEN OR SUSPECTED RIGHT-WING MOTIVATION

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Violent Offenses</th>
<th>Percent Change Over Previous Year</th>
<th>Number of Murders</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>309</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>1991</td>
<td>1,492</td>
<td>383%</td>
<td>3</td>
</tr>
<tr>
<td>1992</td>
<td>2,639</td>
<td>77%</td>
<td>17</td>
</tr>
<tr>
<td>1993</td>
<td>2,232</td>
<td>-15%</td>
<td>3</td>
</tr>
<tr>
<td>1994</td>
<td>1,489</td>
<td>-33%</td>
<td>0</td>
</tr>
<tr>
<td>1995</td>
<td>837</td>
<td>-44%</td>
<td>0</td>
</tr>
<tr>
<td>1996</td>
<td>781</td>
<td>-7%</td>
<td>1</td>
</tr>
</tbody>
</table>

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Appendix B

Verlautbarung der Pressestelle des Bundesverfassungsgerichts, Nr.13/95²²⁹

Das Bundesverfassungsgericht-Zweiter Senat-hat die Anträge der Bundesregierung und des Bundesrates auf Feststellung der Verfassungswidrigkeit der Freiheitlichen Deutschen Arbeiterpartei (FAP) und den Antrag des Senats der Freien Hansestadt Hamburg auf Feststellung der Verfassungswidrigkeit der Nationalen Liste (NL) in dem in Sec 45 des Gesetzes über das Bundesverfassungsgericht vorgeschriebenen Vorverfahren als unzulässig zurückgewiesen. Wegen der herausgehobenen verfassungsrechtlichen Stellung der politischen Parteien ist deren Verbot dem Bundesverfassungsgericht vorbehalten (Art. 21 Abs. 2 Satz 2 GG, Sec Sec 13 Nr. 2, 43 ff. BVerfGG). Auf politische Vereinigungen, die nicht Parteien sind, findet das Verbotsverfahren vor dem Bundesverfassungsgericht dagegen keine Anwendung; ein Verbot solcher Vereinigungen fällt in die Zuständigkeit der vollziehenden Gewalt (Art. 9 Abs. 2 GG, Sec 3 ff. VereinsG).

Nach Auffassung des Senats sind FAP und NL keine Parteien, da sie die Anforderungen, die das Grundgesetz und das Parteiengesetz an Parteien stellen, nicht erfüllen.


Danach reicht allein der Wille, “Partei” zu sein, nicht aus; vielmehr muß eine Partei in der Gründungsphase mindestens ansatzweise, mit wachsendem zeitlichen Abstand vom Gründungsdatum zunehmend in der Lage sein, die ihr nach Sec 2 Abs. 1 Satz 1 PartG in Übereinstimmung mit dem Grundgesetz zugedachten Aufgaben wirksam zu erfüllen. Mit fortschreitender Dauer des Bestehens muß eine politische Vereinigung, die Partei sein will, die Ernsthaftigkeit ihrer politischen Zielsetzung auch anhand objektiver Kriterien bestätigen, die ihre Fähigkeit zur Erfüllung der Aufgaben einer Partei erkennen lassen. Solche Kriterien sind insbesondere Umfang und Festigkeit der Organisation sowie Mitgliederzahl und Hervortreten in der Öffentlichkeit. Dadurch wird gewährleistet, daß sich nur ernsthafte politische Vereinigungen und keine Zufallsbildungen von kurzer Lebensdauer um Wähler bewerben; hinter dem verbalen Anspruch einer als Partei gegründeten und sich entwickelnden

²²⁹. See Appendix C for translation.
Vereinigung, an der politischen Willensbildung des Volkes mitwirken zu wollen, müssen gewisse Wirklichkeiten stehen, die es erlauben, sie als Ausdruck eines ernsthaften, in nicht zu geringem Umfang im Volke vorhandenen politischen Willens anzusehen. Insgesamt kommt es darauf an, ob die Gesamtwürdigung der tatsächlichen Verhältnisse einer Vereinigung unter Einschluß der Dauer ihres Bestehens den Schluß zuläßt, daß sie ihre erklärte Absicht, an der politischen Willensbildung des Volkes mitzuwirken, ernsthaft verfolgt.


Da die Anträge unzulässig waren, hatte der Senat über die Frage der Verfassungswidrigkeit der beiden Vereinigungen nicht zu entscheiden. Über ein Verbot zu befinden, ist nach Sec 3 Abs. 2 des Vereinsgesetzes bei Vereinen, deren Organisation oder Tätigkeit sich über das Gebiet eines Landes hinaus erstreckt, Sache des Bundesministers des Innern, sonst der obersten Landesbehörde.

Karlsruhe, den 24. Februar 1995
Announcement of the Press Office of the Federal Constitutional Court, Nr. 13/95233

The Second Senate of the Constitutional Court has rejected as inadmissible the requests of the Federal Government and the Federal Council for a declaration of the unconstitutionality of the Free German Workers Party (FAP) and the request of the Hamburg Senate for a declaration of the unconstitutionality of the National List (NL) by the method laid down in Paragraph 45 of the Law of the Constitutional Court. On account of the important constitutional position of political parties their banning is reserved for the Constitutional Court. Art 21(2) GG, Sec 13 Nr. 2, 43 ff. BVerfGG. The banning proceedings in the Constitutional Court are not applied against political associations which aren’t parties; a banning of such an association falls within the jurisdiction of the executive. Art 9, §2 GG, Sec 3 ff. VereinsG.

In the opinion of the Senate, the FAP and NL are not parties, because they don’t fulfill the requirements for parties set by the Basic Law and the Law on Political Parties.

Parties are associations of citizens who set out to influence either permanently or for a lengthy period of time the formation of political opinions and want to play a part in the representation of the people in the German Parliament or a State Parliament, provided that they offer sufficient guarantee of the sincerity of their aims in the general character of their circumstances and attendant conditions, particularly in regard to the extent and strength of their organization, the count of their members and their public image. This definition, which is contained in Paragraph 2, Sec 1 of the Law on Parties is unquestionably constitutional.

Accordingly, the intention to be a party is insufficient; much more, in the founding phase, at minimum at initial stages, and with growing temporal distance from the founding date must a party be increasingly in the position to actually fulfill the tasks intended by Paragraph 2, Sec 1, Sentence 1, Part G in agreement with the Basic Law. With progressive permanence of existence a political association which wants to be a party must confirm the seriousness of their political objective by objective criteria that demonstrate their capability to fulfill the tasks of a party. Such criteria are, in particular, the extent and strength of the organization as well as number of members and public presence. To guarantee that only serious political organizations and not short-lived accidental associations compete for voters, certain realities must stand behind the stated claim of a developing organization, which was founded as a party, to want to participate in the formation of political opinion of the people. These realities must make it possible to regard the organization as an expression of a serious

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230. I thank Erich Hahn for his translation assistance. Errors and awkward phrasings are mine.
political opinion, not limited to only a small sector of the population. In general, it depends on whether the comprehensive estimation of the actual relations of an organization — including the length of its existence — allows the conclusion to be drawn that it pursues its stated intention of participating in the formation of political opinion of the people in a serious manner.

In the opinion of the Senate, the FAP and NL present, in regard to the overall picture of their actual proportion, unsatisfactory preparation for the seriousness of their purpose — as clarified in their charter and their program — to play a part in the building of the political will and the representation of the people, above all in light of their lack of organizational density, insufficient ability to act as a viable party organization, insignificant steady membership, the absence of continuous public presence, and the lack of any resonance in the population. They are therefore not parties.

Since the request was inadmissible, the Senate did not have to rule on the question of the unconstitutionality of both associations. The verdict on banning an organization whose activities are carried out beyond the region of one state is a matter for the Interior Minister, otherwise that of the highest State authority, according to Paragraph 3, Sec 2 of the Law of Associations.

