TWO CULTURES OF RIGHTS

The Quest for Inclusion and Participation in Modern America and Germany

Edited by
Manfred Berg and Martin H. Geyer

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THE QUEST FOR INCLUSION AND PARTICIPATION IN MODERN AMERICA AND GERMANY

This collection examines key issues in the history of the struggle for civil rights, political rights, and social rights in the United States and Germany from the late nineteenth century to the present. The book provides a cross-national comparative perspective and presents national case studies that explore the similarities and differences in the conceptualization of rights on both sides of the Atlantic. By examining the different ways that rights have been denied due to race, ethnicity, gender, and sexual orientation, the essays in this volume address vital aspects of the definition of citizenship for women, African Americans, Asian Americans, Jews, resident aliens, and homosexuals. The book demonstrates that these struggles for rights became an essential feature of not only political discourse but also social and political practice and culture in Germany and the United States.

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Introduction

MANFRED BERG AND MARTIN H. GEYER

The demand and struggle for rights has been the centerpiece of the development of modern citizenship. In his seminal essay *Citizenship and Social Class*, first published in 1950, British sociologist T. H. Marshall defined citizenship as determined by three types of rights: civil rights, political rights, and social rights. The first refers to the classical legal protections and liberties of the individual, the second to suffrage and political participation, and the third to what Marshall defined as "the right to a modicum of economic welfare and security . . . to live the life of a civilised being according to the standards prevailing in society."[1] Developing his argument along the lines of British history, Marshall assigned the achievement of civil rights to the eighteenth century, of political rights to the nineteenth century, and of social rights to the twentieth century. He readily conceded the simplifications in his chronology in order to stress his systematic point: The emergence of a comprehensive and egalitarian concept of citizenship as an institutional counterbalance to the social inequalities of market capitalism. Although this process was hardly free from conflicts and contradictions, Marshall was confident that this expansion of rights had created a fairly stable and legitimate democratic social order.

Marshall's periodization of British history was criticized because of its inherent quasi-teleological model of historical development, among other things. However, as a classificatory scheme his trio of citizenship rights has been immensely useful. His key argument that civil, political, and

1 T. H. Marshall, *Citizenship and Social Class* (Cambridge, 1950); for a German translation that includes an introduction to Marshall's works and a bibliographical afterword on the reception of *Citizenship and Social Class*, see T. H. Marshall, *Bürgerrechte und soziale Klassen: Zur Soziologie des Wohlfahrtsstaates* (Frankfurt am Main, 1992). A more detailed discussion of Marshall's concept of social rights is provided in T. H. Marshall, *The Right To Welfare and Other Essays* (London, 1981).

social rights open ways of social and political integration, that they can in fact transcend market forces, also helps us to understand why rights have held such fascination for those who do not possess them. Equality of rights not only is an indicator of full inclusion into the polity and society, it also is widely viewed as the precondition for personal and collective self-improvement.[2]

To conceptualize the evolution of society and politics in terms not only of civil but also of social and economic rights, as Marshall did, was a well-established trend after World War II. Military conflict, specifically the confrontation with totalitarian regimes that denied civil and political liberties, had heightened the world's awareness of rights. If revolution and the process of constitution making in the eighteenth and nineteenth centuries gave the discourse over civil and political rights a radically new status, the experience of fascism and the efforts to create a new world order helped to establish a new universal language of rights. The founding of the United Nations and the formulation of the Universal Declaration of Human Rights in 1948, with its somewhat uneasy mingling of civil, political, social, and economic rights,[3] certainly marked a tremendously important step in preparing the way not only for the civil rights revolution of the 1950s and 1960s in the United States but, one may argue, also for much of our modern "rights talk."[4]

From a late-twentieth-century perspective, Marshall's conceptualization of rights may appear somewhat simplistic because it assumed a more-or-less homogeneous nation-state similar to that of Great Britain at the end of World War II; thus, it focused almost exclusively on the impact of rights on the formation of social classes. Historians, sociologists, and political theorists, among others, have long since argued that the quest for rights and citizenship must be placed into a broader context that, in addition to class, must take into account a multiplicity of identities based on race, ethnicity, gender, religion, or sexual orientation, all of which have been used as rationales for the denial of rights throughout history. With societies growing ever more culturally diverse and ethnic conflict a serious threat to many countries, the question of how the liberal concept of cit-

2 See also Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass., 1991).

3 A. H. Robertson, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (New York, 1982). For a good survey of civil and social rights, see D. D. Raphael, ed., *Political Theory and the Rights of Man* (Bloomington, Ind., 1967).

4 Louis Henkin, *The Age of Rights* (New York, 1990); Mary Anne Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, 1991), 10; Dorothy B. Robbins, *Experiment in Democracy: The Experiment of U.S. Citizen Organizations in Forging the Charter of the United Nations* (New York, 1971).

izenship can be reconciled with the dynamics of multicultural societies has become a matter of intense debate.[5] No doubt, the postwar period and particularly the civil rights movement of the 1960s have resulted in a fundamental reshaping of the rights debate and of legal culture; in fact, nothing in the eighteenth or nineteenth centuries "matched this avalanche of multiplying rights claims" that has been evident ever since.[6]

In June 1997 the German Historical Institute in Washington, D.C., held a conference that focused on modern debates over rights and citizenship. This book is an outgrowth of that conference. Because the Institute is especially dedicated to promoting comparative work on Germany and the United States, it seemed obvious to concentrate on the experiences of these two countries. As cultures rooted in the Western tradition of rights, they bear enough similarities to make comparison possible but exhibit enough differences to make it fruitful. Issues concerning differences in civil rights, in modes of inclusion, as well as in the denial of rights and thus the different definitions of citizenship so important for cross-cultural comparisons[7] comprise the basic focus of this book, as do the various forms of popular legal culture, meaning – as Lawrence Friedman presented the concept – people's ideas, attitudes, and expectations about law and the legal process.[8]

The title of this book is adapted from a volume commemorating the bicentennial of the Bill of Rights to the U.S. Constitution, which defined the "culture of rights" as "a way of life informed by a set of beliefs and values in which the language of rights plays a prominent role," often complemented by "a rights-related, philosophical jurisprudence."[9] Unlike *A Culture of Rights*, which is primarily concerned with the philosophical foundations and legal interpretations of rights, the focus of this book is on the social and political history of rights, that is, on the different

5 See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, 1995); Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford, 1995); see also William Rogers Brubaker, *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, Md., 1989); William A. Barbieri, *Ethics of Citizenship: Immigration and Group Rights in Germany* (Durham, N.C., 1998).

6 Daniel T. Rogers, *Contested Truths: Keywords in American Politics Since Independence* (New York, 1987), 220; for an excellent outline of core issues, see Lawrence Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, Mass., 1990).

7 See also Heinz-Gert Haupt and Jürgen Kocka, "Historischer Vergleich: Methoden, Aufgaben, Probleme," in Heinz-Gert Haupt and Jürgen Kocka, eds., *Geschichte und Vergleich: Ansätze und Ergebnisse international vergleichender Geschichtsschreibung* (Frankfurt am Main, 1996), 9–37.

8 Friedman, *Republic of Choice*; see also the debate between Roger Cotterrell and Lawrence Friedman, in David Nelken, ed., *Comparing Legal Cultures* (Dartmouth, N.H., 1997).

9 Michael J. Lacey and Knud Haakonssen, "Introduction: History, Historicism, and the Culture of Rights," in Michael J. Lacey and Knud Haakonssen, eds., *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law – 1791 and 1991* (Cambridge, 1991), 1–18, esp. 3.

contexts in which different groups tried to secure rights in the twentieth century. Law and litigation are obviously part of this, but they are treated primarily as a framework for social action, whereas questions related to the "correct" normative interpretation of legal propositions remain in the background.

The modern language of rights, as historian Thomas L. Haskell has pointed out, transcends the realm of personal and subjective interests and appeals to an "objective moral order" that confers legitimacy on the claims made by individuals or social groups.[10] The "objective" quality of "rights language" offers a good explanation of why rights talk has been such an attractive discursive strategy for the excluded and disadvantaged. If such an objective moral order really exists or any other acceptable epistemological justification for rights can be found, then this certainly is a worthwhile subject for intellectual historians, philosophers, and legal and political theorists alike to explore. For the purposes of this book, however, the crucial question is not whether rights must be taken seriously as a philosophical concept but whether rights were actually taken seriously by the people we study. A preponderance of historical evidence suggests that the individuals and social groups struggling for rights did indeed believe in their moral and practical relevance, just as did those who tried to bar them from enjoying those rights.

This is certainly true for American history. As Michael J. Lacey and Knud Haakonssen have aptly put it, "Nothing is more deeply rooted in the American political tradition than the vocabulary of rights."[11] From the formative experiences of the revolutionary period onward, virtually all disadvantaged groups have made their demands for equality, inclusion, and participation in the language of rights. In the course of these struggles the concept of American citizenship took shape. As the late Judith N. Shklar, among others, argued, the most important factors in this process have been slavery and race. Throughout American history slavery formed the visible antithesis to American citizenship and dominated the political thought and discourse even of those Americans who themselves were never threatened by enslavement.[12] According to Chief Justice Roger B.

10 Thomas L. Haskell, "The Curious Persistence of Rights Talk in the 'Age of Interpretation,'" *Journal of American History* 74 (1987): 984. For an introduction to the most important philosophical debates, see William A. Galston, "Practical Philosophy and the Bill of Rights: Perspectives on some Contemporary Issues," in Lacey and Haakonssen, eds., *Culture of Rights*, 215–65.

11 Lacey and Haakonssen, "Introduction," 1. For a variety of rights-related essays, see special issue of the *Journal of American History* 74 (1987); David Thelen, ed., *The Constitution and American Life*, pt. 2: *Rights Consciousness in American History* (Ithaca, N.Y., 1988), 795–1034.

12 Shklar, *American Citizenship*, esp. 14–23.

Taney's infamous dictum in *Dred Scott v. Sandford* (1857), blacks were not entitled to the rights and privileges enjoyed by American citizens under the Constitution because they were "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[13] Emancipation and the granting of citizenship and suffrage to the black freedmen notwithstanding, Taney's words would burden the American culture of rights for more than a century. Not surprisingly, the issue of race figures prominently in most of the chapters in this book that focus on the American experience.

Ironically, racial discrimination and the African-American civil rights movement of the twentieth century have also played a key role in triggering what is sometimes called a rights revolution. Over the past five decades or so, the United States has experienced an expansion in the scope and content of constitutional rights that prompted historian Robert H. Wiebe to speak of a "bull market of rights."[14] Rights talk is virtually ubiquitous in American political and cultural debates. For example, the "right to life" is held against the "right to choose" in the heated controversy over abortion; assisted suicide is justified by a "right to die"; the humane society argues for "animal rights"; and some environmentalists have even claimed rights for nature itself.[15] The expansion of rights is often viewed as progress toward greater liberty and justice, whereas critics have complained that the trivialization of the very concept of rights has led to an inflation of all sorts of spurious claims. In addition, the implications of rights-centered discourse for the political process have been depicted as harmful. Because rights language has an absolute quality to it, communitarians argue, it tends to polarize political issues and to preclude considerations of the common good and the broader interests of society.[16] Wiebe has pointed to the danger that a preponderance of rights for individuals and minorities might pose for majoritarian democracy and wondered, "When does the sum of rights removed from the realm of collective decision bulk so large that it disables popular self-government?"[17]

13 Quoted in Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Boston, 1997), 61. Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South* (New York, 1992), argues convincingly that despite the paternalistic rhetoric of slaveholders, slaves did not enjoy any rights as persons under southern slave laws.

14 Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago, 1995), 239. For a brief overview of the expansion of constitutional rights by the judiciary, see Henkin, *Age of Rights*, 118–24.

15 Roderick F. Nash, *The Rights of Nature: A History of Environmental Ethics* (Madison, Wis., 1989).

16 Robert Bellah et al., *The Good Society* (New York, 1991), 124–30.

17 Wiebe, *Self-Rule*, 264–5.

Because the struggle for rights in America has basically been a quest for inclusion and equality, the present concern about the alleged "Balkanization" of America by all sorts of particularist and divisive group rights is perhaps a little too alarmist. As Will Kymlicka has argued, the claims of minorities to group rights are actually demands for recognition and full membership in the larger society, demands that do not threaten the society's political stability.[18]

Arguments that the pursuit of rights and collective goals must be brought into equilibrium are fairly traditional, however, and do not question the concept of rights per se. A more fundamental criticism has been advanced by scholars on the left who have denied the legal and political usefulness of rights for the disadvantaged. Rights, the protagonists of the so-called Critical Legal Studies Movement have argued, fail to provide solutions to real cases, are aloof from the social world, and create illusions about the law as an independent power capable of protecting the weak. Rather than catalyzing political and social change, rights talk often serves the purpose of co-opting radical social movements and thus enhances the legitimacy of the legal and political systems.[19] For example, the rights consciousness that grew out of the African-American civil rights movement is said to have been "created by the powerful in search of moral exoneration" and to have produced an antidiscrimination ideology that has no bearing on the needs and interests of the victims but may actually reinforce the victimization of women and minorities.[20] There is no evidence, however, that such fundamentalist criticisms of rights have had any serious impact on the rights consciousness of the American people or the different groups trying to secure rights. The United States arguably remains the most rights-conscious culture in the world.

With respect to different cultures of rights, Germany quite noticeably lacks a body of academic and nonacademic literature dealing with the issue of rights talk.[21] No doubt, this has something to do with the way the American civil rights movement has transformed the older language of rights and liberties; but it also has something to do with the differences in academic milieus and in the ways in which law and rights are

18 Kymlicka, *Multicultural Citizenship*, 192. For an influential critique of ethnic diversity and minority rights, see Arthur M. Schlesinger Jr., *The Disuniting of America: Reflections on a Multicultural Society* (New York, 1992).

19 Compare the overview of the Critical Legal Studies Movement in William W. Fisher III, "The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights," in Lacey and Haakonssen, eds., *Culture of Rights*, 288–95.

20 Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore, 1988), esp. 4–6.

21 Glendon, *Rights Talk*; in her critique Glendon repeatedly refers to Europe.

conceived altogether. Thus, one German observer of the American university scene recently expressed his bewilderment at the topics addressed by his American colleagues and with the way they write about these topics: On the one hand, the American literature lacks elements of classic "doctrinal scholarship" that play such an important role in German jurisprudence, and, on the other, exhibits a pervasiveness of critical legal studies emphasizing race and gender or neoconservative economic interpretations of law. This reflects an altogether "outlandish world." This observer speaks of a "growing disjunction" between Europe and the United States.[22] If such arguments are based on concepts of law as a "science,"[23] this reflects very well the thoroughly different role of law in these two societies. It has been argued that it is the "role law plays in the formation of American myths and ideologies that is so puzzling to foreigners."[24] Certainly there is no way of imagining the rule of law in Europe as a "civil religion," as it is often described in the United States, where the Constitution has always been able to influence American civil life to a greater degree than comparable documents or traditions have in Europe because in America traditional authoritative institutions of the state and the churches have been comparatively weak.[25]

However, Germans are no less adamant in claiming their rights both individually and collectively. The fact that Germany has a greater number of courts and judges per capita than the United States might well prove the argument that the law plays an equally strong role in structuring and regulating the everyday life of its citizens. However, the rights talk of groups and individuals tends to dwell on different issues, namely, on social rights, and places a different emphasis on the homogeneity of citizenship. Last but not least, German rights talk has struggled within formalized parliamentary political contexts much more than it has in the United States. However, as some of the essays presented here demonstrate, recent American debates on rights have had an impact in Germany.[26]

22 Reinhard Zimmermann, "Law Reviews – Ein Streifzug durch eine fremde Welt," Reinhard Zimmermann, ed., *Amerikanische Rechtskultur und europäisches Privatrecht: Impressionen aus der Neuen Welt* (Tübingen, 1995), 87–101.

23 Ibid., 113.

24 Helle Porsam, *Legally Speaking: Contemporary American Culture and the Law* (Amherst, Mass., 1999), xii.

25 Sanford Levinson, *Constitutional Faith* (Princeton, N.J., 1988); Morton J. Horowitz, *The Transformation of American Law, 1870–1960* (Cambridge, Mass., 1991), 193.

26 Many rights issues discussed in Germany can be traced back to the American debate; the legal solutions and the intensity of debate, however, are considerably different; see, e.g., Ulrich Herzog, *Sexuelle Belästigung am Arbeitsplatz im US-amerikanischen und deutschen Recht* (Heidelberg, 1997).

These differences should not lead us to forget that modern German history can be described as a struggle for rights, much in the way Marshall argued in his grand theology on the modernization of Western societies. The catalog of civil rights (*Grundrechte*, or basic rights) of the revolution of 1848 carried on the tradition of similar declarations produced in the American and French revolutions, combining it with the older natural law tradition in Germany.[27] Despite the failure of that German revolution, the notion became firmly entrenched that modern Germany was to be *Rechtsstaat*, a state ruled by law with a constitution based on the separation of powers, which thus guaranteed the civil rights of its citizens. The characteristic compounding of the words *state* and *law* (rights) in the term *Rechtsstaat* is revealing and indicative of the strong statist tradition in which the aims of the state are also always defined in terms of some form of common good. This is even more evident with regard to the term *Sozialstaat*; the "social state" proactively guarantees social rights. Although social legislation before 1914 created the foundation of this social state, it was the Weimar constitution of 1919 that specified a set of social rights for its citizens: Social rights were to complement the new political rights within the framework of the democratic republic born of the revolution.[28] The idea that the constitutional *Rechtsstaat* was to be based on the principles of the *Sozialstaat* characterizes an important aspect of the German Basic Law of 1949 and is one of the fundamental assumptions in contemporary German constitutional life and politics. After the historic catastrophe of the Nazi *Unrechtsstaat*, with its denial of political and social rights, its fervid attacks on the "principles of 1789," the destruction of Jewish and other citizens, and the bloody repression of its political opponents, the founders of the Federal Republic felt it necessary to define more clearly, and to protect, the rights of the country's citizens.[29]

Historically, parts of this statist and social law tradition have been the highly contested notions of common good and equity, which not only

27 See Gerd Kleinheyer, "Grundrechte: Menschen- und Bürgerrechte, Volksrechte," in Otto Brunner, Werner Conze, and Reinhart Koselleck, eds., *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 9 vols. (Stuttgart, 1972–97), 2:1047–82; Günter Birtsch, *Grund- und Freiheitsrechte im Wandel von Gesellschaft und Geschichte: Beiträge zur Geschichte der Grund- und Freiheitsrechte vom Ausgang des Mittelalters bis zur Revolution von 1848* (Göttingen, 1981); Günter Birtsch, *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft* (Göttingen, 1987).

28 For a short overview, see Gerhard A. Ritter, *Der Sozialstaat: Entstehung und Entwicklung im internationalen Vergleich* (Munich, 1989), 112–29.

29 Karlheinz Niclauss, *Der Weg zum Grundgesetz: Demokratiegründung in Westdeutschland 1945–1949* (Paderborn, 1998); Erhard Denninger, *Menschenrechte und Grundgesetz* (Weinheim, 1994).

limit property rights and freedom of contract but make it necessary to ensure the balance between individual and societal interests. This debate can be traced back to the nineteenth century; yet the political and social devastation brought on by two world wars has clearly left its mark.[30] Even an issue such as abortion is handled by the constitutional court not merely within the context of the rights of mothers and those of the unborn but also within the framework of social provisions for pregnant women.[31] Although special groups have successfully invoked group rights – the best example is perhaps the special labor law established in the 1920s with its own court system – rights have been demanded throughout history not so much on the basis of differences in race, class, or gender but on the basis of an inclusionary model of citizenship. Even today, groups do not strive to be defined in terms of their status as minorities within society but on the basis of safeguarding equality and the equal rights of all citizens.

The following twelve essays by scholars from Europe and the United States cover a broad array of topics. In one way or another they all relate to Marshall's trio of civil, political, and social rights but certainly do not offer a comprehensive account of all the rights that could be listed under these headings. Such an undertaking obviously would be much too ambitious for a single collection. Rather, the goal of this book is to trace the development of several key components of modern citizenship within two different but related cultures of rights from roughly the mid-nineteenth century to the present. It is divided into three parts.

The first part deals with race, immigration, and rights. Race has arguably been the most pervasive barrier to the attainment of rights and citizenship throughout American history. African Americans and American Indians may have suffered most severely under racism, but Asian Americans, according to Roger Daniels (Chapter 1), have experienced more wide-ranging discrimination than any other group. In his survey of the rights that were denied to and attained by Asian Americans, Daniels considers nine specific fields, ranging from naturalization and immigration to the issues of racial segregation and what he calls "a right to redress for past governmental wrongs." Their dual status as immigrants and nonwhites made Asian Americans particularly vulnerable to both official and private discrimination. In California, where Asian Americans were more numerous than blacks, the segregation laws were enforced only

30 See Willibald Steinmetz, ed., *Civil Law and Social Inequality in Europe* (Oxford, 1999).
31 Glendon, *Rights Talk*, 64.

against the former group. Japanese Americans, as is well known, were incarcerated during World War II on the mere presumption of disloyalty. Still, no organized Asian-American civil rights movement was ever formed. Although Asian Americans were deemed unable to acculturate, Daniels shows that they skillfully and successfully employed the traditional legal and political strategies also used by other immigrant groups. He demonstrates how disadvantaged groups that seek legal rights and inclusion must adapt to the dominant culture of rights in order to gain acceptance.

The advocates of black voting rights, as Manfred Berg (Chapter 2) argues in his essay on the discursive strategies of the National Association for the Advancement of Colored People (NAACP), had to confront a racist political culture that denied that blacks as a group were fit for "first-class citizenship." Although it put great hopes in the ballot as a weapon for self-protection and the attainment of civil rights in general, the NAACP also tried to reassure the white majority that African Americans had no collective interests that were incompatible with or adversarial to those of white Americans. This led to far-reaching concessions with regard to the legitimacy of allegedly color-blind voting restrictions, such as literacy tests, yet it also worked toward the integration of black voters into the American political system. In stressing the American creed, the leaders and followers of the NAACP not only revealed their deep roots within the American culture of rights but also made an important contribution to transforming this culture.

For no other minority group has the American culture of rights been more benign than for Jews, as Hasia R. Diner (Chapter 3) argues in her analysis of how Jewish Americans have historically conceived of and articulated their rights. Whereas Jews in virtually all other parts of the world either were subjected to recurring persecution or experienced a protracted process of emancipation, in the United States they enjoyed, as a rule, the same rights as all other white Americans. To be sure, the hegemonic Christian Protestant culture imposed a number of restrictions on Jews, such as Sunday closing laws, but the separation of church and state restrained the authorities from interference with Jewish institutions and guaranteed an unparalleled degree of internal autonomy. Because the public sphere was committed to religious neutrality, Jews developed both a keen interest in the expansion of the state and a strong identification with the American Republic at large. Anti-Semitism, although an undeniable presence, was not nearly so politically virulent as almost everywhere in Europe. Nevertheless, even in America Jews did not feel completely secure and preferred not to articulate their rights in an aggressive manner

that might offend the Christian majority. After World War II, however, the decline of anti-Semitism, the Holocaust, and the founding of Israel spurred an increase in Jewish political activism. Jewish organizations and individuals played a salient role in support of the black civil rights movement and also attacked the vestiges of official Christianity.

If the American culture of rights was tailor-made to Jewish life and interests, the complete collapse of the German culture of rights under National Socialism led to the most horrifying consequences for German and European Jewry. In his account of the dismantling of Jewish rights in the 1930s and 1940s, Karl A. Schleunes (Chapter 4) reminds us that Nazi ideology represented the total negation and rejection of the modern concept of rights. The rights of the individual were *eo ipso* subject to the interests of *Volk* and race, and "non-Aryans" and Jews in particular had no rights at all. Schleunes's essay not only explains how the Nazi ideology was meticulously cast into law after 1933, it also points out that long before their seizure of power the Nazis had publicly displayed their eagerness to strip the Jews of the rights they enjoyed as German citizens. Any meaningful rights discourse ceased as soon as they were able to carry out their plans. Some legal tangles arose in connection with the so-called mixed marriages prior to the Nuremberg laws of 1935, but the evidence presented by Schleunes clearly shows that the second thoughts of some Nazi bureaucrats and jurists were motivated by purely legalistic considerations and not by any residual respect for the rights of Jewish and non-Jewish Germans.

Nation-states are membership associations that distinguish between citizens and aliens who are accorded a very different status regarding their rights – most fundamentally, the right to enter and reside within a respective state. In his comparison of the rights of aliens in Germany and America, Christian Joppke (Chapter 5) argues against the notion that the sovereignty of the state to regulate these matters has been replaced by an international human rights regime. All legal restrictions by states in this respect are self-imposed, he contends, and neither German nor American courts have invoked international law to any significant extent. In the United States the legal debates have hovered around the question of which classes of aliens could claim due process and equal protections guaranteed by the U.S. Constitution. Joppke sees an evolution over time from the classical model of immigration, which is based on the assumption of virtually unfettered state sovereignty, to a communitarian model that builds on the respect for established social ties and extends constitutional rights to aliens. German law and adjudication have been

characterized by the dualism of a constitution that protects a wide set of basic rights for noncitizens and an alien law that is predicated on a strict concept of state sovereignty. Ironically, because German citizenship has been difficult to acquire, the rights of legal resident aliens are extraordinarily well developed. In addition, the recognition by the courts of family unification rights has worked against the official no-immigration policy. Despite opposing public policies toward citizenship and immigration, the rights of aliens have continuously been expanded in both countries, whereas the legitimacy of state sovereignty in dealing with aliens has been undermined.

The second part of this book deals with issues of civil and social rights. Among these, the right to earn a living as the material basis for social standing has been a key concept in American citizenship.[32] In her essay on the attempts to establish fair employment practices during and after World War II, Eileen Boris (Chapter 6) explores the interplay of class, race, and gender in the construction of social citizenship in America. The universalist discourse of fairness and democracy-inspired hopes for a comprehensive right to work implied nondiscrimination and full employment guarantees for all "citizen-workers," including blacks and women. But not only did the short-lived Fair Employment Practices Committee fail to meet such expectations, the demise of the New Deal decisively shifted the terrain of the debate. The right to work became a battle cry for anti-union legislation, and the language of equal opportunity replaced the original vision of social justice.

The debates over social citizenship during World War II are also examined by Martin H. Geyer (Chapter 7), but from a different angle. During the war a debate flourished over extension of the welfare state. Geyer argues that postwar efforts to counter Nazi Germany's economic and social propaganda with ideas of a social order based on full employment and social benefits played an important role in stimulating domestic debate. Unlike their counterparts in European countries, American reformers framed their reforms, which would indeed have meant a fundamental recasting of citizenship, in a pervasive language of liberty and rights. The effort to have President Franklin D. Roosevelt promulgate a new "Bill of Rights" illustrates this well. Even though these attempts by social reformers failed both during and after the war – thus permanently weakening the idea of social rights and citizenship as defined by Marshall – American social reformers did indeed influence not only the way in

32 Shklar, *American Citizenship*, 63–101.

which the very concept of social rights was shaped to complement political rights but also the establishment of concepts of social rights on the agenda of new international organizations.

The German consensus on economic redistribution is a central topic of Michael L. Hughes's essay on the quest by the so-called war-damaged (*Kriegsbeschädigte*) for compensation for lost property and restoration of their former social status (Chapter 8). In fear of being reduced to the status of welfare recipients in a new achievement economy, the war-damaged based their claims not only on individual property rights but also on the duty of the community to restore a moral order and hierarchy based on individual virtue and social justice. The arguments that property signified virtue and independence, and that everybody who had lost property through no fault of their own was entitled to compensation from society, met with a surprisingly high rate of approval even from those who had to underwrite such a program. The actual *Lastenausgleich* (balancing of burdens), however, was a pragmatic solution that struck a balance among individual rights, public obligation to the "deserving victims," and the necessities of economic reconstruction.

In his broad comparison of the structural and historical factors that have shaped the postwar political cultures in Germany and the United States, Hugh Davis Graham (Chapter 9) points out that both societies have achieved an impressive record of expanding and fulfilling the rights of their citizens. Germany has built on its traditional combination of ethnocultural citizenship and strong emphasis on social integration by expanding the welfare state, whereas America has expanded individual and group rights but remains relatively weak on social rights. An American political scientist, Graham bemoans the political fragmentation and ideological polarization that has been the price of the American rights revolution. According to Graham, this revolution has expanded the regulatory capacity of government but has not prevented the gap between rich and poor from widening. He joins the chorus of critics who argue that an overdose of multiculturalism and rights talk since the late 1960s has destroyed the political basis of economic liberalism and social policy in America.[33] From this perspective, the stability of the German consensus on the welfare state and economic redistribution that has restrained conflicts over rights may appear to be a mitigating factor in Germany's difficulties to modernize its concept of citizenship.

33 See, e.g., Thomas Byrne Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* (New York, 1991).

The proper role of the state is also an important consideration in Margaret S. Dalton's essay on the emerging right to information (Chapter 10). With the dramatic changes brought about by the advent of the global information age, new challenges and old questions abound: Is there a right to information? Who has the responsibility to provide and disseminate information? What would be the social, political, economic, and technological implications of a right to information? Both in the United States and in Germany, political and expert discourses stress the necessity to live up to the challenges of the "information society" but at the same time warn against the danger of a two-tier society of "information haves and have nots," in which disadvantaged minorities would fall hopelessly behind. Although American leadership is somehow taken for granted, Dalton shows that, as of now, no clear-cut answers exist regarding the challenges of securing information equity. In the absence of a broad-based demand for a right to information, this right is still inchoate. Yet, if information is indeed the key to future economic success and social status, it is plausible to expect that the right to information will be considered a vital social right in Marshall's terms because information access will be instrumental in living "the life of a civilised being according to the standards prevailing in society."[34]

The two essays in Part Three deal with issues of gender, sex, and rights. Ann Taylor Allen's essay explores the different cultures of rights in the feminist movements in Germany and the United States from the mid-nineteenth century until the 1930s (Chapter 11). She takes issue with the notion that German feminism's emphasis on gender differences indicated an inherent ideological commitment to conservative values that eventually played into the hands of the Nazis, whereas the American women's movement consistently showed an unwavering commitment to the "progressive" cause of gender equality. Allen demonstrates that such a dichotomy does not do justice to the complexity of either movement and that the concepts of difference and equality were not mutually exclusive but rather interdependent. Perhaps even more important, she demonstrates that the differences between German and American feminists were not predicated on ideological dispositions but on the different political, institutional, and cultural environments in which they operated.[35] Ironically,

34 See note 1 to this chapter.

35 On the intensive dialogue between German and American feminists that shows very little of the ideological gap construed by later historians, see Kathryn Kish Sklar, Anja Schüler, and Susan Strasser, eds., *Social Justice Feminists in the United States and Germany: A Dialogue in Documents, 1885–1933* (Ithaca, N.Y., 1998).

it was the relatively modern character of German society – particularly the state's involvement in the areas of social welfare and higher education, and the existence of a strong labor movement – that most seriously restricted the development of a strong, independent women's movement. Finally, by questioning the alleged ideological affinities between German feminism and Nazism, Allen argues against the still influential concept of a German *Sonderweg*, in which all aspects of culture, including feminism, are reduced to a "pattern of conservatism, authoritarianism, and racism that culminated in National Socialism."

Homosexuals, both male and female, are the one minority that Germany and the United States (and all other cultures) have in common. In his comparative analysis of the quest for gay and lesbian rights Michael Dreyer (Chapter 12) points to the different legal frameworks and political cultures that have shaped this history. In Germany, abolition of the infamous Paragraph 175 of the penal code, which proscribed male homosexual behavior, provided the overriding common goal of homosexuals from the founding of the German Empire until the law was revised in 1969 (it was repealed only in 1994). Persecution was most brutal under the Nazis, but the postwar Federal Republic retained much of the Nazi antihomosexual legislation. Traditionally, German homosexuals had not relied on civic activism but on scientific and legal discourse to secure equality of rights and to gain respectability. Eventually, the decriminalization of homosexuality was brought about by physicians and lawyers within the context of the cultural sea change of the 1960s, not by a powerful gay rights movement. In the United States, there was no single national law against homosexuality, so gay men and lesbians had to confront (and still do) various legal and social discrimination on the state level. The organized U.S. gay-rights movement became part of civil rights activism and the broad-based coalition building typical of the American political process. Over the past few decades the two movements have become more similar, not least because of the global challenge posed by the AIDS crisis.

Rights, as the contributions to this book bear out, have been a key component in shaping the political and social histories of modern America and Germany. Yet, even though America has often been considered a harbinger of universal trends and developments, and (West) Germany has generally been very receptive to American influences in the postwar period, the American culture of rights has not simply been transplanted. Rights may be "[the most] universal feature of politics in the late twentieth century," but national traditions seem to remain very strong in shaping the particular "set of beliefs and values" that make up a culture

of rights.[36] Whether the American concept of multiculturalism is a viable model for Germany to emulate remains a question that not only the die-hard protagonists of ethnocultural citizenship ask. Germans view the American experience as a valuable precedent, albeit one that offers only selective lessons.[37] This book, it is hoped, will contribute to deepening the historical dimensions of these debates.

36 Lacey and Haakonssen, "Introduction," 2–3.
37 See Berndt Ostendorf, ed., *Multikulturelle Gesellschaft: Modell Amerika?* (München, 1994), 7–12.

PART ONE

Race, Immigration, and Rights

1

Asian Americans

Rights Denied and Attained

ROGER DANIELS

I

Asian Americans, a category created by the American government rather than a unified ethnic group, have experienced a wider variety of discrimination than any other group. This is not to say that they are the most discriminated against or the most disadvantaged. Native Americans and African Americans have endured and continue to endure a greater and deeper denial of rights. Moreover, large numbers of Asian Americans – and absolute majorities of some discrete ethnic groups – have achieved middle-class status. The separate history of Asian Americans is worth noting both for its own sake and to emphasize an important but often ignored fact: Racism in the United States has not been bichromatic, a matter of black and white, but multichromatic, a matter of red, black, yellow, brown, and white.[1] In this chapter I examine the major rights that Asian Americans have achieved after first being denied them by American governments, and then I indicate the successful strategies employed by various groups and their leaders to achieve specific rights. The major rights considered during specific eras are: (1) The right of naturalization (1870–1952); (2) the right of immigration (1882–1952); (3) the right of family reunification (1882–1965); (4) the right to earn a living (1850s–1965); (5) the right of residence (1850s–1948); (6) the right of integrated schooling (1860s–1954); (7) the right to marry (1850s–1967); (8) the right to equal accommodation (1850s–1964); and (9) the right to redress for past governmental wrongs (1988).

1 General accounts of Asian-American history include: Harry H. L. Kitano and Roger Daniels, *Asian Americans: Emerging Minorities* (Englewood Cliffs, N.J., 1995), Sucheng Chan, *Asian Americans: An Interpretive History* (Boston, 1991), and Ronald T. Takaki, *Strangers from a Different Shore* (Boston, 1989).

The Constitution of the United States contains no specific criteria for naturalization; it merely instructs Congress to create "a uniform system of naturalization." Congress did so with a relatively simple statute in 1790, making "free white persons" eligible for naturalization and meaning to deny the process to indentured servants and blacks. Despite this, a few Chinese and Japanese individuals were naturalized in the ensuing eighty years. The passage of the Thirteenth and Fourteenth Amendments to the Constitution – the former ending slavery and the latter creating birthright citizenship – suggested the need for change. In 1870 Congress rewrote the statute. A few Radical Republicans, led by Senator Charles Sumner of Massachusetts, sought to make the new law color-blind, but the majority, aware of the anti-Chinese furor on the West Coast and of a few well-publicized incidents involving the use of Chinese labor in the East, refused to do so. Instead, it recast the law by dropping the word "free" and making "persons of African descent" eligible for naturalization. This meant that only "white persons" – whatever that meant – and persons of African descent could become naturalized citizens, and that Asians – and only Asians – were what later statutes would refer to as aliens "ineligible to citizenship."[2] Although many statutes would single out the Chinese for special treatment, most subsequent statutory anti-Asian discrimination over the next eighty-two years was carried out under the "aliens ineligible to citizenship" formula. The right of naturalization was granted to Asians piecemeal between 1943 and 1952, first to Chinese as a wartime ally, then, in 1946, to Filipinos for wartime service and "natives of India" because of effective lobbying. In 1952, under the impetus of Cold War imperatives, the McCarran-Walter Act fulfilled Sumner's dream and made naturalization color-blind.[3]

Although the word "immigration" does not appear in the Constitution, the instruction about naturalization, the provision that only native-born citizens could be president, and the language regarding the "importation of persons" – that is, slaves – all refer to it. The first statutory regulation of immigration came in 1809, when Congress outlawed the slave trade. In the 1840s, when a few eastern states wanted to keep out certain immigrants – chiefly Irish and Germans – the Supreme Court ruled in the *Passenger Cases* of 1849 that immigration was "foreign commerce" and thus could be regulated only by Congress.[4] Congress passed

2 Obviously unsure of the meaning of the 1870 statute, Congress specifically barred Chinese from naturalization in the 1882 Chinese Exclusion Act. The definitive rulings came only in Supreme Court cases in 1922 and 1923. See notes 28 and 29 to this chapter.

3 For an analysis of these statutes, see Roger Daniels, *Asian America: Chinese and Japanese in the United States Since 1850* (Seattle, 1988), 196–8, 283–4.

4 48 *U.S.* 283 (1849).

no legislation restricting free immigration until the largely ineffective Page Act of 1875, which was aimed chiefly at Chinese women,[5] and only with the passage of the Chinese Exclusion Act of 1882 was there effective legislation.[6] Contrary to popular belief, the Chinese Exclusion Act did not bar all Chinese immigration, only that of "Chinese laborers." During the sixty-one years that it was on the books, some 95,000 Chinese aliens legally immigrated to the United States.[7] Nevertheless, the Chinese Exclusion Act, usually treated by historians as an unfortunate minor incident, was much more than that. It did not just affect Chinese; it became the hinge on which all American immigration policy turned. Before the passage of the act there had been no effective exclusion of aliens except for disease, and that exclusion was effected by local health and police authorities. Nor had there been any deportation of aliens: Not one person had been forced to leave under the infamous and short-lived Aliens Act signed by President John Adams in 1798, and no other deportation statute existed.[8] The exclusion of most Chinese in 1882 ended the era of free and unrestricted entry to the United States. In the following forty years the House of Representatives would vote to end all immigration for a limited period, and by 1924 Congress, having passed a wide variety of restrictive measures in the previous decades, would enact a "permanent" quota system that would drastically limit most European immigration and, using the "aliens ineligible to citizenship" formula, would bar all alien Asians. The 1943–52 eradication of the "aliens ineligible to citizenship" category left Asians admissible, but under very small quotas. The 1965 Immigration Act put Asians on a relatively equal footing with other aliens.

It is ironic that family reunification, which now is the most common avenue of legal entry into the United States, was introduced into

5 The Page Act made it a crime for Americans to participate in the "coolie-trade," and it barred the entry of persons under sentence for nonpolitical offenses, of persons whose sentence had been remitted on condition of emigration, and of women "imported for the purpose of prostitution." Although no enforcement bureaucracy was created and the federal courts insisted on proof that women were actually prostitutes, it is clear that the law made it difficult for Chinese women to enter the country and probably deterred some from even trying. This minor act was the start of modern American immigration restriction. It also marked the introduction of what would become a minor motif in anti-immigrant legislation: the notion that immigrants, and especially immigrant women, were contaminating pure and innocent American men. 18 *Stat*. 477–8. For a detailed analysis of the Page Act and its consequences, see George A. Peffer, *If They Don't Bring Their Women Here: Chinese Female Immigration Before Exclusion* (Urbana, Ill., 1999).

6 The classic account is Elmer C. Sandmeyer, *The Anti-Chinese Movement in California* (Urbana, Ill., 1939; reprint, 1973).

7 Roger Daniels, "No Lamps Were Lit for Them: Angel Island and the Historiography of Asian American Immigration," *Journal of American Ethnic History* 17 (fall 1997): 4–18.

8 For accounts of how the process of excluding Chinese shaped American law and practice, see Charles J. McClain Jr., *In Search of Equality: the Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley, Calif., 1994), and Lucy Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill, N.C., 1995).

American law as part of a treaty designed to pave the way for the Chinese Exclusion Act. The Sino-American Treaty of 1881 specifically exempted from immigration restriction "Chinese subjects . . . proceeding to the United States as teachers, students, merchants or from curiosity."[9] This allowed the wives of those whom later statutes called "treaty merchants" to enter the United States.

The reunification principle was again recognized by the Gentlemen's Agreement of 1907–8 between the United States and Japan, which effected the exclusion of most Japanese aliens from immigration. But it did provide for the admission of the wife of any Japanese, regardless of his status, who had established domicile in the United States.[10]

Family reunification was further embedded into law by the 1924 Immigration Act that singled out certain family members of American residents and made them eligible for admission "without numerical limitation," that is, regardless of the quotas. At the same time the right of U.S. citizens of Asian descent to bring in Asian wives was ended. A 1930 act amended this by allowing the entry of such wives, provided that the marriage had taken place before the 1924 act went into effect.[11] The ending of the bars to naturalization at mid-century placed the family reunification status of Asian Americans on the same footing as that of other Americans.

From the very beginning of their experience in the United States, Asian immigrants were subjected to severe limitations on how they could earn a living. That discrimination was both de facto and de jure, and was over and above that experienced by other immigrants. An 1850 California tax on "foreign miners," although theoretically affecting all such miners, was collected largely from Chinese, who paid almost all of the $100,000 it raised annually over nearly two decades. That law was the first American statute printed in Chinese by order of a legislature. In other states and territories, for example, Idaho, Chinese were simply forbidden to become miners. California imposed special taxes on Chinese laundries, a device emulated in other jurisdictions. The adoption of the Fourteenth Amendment in 1868 made discrimination that singled out Chinese difficult to sustain; after that time statutory discrimination was most often effected either by laws barring certain professions and jobs to all aliens – although

9 William M. Malloy, comp., *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, 1776–1909*, 2 vols. (Washington, D.C., 1910), 1:237–9.

10 Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (Berkeley, Calif., 1962; reprint, 1999), 31–45.

11 46 *Stat*. 581.

such statutes usually made exceptions for aliens who had declared their intention to become citizens – or, in other instances, barred them to aliens "ineligible to citizenship." The employment bar against aliens becoming lawyers was all but universal; other bars prevented Asians from becoming pharmacists or undertakers, bartenders or barbers.[12]

Although Chinese in California and elsewhere had engaged in agriculture from the Gold Rush era on, no nineteenth-century legislation was aimed at Asian farmers. Under Populist influence late in the century a number of states and the federal government passed alien land laws, but these were aimed at absentee foreign owners and usually exempted actual settlers by one means or another.[13]

The arrival of large numbers of Japanese in the early twentieth century changed that. Beginning in 1913 California and ten other western states passed alien land laws that prohibited "aliens ineligible to citizenship" from owning agricultural land. The original statutes were deliberately ineffective because they ignored leasing. By the time this defect was remedied in the years after World War I, most Japanese settlers had American-born children in whose name they could safely place their land. This sometimes led to difficulties: As late as the post–World War II years, the State of California under the governorship of Earl Warren confiscated land in the hands of alien Japanese under escheat proceedings. By that time the typical case involved the death of a Japanese-American soldier in the U.S. Army, which caused his estate to be inherited by an alien parent or parents. Such laws became dead letters in 1952, when Congress in effect abolished the category of "alien ineligible to citizenship."[14]

Apart from agriculture, most twentieth-century employment discrimination involved the simple, nonstatutory refusal to hire. In the years before World War II, for example, although thousands of Japanese-American citizens had been trained as teachers, not one had been hired in a West Coast state. Many received their first opportunity to teach when they gained employment in the schools set up in the concentration camps that confined most mainland Japanese Americans during World War II.

During that war the federal government promulgated its first equal employment orders in connection with the wartime Fair Employment Practices Committees (FEPC).[15] Although primarily affecting African

12 See Sandmeyer, *Anti-Chinese Movement*, 40–77, and Daniels, *Asian America*, 109–52.

13 Douglas W. Nelson, "The Alien Land Law Movement of the Late Nineteenth Century," *Journal of the West* 9 (1970): 46–59.

14 Daniels, *Politics*, 46–64, and Daniels, *Asian America*, 298–9.

15 On the FEPC and social citizenship, see Eileen Boris's essay (Chapter 6) in this book.

Americans, a handful of the cases handled by the FEPC involved discrimination against Chinese and Japanese. At the same time, the combination of wartime labor shortages and an increased commitment to at least pro forma equality broke down many of the existing job barriers, first east of the Sierras, and then across the entire country. In addition, although the federal FEPC expired in 1945, a number of states passed FEPC statutes in the postwar era.[16] Even before the federal equal opportunity acts of the 1960s Asian Americans were no longer shut out of any significant employment areas. However, much evidence points to the continuing existence of impediments to promotion, often described as glass ceilings.

Residential segregation was and continues to be a fact of life for large numbers of Asian Americans: Today, as in the recent past, much segregation has been voluntary because large numbers of Asian Americans, particularly but not exclusively immigrants, have chosen to live in ethnic enclaves, Chinatowns, Nihonmachi (Japan towns), Little Manilas, Little Saigons, and so forth. Once restricted to city centers, like the Chinatowns of San Francisco and New York, and the wrong side of the tracks in smaller towns, today there are satellite Chinatowns in New York's Borough of Queens and in suburban towns like Monterey Park, just east of Los Angeles.[17]

However, from the mid-nineteenth century to the post–World War II era, such segregation was not voluntary: It was virtually impossible for Asian Americans to acquire housing anywhere other than in ghettolike locations. Although there were some state and municipal segregation statutes and ordinances, the chief means of enforcing residential segregation was through restrictive covenants, clauses placed in real estate titles that limited the sale or transfer of that particular piece of property to members of certain groups, most usually "Caucasians" but often "white Christians." On the West Coast, "Orientals" were often barred. In a 1917 case the U.S. Supreme Court upheld the enforceability of such covenants in state courts in a decision that was not reversed until 1948. After the court's reversal, rendering restrictive covenants unenforceable, the National Association of Real Estate Boards changed its code of ethics to read, "A realtor should not be instrumental in introducing into a neighborhood a

16 Andrew E. Kersten, *Race, Jobs, and the War: The FEPC in the Midwest, 1941–1946* (Urbana, Ill., 2000).

17 Timothy P. Fong, *The First Suburban Chinatown: The Making of Monterey Park, California* (Philadelphia, 1994), and Leland T. Saito, *Race and Politics: Asian Americans, Latinos, and Whites in a Los Angeles Suburb* (Urbana, Ill., 1998).

character of property or use which clearly will be detrimental to property values in that neighborhood."[18]

Other housing segregation was effected by banks and federal housing and financing agencies through a process of "redlining" that created districts in which it was difficult if not impossible for some to get the low-interest mortgage necessary to afford to buy a home. Although such subtle sanctions no longer prevail, they still exist and discriminate against all people of color.

Legally segregated schools for Asian Americans existed in California and Mississippi, but nowhere else on the mainland. In Mississippi, until sometime after 1954, there were three separate schools in some places: one for whites, one for blacks, and one for Chinese.[19] During World War II, when Japanese-American troops trained in Mississippi, a separate school was established for the children of those soldiers. In California, statutory school segregation for Chinese began in 1858. California law provided that school districts might set up Chinese schools, and, if they did, all Chinese pupils must attend. Only in San Francisco was such a school established. When in 1906 the San Francisco School Board ordered Japanese pupils to attend the Chinese school, an international incident erupted requiring the intervention of President Theodore Roosevelt before the school board revoked the offending order. The Japanese government closed its eyes to the fact that schools were segregated in at least two rural California districts where Japanese-American pupils predominated.[20] It is interesting that there was no legal segregation of African-American students in twentieth-century California. All statutory school segregation in California ended shortly after the *Brown* decision of May 1954.

Bars against interracial marriage and sexual relations are older than the Republic. One authority dates them from 1630. There is no federal law on the subject, but forty-two of the fifty states have had such laws on the books.[21] California and other far western states and territories, except

18 David H. McKay, *Housing and Race in Industrial Society: Civil Rights and Urban Policy in Britain and the United States* (Totowa, N.J., 1977), 53.

19 For California, see Irving G. Hendrick, *The Education of Non-Whites in California* (San Francisco, 1977), and Charles M. Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855–1975* (Berkeley, Calif., 1977); for Mississippi, see James W. Loewen, *The Mississippi Chinese: Between Black and White* (Cambridge, Mass., 1971), and Robert S. Quan, *Lotus Among the Magnolias: The Mississippi Chinese* (Oxford, Miss., 1982).

20 Daniels, *Politics*, 31–45.

21 The eight exceptions are: Arkansas, Connecticut, Hawaii, Minnesota, New Hampshire, New Jersey, Vermont, and Wisconsin. A comprehensive account is Byron Curti Martyn, "Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation," Ph.D. diss., University of Southern California, 1979. See also Candice L. Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley, Calif., 1998).

Hawaii and Alaska, enacted separate laws barring marriage between Asians and whites. These laws were not formally struck down by the court until the 1967 case of *Loving v. Virginia*, which did not directly involve Asians. Asian-American women citizens, however, had one unique disadvantage. The Cable Act of 1922 ended the automatic granting or revocation of citizenship for married women solely because of the status of their husbands. Prior to 1922 a female alien who married a citizen or whose husband became naturalized automatically became an American citizen. Conversely, any female citizen, native born or naturalized, who married an alien was divested of her citizenship. This ended when Congress declared that "the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman." However, there was a joker for a few women: Despite the principle previously cited, the law also provided that "any woman citizen who marries an alien ineligible to citizenship" – in other words any Asian alien – "shall cease to be a citizen of the United States." The anti-Asian provisions were repealed in 1930. Men's marriages were not affected either before or after 1922. No male ever gained or lost citizenship because of marriage.[22]

Until the 1960s Asians, like other people of color, suffered continuous discrimination in places presumably open to the public. In California, but nowhere else that I am aware of, in the 1920s and 1930s Asians suffered some discrimination that was not visited on the less numerous African Americans. In the case of municipal swimming pools in Southern California, for example, Asians were barred, blacks were not, and sometimes Mexican Americans were allowed to use the pool one day a week – usually the day before the pool was drained and cleaned.

The great watershed for Asian Americans was World War II. During the war Chinese Americans, Filipino Americans, and Korean Americans all gained special recognition as allies in the war against Japan. Japanese Americans, as we know, suffered grievously. I will not expand here on that massive violation of the civil rights of more than 120,000 people, more than two-thirds of them American citizens.[23] But I do want to note what may become a new right that has arisen from the Japanese-American wartime experience.

Even before the war was over, most of the federal officials involved were aware that a miscarriage of justice had taken place and raised no

22 The Cable Act is 42 *Stat*. 1021; the act ending denaturalization of wives of Asian aliens is 46 *Stat*. 854. *Loving v. Virginia* is 388 U.S. 1 (1967).

23 Roger Daniels, *Prisoners Without Trial: Japanese Americans in World War II* (New York, 1993).

objection when the Supreme Court, in late 1944, finally ordered that imprisoned and exiled Japanese-American citizens be allowed to return to their West Coast homes. Just three years after the war Congress passed the Japanese-American Claims Act, which provided $38 million to compensate for losses of real property. The act created no precedents: It was similar to claims acts after other wars and to Indian claims acts as well.

More than thirty years after the war was over a movement to gain some kind of redress for the wartime wrongs done them arose among a few activists in the Japanese-American community. By the end of 1980 Congress acceded to their demands and created the Commission on the Wartime Relocation and Internment of Civilians (CWRIC), whose mission was to investigate whether "wrong" had been done to Japanese Americans during World War II and, if so, to recommend what should be done about it. A little over two years later the commission issued its report and found that "the broad historical causes" of the incarceration of Japanese Americans were "race prejudice, war hysteria, and a failure of political leadership." It recommended (1) a formal apology from Congress; (2) presidential pardons for those who had run afoul of the justice system in resisting incarceration; (3) restoration of lost status when possible; (4) that a special fund be set up for research and education about race relations; and (5) a one-time, tax-free payment of $20,000 to each survivor.[24] It took five years of debate for Congress to pass what became the Civil Liberties Act of 1988, although payments did not begin until 1990. More than 80,000 people have been compensated; the direct cost has been about $1.5 billion dollars.[25]

This is, to my knowledge, the first time the winner of a war has apologized to some of its victims. The United States has never formally apologized to Native Americans, to the descendants of slaves, or to anyone else. The American apology has increased the pressure on the Japanese government to apologize for its wartime atrocities in China and Korea. The German Bundestag is discussing monetary redress to the town of Guernica, and, in the most recent and far-ranging apology, British Prime Minister Tony Blair has apologized to the Irish people for the British government's failings during the famine years of the late 1840s. Whether this

24 CWRIC, *Personal Justice Denied* (Washington, D.C., 1982), and CWRIC, "Press Release," (Washington, D.C., June 15, 1983).

25 Roger Daniels, "Redress Achieved, 1983–1990," in Roger Daniels, Sandra C. Taylor, and Harry H. L. Kitano, *Japanese Americans: From Relocation to Redress*, 2d ed. (Seattle, 1991), 221–3. The same volume contains a text of the statute, which is P.L. 100–383. See also Leslie T. Hatamiya, *Righting a Wrong: Japanese Americans and the Passage of the Civil Liberties Act of 1988* (Stanford, Calif., 1993).

sort of governmental action will be repeated and become another segment of the culture of rights no one can say, but it seems at least a possibility.

II

The strategies employed by the wronged groups and their representatives have varied widely. This account surveys the methods used by members of three groups: Asian Indians, Chinese, and Japanese. It is particularly worth noting that each of these groups, denounced as "unable to acculturate to American ways," did in fact manage to use American traditions and techniques in attempting to achieve their political ends: litigation, diplomatic pressure, lobbying, and coalition politics. They were not always successful, but each group did manage to gain advantages in its struggle for rights by use of these "American" methods.

The Chinese, from almost their earliest days in California, experienced confrontations with American law. In criminal cases Chinese almost always lost because juries of American citizens refused to convict whites of offenses against Chinese. Until 1872 a Chinese could not testify against a "white" in California courts. But in civil matters, especially those involving property, Chinese fared somewhat better. As early as 1860, organized groups of Chinese began to employ Caucasian lawyers to defend them and to lobby for them. (Because Chinese were "aliens ineligible to citizenship," no Chinese could practice law anywhere in the United States until there were native-born adults who had passed bar examinations.)

Basing their arguments on federal supremacy in matters of immigration, treaty rights, and, eventually, the Fourteenth Amendment, attorneys for the Chinese achieved a high degree of success. Initially, much of the defense of Chinese was sponsored by immigrant protection societies, ranging from the mercantile elite Six Chinese Companies to shoemakers' and laundrymen's guilds that served functions later assumed by civil rights organizations. After 1878 many of these functions were assumed by American attorneys who served as co-consular representatives for the Chinese in San Francisco.[26]

After 1882 the federal Chinese Exclusion Act and its enforcement became the focus of Chinese civil rights litigation. The sheer number of cases is amazing: Although there were probably no more than 125,000 Chinese in the United States at any time in the nineteenth century, scholars have counted 9,711 different cases in the federal courts of the Northern District of California alone, in addition to which there were "tens of

26 Some of what follows on the Chinese owes much to the superior monographs by McClain and Salyer cited in note 8.

thousands of petitions for habeas corpus" in those same courts.[27] Although the Chinese and their attorneys won a number of individual cases – and, in the process helped to establish important legal precedents that protected other immigrant groups – all litigative attempts to overturn the Chinese Exclusion Act failed. After the turn of the century the Chinese-American community used fraud and chicanery – illegal entry, successfully claiming U.S. citizenship, and falsifying kinship relationships – to partially defeat the intent of the Exclusion Act. The eventual repeal of the act in 1943 owed nothing to Chinese-American activism but was, as noted previously, a sidebar to global diplomacy. Chinese effectively used the American rules as long as it availed them to do so; when those no longer worked, they made up their own.

Asian Indians also tried to use the law to their advantage by challenging the Naturalization Act of 1870, which denied them citizenship. Bhagat Singh Thind, a Sikh from Punjab, argued in a case decided by the Supreme Court in 1923 that because he was ethnologically of Aryan stock, and therefore Caucasian, he was eligible for naturalization under the statute. His case seemed to be supported by the fact that, in a naturalization case involving a Japanese decided in the previous year, the court had ruled that the word "white" in the naturalization statute meant "Caucasian."[28]

This was a misapprehension. The very same justice who had ruled in the earlier case, British-born George Sutherland (1862–1942), who sat from 1922 to 1938, here ruled that "white" did not mean "Caucasian" after all, but rather meant "white" in the "understanding of the common man." He directly rejected Thind's argument, ruling that "It may be true that the blonde Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity but the average man knows that there are unmistakable and profound differences between them today."[29] Based on the Thind case the Department of Justice began proceedings to revoke some seventy naturalization certificates previously issued to Asian Indians, revoking about fifty of them between 1923 and 1926. But in 1926 Sakharam Ganesh Pandit, who had been naturalized in 1914 and subsequently had become a lawyer in California, successfully challenged the government by invoking an established rule of civil law that a deci-

27 The number comes from Christian G. Fritz. "A Nineteenth-Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *American Journal of Legal History* 32 (1988): 347–72; Lucy Salyer, "Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891–1905," *Journal of American History* 79 (1989): 91–117; and Christian G. Fritz and Gordon M. Bakken, "California Legal History: A Bibliographic Essay," *Southern California Quarterly* 70 (1988): 204.

28 *Ozawa v. U.S.* (260 U.S. 189).

29 *U.S. v. Bhagat Singh Thind* (261 U.S. 204).

sion not appealed within three years should stand. He retained his citizenship, and the government ceased its campaign of revocation but made no move to restore citizenship to those whose naturalization had been improperly revoked.[30]

Asian Indians used other means to achieve a 1946 victory. At least six Asian Indian civil rights organizations had been created in part to fight for citizenship in the years after the Thind decision: the Hindu Citizenship Committee, the Indian Association for American Citizenship, the Indian National Congress of America, the Indian Welfare League, the National Committee for India's Freedom, and, most important, the India League of America. At this time there were only a few thousand Asian Indians in the entire United States, many of them on nonimmigrant visas, so these were lobbying organizations. The India League's "one-man lobby," the New York merchant who called himself "J. J. Singh," was aptly described by journalist Robert Shaplen: "Sirdar Jagjit Singh, the president of the India League of America . . . is, at fifty-three, a handsome, six-foot Sikh who by means of persistent salesmanship, urbane manners, and undeviating enthusiasm, has established himself as the principal link between numberless Americans and the vast mysterious Eastern subcontinent where he was born."[31] Thanks largely to Singh's efforts, but also to the fading anticolonial tradition of the United States, the act of July 2, 1946, gave the right of naturalization to, and established a small immigration quota for, "persons of races indigenous to India." To place that law in context, it followed by less than three years the repeal of the Chinese Exclusion Act and was part of a statute that granted the right of naturalization to Filipinos.[32] In that same session of Congress bills to make Koreans and Thais eligible for naturalization failed.

Both of these strategies – lawsuits and lobbying – were employed by Japanese Americans, but they were able to make gains because of diplomatic pressure in the early years of the twentieth century. Beginning with protests from Tokyo about San Francisco's orders to segregate Japanese pupils in 1906, the imperial government effectively defended some of the rights of the Japanese in the United States until 1924, when popular sen-

30 I believe that this is the first civil rights case in which an Asian American was an attorney of record. Roger Daniels, *History of Indian Immigration to the United States: An Interpretive Essay* (New York, 1989).

31 Robert Shaplen, "One-Man Lobby," *New Yorker*, Mar. 24, 1951, 35–55. See also R. Narayanan, "Indian Immigration and the India League of America," *Indian Journal of American Studies* 2, no. 1 (1972): 1–30; and Premdatta Varma, *Indian Immigrants in the USA: Struggle for Equality* (New Delhi, 1995).

32 60 *Stat*. 416.

timent overruled reason of state. The Tokyo protests bore fruit because Washington respected Japan's growing military power. As President Theodore Roosevelt put it in a private letter: "It is unthinkable that we should continue a policy under which a given locality may be allowed to commit [unfriendly acts] against a friendly nation." Roosevelt negotiated successfully with San Francisco officials to revoke its segregation order, and the Japanese government turned a blind eye to the segregation of Japanese pupils in at least two rural California school districts. Roosevelt's administration then negotiated the Gentlemen's Agreement of 1907–8 with Japan, under which Japan agreed to stop issuing passports to laborers to come to the United States and Hawaii, and the United States agreed not to inhibit family reunification for people already resident in the United States and not to enact federal anti-Japanese legislation. Roosevelt and his Republican successor, William Howard Taft, successfully persuaded Republican California governors "to sit upon the lid," as one of them put it, and prevent anti-Japanese statutes from being enacted, but that restraint did not work under Democrat Woodrow Wilson; much state anti-Japanese legislation passed in 1913 and after. The Gentlemen's Agreement held until Congress abrogated it over Calvin Coolidge's weak protest (but no veto) in 1924.

During this period, when almost all adult Japanese Americans were, by law, Japanese nationals ineligible for citizenship, the tutelage of the Japanese government was appropriate. The major organization of the first or Issei generation of Japanese Americans, the Japanese Association of America, was always under the informal leadership of Japanese consuls and other officials appointed by Tokyo.[33] The Issei and the Japanese government also availed themselves of American law and lawyers. They successfully blunted the effect of the Alien Land Acts of California and other western states, but unsuccessfully challenged the ineligibility of Japanese for naturalization.[34]

The second generation Japanese Americans, the Nisei, tried to keep the Japanese government at arm's length and went so far as to bar their parents from membership in their civil rights organization, the Japanese-American Citizens League (JACL), founded in the 1930s. They pursued lawsuits, sometimes filed by Japanese-American attorneys, and were successful in a lobbying effort, chiefly due to the support of the American

33 I have spelled out much of this in greater detail in Roger Daniels, "The Japanese," 36–63, in John Higham, ed., *Ethnic Leadership in America* (Baltimore, 1977).

34 For the state laws, see Daniels, *Politics of Prejudice*, esp. 46–64. The citizenship case is *Ozawa v. U.S.* (260 U.S. 178).

Legion, for a statute to make a small cohort of Japanese-born veterans of World War I who had fought as part of the United States armed forces eligible for citizenship.[35]

During the wartime incarceration of the vast majority of mainland Japanese Americans, the JACL was impotent. It professed its loyalty and decided to cooperate with its oppressors in the hope of mitigating the situation and earning a better postwar future. It encouraged Japanese Americans to volunteer for military service even while incarcerated in concentration camps and later encouraged the government to reinstitute the military draft for Japanese-American young men. In the postwar era the JACL lobbied, with the support of some of the same government officials who had organized the incarceration, for passage of the Japanese-American Claims Act of 1948, which provided a traditional kind of payment for property losses, and lobbied, too, for the otherwise repressive McCarran-Walter Immigration Act.

The innovation for Japanese Americans was the Civil Liberties Act of 1988, an act whose passage was hotly contested. An umbrella group of Japanese-American organizations established a successful bipartisan coalition for what it called redress, which eventuated in the act's passage through Congress.[36] As noted above, the act's terms were unprecedented; so was its passage. One of the reasons that the small Japanese-American community – fewer than 850,000 people – could lead a diverse coalition was that it had paid its dues over the years. Its leading organization, the JACL, worked with the various lobbying organizations that had advocated civil rights. In addition, it had important ethnic "clout" in Congress, in the small but effective group of Japanese-American legislators in the House and Senate who provided leadership and called in "IOUs" from other legislators not otherwise interested in a bill whose benefits were exclusively for one ethnic group. And last but by no means least, the Japanese-American lobbyists and their supporters played effectively on the sense of justice that is deeply embedded in the American tradition, the positive horn of what economist Gunnar Myrdal called an American dilemma.[37]

35 49 *Stat*. 397.

36 For a thorough account of the struggle for redress, see Mitchell Maki, Harry H. L. Kitano, and S. Megan Bechtold, *Achieving the Impossible Dream: How the Japanese Americans Achieved Redress* (Urbana, Ill., 1999).

37 Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 2 vols. (New York, 1964).

2

Individual Right and Collective Interests

The NAACP and the American Voting Rights Discourse

MANFRED BERG

In March 1911 the third annual conference of the National Association for the Advancement of Colored People (NAACP) passed a "Declaration of Principles and Purposes" that condemned the increasing racial discrimination in America and vowed to fight for the rights of black people. One of the key paragraphs read:

> We insist that the colored citizen of the United States is entitled to every right, civil and political, that is accorded to his white neighbor. We hold as a self-evident political truth that no men who are deprived of the right to vote can protect themselves against oppression and injustice. They cannot influence legislation or have a voice in selecting the tribunals by which their rights are determined, and the first step toward the advancement of the colored race is the recognition and protection of their right to vote.[1]

The NAACP declaration echoed the two principal reasons why disfranchised groups have sought the vote throughout American history: They want the ballot because it symbolizes equality and inclusion as "first-class citizens" and because it is seen as an instrument for self-protection and for advancing collective interests. The symbolic function of the ballot is said to confer primarily an individual psychological benefit, the affirmation of civic pride and belonging, whereas its instrumental value only materializes if groups of voters pursue common goals with sufficient electoral clout to ensure that governments will respond to their needs and demands.[2] Both motifs have played an important role during the long struggle for voting rights for African Americans. Blacks tried to register and vote simply to assert their claim to first-class citizenship, even if

1 Quoted in *The Crisis: A Journal of the Darker Races* 2 (May 1911): 24.

2 On the dual function of the elective franchise, see Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass., 1991), "Voting," 25–62. Shklar's argument, however, overemphasizes the symbolic function of the vote.

they knew that this would have no impact on the power of white supremacists and might very well jeopardize their livelihoods and even their lives. At the same time, African Americans truly believed in the practical benefits of the vote to an extent that may seem somewhat naive in retrospect.[3]

This chapter does not address familiar questions about why the high hopes associated with voting have inevitably been disappointed. Rather, it seeks to explore the impact that the dual concept of voting had on the discursive strategies of black suffragists. It focuses on the NAACP because, as the oldest and largest African-American civil rights group, it has been a major organizational player in this fight from the beginning of this century until the breakthrough of the 1960s and beyond. During all those decades of bitter defeat and elusive victory the NAACP never abandoned its fundamental belief in the ballot as the appropriate instrument to bring about equality and opportunity for blacks within the framework of the U.S. Constitution and the American political system. As a registration campaign flyer of the NAACP's Baltimore, Maryland, branch put it as late as 1965: "The Ballot Is Our Ticket to Freedom!"[4]

Obviously, no exhaustive account of the various legal, political, and organizational actions the NAACP has taken in its long quest for the ballot can be given here. Instead, I address a more specific problem: How did the NAACP react to a culture of voting rights that assumed that black people – individually and collectively – were unfit for first-class citizenship? How did it shape its discourse on voting in order to persuade the white majority that it had nothing to fear and much to gain from black participation? The weight of my argument lies in the early period of the NAACP to World War II, when the culture of disfranchisement and

3 For the standard account of the struggle for black voting rights, see Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944–1969* (New York, 1976); Steven F. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1962–1982* (New York, 1985).

4 "Some Reasons Why Everybody Should Register and Vote," Records of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division, Washington, D.C., part III, series A, box 270 (hereafter NAACP III A 270). This quotation has inspired the title of my book, which offers both a detailed account of the NAACP's strategies to regain the vote for African Americans and a more general political history of the association. See Manfred Berg, *"The Ticket to Freedom": Die NAACP und das Wahlrecht der Afro-Amerikaner* (Frankfurt am Main, 2000). Otherwise, the literature on the NAACP is rather thin. The two most recent books are inadequate in both sources and interpretation and are hardly useful even as an introduction. Cf. Minnie Finch, *The NAACP: Its Fight for Justice* (Metuchen, N.J., 1981); Jacqueline L. Harris, *History and Achievement of the NAACP* (New York, 1992). The standard account of the association's founding and first decade is Charles Flint Kellogg, *NAACP: A History of the National Association for the Advancement of Colored People, 1909–1920* (Baltimore, 1967). The best studies dealing with specific NAACP policies are Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909–1950* (Philadelphia, 1980); Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* (Chapel Hill, N.C., 1987).

discrimination was firmly in place and forced the NAACP to go a long way toward accommodating the anxieties of the majority.

I

By the time the NAACP was founded by white neoabolitionists and black intellectuals in 1909 the white South had just about completed the virtual nullification of the Fifteenth Amendment, which had been ratified in 1870 to ensure suffrage for black men. Following the end of Reconstruction, after a period of violent racial and social conflict, the southern state legislatures enacted a variety of devices to ensure the "orderly" exclusion of black voters. Although not racially discriminatory in their language, voting requirements such as the poll tax and literacy tests were administered in a way that made sure that most African Americans were barred from registering and voting. These "reforms" resulted in a rather peculiar political system characterized by the near monopoly of the Democratic Party, the dominance of a well-to-do planter and business elite, and widespread apathy. Racial demagoguery became the substitute for ordinary political and social mobilization.[5] As journalist Wilbur Cash wryly observed in the 1940s, southern voters usually faced the following alternatives: "Did Jack or Jock offer the more thrilling representation of the South in action against the Yankee and the black man?"[6]

It is important to note that the disfranchisement of African Americans in the South was accomplished during a period in American history that otherwise saw the expansion of participation rights. Certainly, the electoral reforms of the Progressive Era that were targeted against urban machines and corrupt bosses betrayed a clear anti-immigrant bias, but whatever discrimination occurred was a far cry from southern practices. The introduction of direct primaries and plebiscites, especially in the western states, the direct election of U.S. senators, and the successful conclusion of the push for women's suffrage in 1920 testify to a strong democratic current in the American political culture of the early twentieth century.[7]

5 On the genesis of the southern political system, see the comprehensive study by J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven, Conn., 1974), esp. 238–65; on the state of southern politics around mid-century, see the classic study by V. O. Key, *Southern Politics in State and Nation* (New York, 1949; reprint, Knoxville, Tenn., 1984).

6 Wilbur J. Cash, *The Mind of the South* (New York, 1941), 130.

7 There is no modern history of suffrage in the United States. For an introduction, see J. Morgan Kousser, "Suffrage," in Jack P. Greene, ed., *Encyclopedia of American Political History: Studies of the Principal Movements and Ideas*, 3 vols. (New York, 1984), 3:1236–58; Peter H. Argersinger, "Electoral Processes," in Greene, ed., *Encyclopedia*, 2:489–512; on the debates over direct democracy early this

Black voters, however, were clearly not included. The disfranchisement of southern blacks met with little protest outside the South. Three principal factors contributed to the tacit acquiescence to this most important setback to participation rights in all of U.S. history. Obviously, racism figured prominently, as did the desire not to jeopardize the newly found reconciliation between the different sections of the country. A third reason was that by the 1890s the Republican Party had practically given up on southern African-American voters. Its expanding electoral basis in the newly admitted western states ensured its national political hegemony without the need for waging an increasingly difficult struggle for the South. Black voters in the North, few in number anyway, were courted with memories of the "Great Emancipator," as the "Party of Lincoln" more and more succumbed to racism.[8]

As a result of this political marginalization, an essentially premodern discourse on black voting came to the fore. It drew a sharp distinction between the exercise of suffrage as an individual privilege confined to a few "good Negroes" who would follow white leadership, and voting as the pursuit of collective interests, which conjured up the Reconstruction myths of northern carpetbaggers and southern scalawags exploiting the "ignorant Negro bloc vote" to wreak havoc on southern civilization. As late as 1937 the *Charleston News and Courier* succinctly put it: "We Southerners know that there are intelligent Negroes . . . of character and information qualifying them for the suffrage. But we know that they are extremely few. We know that were the hordes of negroes voting in South Carolina they would follow, not the white men on whom the existence of the state in decency and civilization depends, but depraved white men cunningly able to equalize themselves with negroes and be beloved by them."[9] The token participation of a few black voters served two important ends: It reinforced the paternalistic self-image of the white South and, more important, helped maintain the fiction that the masses of African Americans were barred from voting not because of their race but because of their inability to meet other, ostensibly color-blind qualifications. As long as southern voting laws did not explicitly discriminate by

century, see Thomas Goebel, "A Government of Laws or a Government of the People? Direct Democracy and American Political Culture, 1890–1920," in Knud Krakau, ed., *The American Nation – National Identity – Nationalism* (Münster, 1997), 123–48.

8 On the Republican retreat from the southern states, see Richard M. Valelly, "National Parties and Racial Disenfranchisement," in Paul E. Peterson, ed., *Classifying by Race* (Princeton, N.J., 1995), 188–216; on the national Republican Party's attitude toward race during the early twentieth century, see Richard B. Sherman, *The Republican Party and Black America: From McKinley to Hoover, 1896–1933* (Charlottesville, Va., 1973).

9 Quoted in Rayford W. Logan, ed., *The Attitude of the Southern White Press Toward Negro Suffrage* (Washington, D.C., 1940), 69.

race and a few blacks were permitted to vote, the U.S. Supreme Court would accept them at face value. In 1897, the year after it had legally sanctioned racial segregation in *Plessy v. Ferguson*, the court ruled in *Williams v. Mississippi* that the literacy test required by Mississippi registration laws did not violate either the Fourteenth or the Fifteenth Amendments to the federal constitution.[10] A few years later the Supreme Court, in one of its most formalistic decisions ever, made clear that it had no intention of protecting the voting rights of blacks. An African-American plaintiff from Alabama who had sought an order to add his name to the registration rolls of his home state was confronted with a marvelous example of "Catch 22" logic: If the voter list of Alabama had been drawn up in violation of the Constitution, as alleged by the plaintiff, the court could not become a part of this by adding another name![11]

It is doubtful that such legal sophistry was taken very seriously either in the South or in the rest of the nation. In his *History of Suffrage in the United States*, published in 1918, historian Kirk Porter freely admitted that the "electoral reforms" in the South had been introduced for the sole reason of excluding blacks. That the disfranchisers had to resort to legal travesty was a little embarrassing but served a necessary and salutary purpose. The fact that blacks had passively watched their own "political funeral," Porter argued, had brought more and more of the former advocates of black suffrage to their senses.[12]

Porter was not far off the mark. Most conspicuously, the Republican Party for all practical purposes had abandoned its Reconstruction legacy and accepted the tacit consensus that the "Negro problem" was an internal affair of the South. If the party was to regain influence below the Mason-Dixon line, it had to be on a strictly "lily-white" basis. In 1921 former President William Howard Taft, one of the leading spokesmen for rebuilding a lily-white southern Republican Party, openly conceded that the disfranchisement of blacks was a clear violation of the Constitution but argued that "the only hope the Negro has of securing his right to vote is in developing his intelligence and economic utility, so that individual negroes of character and intelligence may gradually have accorded to them what is theirs now by right."[13] Taft, in essence, argued that the Fifteenth Amendment was unenforceable for the time being and that

10 *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Williams v. Mississippi*, 170 U.S. 213, 225 (1897).

11 *Giles v. Harris*, 189 U.S. 475, 486–7 (1903).

12 Kirk H. Porter, *A History of Suffrage in the United States* (Chicago, 1918), 220. Porter's book is outdated, of course, but nicely reflects the predominant racism and antifeminism of the early twentieth century.

13 See Taft's article: "Federal Offices for Negroes," *Boston Evening Globe* (Jan. 8, 1921), copy in NAACP I C 389.

southern blacks, in the spirit of the late Booker T. Washington, ought to resign themselves to this fact. When Taft was nominated for the position of chief justice of the Supreme Court a few months later, the NAACP was understandably appalled and briefly considered a propaganda campaign against his appointment. The idea was dropped, however, because the NAACP realistically did not feel it was strong enough to take on a former president.[14]

II

The NAACP had to operate in a racist political culture that assumed black people had no legitimate interests that they could articulate and pursue independently of whites. This situation required a delicate balancing act. On the one hand, the advancement of colored people could be achieved only if the association encouraged African Americans to assert their rights and interests as a group. On the other hand, the white majority had to be reassured that such assertiveness did not pose a threat to their own interests. Like other reform movements, the NAACP wrapped itself in the flag to persuade the American public that political rights for blacks were in the best interest of the nation.

The discursive strategy that the NAACP adopted in its early days and basically maintained throughout the next six decades can perhaps be best characterized as democratic nationalism. It tried to combine the universalist principles and language of the Declaration of Independence and the Constitution with conventional patriotism. In order to redeem its promise of freedom, equality, and democracy, America had to liberate itself from the blemish of racism. Thus, the struggle against the oppression of black Americans was a service to the entire nation, including the oppressors. "As much as anybody in the country the Negro wants to be a good American," wrote the NAACP executive secretary James Weldon Johnson in 1929 for the *American Mercury*; "He is also determined to wear the rights as well as bear the burdens of American citizenship. . . . He must win not only for himself but for the South. . . . He must win for the nation, because if he fails, democracy in America fails with him."[15]

14 See the letter of May 27, 1921, by Robert Church, a member of the NAACP Board of Directors and a black Republican from Memphis, Tenn., to NAACP Executive Secretary James Weldon Johnson; Johnson's reply of June 1, 1921, in NAACP I C 389. Taft's indifference toward the plight of black people had incurred harsh criticism from the NAACP when he was president. "Mr. Taft," *Crisis* 2 (Oct. 1911): 243. On Taft's attitude toward blacks during his presidency, see Sherman, *Republican Party and Black America,* 83–112.

15 See the NAACP press release of Aug. 23, 1929, NAACP I C 390.

This did not mean that the white majority could be relieved of its duty to eradicate the evil of racism, as the NAACP's "Declaration of Principles and Purposes," previously quoted, clearly stated. But in dwelling on what Gunnar Myrdal later aptly coined the "American Creed," the association acknowledged that white America had created the very norms and institutions necessary to overcome this evil. The organicist metaphor of racism as a social disease threatening "the whole body of American citizenship" implied that both minority and majority had a vital interest in "healing." As a toothache tells the body of decay, the NAACP journal *The Crisis* explained, "The function of this Association is to tell this nation the crying evil of race prejudice."[16] Obviously, *The Crisis* extended too much good faith when it blamed "ignorance and misapprehension" for much of the prevailing racism. But in the vein of progressive reform the NAACP honestly believed in the ability of the white citizenry – at least of the vast majority that had no material stake in racial discrimination – to realize that racial prejudice was detrimental to its own welfare and to cure itself of this disease.[17]

Why should whites in the North care about black voting rights in the South? Racial disfranchisement was not a regional but rather a national problem, the NAACP argued, because it led to a gross overrepresentation of the southern oligarchy in national elections. Because African Americans were counted in the apportionment of congressional seats to the southern states but were excluded from voting, many fewer votes were needed in the South to win a seat in Congress or to carry a state in a presidential election. For example, *The Crisis* demonstrated that in 1908 Republican candidate William Howard Taft had received almost 200,000 votes to win the eleven electoral votes of Minnesota, while his Democratic rival William J. Bryan needed fewer than 75,000 votes to pocket an equal number of presidential electors in Alabama. In the congressional elections of 1910 the victorious candidate in the 19th congressional district of Illinois received about as many votes, namely, 23,000, as all winners in Mississippi's eight congressional districts combined.[18] Obviously, southern congressmen represented far fewer voters than their northern

16 "Declaration of Principles and Purposes," see note 1 to this chapter; "Agitation," *Crisis* 1 (Dec. 1910), 11; Gunnar Myrdal, with the assistance of Richard Sterner and Arnold Rose, *An American Dilemma: The Negro Problem and Modern Democracy* (New York, 1962), 3–25.

17 Cf. *Crisis* 1 (Dec. 1910): 16; on the roots of the NAACP in the progressive movement, see August Meier and John H. Bracey Jr., "The NAACP as a Reform Movement, 1909–1965: 'To Reach the Conscience of America,'" *Journal of Southern History* 59 (1993): 3–30.

18 Joseph C. Manning, "Suffrage Conditions in Democratic and Republican States Compared," *Crisis* 4 (Oct. 1912): 304–8.

colleagues, and the individual ballots of southern voters counted for many times more than those of their fellow citizens in the North due to racial disfranchisement. Hence, former Massachusetts Attorney General Albert Pillsbury argued at the founding conference of the NAACP, more than the voting rights of blacks was at stake: "It is not merely a question of Negro suffrage, or Negro equality. It is a question of the equality of white men."[19]

To remedy this situation the NAACP demanded the enforcement of Section Two of the Fourteenth Amendment, which stipulates that the congressional representation of states that deny the vote to any number of their adult (male) inhabitants for reasons other than rebellion or crime shall be reduced in proportion to the number of disfranchised voters. Because the Fifteenth Amendment prohibits disfranchisement "on account of race, color, or previous condition of servitude" the NAACP argued, all other legal voting restrictions, such as literacy tests and poll taxes, would trigger a reduced representation in Congress according to the aforementioned section of the Fourteenth Amendment.[20] Despite the amendment's ostensibly unambiguous wording, the association's attempts to invoke the amendment came to no avail. Its enforcement involved too many intricate and extremely controversial constitutional and political issues that touched directly on the fragile balance of power between the regions. The South, for example, could point to a large immigrant population in the North that counted in the apportionment of congressional representation but could not vote, either. Unlike the equal protection and due process clauses of Section One of the Fourteenth Amendment, which developed into the constitutional bedrock of modern American citizenship, Section Two could never be divorced from its coercive Reconstruction legacy that few Americans wished to revive.[21]

The emphasis on the enforcement of Section Two of the Fourteenth Amendment also underscored the proclivity of NAACP leaders to accept a strict textual interpretation of the Fifteenth Amendment. Pillsbury told the founders of the NAACP that the Fifteenth Amendment entitled blacks "to be treated, in respect of the suffrage, only as other men of the same standing or character are treated, and nothing more. The federal law does not make a single Negro a voter, in any state of the union."[22] In

19 Albert E. Pillsbury, "Negro Disfranchisement as it Affects the White Men," *Proceedings of the National Negro Conference 1909* (New York, 1969), 180.

20 Ibid., 184–8; W. E. B. Du Bois, "Reduced Representation in Congress," *Crisis* 21 (Feb. 1921): 149–50.

21 Berg, *Ticket to Freedom*, discusses these problems in more detail.

22 Pillsbury, "Negro Disfranchisement," 181.

pondering possible constitutional strategies, Moorfield Storey, the first president of the NAACP and a former president of the American Bar Association, maintained that "it is what the Constitution says which determines what it means." Storey did realize that a strict interpretation of the Fifteenth Amendment amounted to a recognition of the validity of southern voting laws. He considered the Fourteenth Amendment, Section Two, the more promising constitutional argument with which to attack these laws.[23]

The view that the Fifteenth Amendment was a mere prohibition against open racial discrimination that otherwise left the states free to impose all kinds of ostensibly color-blind restrictions on voting was by no means confined to prominent white lawyers like Pillsbury or Storey. Many black advocates of civil rights agreed that universal suffrage was not legally required and not desirable, either. In *The Souls of Black Folk*, first published in 1903, W. E. B. Du Bois poignantly criticized Booker T. Washington's accommodations but conceded that "reasonable restrictions in the suffrage," even if applied evenly, would disfranchise many African Americans because of "the low social level of the mass of the race."[24] Almost twenty years later, after co-founding the NAACP and editing its journal *The Crisis*, the leading African-American intellectual of his time had not altered his views. In a 1921 article for *The Crisis*, DuBois wrote: "As long as the 15th Amendment stands, it is absolutely illegal to disfranchise a person because of 'race, color, or previous condition of servitude.' But it is absolutely legal to disfranchise persons for any number of other reasons. Indeed a state might legally disfranchise a person for having red hair."[25] Du Bois may have referred to hair color as a figure of speech, but there is no doubt that he earnestly acknowledged a very broad discretion of the states to impose suffrage qualifications. "If the[se] qualifications are reasonable," he continued, "it is only a matter of time when Negroes will meet them. . . . If they are disfranchised by unreasonable qualifications or by the unfair administration of the law, they can continue to attack these in the courts and before the public opinion of the nation. . . . In such a case they cannot in the long run fail to triumph."[26]

Such language clearly reflected the unwavering faith of the NAACP leaders, white and black, in the Constitution as an inexorable historical

23 Cf. Moorfield Storey to NAACP Executive Secretary Mary C. Nerney, Aug. 6, 1915, in Arthur B. Spingarn papers, Library of Congress, Manuscript Division, Washington, D.C., box 28.
24 W. E. B. Du Bois, *The Souls of Black Folk* (New York, 1989), 46.
25 W. E. B. Du Bois, "Reduced Representation in Congress," 149.
26 Ibid., 150.

force. But the NAACP's self-imposed limitation to a narrow concept of color-blind fairness also served the purpose of demonstrating to the American public that African Americans neither needed nor sought special privileges. In particular, this defensive mind-set governed the association's attitude toward the most important of nonracial qualifications: the literacy test. From colonial times on, the logic that the responsible exercise of participation rights is predicated on the ability to read and write has retained a high degree of historical and legal dignity within the American culture of rights. Literacy tests as a qualification for voting were also required in many nonsouthern states and sanctioned by the Supreme Court as a legitimate state interest. Despite blatant racial discrimination in the South, advocates insisted that a reasonable institution should not be banished because of misuse in some parts of the country.[27]

Their wide social and legal acceptance and disproportionate impact on a black population heavily disadvantaged by segregated and inferior schools made literacy tests a favorite instrument of disfranchisement. To allow white illiterates to register, several southern states had passed so-called understanding clauses as an alternative to reading and writing. These required a "reasonable interpretation" of sections of the federal or state constitutions or of the concept of citizenship in a republic.[28] It is needless to add that the interpretations of black applicants were very rarely accepted as "reasonable." With an increasing literacy rate among African Americans, some states made these understanding clauses mandatory voting qualifications, giving almost unlimited discretion to registrars.[29] Anecdotes about outlandish questions and arbitrary administration could be told by the hundreds, illustrating V. O. Key's apt judgment of the late 1940s: "The southern literacy test is a fraud and nothing more."[30]

Yet the NAACP never directly attacked the literacy test but merely insisted on its impartial, color-blind administration. Surely, it was difficult enough to prove in court the discriminatory intent of registrars. To attack the Louisiana understanding clause, NAACP legal counsel Charles

27 See Edward W. Stevens, *Literacy, Law, and Social Order* (DeKalb, Ill., 1988), esp. 64–83. For a spirited defense of literacy tests by nonsoutherners, see the debate in *Report of the President's Commission on Registration and Voting* (Washington, D.C., 1963), 51–9.

28 Mississippi was the first state to introduce such a clause in 1890. Cf. William F. Swindler, ed., *Sources and Documents of United States Constitutions*, 11 vols. (Dobbs Ferry, N.Y., 1973–88), 5:425.

29 In 1946 Alabama passed an amendment requiring registrants to demonstrate their ability to "understand and explain" the federal constitution. Under this amendment, registrars might have turned down Supreme Court justices if they disliked their interpretation of the Constitution. See Lawson, *Black Ballots*, 89–97.

30 Key, *Southern Politics in State and Nation*, 576.

Houston told the association's New Orleans branch, he needed a host of well-documented cases of racial discrimination, "rather a thousand than a hundred."[31] Still, other motifs also figured in. Most important, the demand for the abolition of literacy tests could have been construed as an implicit admission of intellectual deficiency. The frequent use of the phrase "intelligent Negroes" in the NAACP's rhetoric betrays a deep-seated inferiority complex that played directly into the hands of racism.[32] By accepting educational deficits as a legitimate reason for disfranchisement, the NAACP tended to ignore the fact that the high ideal of the "intelligent voter" served to justify the exclusion of marginalized groups. This attitude also mirrored the pride of the association's black middle-class leaders in their own educational achievements. As Walter White, its longtime executive secretary, wrote in the late 1930s: "We do not care how rigid these tests are, all we insist upon is that they be applied without restriction of race, creed, or color."[33] White ignored the fact that even if "rigid tests" were administered in a perfectly impartial manner, large numbers of blacks would still be excluded as a result of blatant racial discrimination in education.

To be sure, the NAACP vigorously fought for equal opportunity in education, which was expected gradually to do away with the racial imbalance of literacy tests as a qualification for voting.[34] But such hopes would not only take time to materialize, they also overlooked the fact that literacy tests and understanding clauses could simply be made more difficult. In the 1950s and early 1960s Alabama used a catalog of sixty-eight possible questions, some of which would have been tricky business for lawyers or political scientists. In Mississippi registrants might be asked to explain the corporate tax laws of the state.[35] Such absurd practices

31 Charles Houston's letter of Oct. 16, 1935, to F. B. Smith, NAACP I C 392.

32 The attribute "intelligent" was a standard line in political declarations of the NAACP during its early decades. See, e.g., W. E. B. Du Bois, "The Election," *Crisis* 29 (Dec. 1924), 55–6: "Negroes voted with greater intelligence . . . than ever before"; NAACP press release, Oct. 17, 1932, NAACP I C 391: "The intelligent Negro voter has but little hope in the Democratic Party."

33 Walter White's letter to U.S. Senator Carter Glass (D-VA), an archconservative member of the southern oligarchy, NAACP I C 285.

34 On the legal struggle for equal opportunity and desegregation in the field of education, see Tushnet, *NAACP's Legal Strategy*; Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York, 1975).

35 The test is printed in Howard Ball, Dale Krane, and Thomas P. Lauth, *Compromised Compliance: Implementation of the 1965 Voting Rights Act* (Westport, Conn., 1982), 237–41. See, e.g., question #62: "If a person flees from justice into another state, who has authority to ask for his return?"; on Mississippi, see U.S. Commission on Civil Rights, *Hearings Held in Jackson, Miss.: Voting* (Washington, D.C., 1965), esp. 13–18.

ceased only after the civil rights movement of the early 1960s had paved the way for the passing of the Voting Rights Acts of 1965 and 1970, which banned the use of literacy tests as a prerequisite for registration.[36]

It would be highly speculative to argue that a more straightforward attack on the literacy test by the NAACP could have led to its earlier demise. Because the device was not racial on its face and did not technically violate the Fifteenth Amendment, the focus on its racially biased administration perhaps was the only practical legal strategy – albeit one that yielded few tangible results because the courts insisted on a strict standard of discriminatory intent that was almost impossible to prove.[37] However, legal considerations cannot fully explain why the NAACP remained so acquiescent toward educational tests in its discursive strategy. At least part of the answer lies in its more-or-less explicit acceptance that a large number of African Americans, due to a long history of discrimination, were indeed lacking the basic educational requirements to use the ballot "intelligently," that is, for the enlightened self-interest of their race.

III

Rhetorically, the concept of the "intelligent Negro" came perilously close to the racist claim that blacks as a group were unfit for voting and could only qualify on the basis of individual achievement. However, the NAACP also used the phrase in a very different context that related directly to the assertion of African-American collective political strength. In the association's view, the lack of political "intelligence" in black voters was not the result of an innate intellectual inferiority as the pseudoscientific racism of the early twentieth century claimed. Still, it is telling of the cultural hegemony of racism at the time that the first two speakers at the NAACP founding conference were an anthropologist and a neurologist arguing against the biological distinctiveness, that is, inferiority, of black people.[38]

36 For a brief overview of the Voting Rights Act and its extensions, see Bernard Grofman, "Voting Rights Act of 1965 and Extensions," in L. Sandy Maisel, ed., *Political Parties and Elections in the United States: An Encyclopedia*, 2 vols. (New York and London, 1991), 2:1176–9; Chandler Davidson, "The Voting Rights Act: A Brief History," in Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C., 1992), 7–51; on the origins and the legislative history, see David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (New Haven, Conn., 1978); Lawson, *Black Ballots*, 314–21.

37 See, e.g., *Sherman Williams et al. v. James H. McCulley*, U.S. District Court for the Western District of Louisiana, Jan. 3, 1955, copy in NAACP II B 212. In this case the court dismissed a lawsuit against a Louisiana registrar who had disqualified three times as many blacks as whites under the state's understanding clause.

38 Livingston Farrand, "Race Differentiation–Race Characteristics," in *Proceedings of the National Negro Conference 1909*, 14–21; Burt G. Wilder, "The Brain of the American Negro," ibid., 22–66.

That blacks as a group were politically immature was no fault of their own. They were, as Du Bois argued, simply left out of political education by the parties that at best treated them as an ignorant "bloc vote" that could be bought off with a few breadcrumbs: "They are given over to the lowest white politicians and ward heelers, and the only arguments used are money and honeyed words. . . . As a method of government, a way of securing decent schools, healthful conditions of living, the right of administration of the laws and the like, the colored voter is singularly in the dark. He needs systematic education."[39]

Traditionally, voters are mobilized and educated by parties and candidates seeking their support and promising to represent their interests in return. However, African-American voters in the early twentieth century found themselves in the peculiar situation that nobody was really interested in their votes. Even after the so-called Great Migration of World War I, about 85 percent of the black population lived in the South, where they faced disfranchisement and the monopoly of the white supremacist Democrats. The small black electorate of the North was taken for granted by the Republican Party. Prior to the election of 1924, NAACP Executive Secretary James Weldon Johnson aptly spoke of a "gentlemen's agreement" among the two parties: "The agreement provides that the Republican Party will hold the Negro and do as little for him as possible and that the Democrats will have none of it at all." Johnson had few illusions about the political clout of the twelve million blacks in the United States. They were "the least influential and least effective political unit in the whole country . . . a political nonentity."[40]

If the parties refused to do their job, the NAACP had to step in and educate African Americans about candidates, issues, and the best interest of their people. By an "intelligent" use of the ballot, black voters could put themselves on the political map and force parties and candidates to face their growing strength. Political "intelligence" first and foremost meant voting as independents. Not tradition, habit, nor petty gains should govern black voting but rather an enlightened nonpartisan approach to politics. "Men and measures" had to be considered strictly in relation to

For a general introduction to the history of (pseudo)scientific racism, see Stephen Jay Gould, *The Mismeasure of Man* (New York, 1981); William H. Tucker, *The Science and Politics of Racial Research* (Urbana, Ill., 1994).

39 W. E. B. Du Bois, "Lessons in Government," *Crisis* 12 (Oct. 1916): 269.

40 James Weldon Johnson, "The Gentlemen's Agreement and the Negro Vote," *Crisis* 28 (Oct. 1924): 260–4. On the distribution of the black population among the sections, see Jessie Carney Smith and Carrell Peterson Horton, eds., *Historical Statistics of Black America*, 2 vols. (New York, 1995), 2:1589–90, 1595–6. According to the 1920 census the potential black electorate nowhere exceeded 4 percent of the total in the northern industrial states. Ibid., 1319–20.

black interests. "Friends" would be rewarded and "enemies" punished at the polls.[41]

As an organization dedicated to the advancement of African Americans, to be taken seriously the NAACP had to adhere to the principle of nonpartisanship. But nonpartisanship also formed the cornerstone of its electoral balance-of-power strategy, which it hoped would revive party competition for black votes. Given that African Americans were a minority in the first place and that only the tiny fraction living in the North could vote freely, the association tried to cultivate the idea that black voters could sway the balance of power in close races and then expect the gratitude of the victorious side. For this theory to work, it was necessary that no party or candidate ever take black support for granted. African Americans, NAACP co-founder William English Walling told the 1926 annual conference, had to follow the lead of the progressive, labor, women's, and prohibition movements, all of which had practiced "organized nonpartisan voting" and gained considerable influence in both parties.[42]

To underscore the claim that black voters held the balance of power, the NAACP did its best to inflate their numbers and to dramatize their alleged key position. For the presidential elections of 1912, for instance, Du Bois estimated that there were 600,000 eligible African-American voters outside the South and predicted that they would decide the outcome in the states of Illinois, Indiana, New York, and Ohio. Only in Illinois did the race even come close. According to Du Bois's generous estimate, the winning contender, Woodrow Wilson, received no more than 100,000 black votes nationwide – a negligible quantity with regard to his total of six million.[43] Yet even the constant blurring of the difference between the potential electorate and actual turnout – for the 1924 elections *The Crisis* tacitly assumed a fantastic black turnout of 90 percent – did not impress parties and politicians who knew quite well that African Americans, except in a few localities, could be safely ignored because their numbers simply were not large enough.[44]

41 See, e.g., W. E. B. Du Bois, "Voting," *Crisis* 1 (Dec. 1910): 11; W. E. B. Du Bois, "Colored Votes," *Crisis* 25 (Jan. 1923): 117–18.

42 See William English Walling, "Salvation by the Ballot," *Crisis* 32 (Sept. 1926): 227–30.

43 See "Political," *Crisis* 4 (Sept. 1912): 233; "Mr. Roosevelt," ibid., 235–6; "The Elections," ibid., 5, 75–6.

44 Prior to the election *The Crisis* had estimated that about 2.25 million blacks could vote freely, "Where We Are," *Crisis* 28 (Oct. 1924): 247–8. Afterward it maintained that two million had cast their ballots, "The Elections," *Crisis* 28 (Dec. 1924): 55–6. For all nonsouthern states the general turnout varied between 40 percent and 70 percent. See U.S. Department of Commerce, Bureau of the Census, ed., *Historical Statistics of the United States: Colonial Times to 1970*, 2 vols. (Washington, D.C., 1975), 2:1071–2.

The balance-of-power theory is not exactly an original idea; it has been employed by many interest groups and minorities throughout American political history. Still, the NAACP's claims appear especially questionable considering the specific conditions on which balance-of-power elections are based.[45] First, the concept requires a homogeneous, disciplined, and well-informed voting bloc that can be easily mobilized. Second, to lend credibility to the claim of volatile nonpartisanship this voting bloc must continuously shift its electoral allegiance in a clear and visible manner. Third, only if the white majority is divided into two camps of roughly the same strength will blacks be in a position to tip the scales. This last assumption was the most problematic because the specter of the "Negro bloc vote" could easily be exploited to unify white voters in the name of white supremacy. Where racial polarization played into electoral campaigns blacks could hardly expect to be allowed to hold the balance of power.

Despite its obvious shortcomings, the balance-of-power theory remained the NAACP's political mantra for decades. This was hardly due to a lack of analytical skills but rather to a lack of viable alternatives. The idea of an all-black party was incompatible with the association's integrationist creed and even less realistic than the balance-of-power concept.[46] In addition, the call for voting as independents met with very limited resonance. To most African-American voters Frederick Douglass's famous words remained an article of faith: "The Republican Party is the deck, all else is the sea." In Herbert Hoover's 1932 landslide defeat by Franklin D. Roosevelt blacks still formed the most loyal Republican voting bloc, following twelve years of "lily-white" Republicans in the White House. Undaunted, the NAACP declared the end of "blind allegiance" to the Republican Party.[47]

Four years later African Americans terminated their loyalty to the GOP in the most massive shift of a single group of voters in American political history. FDR's performance in black districts even exceeded his 61 percent overall share of the popular vote; in Harlem he received

45 In 1948 the NAACP's director of public relations, Henry Lee Moon, published his *Balance of Power: The Negro Vote* (Garden City, N.Y., 1948; reprint, Westport, Conn., 1977). For a critique of Moon, see Chuck Stone, *Black Political Power in America* (Indianapolis, 1968), esp. 42–4. In 1972 Mark R. Levy and Michael S. Kramer, *The Ethnic Factor: How America's Minorities Decide Elections* (New York, 1972), argued that other ethnic minorities should emulate the success of black bloc voting.

46 The idea was rarely discussed. See, e.g., Oswald Garrison Villard, "The Plight of the Negro Voter," *Crisis* 41 (Nov. 1934): 323, 336.

47 Douglass quoted in Sherman, *Republican Party and Black America,* preface; on black voting patterns in 1932, see Nancy J. Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of FDR* (Princeton, N.J., 1983), 29–32; NAACP press release, Nov. 9, 1932, NAACP I C 391.

81 percent. But given Roosevelt's smashing victory, any claim to a balance-of-power role by the black vote would have been preposterous. Moreover, the African-American defection to the Democrats was hardly an exercise in independent nonpartisan voting. As historian Nancy Weiss has convincingly argued, blacks joined the New Deal bandwagon for the same reasons most Americans did: They hoped for an improvement of their economic plight, even though many of the New Deal programs heavily discriminated against blacks.[48]

The NAACP actively supported the shift toward the New Deal coalition, but it warned the Democrats not to consider black voters their property.[49] Only if the African-American vote was seen as a prize coveted by both parties could electoral strength be translated into tangible gains. Although it took the national Democratic Party another thirty years to come down squarely and unequivocally on the side of civil rights, black voters after 1936 became the most loyal Democratic constituency without receiving substantial political compensation. When they could claim a decisive part in the razor-thin victories of Harry Truman in 1948 and John F. Kennedy in 1960, little more than tokenism followed. In retrospect it seems obvious enough that the NAACP's rhetoric of independent nonpartisanship and balance of power had a very tenuous base in the American political realities and consequently yielded few results.[50]

Given the political isolation of African Americans in the first half of this century, there were no readily available alternatives to the NAACP's approach. Still, it is remarkable that the black and white leaders of the association never questioned their elitist ideal of the "intelligent" rational-choice voter that had little meaning for the vast majority of the black population. How could the black proletariat of the big cities, which made up the bulk of the black electorate, be induced to cast their ballot "intelligently"? Not only did the NAACP have a hard time reaching these

48 On the black vote in 1936, see Weiss, *Farewell to the Party of Lincoln*, 205–8; see also her arguments in ibid., 209–35; on the New Deal and black issues in general, see Harvard Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue* (New York, 1978).

49 See NAACP press release, Nov. 6, 1936; also compare the telegrams by NAACP leaders Walter White and Joel Spingarn to FDR, Nov. 4, 1936, all in NAACP I C 392.

50 Since Lyndon Johnson's landslide of 1964, the Democratic presidential candidates have received around 90 percent of the black vote. See Henry Lee Moon, "How We Voted and Why," *Crisis* 72 (Jan. 1965): 26–31; for the 1990s, see Katherine Tate, *From Protest to Politics: The New Black Voters in American Elections* (Cambridge, Mass., 1994), 181–98; on the civil rights policies of the Truman and Kennedy administrations, compare William C. Berman, *The Politics of Civil Rights in the Truman Administration* (Columbus, Ohio, 1970); Carl M. Brauer, *John F. Kennedy and the Second Reconstruction* (New York, 1977); and Mark Stern, *Calculating Visions: Kennedy, Johnson, and Civil Rights* (New Brunswick, N.J., 1992). I have explored these questions more fully in Berg, *Ticket to Freedom*.

people, but due to its adherence to the principle of nonpartisanship, it could rarely offer them clear-cut recommendations. And what should motivate the black masses to vote, if the educated NAACP leaders told them prior to every election that there were but marginal differences between the major parties, that there was only, as Du Bois once put it, the choice between "the Democratic devil and the Republican deep blue sea"?[51] What the NAACP defined as "intelligent voting" perhaps was not so much a problem of educational deficits as one of meaningful political choices and incentives.[52] The efforts in political education by the NAACP, meritorious and important as they were, simply could not provide the mobilizing force of true political competition and alternatives. Black voters were as sensitive to this as all other Americans. As soon as they perceived Roosevelt and the New Deal as a political alternative that promised to improve their economic condition, they responded enthusiastically.

IV

The efforts of the NAACP to reward "friends" and to punish "enemies" at the ballot box were not altogether unsuccessful. In the 1922 congressional elections the association successfully targeted several opponents of a federal antilynching bill that was stalled in Congress. After 1930 it worked for the defeat of senators who had supported the nomination to the Supreme Court of North Carolina Judge John J. Parker, a notorious racist who had publicly approved of black disfranchisement.[53] Moreover, the hope that the constant northward migration of southern blacks would increase their voting strength and political influence was not completely unwarranted. In 1928 the black Republican Oscar DePriest was elected to the U.S. House of Representatives from a district in Chicago, the first African-American member of Congress in almost thirty years.[54] But this process was slow and by no means unambiguous. Southern racists

51 "The Harding Political Plan," *Crisis* 23 (Jan. 1922): 105–6.

52 Many political sociologists have become very critical of simply correlating political participation with individual structural variables, such as education or income, and stress the importance of external mobilization. See Steven J. Rosenstone and John Mark Hansen, *Mobilization, Participation, and Democracy in America* (New York, 1993); Michael J. Avey, *The Demobilization of American Voters: A Comprehensive Theory of Voter Turnout* (New York, 1989).

53 On the fight against the opponents of the antilynching bill, see W. E. B. Du Bois, "Colored Votes," *Crisis* 25 (Jan. 1923): 117–18; on the Anti-Parker campaigns, see Kenneth W. Goings, *The NAACP Comes of Age: The Defeat of Judge John J. Parker* (Bloomington, Ind., 1990). The story behind these campaigns and their actual results is dealt with more exhaustively in Berg, *Ticket to Freedom*.

54 Cf. Weiss, *Farewell to the Party of Lincoln*, 81–4.

even hoped that the black migration would win over many white northerners to the southern viewpoint on race, and not entirely in vain: When black voters helped elect "Big Bill" Thompson, a scandal-ridden foe of prohibition, as mayor of Chicago in 1927, the *New York Evening Post* commented: "Chicago, like Indianapolis and other northern cities, is learning what Negro control means and why the South has kept these voters from the ballot box. May the day never come when Harlem runs New York."[55] Ironically, the paper had once belonged to Oswald Garrison Villard, grandson of the famed abolitionist William Lloyd Garrison and co-founder of the NAACP.

Except for a few isolated incidents, no systematic attempts to disfranchise African Americans were undertaken outside the South, but black support for corrupt party machines frequently aroused the dismay of northern whites who considered themselves friends of the black cause. The NAACP refused to hold African Americans to a higher standard of probity than whites, but the sale of votes by corrupt black leaders remained a source of embarrassment and frustration. The Reconstruction myths of chaos and "black supremacy" were still potent ideological forces to which the NAACP felt compelled to respond. It was not true, Pillsbury had proclaimed at the founding of the association, "that Negro suffrage means Negro control or domination, in any state of the Union. There is not a state in which impartial suffrage, honestly administered, would endanger white supremacy for a day."[56]

The simplistic dichotomy of white versus black supremacy would continue to shape the discourse on African-American voting rights for many more years, much to the chagrin of the NAACP and white liberals alike, who time and again were forced to profess that they did not advocate "black supremacy" and "social equality," the southern code for sexual relations between the races.[57] The NAACP courageously defended the right of all Americans to enter into private relations and marriage with whomever they wished but maintained that "intermarriage" was an issue of little concern to the black community that was exploited only by racist demagogues. Most important, the question of voluntary

55 See the quote from the *New York Evening Post* and the protest letter by NAACP Executive Secretary James Weldon Johnson in the NAACP press release of Apr. 15, 1927, NAACP I C 390.

56 Pillsbury, "Negro Disfranchisement," 181.

57 See, e.g., Key's complaint about the misleading concepts of white and black supremacy, *Southern Politics in State and Nation*, 646. On the significance of "social equality" and its sexual connotations for the defense of segregation, see I. A. Newby, *Jim Crow's Defense: Anti-Negro Thought in America, 1900–1930* (Baton Rouge, La., 1965), 113–40.

private association had nothing to do with the free exercise of the right to vote.[58]

Black voters, the NAACP was trying to convey to the general public, were not out to dominate their fellow citizens but were merely seeking their constitutional rights and pursuing their legitimate material interests. The very concept of racial bloc voting was forced on them by the evil of racism. As long as race was a powerful topic for demagogues, blacks had no choice but to unite and vote against their enemies. Without this external pressure and without the overriding significance of racial discrimination for every single African American, the black vote, like that of other groups, would divide along class lines. "They will vote on issues and on candidates as individuals," NAACP leader Roy Wilkins predicted in the late 1940s; "they will vote for the best interest of their class (rather than their race) and of a community as a whole."[59]

Obviously, the NAACP could not go so far as to suggest that blacks had no common interests other than those imposed on them by racial discrimination. Because the vast majority of African Americans belonged to the working class, their voting behavior would be rather uniform in any case, but for different, more acceptable reasons. As long as the American labor movement continued to be a stronghold of exclusion and the white working class remained hostile to black advancement, there appeared to be little hope in calls for class solidarity.[60] But with the onslaught of the Great Depression the social and economic dimension of the race issue became much more prominent in the NAACP's discourse. "We are becoming convinced that it is because we are poor and voiceless in industry," the 1932 NAACP annual conference declared, "that we are able to accomplish so little with what political power we have, and with what agitation and appeal we set in motion."[61] The right to vote was defined primarily as an instrument to bring about economic reform. Some leftist members even tried to get the NAACP to shift its focus away from opposing racial discrimination in a narrow sense and "to attempt to

58 See "Intermarriage," *Crisis* 5 (Mar. 1913): 180–1. The so-called miscegenation laws that prohibited interracial marriage were the last segregation laws to be struck down by the Supreme Court. See *Loving v. Virginia*, 388 U.S. 1 (1967); Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of Race in Twentieth-Century America," *Journal of American History* 83 (1996): 44–69.

59 See Wilkins to George Johnson, Feb. 3, 1949, NAACP II A 452.

60 See, e.g., W. E. B. Du Bois, "The Class Struggle," *Crisis* 22 (Aug. 1921): 151–2.

61 Resolutions of the 23rd Annual Conference of the NAACP, May 17–22, 1932, Washington, D.C., copy in Arthur B. Spingarn papers, box 26.

get Negroes to view their special grievances as a natural part of the larger issues of American labor as a whole."[62]

Although the NAACP did not become subsumed into the labor movement and remained a civil rights organization, the emerging New Deal liberalism with its emphasis on class made it easier to conceptualize black interests as part and parcel of a larger cause. In the field of voting rights this tendency resulted in the formation in 1941 of the interracial National Committee to Abolish the Poll Tax (NCAPT), which was supported by both labor unions and civil rights groups, including the NAACP and the American Civil Liberties Union.[63] Like the literacy test, payment of the poll tax was an additional burden on registrants in the southern states, albeit one that kept at least as many poor whites from voting as blacks. According to one estimate by the NCAPT the ratio was three whites for every two blacks. Critics viewed the tax as the most important reason for low voter turnout and the predominance of ultra-conservatives in the South.[64] Abolishing the poll tax, however, was a long shot. Although the tax enjoyed little support outside the South, the Supreme Court accepted it as a qualification for voting as long as it was fairly administered.[65] Congressional bills against it were routinely filibustered to death by southern senators. As with the literacy test, the poll tax would be overcome only during the civil rights revolution of the 1960s.[66]

Because the poll tax also disfranchised whites, it provided an excellent case for both interracial class interests and for fighting the violation of the American democratic creed by the southern oligarchy. Unlike their rather timid opposition to educational tests, NAACP leaders attacked the poll tax head-on. Many Americans were poor, and their right to participate in their government could not be predicated on their ability to pay.[67]

62 See the report by a young sociologist from Howard University, Abram Harris, "Future Plan and Program of the NAACP," Sept. 1934, NAACP I A 29. On the programmatic debate within the NAACP during the 1930s, see also B. Joyce Ross, *J. E. Spingarn and the Rise of the NAACP, 1911–1939* (New York, 1972), 217–41; see also Beth Tompkins Bates, "A New Crowd Challenges the Agenda of the Old Guard in the NAACP, 1933–1941," *American Historical Review* 102 (1997): 340–77, whose "old guard" versus "new crowd" approach, however, is a cliché.

63 On the legislative struggle against the poll tax, see Lawson, *Black Ballots*, 55–85. More details on the role and attitude of the NAACP in Berg, *Ticket to Freedom*.

64 Cf. the NCAPT brochure, of 1942 "Poll Tax Fact Sheet," NAACP II A 386; Key, *Southern Politics in State and Nation*, 599–618; Myrdal, *American Dilemma*, 481–3.

65 *Breedlove v. Suttles*, 302 U.S. 277 (1937).

66 The 1964 Twenty-Fourth Amendment to the U.S. Constitution prohibits the poll tax as a requirement for voting in federal elections. Two years later the Supreme Court also struck down the tax in local and state elections in *Harper v. Virginia State Board of Elections*, 383 U.S. 663.

67 See Thurgood Marshall's memorandum, Mar. 5, 1940, for the ACLU, NAACP II A 480.

Abolishing the poll tax would lead to the destruction of the disproportionate power that the southern elite exerted on both state and national levels and facilitate progressive legislation that would benefit poor blacks and whites alike. Moreover, with America entering World War II, the poll tax – and disfranchisement in general – ceased to be just an issue of race and class and became a truly national concern. It undermined the war morale of many Americans and America's credibility as the bulwark of democracy. In 1943 Walter White called the poll tax "part and parcel of a fascist system in no wise different in concept from that of Hitler and Hirohito."[68] Supporters of the tax were accused of playing into the hands of the enemy.

Such rhetoric reflected the spirit of militant protest that many African Americans adopted during World War II, making this war a watershed in the history of the civil rights struggle. That the United States confronted an enemy who advocated a racist ideology not unlike that of white supremacists at home was bound to have significant repercussions on domestic race relations.[69] The NAACP had particular reason not to pass by this opportunity. In World War I, *The Crisis* had called on blacks to "close ranks" with their white compatriots and postpone their own grievances for the duration of the war.[70] Instead of being rewarded for their loyalty, black troops were subjected to discrimination and chicanery in every possible way, and a wave of racist violence followed that war. The next time around, African-American opinion leaders, including the NAACP, made clear from the outset that if the world was to be made safe for democracy again, democracy had to begin at home.[71] More than a year before America became a belligerent, the NAACP annual conference declared that patriotism was not tantamount to patience: "We will do our part and more to defend our country and its principles. We are equally determined to make our country and its practices worth defend-

68 Cf. White's speech, Mar. 9, 1943, before the NCAPT, NAACP II A 386; also the NAACP press releases, Oct. 13, Nov. 12 and 27, 1942, NAACP II A 479.

69 Already during the 1930s African Americans had watched with dismay that the American public seemed to care more about the persecution of Jews in Germany than about racial discrimination at home. See, e.g., Roy Wilkins, "Hypocrisy," *Crisis* 45 (Sept. 1938): 301; Johnpeter H. Grill and Robert L. Jenkins, "The Nazis and the American South in the 1930s: A Mirror Image?" *Journal of Southern History* 58 (1992): 690–1.

70 See W. E. B. Du Bois, "Close Ranks," *Crisis* 16 (July 1918): 111. The long-standing controversy on Du Bois's article and the attitude of the NAACP during World War I has recently been renewed. Cf. William Jordan, "'The Damnable Dilemma': African-American Accommodation and Protest During World War I," *Journal of American History* 81 (1995): 1562–83; Mark Ellis, "W. E. B. Du Bois and the Formation of Black Opinion in World War I: A Commentary on the 'Damnable Dilemma,'" ibid., 1584–90.

71 See, e.g., "Defending Democracy," *Crisis* 46 (Oct. 1939): 305.

ing." A few weeks after Pearl Harbor, *The Crisis* proclaimed: "Now is the time not to be silent!"[72]

The economic radicalism of the Depression era and the racial protests during World War II had a profound impact on the American culture of rights, paving the way for the civil rights movement of the late 1950s and early 1960s.[73] The NAACP not only articulated this militant mood in an assertive rhetoric, it also benefited tremendously in membership and income. According to an internal estimate, the association had fewer than 20,000 dues-paying members by the late 1920s, which slowly increased to 50,000 in 1940. In 1946 the NAACP counted no fewer than 400,000 members; its Detroit branch alone claimed 20,000.[74] This newly found organizational strength did not, however, lead to any principal changes in its political ideology or strategy. It continued to demand a free and equal right to vote for all American citizens, called on blacks to exercise this right "intelligently," and repeated its inflated claims that black voters held the balance of power in important elections. The war also did not alter the NAACP's message that black voters would be no different from whites once they were accorded equality of rights and opportunity. All patriotic whites had a vital interest in, and the duty to work for, the end of racial discrimination, which threatened both victory and the survival of democracy at home.[75]

The belief in the liberating potential of the ballot would be put to hard tests after the end of the war. Although the Supreme Court in 1944 struck down the "white primary," which excluded blacks from the Democratic primaries in the South on the theory that parties were private associations not bound by the Fourteenth and Fifteenth Amendments, the South continued its defiance of democratic principles. Black veterans who

72 Resolutions of the NAACP Annual Conference, June 22, 1940, Philadelphia, in Arthur B. Spingarn papers, box 26; "Now is the Time Not to Be Silent," *Crisis* 48 (Jan. 1942), 7.

73 Interestingly enough, these continuities were rediscovered only after the civil rights movement had slowed down. See Richard M. Dalfiume, "The 'Forgotten Years' of the Negro Revolution," *Journal of American History* 55 (1968): 90–106; Harvard Sitkoff, "Racial Militancy and Interracial Violence in the Second World War," *Journal of American History* 58 (1971): 661–81; Robert Korstad and Nelson Lichtenstein, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (1988): 786–811; Patricia Sullivan, *Days of Hope: Race and Democracy in the New Deal Era* (Chapel Hill, N.C., 1996).

74 Cf. the memorandum on the development of the NAACP membership between 1912 and 1950 by R. Williams, June 15, 1954, NAACP II A 202; Detroit NAACP branch, press release, Apr. 3, 1947, NAACP II A 201.

75 See the "Declaration of Negro Voters" (1940), reprinted in Walter White, *A Man Called White: The Autobiography of Walter White* (Athens, Ohio, 1995), 262–4; Walter White, "How Will the Negro Vote?" *Liberty* (Oct. 21, 1944), copy in NAACP II A 78; text of a radio speech by Walter White, Apr. 8, 1942, NAACP II A 375.

tried to register there were greeted with brutal violence.[76] Despite this resistance, the number of black registered voters in the South continued to rise, from approximately 150,000 in 1940 to about 1.2 million in 1952. To a considerable extent, this upsurge was due to the tenacious fieldwork of the local NAACP branches.[77] After the Supreme Court, in its famous *Brown v. The Board of Education* ruling of 1954, declared racial segregation in education unconstitutional, the NAACP's leaders and lawyers could not only take due credit for having brought about this major blow against Jim Crow, they also became convinced that the tide was finally turning. "We have won our propaganda battle," Executive Secretary Roy Wilkins wrote to his colleague Whitney Young of the Urban League. "It is no longer a tenable or fashionable policy to discriminate racially."[78]

Ironically, as the prospects for securing civil rights and equal opportunity for African Americans through the political process seemed to be vastly improved, civil rights activists began challenging racial discrimination through nonviolent direct action. Although it did not object in principle to the disruptive tactics of nonviolent protest and civil disobedience, the NAACP clearly preferred the kind of orderly change associated with the electoral process. Basically, it stuck to the bargain it had offered since its founding: If the white majority agreed to laws and measures that would effectively protect black voting rights, it could expect to be rewarded with domestic tranquillity. The vote would enable African Americans to take care of their interests locally and remove the contentious civil rights question from national politics. As NAACP leader Wilkins put it in a letter to the *New York Times*: "Following a period of transition and training, many aspects of civil rights now considered ponderously in Washington will plague the Hill less and less as the state capitols and the county courthouses take over. The Hill can then concern itself with the myriad 'normal' problems of federal–state relationships, budget, defense, foreign policy, and space."[79]

76 *Smith v. Allwright*, 321 U.S. 649 (1944); on the history of the struggle against the white primary, see Darlene C. Hine, *Black Victory: The Rise and Fall of the White Primary in Texas* (New York, 1979). I have deliberately omitted this topic here because it leads into too many legal technicalities. Instead, see Berg, *Ticket to Freedom*, which analyzes the legal strategies of the NAACP with regard to voting rights; on the violence against black registrants see Lawson, *Black Ballots*, 101–4.

77 On the registration work of the NAACP, see Berg, *Ticket to Freedom*. The numbers on registration vary but follow a uniform trend. See, e.g., Lawson, *Black Ballots*, 134; Smith and Horton, *Historical Statistics of Black America,* 2:1303.

78 *Brown v. The Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954); letter by Wilkins, Dec. 5, 1958, NAACP II A 212.

79 Wilkins's letter to Anthony Lewis of the *New York Times*, Feb. 4, 1960, NAACP III A 267.

In reality, history took quite a different path. The end of segregation and disfranchisement was not achieved primarily at the ballot box but came on the heels of a nonviolent social movement that pressured the federal government into taking truly drastic steps. The Voting Rights Act of 1965, undoubtedly the most revolutionary national legislation in terms of federal-state relations since Reconstruction, did away with the traditional forms of racial disfranchisement and secured the individual right of African Americans and all other minorities to register and vote.[80]

V

In its "Declaration of Principles and Purposes" of 1911 the NAACP called the recognition and protection of black voting rights "the first step" toward the advancement of African Americans.[81] Throughout the roughly sixty years of struggle it had taken to attain this goal, the NAACP never lost its faith in the political process as the appropriate means to secure equal rights and opportunity for black people. Ironically, when the vote as a token of "first-class citizenship" had been secured, a growing number of blacks had already begun to question both the symbolic and instrumental value of suffrage. Heeding the battle cry of "Black Power," young radicals attacked the integrationist vision of the NAACP and called for separate black institutions. Far from accepting the frequent charge that its goals and tactics had become "irrelevant," the association remained steadfast in its ideological commitment to a color-blind democracy. Responding to the National Black Political Convention held in Gary, Indiana, in early 1972, which had urged retreat from "decadent white politics" and the creation of an "independent black political agenda," Wilkins insisted that the historical mission of the NAACP had always been and would continue to be participation and inclusion: "The NAACP . . . was organized to win for nonwhite citizens complete equality within the American system, using the American documents of citizenship and the tools available within the American system to achieve equality and to make reality of the doctrine of 'all men' enunciated in the Declaration of Independence."[82]

80 For an account of the civil rights movement that focuses on national politics, see Robert Weisbrot, *Freedom Bound: A History of America's Civil Rights Movement* (New York, 1990); the vast literature on the effects of the Voting Rights Act cannot be cited here. For an introduction, see Davidson, "Voting Rights Act."

81 See note 1 to this chapter.

82 Roy Wilkins to Charles C. Diggs Jr., May 3, 1972, in Roy Wilkins papers, Library of Congress, Manuscript Division, Washington, D.C., box 9. For a more comprehensive account of the

Wilkins's statement indeed sums up the essence of the NAACP's discursive strategy during the age of segregation and disfranchisement. To some degree this strategy was disingenuous in understating racial cleavages and in overstating the potential of the vote. Quite obviously, it exaggerated the power of persuasion and the self-executing force of American democratic ideals. The NAACP did not question the American political and social system at large, and it took pains to reassure white Americans that black voters would not pursue any collective goals that were incompatible with or adversarial to their own best interests.

From the vantage point of the post–civil rights era it is easy to point out that the ballot has hardly solved the problems of racial discrimination and vast social disparity for African Americans.[83] It is equally easy to criticize the NAACP for its limited vision of freedom as "social acceptance and upward mobility" for the black elite within the confines of corporate capitalism.[84] Whether socialism or black nationalism ever presented viable historical alternatives to the reformist and integrationist thrust of the mainstream civil rights struggle as embodied by the NAACP is open to debate. As I have tried to show, the NAACP faced the challenge of how blacks could assert their individual rights and their collective interests within a culture of rights that had excluded them both practically and discursively. In order to gain legitimacy for its demands, it chose to employ the language and the ideological arsenal of the American democratic creed that spoke to the white majority. In doing so, the leaders and followers of the NAACP not only revealed their own deep roots within the American culture of rights but also made an important contribution to transforming that culture.

NAACP's reaction to the Black Power movement, see Manfred Berg, "Black Power: The National Association for the Advancement of Colored People and the Resurgence of Black Nationalism During the 1960s," in Krakau, ed., *American Nation*, 235–62.

83 For disillusioned and outrightly pessimistic assessments of the civil rights struggle, see Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York, 1987); Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (New York, 1992).

84 See Manning Marable, *Race, Reform, and Rebellion: The Second Reconstruction in Black America, 1945–1990* (Jackson, Miss., 1991), 86–7, passim. Among the overall accounts of the civil rights struggle, Marable is consistently the most critical toward the role of the NAACP.

3

Securing Rights by Action, Securing Rights by Default

American Jews in Historical Perspective

HASIA R. DINER

The history of Jews as individuals and Judaism as a religious body in America cannot be disentangled from the history of rights. In every era, from the arrival of the first Jews in New Amsterdam in 1654 through the end of the twentieth century, Jewish life in the United States has been deeply influenced by the particular set of rights that Jews enjoyed or to which they considered themselves entitled.

Much of what came to be distinctively American in the lives of American Jews historically flowed from the existence of those rights, which far outstripped those of other Jews in other places. Although it is hardly notable that Jews in the United States expected and received more rights than Jews in Russia or Poland, for example, their benefits as American citizens outstripped those of Jews in most other Western liberal democracies. If nothing else, Jews in the United States did not have memories of a conflicted and tense process of emancipation, such as the Jews of England, France, and especially Germany endured. With some minor exceptions, no state legislature and certainly not the U.S. Congress ever debated the merits or demerits of Jews or their worthiness for inclusion in the polity. English, French, and German Jews did have such memories.

Even the basic nature of American Jewish communal patterns derived from those rights. Because of the nonestablishment clause of the U.S. Constitution's First Amendment, possibly derived from the American reality of religious heterogeneity, the state, broadly defined, did not interfere with the internal affairs of the Jewish community. Individual Jews had a broad range of options in creating the kinds of Jewish institutions they wanted. Although elements within the world of Jewish traditionalism decried the anarchy and chaos of American Jewish life, and bemoaned the lack of

respect for the traditional Jewish authority structure, American Jewish history witnessed the formation of an elaborate communal institutional landscape that was highly responsive to the wishes of individuals and particularistic groups. The state had no interest in what went on within the Jewish world. It did not collect taxes for the community, nor did it disburse funds, decide who was a Jew or who was a rabbi, or decide which institutions should receive the benefits of state support. Individual Jews in America had the right to make those determinations.[1]

Jewish economic mobility and access to education can also be attributed to the rights that they both "found" in America and helped to shape. The history of American higher education and employment, particularly on the professional level, included discrimination and exclusion, but those practices by and large did not impede Jews. For example, the development of state schools of higher education after the 1860s and the absence of discrimination in that sector made it possible for Jews to circumvent the restrictive practices of private institutions.[2]

By a fortuitous coincidence, New York City, home to America's largest Jewish community at the end of the nineteenth century, also boasted the most elaborate public and free higher educational system. By 1917 Jews, primarily young men but many women as well, made up 73 percent of the students in that system.[3]

Similarly, the movement of Jews, primarily the children of immigrants, into white-collar and professional positions coincided with the expansion of public-sector employment. On the municipal, state, and federal levels Jews seized job opportunities that they often found unavailable in private concerns.[4] The fact that the state did not discriminate while individual Christians did had tremendous implications for the Jewish political stance in twentieth-century America. First, Jews had an economic interest in the constant expansion of state services. Historians and political scientists have argued over the sources of Jewish liberalism. The fact that government in

1 I have written about this elsewhere. See Hasia R. Diner, "Jewish Self-Governance, American Style," *American Jewish History* 81, nos. 3–4 (spring 1994): 277–95; and Hasia R. Diner, "The Americanization of Judaism: The Impact of National Culture on the Modernization of Religion," in M. L. Bradbury and James B. Gilbert, eds., *Transforming Faith: The Sacred and Secular in Modern American History* (New York, 1989), 11–27.

2 Harold S. Wechsler, *The Qualified Student: A History of Selective College Admission in America* (New York, 1977).

3 Figure quoted in Henry Feingold, *A Time for Searching: Entering the Mainstream, 1920–1945* (Baltimore, 1992), 143.

4 Nathan Reich, "The Role of the Jews in the American Economy," *YIVO Annual of the Jewish Social Sciences* 5 (1950): 198–220; Nathan Goldberg, "Economic Trends Among American Jews," *Jewish Affairs* 1 (Oct. 1, 1946): 11–16.

America had been the patron of the Jews ought to figure into the analysis. Second, the reality that the state – the embodiment of the American system – facilitated Jewish success oriented Jews toward an understanding that their rights emanated from America's essential core, its governmental system, whereas those forces that held them back, that denied them rights, represented the perversion of America's fundamental principles.[5] From a comparative perspective, this Jewish alliance with and benefit from the state had much to do with the veneration of America expressed by American Jews. Again, American Jews saw the state as the source of their rights and as their benefactor rather than as a barrier to their advancement, unlike most countries, liberal democracies included.

Whether as immigrants or as their descendants, Jews carved out for themselves an economic niche in the United States that fueled their passionate embrace of America. Although the history of that economic engagement is more complicated than a simple "rags to riches" story, it does provide dramatic evidence of the beneficence of American life. Tales of peddlers who in their own lifetimes became shopkeepers, of garment workers whose daughters became schoolteachers and whose sons became doctors, peppered the more prosaic narratives of hard work and struggle. The relative openness of the American system, its tremendous expansion in the years of Jewish migration, its veneration of commerce, its rigid racial structure benefiting those considered white, and the opening up of new fields with no entrenched elite to keep Jews out – all proclaimed to the Jews in America and to those still in Europe that "America is different."[6]

It is noteworthy that in most places where Jews lived, for centuries before their migration to America, they had found ways to identify with and understand themselves in relation to their nations, principalities, states, and the like. They prayed for the rulers on whom they depended and hoped for the welfare of their host societies. Expulsions and differential taxation taught the Jews that they lived in those places only on the sufferance of local rulers. Even after their legal status had been regularized by emancipation, they understood their history as fraught with the memories of past intolerance.

Not so in America. American Jews debated whether America should even be considered part of the *galut*, the diaspora. Their very migration

5 For one view of Jews' commitment to the idea of the state, see Benjamin Ginsberg, *The Fatal Embrace: Jews and the State* (Chicago, 1993).

6 This phrase rings through the Jewish rhetorical tradition about America. See, e.g., Stuart E. Rosenberg, *America Is Different: The Search for Jewish Identity* (New York, 1964).

to America took its impetus, in large measure, from the knowledge of American particularism when it came to Jewish rights. Although much of that migration, which began in large numbers in the 1820s and continued for a century, was driven by a negative force, the urgency to leave Bavaria, Hungary, Lithuania, Posen, Romania, and a score of other European settings, it also focused positively on the rights that they would enjoy in America. They chose America for both its economic opportunities and its political freedoms. Importantly, political rights and economic opportunities were intertwined. Economic opportunities for Jews thrived within the context of political rights. The patterns of Jewish migration testify to the lure of America and its benefits for Jews. From the middle of the nineteenth century onward, German, Lithuanian, Polish, and Russian Jews who migrated to England, for example, viewed the British Isles, despite their liberalism and economic opportunities, as a way station for the more coveted goal, the move to America. After the 1920s, when U.S. immigration restrictions went into effect, Jews still regarded migration to Latin America and even Canada, as either temporary stopovers or consolation prizes.[7]

As immigrants from European countries or as native-born Americans who recognized the absence of rights in those countries, American Jews almost universally understood their rights in America, not just in an abstract sense but also in relation to historical experience. Until the end of World War II most American Jews still had family members in Europe and comparison between countries could be understood in very concrete terms. The efforts by American Jews to aid their families in Europe and on a communal level to assist Jews in distress abroad confirmed the salience of their rights in America.

In voluminous writings on this subject, in behavior as ordinary women and men operating in the "neutral" realm of the public, and in the formal activities of their organizations whose representatives claimed to speak for Judaism – a particular religion with a complicated and tortured history vis-à-vis the dominant religious tradition in the United States, Christianity – American Jews vacillated between two interpretive poles.[8]

More often than not, Jews recognized that America differed dramatically from Europe and that by any measure its Jews and its Judaism at any moment in time basked in the benevolent light of freedom and equality,

7 Lloyd P. Gartner, *The Jewish Immigrant in England, 1870–1914* (London, 1973); Robert M. Levine, *Tropical Diaspora: The Jewish Experience in Cuba* (Gainesville, Fla., 1993).

8 For a fuller statement of this, see Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (New York, 1992).

the freedom to express Jewishness as Jews chose and to enjoy equal access to citizenship with other (white) Americans, the vast majority of whom were Christian. Anti-Semitism and the related phenomenon of anti-Judaism hovered on the periphery of American life. It spawned no political parties. Indeed, the one anti-immigrant party that issued a powerful challenge to the American political status quo, the Know-Nothings, ignored Jews and Jewish immigration from Central Europe. Likewise, anti-Judaism as a forceful element in the political culture existed only in the colonial era, when some colonies forbade the practice of the Jewish religion. But early on such restrictions faded and played no role in the establishment of Jewish institutions in America.

Within a few decades of the establishment of the United States, Jews could claim that nowhere in America did their religion affect the ways in which they experienced the rights of American citizenship. After the 1820s and the passage of the "Jew Bill" in Maryland, no state that had a Jewish population disfranchised Jews in public life. North Carolina and New Hampshire were the last states to remove anti-Jewish laws from their books, but because virtually no Jews lived there they merited little attention in the Jewish world of public opinion.[9] In the postconstitutional era, no new laws went into effect that disadvantaged the Jewish people as individuals. Finally, in the process by which Jews gained full individual rights (or by which disabilities were removed), they did not have to prove themselves worthy. Rights in America extended to Jews because of their humanness and whiteness, not because they had earned them. In America rights rather than privileges informed Jewish civil status.[10]

Jews in America could and did take comfort in the reality that in the federal constitution and most of the state constitutions no one drew attention to the Jews or their situation, past or present. Even in the colonies, most of which maintained established churches, Jews suffered relatively little and shared in whatever rights others of their class (and obviously race and sex) enjoyed. For one, they were for the first time in their history not the only group of religious outsiders. Depending on where they resided, they shared this marginal status with Catholics, Lutherans, Mennonites, Presbyterians, and Quakers.[11] Where religious restraints had made

9 Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill, N.C., 1984); E. Milton Altfeld, *The Jew's Stand for Religious and Civil Liberties in Maryland* (Baltimore, 1924).

10 John Higham, "Anti-Semitism in the Gilded Age: A Reinterpretation," *Mississippi Valley Historical Review* 43 (Mar. 1957): 559–78; John Higham, "Social Discrimination Against the Jews in America, 1830–1930," *Publications of the American Jewish Historical Society* 47 (Sept. 1957): 1–33.

11 Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* (New York, 1986).

their way into colonial policies, Jews had not been the sole or most hated targets.[12] As a point of historic irony, the real victim of religious discrimination in the colonies was the Jews' long-time nemesis, the Roman Catholic Church. Militantly Protestant or skeptically deist, early Americans considered Catholicism to be the great enemy of American freedom, whereas the Jews served as relatively benign reminders of the glories of the Old Testament tradition. In addition, Jews had much that the colonial governments wanted. Mainly traders, some of whom maintained good business connections to Amsterdam, London, and elsewhere in Europe, and in the Caribbean, Jews were welcomed for the economic bounty it was thought they could bestow on mercantile outposts on the far side of the Atlantic.[13]

This was obviously a far cry from their situation in Europe, where Jews had to undergo the process of emancipation. Legislators, heads of state, judges, lawyers, and government representatives at all levels argued the pros and cons of granting citizenship to Jews. In various European jurisdictions, Prussia for example, only those Jews who spoke German, who had enough capital, and who could prove that they had successfully undergone the process of *Bildung* (humanistic education) achieved emancipation. The vast majority of Jewish men in Prussia and in other states had to wait decades until issues of "character" and rights were decoupled.[14] The U.S. Constitution's silence on religion and both the disestablishment and free exercise clauses of the First Amendment made Jewish rights central to the American political creed.

This reality drew praise and thanks from Jews. It should hardly surprise us that they articulated a view of America as a benign place where individuals could expect the protection of their beliefs and a fair chance in public life. They waxed eloquent about the rights they enjoyed, even when they challenged the political culture on its flaws, such as the denial of rights to others, and when they recognized that the wall of separation between church and state had been partially and occasionally breached.

Indeed, running throughout their rhetoric and manifested in much of their behavior we can discern a countercurrent. America, for all its dif-

12 The classic historic texts on this are Ray Allen Billington, *The Protestant Crusade, 1800–1860: A Study in the Origins of Nativism* (New York, 1952); and John Higham, *Strangers in the Land: Patterns of American Nativism* (New Brunswick, N.J., 1955).

13 Eli Faber, *A Time for Planting: The First Migration, 1654–1820*, The Jewish People in America, vol. 1 (Baltimore, 1992); Sheldon J. Godfrey and Judith C. Godfrey, *Search Out the Land: The Jews and the Growth of Equality in British Colonial America, 1740–1867* (Montreal, 1995).

14 Jacob Katz, *Out of the Ghetto: The Social Background of Jewish Emancipation, 1770–1870* (Cambridge, 1973); Jacob Katz, *Jewish Emancipation and Self-Emancipation* (Philadelphia, 1986).

ferences, still functioned as a Christian nation. Part of the Jewish anxiety over what equality of rights in America really meant grew out of a recognition that anti-Semitism existed. It regularly bubbled over into ugly rhetoric and at times manifested itself in acts of public violence or institutional discrimination.[15] How far, Jews asked in their publications, sermons, and in the memoranda and reports of their organizations, did the anti-Semitism at the margins stand from the center of policy making? How secure were rights in a society where some elements of the polity considered Jews to be less than fully American and in which Christianity was hailed as the essential faith of the nation?

In some measure this concern with how secure Jews ought rightly to feel in the United States stemmed from a basic distrust of the legacy of Christian doctrine, with its emphasis on the culpability of Jews in the crucifixion, and the strong evangelical, proselytizing zeal of American Protestantism in the nineteenth century.[16] American Jews of today can plainly see that throughout much of the nearly 350 years of Jewish life in America, Christianity enjoyed the status of the dominant faith, and its adherents could claim a greater share of rights by virtue of belonging to the majority tradition.

Throughout this lengthy span of time Jews had to contend with the reality that as individuals they enjoyed, from the second decade of the nineteenth century onward, full access to most – if not all – forms of public participation, yet Judaism did not. Examples abound: Mandatory Sunday closings (blue laws), school prayer, Bible readings, public invocation of Jesus by government officials, and presentations of Christian symbols in public spaces – all constituted the enshrining of Christianity as inherently and seamlessly "American."[17]

Jewish reaction to the Christianity of American society can be divided into two unequal eras. From the earliest years of Jewish participation in the debate over the character of American public life until roughly World War II, Jews shied away from advocating a religiously neutral civic culture. After World War II, emboldened by their increasingly middle-class, professional profile, by the harrowing experience of the war, and by the growing secularization of American society, they joined, and indeed led, an assault on the vestiges of Christian privilege in the trappings of public culture. They sought to strip American public – that is, state-endorsed and supported – culture of anything that celebrated religion, no matter whose.

15 Leonard Dinnerstein, *Anti-Semitism in America* (New York, 1994).
16 David Max Eichhorn, *Evangelizing the American Jew* (Middle Village, N.Y., 1978).
17 John F. Wilson, *Public Religion in American Culture* (Philadelphia, 1979).

In the earlier period, from the 1820s through the 1940s, Jews recognized their numerical minority and the intensity of evangelical Protestantism in society, and adopted a stance that asked merely for the same benefits and privileges as enjoyed by Christians. They wanted to be equal but accepted the reality that equality would have to be embedded in a religiously charged political culture.

Two examples from the nineteenth century should put this in bolder relief. In 1844 Congress, who governed the District of Columbia, passed a law allowing trustees of Christian congregations there to assume the conveyance of real estate. The law clearly specified the religion of those congregations: Christian. Yet Jews were living in the federal district and formed a congregation there in 1855. To do that they had to enlist a politically well-connected Jew, Jonas Levy, who happened to live in Washington, to intercede on their behalf and to negotiate the law that was limited to Christians. So, whereas the Washington Hebrew Congregation may have the distinction of being the only congressionally chartered synagogue in America, it achieved this distinction because Congress assumed that only one religious institution of this kind would ever develop along the shores of the Potomac.

Because Jews were so few in number in the entire United States it may be assumed that Congress's specific reference to "Christian" congregations involved not so much a desire to snub Jews as a worldview that non-Christians just did not exist or did not count. More notable than congressional motivation, however, was the way in which the handful of members of the Washington Hebrew Congregation tackled their seeming lack of rights. From the point of view of the Jews – the two dozen men and their families who made up the membership of this congregation – the clause limiting this privilege to "Christian" congregations posed a problem that had to be negotiated. It is no wonder that by and large when it came to Jews publicly asserting their rights in America, they tended to opt for quiet strategies that drew little attention to themselves and their "otherness." Rather than enunciate a principle of the rights to which they were entitled, they chose instead to negotiate, through a powerful intermediary, on this particular case, as in others.[18]

The second example, from a decade later during the U.S. Civil War, shows the Christian evangelical character of American public life in even bolder relief and demonstrates again the disjunction between the rights of Jews and those of the dominant religious tradition. One of the few

18 Abram Simon, *A History of the Washington Hebrew Congregation: In Commemoration of its Jubilee* (Washington, D.C., 1905).

areas in American official life where the clergy has received formal, governmental status involves the commissioning of military chaplains. During the Civil War the members of Union regiments voted for their own chaplains. It happened that Jews constituted a majority of the Sixty-fifth Regiment of the Fifth Pennsylvania Cavalry, under the command of Colonel Max Friedman. The men elected Sergeant Michael Allen, a Philadelphia Hebrew teacher, as their chaplain and spiritual guide. The Young Men's Christian Association (YMCA) had been given the responsibility of overseeing the chaplaincy program, and when a YMCA field worker discovered this, controversy flared. The field worker declared that Allen did not fit the Christian notion of a "chaplain," and demanded that he not only be removed from his chaplaincy but that he be dishonorably discharged. Allen resigned. The regiment, however, defiantly voted in another Jew, Arnold Fischel, an ordained rabbi from New York's Shearith Israel congregation. Fischel applied directly to the War Department for his commission. The War Department turned him down.[19]

The Board of Delegates of American Israelites, founded in 1858 as the first proto-defense organization for Jews in America, rushed to Fischel's aid in the name of religious freedom. According to Rabbi Isidor Kalisch, who drafted the letter of protest to Congress, Jewish soldiers "have the same rights, according to the Constitution of the U.S. which they endeavor to preserve and defend with all their might." He implored Congress to "make provisions that Jewish Divines shall be allowed to serve as chaplains in the army and hospitals of the U.S." It is important to note that Kalisch and others writing to Congress on Fischel's behalf claimed the rights of Jews as a religious community. If the government was going to appoint and support chaplains, then chaplains representing Judaism should have the same rights as those representing any of the Christian denominations. They did not raise questions about this particular admixture of church and state but rather staked out a position that basically said that if some could elect their own, they should be able to, too.[20]

In the long period before World War II Jews maintained a public stance that asked just for the right of Judaism to enjoy the same benefits as any other religious denomination. They seemed to accept the notion that the state did have the right to behave in a religiously specific manner. They did so in a voice that from the vantage point of the late twentieth century sounds celebratory, casual, and a bit obsequious, a minority group

19 Bertram W. Korn, *American Jewry and the Civil War* (Philadelphia, 1951).

20 Hasia R. Diner, *A Time for Gathering: The Second Migration, 1820–1880*, The Jewish People in America, vol. 2 (Baltimore, 1992).

expressing pleasure at the occasional crumb offered by a government dominated by a majority. This should not, however, be taken as the underlying Jewish view or to mean that Jews accepted with equanimity the clear intermingling of American public life and Christian, particularly Protestant, culture. In their own institutions and publications they expressed tremendous alarm over the Christian character of America. Almost a century and a half ago, in 1869, the evangelical publication *The Christian Statesman* called for a national convention that would legally declare America a Christian nation, informed by the notion that "Christian law" would be binding on all. Jewish leaders reacted nervously, understanding that this constituted a real threat. Isaac Leeser (1806–68), a rabbi, journalist, and organizer of many communal agencies, saw this as a form of *rishus*, a Hebrew word for evil, used to denote anti-Semitism.[21] In *The Occident and American Jewish Advocate*, one of the most widely circulated Jewish publications in America, Leeser lambasted the proposed convention as an "intended inquisition," a loaded term for Jews. Leeser's alarm over the proposal dovetailed with his fear of Christian missionaries, Sunday closing laws, mandatory prayers in public schools, and other state-supported manifestations of Christianity.[22]

The tone of the rhetoric of American Jews, written for private, Jewish-only consumption, was anything but sanguine. In 1892 the U.S. Supreme Court declared in its ruling on *Church of the Holy Trinity v. United States* that "this is a Christian nation." Jews, who experienced relatively untrammeled freedom in their political and economic lives, found themselves surrounded by more than the trappings of Christianity. Their children who more likely than not attended public schools read from the King James version of the Bible, sang Christian hymns, and mumbled prayers invoking Jesus. By law, they had to close their businesses on Sunday, and if they labored as employees, they had to be at work on Saturday.

Yet Jewish migration to America continued at the turn of the twentieth century, and indeed quickened, despite the increasing Christianization of American public life. There was no question that among the range of choices open to them as Jews, no place in the world appeared as attractive as the United States. It was the single most sought-after destination, and although not all European Jews migrated to the United States – not even a majority – the rights and opportunities in America fundamentally transformed Jewish culture in Europe.

21 Quoted in Cohen, *Jews in Christian America*, 68.
22 See Lance Sussman, *Isaac Leeser and the Making of American Judaism* (Detroit, 1995).

The language they used within the community resonated with anger and fear, anger at the reality of Christian hegemony in a land where they believed themselves entitled to all rights and fear that the status quo could actually deteriorate. Isaac Mayer Wise (1819–1900), the founder of Reform Judaism in America, wrote in his *American Israelite* that Sunday closing laws were not just unfair but "unjust, despotic, and damnable."[23]

But Jews did little to organize politically around these issues or to draw attention to their "otherness" or to the disjunction between themselves as Jews and the Christian character of American political life. Until nearly the middle of the twentieth century Jews and their multiple organizations tended to react rather than act. They did not search out test cases nor did they challenge existing practices. Where they needed to, as individuals, they sought exemptions from odious legal practices, such as the Sunday closing laws. They avoided forging any kind of political strategy around the issue of the Christian content of public life. Rather, individually or episodically, they engaged with specific, immediate problems.

They accepted a kind of status quo, a fixed American framework that assumed Christian predominance. They rallied their resources quietly and behind the scenes when some act of outrage or some policy upset the agreed-on order.

By and large their words intended for the consumption of others resounded with conciliatory calm and consistently invoked the "American creed" as a justification for their requests. Jews demanded relatively little, and what political clout they had tended to be used in defense of Jewish rights or the denial thereof abroad rather than in their own name. That clearly would have implied a degree of ingratitude for the rights they had.[24]

Their public quietude should not be taken as evidence of passive acceptance of the status quo. Rather, Jews made a series of political decisions to enhance their rights and prevent jeopardizing the ones they had. How did they behave politically and legally as they continuously faced challenges to their rights?

When Jews decided that they needed to engage in more assertive behavior, they tended to do so in nonpublic, behind-the-doors negotiations. They basically sought to lay low. Communal political engagement with problems on the outside fell into a category defined as "sha-sha,"

23 Quoted in Cohen, *Jews in Christian America*, 72.

24 Gary Dean Best, *To Free a People: Jewish Leaders and the Jewish Problem in Eastern Europe, 1890–1914* (Westport, Conn., 1982); Bertram W. Korn, *The American Reaction to the Mortara Case, 1858–1859* (Cincinnati, 1957).

the Yiddish term for "quietly, quietly." Demanding too much, too loudly, they believed, could bring more bad than good. It could trigger a decline in Jewish rights and could, in an America where anti-Semitism did indeed rear its head, inspire hatred of the Jews where it might previously have been dormant.[25] Critics of this approach both at the time and in retrospect have faulted it for not being a palpable, noisy, and demonstrative American Jewish response to the exigencies of the 1930s and 1940s. Most American Jews, ordinary people and leaders, recognized that Hitler and Nazism were a real danger. They came to know early on that the fate of European Jewry hung in the balance. But the political posture of American Jews never took on a mass, demanding stance. They participated in rescue efforts, engaged in philanthropic and charitable work, and supported the war effort, but did nothing to indicate to the American public that there really was a Jewish agenda in all this.[26]

Jews never sought allies in other marginal groups in an effort to enhance their rights or in their quest to make the United States less overtly a "Christian nation." In the middle and late nineteenth century the Catholic Church took up the cause of ending the reading of the King James Bible in public schools and the provision of state funds to basically Protestant schools and societies. These were causes that Jews actually shared, but never did they overtly and organizationally join with Catholics to promote them.

The Jewish–Catholic comparison bears some examination here. Catholics, too, found their religion deficient in status and themselves stripped of some rights by virtue of their Catholicism. The Catholics, so many more in number, adopted a very different strategy from that of the Jews. For one, they created for themselves a vast alternative system of education where they could be free to pursue their own agenda – without the King James Bible, the Protestant hymns, and what they saw as the Protestant values that underlay the public school system. Because their numbers were so much greater than those of the Jews and their history vis-à-vis American Protestantism so much more resonant with memories of persecutions, violence, and exclusion, they adopted a more confrontational rhetoric. Although this is not intended to indicate that Catholics did not assimilate, demonstrate patriotism and loyalty, or acknowledge the

25 Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee, 1906–1966* (Philadelphia, 1972).

26 See, e.g., Leonard Dinnerstein, *America and the Survivors of the Holocaust* (New York, 1982); Deborah Lipstadt, *Beyond Belief: The American Press and the Coming of the Holocaust, 1933–1945* (New York, 1986).

positive qualities of the American creed, they did, however, develop and elaborate on a fundamental critique of American modernity and the American idea of individual progress.[27]

If Jews did not go out of their way to find common ground with other religious minorities – a problematic term given the size of some of those other groups – such as Catholics, Seventh-Day Adventists, and Mormons in the pre–World War II era, they did couch their calls for fair play, equity, and the extension of rights to all in universalistic rather than particularistic terms. When they asserted that a particular practice was wrong or unfair they made the assertion in terms of a broad range of out-groups rather than in their own name alone. They argued against Christianization in the name of liberal Americanism, not in terms of the impact it would have on Jews.

No place was this clearer than in the advocacy of greater rights for African Americans by Jewish individuals and periodicals, and some organizations. From the beginning of the twentieth century, with the founding of the National Association for the Advancement of Colored People (NAACP) in 1909, individual Jews were overrepresented among the white activists for black rights. Jewish newspapers and magazines, representing the entire spectrum of opinion and discourse, adamantly argued in favor of an end to segregation and violence, toward the creation of a society in which color had no implications, negative or positive, for political or civic participation.[28]

The Jewish advocacy for enhancing and indeed equalizing the rights of African Americans involved not just passionate rhetoric and organizational activities. It involved calls on Congress to pass legislation and calls on the courts to adjudicate in favor of greater rights. Obviously, Jews themselves were not the objects of these demands for the state to do something to protect individuals against lynching or to ensure equal distribution of state resources. Rather, they were articulating a deep disappointment with an essential element in American culture on someone else's behalf.[29]

What is particularly noteworthy is that the passion, the vehemence, and the fiery rhetoric that Jewish publications used to attack segregation and discrimination against African Americans far outstripped the rhetoric that

27 Jay Dolan, *The American Catholic Experience: A History from Colonial Times to the Present* (Notre Dame, Ind., 1992).

28 Hasia R. Diner, *In the Almost Promised Land: American Jews and Blacks, 1915–1935* (Baltimore, 1995). On the intersection of rights and the history of the NAACP, see Manfred Berg's essay (Chapter 2) in this book.

29 Diner, ibid.

they used to describe and decry their own situation, fraught as it was with some level of anti-Semitism. It is entirely possible that this was so because the plight of black Americans was so much worse. This disparity in attack deserves further analysis, particularly when set in the context of a discussion of Jews and Jewish rights in America.

Many of the institutions and practices that oppressed African Americans could be understood by Jews in the context of their own experiences. For example, Jews faced discrimination in the housing market, albeit in a dramatically more limited scope than that endured by black Americans. Jewish entry into private universities and colleges was limited by anti-Semitic practices, although never to the degree that black people were excluded. In the area of employment Jews complained – among themselves – of discrimination against Jewish doctors in securing hospital privileges, against Jewish lawyers in prestigious private firms, and against Jews with training in engineering, accounting, and the like. Jewish academics faced an uphill battle in obtaining university-level positions.

Jews thus had a solid core of complaints that they could publicly have lodged in the 1910s, 1920s, and beyond. But they did not. Instead, they chose to engage in quiet, alternative means to circumvent such discrimination when dealing with their own situation, reserving their passionate rhetoric to decry the vastly greater discrimination suffered by African Americans. Elsewhere, I have labeled this a "vicarious attack." This was not intended to demolish the sincerity of the Jewish outrage at racism in America or to undervalue their accomplishments in the NAACP and elsewhere, but was intended to put their efforts into some kind of context. Jews were aware of the limitations of their rights. They felt outrage at them, but the stakes were too high to draw too much attention to their disappointment in the American "promise." They chose to attack through someone else's issues and in someone else's name.

Thus, before the cataclysm of World War II, if Jews had an agenda in the matter of their rights and the state, it was to ensure that the state be neutral on matters of religion. The state, they believed and wrote in such newspapers as Leeser's *The Occident* or the ideologically very different *American Israelite*, edited by Wise, should privilege no religion above any other. The quest for that kind of neutrality almost by definition lent itself to more proactive, quiet, and nonassertive behavior than did the later Jewish goal, that of stripping the state of as much of its religious repertoire as possible.

World War II proved to be a turning point in the Jews' relationship to their rights in America.[30] Essentially they not only redefined what "rights" meant, but they renegotiated how they would achieve them. They moved away from calls for parity between all religions in America to advocating a truly religiously neutral state. That neutrality was to be so total that it would lead to a secular state in which religions of all kinds received no sanction from the government.

Why did this change occur? The answer to this question can be posited in both negative and positive terms. From the negative side, the post–World War II era saw a precipitous decline of anti-Semitism in America.[31] Every year, from the end of the war onward, opinion polls reported lower levels of anti-Semitism. Under the optimistic glow of such an environment Jewish agencies took more aggressive steps to restructure American life. They sensed a new, never before felt comfort, a degree of acceptance that allowed them to shed their previously timid outer shell.[32]

This is not to imply that the post–World War II era did not have tense moments for American Jews. But, on balance, in the general prosperity, the heady progress of the era of suburbanization, in the public culture symbolized by the "brotherhood weeks" of the 1950s and beyond, American Jews developed a political culture of comfort. In such a world they could push for the real neutrality that they had long desired.

It is notable that in the world of the late 1940s and 1950s, when the Jewish public stance changed so dramatically toward a call for the state to strip itself of its religious vestments, religion also came to be redefined as a highly private matter of positive value no matter what it might be. In these years Judaism, which at most (and statistics on the number of Jews in the United States are relatively difficult to ascertain) encompassed four percent of the American population, came to be included among the notable American faiths. The phrase "Catholic, Protestant, and Jew" – also

30 According to Stuart Svonkin, *Jews Against Prejudice: American Jews and the Fight for Civil Liberties* (New York, 1997), the Jewish strategy to couch prejudice and discrimination against them in universalistic terms persisted until well after the end of World War II. This superb book demonstrates how in the late 1940s and 1950s the specter of anticommunism pushed Jews to continue using a cautious and less overtly Jewish rhetoric. In their organizational attacks they decried hatred against all minority groups and discriminatory behavior regardless of the victim. It was, according to Svonkin, only in the 1960s that Jews began to feel empowered to talk about their particular needs and concerns. What distinguished the behavior of organizations such as the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League after World War II, however, was their willingness to join together formally with others to combat racism.

31 Edward W. Shapiro, *A Time for Healing: American Jewry Since World War II* (Baltimore, 1992), chap. 2, appropriately titled, "The Decline of Anti-Semitism."

32 Calvin Goldscheider and Alan S. Zuckerman, *The Transformation of the Jews* (Chicago, 1984).

the title of Will Herberg's classic work of 1955 – rang in the statements of civic culture as America's spokesmen sought to describe the nature of the American polity.[33] President Dwight D. Eisenhower bore witness to the shift of American sensibilities toward religion and Christianity in particular when he commented in 1952, "Our government makes no sense unless it is founded in deeply felt religious faith, and I don't care what it is."[34] Such rhetoric, found throughout American culture of the 1950s and beyond, clearly represented a tectonic shift away from the 1890s statement that America is a Christian nation.

In addition, after 1945, as a result of demographic shifts, the leadership of communal agencies came into the hands of younger Jews, American-born and -educated, who did not share in the legacy of timidity that had accompanied the migration from Europe. For all the snubs that they might have met, unlike their parents they had experienced the integrative capacity of American public institutions, schools, popular culture, and the armed forces. They learned a range of lessons in those places about the high levels of acceptance of Jews and also about the need for Jews to defend themselves and not quiver in fear lest they offend the non-Jews around them.

Post–World War II America was no ordinary time for American Jews. The two most dramatic events of nearly two millennia of their history had just transpired: the Holocaust, with its destruction of European Jewry, and the rise of an independent, sovereign Jewish state in Israel. These two meta-events deeply affected the American Jewish narrative and the ways in which American Jews acted politically and publicly.

The first event transformed the American Jewish community into the largest center of Jewish life in the world. What had a half-century earlier been seen as a derivative, New World outpost of European culture now stood as the most numerous, most powerful, and wealthiest Jewish community on the globe. An awesome responsibility, this recognition galvanized the Jewish organizational world into a new kind of boldness. One lesson that American Jewry learned from the behavior and fate of the Jews of Germany was that timidity and cooperation did not pay. European Jews, thinking that they could count on the goodwill of their neighbors, ended up destroyed. American Jewry came to understand that flexing political muscle might be a better strategy.

They may have derived that lesson from the image of the Israeli soldiers and pioneers who, in the romance of Zionism, seized the moment,

33 Will Herberg, *Catholic-Protestant-Jew: An Essay in American Religious Sociology* (New York, 1955).
34 Quoted in Shapiro, *Time for Healing*, 53.

rather than sitting back and waiting. Although the majority of American Jews were not affiliated with Zionist organizations, the vast majority identified with the triumph of the assertive *halutzim*, the pioneers who in the rhetorical flurry of the mid-twentieth century "made the desert bloom." Small in number and poorly armed, according to the imagery, the Israeli army subdued the British and the Arabs, and achieved the goal of independence. This was heady stuff for American Jews whose organizations had long believed that not "rocking the boat" might be preferable to annoying the non-Jewish majority around them.

Thus, in the immediate aftermath of World War II, Jews adopted a more assertive, proactive posture. The American Jewish Congress organized the Commission on Law and Social Action in 1945, and its published guidelines, *Full Equality in a Free Society*, spelled out a vision of an America nothing less than totally egalitarian and pluralistic.[35]

Jewish defense organizations actively joined in the legal actions that characterized the postwar civil rights movement. Through the "big three" defense organizations, the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League of the B'nai B'rith, organized American Jewry launched a two-pronged attack on the status quo. They vigorously participated with the NAACP and other civil rights organizations in the assault on the legalized, invidious distinctions between individuals that had long been American practice. These three organizations, for example, played a key role in the passage of the New York State Civil Rights Act of 1945, which banned discrimination in employment, public accommodations, and housing on the basis of race and religion. Notably, Jews directly benefited from this legislation earlier than did black residents of the Empire State.[36]

It was in this climate that Jewish organizations mounted a drive to create an avowedly secular state. No longer willing to accept a Christian framework for America, they now vigorously asserted the need to restructure the nature of public culture.[37] They defined their goal as nothing less than finalizing the drive for total Jewish equality in rights by ferreting out all vestiges of Christian-inspired public symbols. They monitored the behavior of state and local governments, particularly in the realm of any public school practice that smacked of religiosity. With the American Civil

35 Milton R. Konvitz, ed., *Law and Social Action* (Ithaca, N.Y., 1950), 218–59.

36 Shapiro, *Time for Healing.*

37 On the impact of American Jews in the middle of the twentieth century on the emergence of America as a secular, religiously neutral society, see David A. Hollinger, *Science, Jews, and Secular Culture: Studies in Mid-Twentieth-Century American Intellectual History* (Princeton, N.J., 1996).

Liberties Union and some religious denominations with whom they made common cause, they argued that any religious displays by the state violated the separation clause of the First Amendment and, as such, were unconstitutional. For example, Jewish communal agencies joined with the Seventh-Day Adventists to challenge Sunday closing laws, statutes that deprived their members of the right to earn a livelihood and observe their own day of rest.[38]

In this chapter generalities rather than specifics have predominated. By and large, American Jews venerated America for the rights that were ipso facto theirs, that did not have to be earned. They understood, however, that those rights could be compromised if the sensibilities of the Christian majority turned against them. They negotiated cautiously at first, and then, as they became more secure, more vigorously to ensure that the bundle of rights that they, their traditions, and their community enjoy remain secured, and indeed strengthened.[39]

Walls offer me an apt device for constructing my conclusion. In *Pirke Avot*, the Sayings of the Elders, a collection of ethical maxims attributed to sixty-five of the compilers of the Mishnah, the following principle is offered: "Build a wall around the Torah." Like any Talmudic text it can be taken in multiple ways. Most commonly it has been understood to compel Jews to foster the observance of *halacha*, Jewish law, by instituting practices that do not have the force of law but that make the punctilious observance of the laws possible. The metaphoric "wall" buffers Jews from creeping violations of the law, usually unknowingly. In a way, the Jewish stance on rights in America may best be understood in relationship to another wall (again a metaphoric one) that made religion a matter of no concern to the state. The existence of that wall shaped the inner patterns of American Jewish life and much of the relationship between Jews and the public. It also fostered an American Jewish consciousness about itself, American society, and the rights that Jews enjoy.

38 For one local example of this national trend, see Hasia R. Diner, *Fifty Years of Jewish Self-Governance in the Nation's Capital: The Jewish Community Council of Greater Washington, 1938–1988* (Reston, Va., 1989).

39 Seymour Martin Lipset and Earl Raab, *Jews and the New American Scene* (Cambridge, Mass., 1995).

4

From Civil Rights to Civic Death:

Dismantling Rights in Nazi Germany

KARL A. SCHLEUNES

When Adolf Hitler and the National Socialists came to power in January 1933 they launched an immediate assault on the legal structures that protected the civil and human rights of Germany's citizens. They began with physical harassment, to which they quickly added legislation that discriminated against those they deemed enemies of their cause. The assault ended with the mass murders effected in the death factories of eastern Europe. No political movement in modern times has more fundamentally rejected the belief in human rights than the Nazis – a belief they claimed reached its full expression in the Enlightenment of the eighteenth century and its actualization in the French Revolution of 1789. Nazi leaders soon made clear their intention to erase from the pages of history the rights proclaimed by the French Revolution.[1] For them 1789 was the juncture at which history took the wrong turn. The events in France that year were rooted in concepts they considered abhorrent, including the right to political participation, civic and legal equality, the emancipation of the Jews, and that rights were inherent in the individual and therefore limited the authority of the community or group. They viewed every one of these ideas as foreign constructs that had been transplanted to German soil during the previous century and had then, quite illegitimately, been enshrined in the detested Weimar constitution of 1919.

Nazi views on the inherent inequality among human beings and the supposed superiorities and inferiorities residing in blood and race are too well known to require lengthy rehearsing here. Reflections on rights were scarce commodities in Nazi rhetoric. Suffice it to say that they considered the Germanic peoples (Aryans) to be the superior race; all others were considered inferior to varying degrees, with the lowest, most evil,

1 Joseph Goebbels, *Revolution der Deutschen* (Munich, 1932), 155.

being the Jews. When the Nazis spoke of rights at all, they spoke of them as residing in the community (*Gemeinschaft*), not the individual. Point ten of their official party program stipulated that "the activities of the individual must not clash with the general interest but must proceed within the framework of the community and therefore be for the general good," a proposition they often reduced to the slogan: "Common good before individual good" (*Gemeinnutz vor Eigennutz*).[2] They rejected the idea of civil or legal equality not only for the allegedly inferior races but also for individuals within the supposedly superior race who, because of physical or psychic infirmities, were themselves inferior racial specimens. The Nazis argued that these inferiorities were the inevitable product of mixing with an inferior race. Whether it be an inferior race or an inferior individual from a superior race, the Nazis rejected the notion that either possessed rights. Rights belonged only to members of the superior race and then only to superior specimens. When they came to power in 1933 they promised to overthrow the world of legally guaranteed rights and civil equalities that stood as the most immediate formal obstacle to their revolution. For their victims the result was a "civil death," followed not long afterward by actual murder. This chapter examines how the National Socialists dismantled those rights and reflects on the cultural traditions in which both rights and their dismantling were defined and justified.

German Jews stood at the center of the Nazi attack on civil and legal rights. The party's ideology held Jews responsible for the wrong turn history had taken in 1789 and, more recently, for the ills that had befallen Germany. The humiliating defeat in World War I, an unwanted revolution, socialism and Bolshevism, democracy, and inflation and depression were all blamed on a "worldwide Jewish conspiracy" that had as its objective the ruination of Germany. The first phase of the Nazi assault on the rights of Germany's Jewish citizens culminated in September 1935 with the so-called Nuremberg Laws, named for the annual party rally at which they were promulgated. These laws revoked the citizenship of German Jews and intercepted the Jews' alleged intention to pollute the biological purity of the Aryan "race."[3]

The first of these laws, the Reich Citizenship Law, reduced the legal position of Jews from "citizens of the Reich" to the status of "subjects" or mere *Staatsangehörige*. A subsequent implementation decree provided

2 Reprinted in Jeremy Noakes and Geoffrey Pridham, eds., *Documents on Nazism, 1919–1945* (New York, 1975), 38.

3 "Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre," Par. 2, reprinted in Bruno Blau, *Das Ausnahmerecht für die Juden in den europäischen Ländern 1933–1945*, 2d ed. (Düsseldorf, 1954), 30.

the ultimate Nazi definition of a Jew.[4] Henceforth, anyone with three or four Jewish grandparents was automatically defined as Jewish. Someone with two Jewish grandparents would also be classified as Jewish if he or she belonged to a Jewish religious community or was married to someone classified as a Jew. However, a person with two Jewish grandparents could escape being designated as a Jew if he or she were neither a member of a Jewish religious congregation nor married to a Jew. In that case the person was labeled a *Mischling* ("racially mixed"). A *Mischling* was not automatically excluded from citizenship.

The second of the Nuremberg Laws, the Law for the Protection of German Blood and Honor (usually shortened to Blood Protection Law), prohibited newly defined Jews from marrying anyone of "German or related blood" or engaging with them in extramarital sexual relations. The law also barred Jews from employing in their households any female of "German or related blood," thereby protecting them from the predatory sexual instincts the Nazis believed were inherent in the Jewish male character. Another provision enjoined Jews from displaying the Nazi flag, which had at this same party rally become the official banner of the Third Reich. The number of Jews eager to fly the Nazi flag were few, but in the participatory dictatorship of Nazi Germany, displaying the flag was a way of announcing to the world one's loyalty to the regime. Not to display the flag was to advertise to the world, including vengeful Nazi neighbors, one's disloyalty and, by default, one's Jewishness.

By relegating Jews to a status below that of citizen and by implementing legal measures for their biological separation from Germans, the Nazis translated the core elements of their ideology into law. Biological separation was effected incrementally during the following years through a series of decrees attached to the Blood Protection Law. The ultimate purpose of these decrees was to purify the German "racial community," the *Volksgemeinschaft*, of the inferiorities carried by Jewish blood. Under these laws a German caught consorting with a Jew was subject to prosecution for the crime of "racial treason," punishable in "extreme cases" by death. Similar decrees attached to the Reich Citizenship Law facilitated the eventual removal of Jews from nearly all business activities and professional practices, including law, medicine, dentistry, pharmacy, veterinary medicine, tax advising, and many others.[5] A final decree in July

4 The Nuremberg Laws are reproduced in many publications. A convenient source to consult is Benjamin Sax and Dieter Kuntz, *Inside Hitler's Germany: A Documentary History of Life in the Third Reich* (Lexington, Mass., 1992), 403–8.

5 Between June 14, 1938, and Jan. 17, 1939, a series of seven decrees supplementary to the Reich Citizenship Law were announced. Their effect was to drive Jews out of business and to prevent

1943 removed from Jews their few remaining protections under the law, placing them directly under the jurisdiction of the Gestapo and the SS.[6] This last decree did no more than provide a legal gloss to a bitter reality. The "final solution" being executed in the death factories of eastern Europe had long rendered laws and decrees irrelevant.

The Nuremberg Laws swept aside nearly a century and a half of political and legal developments that had fostered the emancipation of Jews and their assimilation into German culture. During the nineteenth century, Jewish assimilation, though never unchallenged, appeared to most Germans and Jews alike as the symbol of freedom's inexorable unfolding. Equal rights and civil liberties flowed naturally, it seemed, from the fountains of freedom and liberty. The final legal discrimination against Jews was lifted in the legislation creating the German Empire in 1871.[7] Therewith was concluded in Germany a process of Jewish emancipation that had begun in Austria in the 1780s, gained momentum during the French and Napoleonic revolutions, and been rearticulated in the 1848 "Declaration on the Fundamental Rights of the German People."

However, it took the German revolution of 1918 and the new Weimar Republic to establish the constitutional anchor for human equality and civil liberty. Article 109 of the Weimar constitution, the "Equality Article," proclaimed unequivocally that "All Germans are equal before the law." Articles 110 to 118 guaranteed to all citizens the classic list of civil liberties, including the freedoms of speech, the press, assembly, religion, movement, the sanctuary of the home, and the inviolability of private property.[8] The anchor for private rights – those relating to contracts, property, inheritance, and the family (including the right of virtually any two consenting adults to marry regardless of religious or "racial" considerations) – had been set down earlier in the civil code of 1900.[9]

their practicing in a great variety of professions. These decrees are available in Joseph Walk, ed., *Das Sonderrecht für die Juden im NS-Staat: Eine Sammlung der gesetzlichen Massnahmen und Richtlinien – Inhalt und Bedeutung* (Heidelberg, 1981).

6 Ibid., 399.

7 An excellent summary of the emancipation process in the German states is that of Werner E. Mosse, "From '*Schutzjuden*' to '*Deutsche Staatsbürger jüdischen Glaubens*,'" in Pierre Birnbaum and Ira Katznelson, eds., *Paths of Emancipation: Jews, States, and Citizenship* (Princeton, N.J., 1995), 59–93.

8 The Weimar constitution is available in Ernst Rudolf Huber, ed., *Dokumente zur Deutschen Verfassungsgeschichte*, 3 vols., 2d ed., (Stuttgart, 1966), 3:129–56. An English translation is available in Rene Brunet, *The New German Constitution*, trans. Joseph Gollumb (New York, 1922).

9 The section of family law dealing with marriage is treated in Paragraphs 1303–47 of *The German Civil Code* (1896), trans. Chung Hui Wang (London, 1907), 289–300. The Civil Code was adopted by the Reichstag in 1896 but did not go into effect until 1900. In practice the right of Germans and Jews to marry had already been articulated, at least for Prussia, in Friedrich II's General Civil Code (*Allgemeines Landrecht*) of 1794.

FLASHBACK TO 1924

Nazi ideology repudiated every tenet of the liberal principles embodied in the Weimar constitution and civil code. Not surprisingly, the Nazis began to attack this legal structure as early as May 1924, when thirty-two Nazis were elected to the German Reichstag.[10] Led by Wilhelm Frick, a Munich police official who had participated in Hitler's abortive Beer Hall Putsch the previous November, the Nazi delegates immediately introduced a resolution calling for "all members of the Jewish race to be subjected to discriminatory legislation."[11] When their resolution failed, Frick presented two proposals: one to expel from Germany all Jews who had entered the country after August 1, 1914, and a second to rescind all name changes by Jews from that same date.[12] The Nazis, like other anti-Semites, were convinced that Jews had undertaken these name changes solely to hide their Jewish identity. At the same time, Nazi delegates in the Bavarian *Landtag* (state diet) were submitting similar proposals directed against the Jews of Bavaria. When their opponents pointed out to them that such anti-Jewish measures would require a precise legal definition of who is a Jew, their spokesman dismissed the idea as ridiculous. He said he, like everyone else, knew exactly "what is a Jew and what is not."[13]

Failure to enact their proposals did nothing to dampen the anti-Semitic enthusiasm of Nazi legislators, who continued their attempts to exclude Jews from the equal protection of the laws. In August 1924 Frick and his colleagues proposed to bar all Jews from holding public office, whether at the Reich, provincial, or local level. They also proposed the expropriation without compensation of property belonging to any Eastern Jews, or *Ostjuden*, who had entered Germany after August 1914. This confiscation, Frick promised, would provide a huge windfall to spend on public welfare.[14] Six years later, in 1930, Nazi legislators finally chose to address directly the question of what they believed to be the racial decline and decomposition of the German *Volk*. In a foreshadowing of the Blood

10 Officially, the Nazi Party had been outlawed after Hitler's failed putsch in November 1923. It came before the German electorate in two national parliamentary elections in 1924 as the National Socialist Freedom Party. The thirty-two seats gained in the April elections were cut in half in the elections of December 1924. See Karl Dietrich Bracher, *The German Dictatorship: The Origins, Structure, and the Effects of National Socialism*, trans. Jean Steinberg (New York, 1970), 122–3.

11 Wilhelm Frick, *Die Nationalsozialisten im Reichstag 1924–1931* (Munich, 1932), 7.

12 Ibid., 8. See also Gunter Neliba, *Der Legalist des Unrechtsstaates, Wilhelm Frick: Eine politische Biographie* (Paderborn, 1992), 47.

13 Shaul Esh, "Designs for Anti-Jewish Policy in Germany up to Nazi Rule," *Yad Vashem Studies* 6 (1983): 112–13.

14 Neliba, *Frick*, 47–8.

Protection Law to come five years later, Frick proposed that marriages between Jews and Aryans be forbidden and the penal code be amended to designate "mixing of blood between [Germans and] members of the Jewish community" a crime punishable by imprisonment or, in egregious cases, by death.[15]

Frick's proposals followed in the wake of a series of regional electoral successes that the party scored in the latter half of 1929. Five years of laboring in the wilderness of electoral marginality seemed finally to be producing the possibility of achieving power. Other party leaders also took heart. Late in 1929 the head of the party's organizational apparatus, Gregor Strasser, added a separate planning section, the Organisationsabteilung II, or OA II, to the party's Munich headquarters.[16] Its purpose, as reported in the *Völkischer Beobachter*, was to "consider all the questions related to the party's development and its policy conceptions, to study them and insure their consistency," in short, to make policy proposals in preparation for gaining power.[17] To head this new planning body Strasser named his old friend Konstantin Hierl, a retired General Staff officer from World War I, a former Free Corps leader, and a recent convert to the Nazis. Hierl established a planning division of seven sections, including a Domestic Policy Section headed during its most active phase after November 1931 by Helmut Nicolai, a former civil servant dismissed for his Nazi sympathies, and a Legal Section headed by Hitler's personal lawyer Hans Frank, the founder (in 1928) of the League of National Socialist Jurists (Bund Nationalsozialistischer Deutscher Juristen).

From the outset Nicolai focused his attention on the need for major revisions of the German constitution. He denounced the Weimar constitution for its liberal underpinnings and for establishing the misdirected objective of trying to "protect the individual from the state, which is assumed to be the 'enemy' of the 'free' human being."[18] He dismissed Weimar's assumptions of "basic rights" as a "shallow lie," amounting to nothing more than a "screen behind which is hidden the notion of 'human rights.'" Nicolai saw National Socialism's task as "restoring to the law that shimmer of sanctity (*Heiligkeit*) that at one time had been its essence." He

15 Frick, *Die Nationalsozialisten*, 63–4. See also Lothar Gruchmann, "Blutschutzgesetz und Justiz," *Vierteljahrshefte für Zeitgeschichte* 31 (1983): 419.

16 See Udo Kissenkoetter, *Gregor Strasser und die NSDAP* (Stuttgart, 1978), 50; Peter D. Stachura, *Gregor Strasser and the Rise of Nazism* (London, 1983), 72; Wolfgang Horn, *Führerideologie und Parteiorganisation in der NSDAP* (Düsseldorf, 1972), 379–84; Dietrich Orlow, *The History of the Nazi Party*, 2 vols. (Pittsburgh, 1969), 1:180.

17 *Völkischer Beobachter*, Sept. 12, 1929, 3.

18 Quotations in this paragraph are from Helmut Nicolai, *Grundlagen der kommenden Verfassung: Über den staatsrechtlichen Aufbau des Dritten Reiches* (Berlin, 1933), 86–7.

believed it "necessary to keep the [new] constitution free of the dishonest rhetoric expressed in the notion of 'human rights.'" Such alleged "basic rights" allowed the self-seeking individual to undermine the state or the *Volk* and was for that reason "impossible for an organic state to accept" because, he concluded, the *Volk* must "be seen as the highest earthly good, the obligation of sacrificing for the larger whole knows no bounds."

It was Hans Frank, later the governor general of Nazi-occupied Poland, who articulated more fully – if not more clearly – the theoretical underpinnings of Nazi law and its conception of rights. In 1931 Frank established what became the party's official legal journal, *Deutsches Recht*. The lead article in its first issue, titled "The Awakening of German Law," was by Frank himself. Any consideration of the law, he wrote, must be based on "the concept of the *Gemeinschaft*."[19] "The 'soul of the people' (*Volksseele*) must be guaranteed by something we call the 'soul of the law' (*Rechtsseele*). The two must grow from the same soil." Legal conceptions of law and justice in the Weimar Republic were the particular targets of his condemnation. In Weimar, he declared, "Justice has become a whore of the politicians." He also castigated German justice for its ignorance of racial matters: "The concept of race, of the *völkisch* community, does not even exist in present-day [1931] German law," he wrote. The result, he claimed, was disastrous. "When the constitution stipulates that the authority of the state derives from the people, this means it derives from the German citizens. If the tennis star [Daniel] Prenn, an Eastern Jew, is a German citizen, he becomes, by definition of German law, a German. He becomes part of the German *Volk* . . . in the sense of today's legal conceptions. This is in total contradiction to the legal sensibilities of the *Volk*, the feelings of the newly awakening German people who reject completely these ideas as a foreign abstraction."

Frank's venom was directed most immediately against the classically liberal Weimar conception of law and rights, but it was by implication also directed against the unique and long cherished German ideal of the *Rechtsstaat*, which, during the nineteenth century, had helped shape a culture of rights sometimes in consonance and sometimes at odds with the classic liberalism of Germany's western neighbors. The view of the *Rechtsstaat* as a state whose powers were constrained by law can be traced back to the Middle Ages. The modern version of the doctrine owes its definition (though not its name) to Immanuel Kant (1724–1804). It was

19 Quotations in this paragraph are from Hans Frank, "Erwachen des deutschen Rechts," *Deutsches Recht* 1 (1931): 3, 6, 7.

Kant who contrasted a government based on law with one given to arbitrary rule, an *Obrigkeitsstaat* (autocratic state).[20] Kant's version of the rule of law distinguished itself from that of the Middle Ages in that it included an enumeration of the specific rights he believed belonged to every individual citizen of the state. The rights of citizenship, he wrote, belonged equally to all people, regardless of caste or estate, and also to Jews, although they would be required to cast off the "garment of their old religious practice" in exchange for an enlightened Christianity.[21] They would then have access to the individual's rights to liberty, equality, and security of property, essentially the rights John Locke (1632–1704) had enumerated in England a century earlier. Like Locke, Kant saw the state as the guarantor of those rights, a postulate that placed him in the vanguard of the developing German liberalism.

Unlike Locke, however, Kant did not assign to citizens the clear right to revolt against a state that failed to protect those rights. The result was the introduction into German liberalism of an ambiguity that in the long run served to weaken its understanding of individual rights.[22] It was an ambiguity that may also have opened the door for German conservatives to adopt the idea of the rule of law as their own. It was the conservative political theorist Adam Müller who, in his *Die Elemente der Staatskunst* (Elements of Statecraft) of 1809, gave the name *Rechtsstaat* to Kant's notion of the rule of law. In doing so, however, he rejected Kant's Enlightenment views of the state as overly mechanistic, positing an organic view in its stead. Through Müller, the concept of the *Rechtsstaat* was reshaped to make it compatible with absolutism and conservatism, so long as their adherents held to an objectively derived set of laws. Lost through Müller was the clear focus Kant had placed on individual rights. As the historian Leonard Krieger has observed about the doctrine of *Rechtsstaat*, "in due course of time it came to mean all things to all men."[23] By the 1840s and 1850s both liberals (for example, Robert Mohl [1799–1875]) and conservatives (for example, Julius Friedrich Stahl [1809–61]) could, and did, invoke its name in the service of incompatible ideological positions.

However protean the *Rechtsstaat* doctrine had become in the nineteenth century, it could not be stretched in the twentieth century to embrace Nazi conceptions either of the state or of rights, individual or

20 Hans Riess, ed., *Kant: Political Writings*, trans. N. B. Nisbet, 2d ed. (Cambridge, 1990), 93–9.

21 Kant quoted in Michael A. Meyer, "Judaism and Christianity," in Michael A. Meyer, ed., *German-Jewish History in Modern Times*, 4 vols. (New York, 1966), 2:171. See also Alfred D. Low, *Jews in the Eyes of Germans* (Philadelphia, 1979), 93–9.

22 Howard Williams, *Kant's Political Philosophy* (New York, 1983), 127.

23 Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition* (Boston, 1957), 261.

otherwise. Whether invoked by liberals or conservatives, the doctrine did call for governance by laws objectively arrived at, a proposition that necessarily imposed limits on political authority and enlisted it in protecting space for the individual citizen to exercise certain civil freedoms.

The Nazis repudiated both the idea of an objective basis for law and the notion of individual rights or freedoms. Point nineteen of their program demanded the replacement of presumably objective "Roman law, which serves the materialistic world order" with one that was rooted in the common law of Germanic tradition, what Hans Frank called the *Volksseele*. Frank faulted Roman law because it "does not recognize the concept of 'racial comrade' [*Volksgenosse*]" and because it elevated the individual person, the "*civis Romanus*," to its center.[24] In Roman law, he noted, the individual finds legitimation "not in his being part of a larger whole, but in his being the possessor of certain objectively assigned rights." Although he did not specify what he was rejecting, he might quite appropriately have said *Rechtsstaat*.

The Nazis' rejection of the *Rechtsstaat* does not necessarily place them outside the bounds in which questions of rights, law, and society were traditionally discussed in Germany. The rejection of liberalism, with its focus on the individual and "basic rights," was hardly original to the Nazis; neither was their focus on the duty of the citizen to the larger society. Even the Weimar constitution, it should be noted, spelled out duties as well as rights. Article 133 on "Fundamental Rights and Duties of Germans" obliged all citizens "to render personal services to the state and community." Moreover, the supposition about the organic nature of society and the primacy of the *Gemeinschaft* had a long and honorable tradition in German political and social thought.[25] Nicolai and Frank were both very much aware of that tradition and tried, with the addition of racism, to tailor Nazism to fit into it. This is not to suggest that National Socialist concepts about society and the law were simply the perverted products of a single German cultural and political tradition. Other factors were involved. Hermann Weinkauf, for example, has pointed to the crucial importance of "a crudely misunderstood Darwinism" in shaping the "legal conceptions" (*rechtliches Weltbild*) of National Socialism, especially those of Hitler.[26]

24 Quotations in this paragraph are from Frank, "Erwachen des deutschen Rechts," 6.

25 Ferdinand Toennies, *Community and Society*, trans. Charles P. Loomis (1887; reprint, East Lansing, Mich., 1957).

26 Hermann Weinkauf, *Die deutsche Justiz und der Nationalsozialismus – Ein Überblick* (Stuttgart, 1968), 41.

For a variety of reasons, large segments of the German public did not seem to be offended by the Nazi conception of rights. Indeed, many Germans could read into the Nazi promise an actual expansion of their own rights. Membership in the Aryan *Volksgemeinschaft*, after all, meant belonging to a superior race. The benefits of that membership were tangible. Suddenly one could be part of an elite destined to rule Germany and, perhaps, much more. Within the *Volksgemeinschaft*, moreover, the old lines of class and hierarchy were to be transcended. Milton Mayer's classic interviews in the early 1950s of ten low-level Nazi Party members from Marburg are instructive on this point. A cabinetmaker recalled that by 1935, the year of the Nuremberg Laws, "the difference between rich and poor grew smaller, one saw it everywhere. . . . A man had a chance." A schoolteacher agreed: "For the first time in my life I was really the peer of men who in the time of the Kaiser and during Weimar had always belonged to classes lower or higher than my own." For many of them it seemed to be the best time of their lives. There was even the promise of owning one's own *Volkswagen*. "There were wonderful ten-dollar holiday trips for the family in the 'Strength Through Joy' program, to Norway in the summer and to Spain in the winter, for people who had never dreamed of a real holiday trip at home or abroad." Testimony like this led Mayer to conclude that during the Third Reich many Germans genuinely "thought they were free."[27]

The dark underside to these conceptions of "freedom" was clear from the outset. It included "freeing" the superior Aryan race from the pernicious yoke of the Jews. For Nazi "freedoms" to be realized it was necessary to solve the Jewish problem. During 1932 Nicolai and his domestic policy staff in Strasser's OA II were particularly active in generating recommendations for an eventual Nazi Jewish policy, some of which would later be reflected in the Nuremberg Laws. Nicolai's deputy, Ernst von Heydebrand und der Lasa, prepared separate drafts proposing "The Separation of Jews and Other Foreign Elements from the German *Volk*" and "An Emergency Law Regarding the Expulsion of Eastern Jews."[28] The party's genealogical expert charged with deciding cases of racial eligibility for party membership, Dr. Achim Gercke, prepared a memorandum titled, "Should Jewish Bastards Be Granted Full Citizenship Rights?"[29] (Gercke's memorandum is lost, but one can guess the answer.) Heydebrand also published an article in Frank's *Deutsches Recht* proposing a legal

27 Quotations are from Milton Mayer, *They Thought They Were Free: The Germans, 1933–45* (Chicago, 1966), 48–9, 61–2, 105.

28 Uwe Dietrich Adam, *Judenpolitik im Dritten Reich* (Königstein im Taunus, 1979), 29.

29 Ibid., 28–30.

distinction between "Reich Germans" (*Reichsdeutsche*) and "Foreigners in the Reich" (*Reichsfremde*).[30] Heydebrand's recommendation was to deny citizenship to *Reichsfremde*, whom he defined as anyone who was half-Semitic or non-Aryan. To support his case, he argued for a reinterpretation of the "Equality Article" of the Weimar constitution to deny the rights of some current citizens (Jews and political undesirables) to freedom of movement, eligibility for public office, access to higher education, and citizenship itself.

We know relatively little more about the party's planning efforts prior to 1933. Few records from Strasser's OA II have survived. Nor is there evidence that Hitler ever took its planning work seriously. A brief glance into its workings is provided in a memoir by the head of its Economic Policy Section and, for a time, one of Hitler's intimates, Otto Wagener.[31] Wagener was a zealous proponent of economic corporativism, a position that identified him with the self-consciously fascist wing among National Socialist intellectuals. Although he fell out of favor with Hitler even before the party's seizure of power in 1933, we know from his memoir of at least one piece of advice he gave Hitler on the Jewish question. Probably in late 1931 or early 1932, at a breakfast at the party headquarters in Munich, Wagener advised the Führer that the Jewish problem could be solved quite simply by forbidding any further Jewish immigration into Germany. Given the low birth rate among Jews, Wagener calculated, and without replenishment from abroad, they would be condemned to gradual extinction. Until that happened, he advised Hitler, a Nazi regime would need to do little more than bar Jews from positions in government and watch while the Jewish problem solved itself. No Nazi ever proposed a milder solution to the Jewish problem. Hitler obviously did not consider it adequate.

THE NAZIS ASSUME POWER

When Hitler assumed the chancellorship in January 1933 he named Wilhelm Frick to head the Reich's Interior Ministry, a signal that legislative initiatives against Jews were imminent.[32] There were constitutional hurdles to overcome before any full-blown legislative attack could be undertaken. The swiftness with which the Nazis overcame these hurdles

30 Ibid., 30.

31 Otto Wagener, *Hitler – Memoirs of a Confidant*, ed. Henry Ashby Turner Jr. and trans. Ruth Heim (New Haven, Conn., 1985), 89.

32 See Raul Hilberg, *The Destruction of the European Jews*, 3 vols., rev. ed. (New York, 1985), 1:31. Between 1933 and 1935 Frick's Interior Ministry issued some 100 laws and decrees on racial and public health matters. See also Neliba, *Frick*, 165.

(before April 1933) stunned their supporters and opponents alike. On February 4, five days after coming to power, Hitler used the emergency authority given him by President Paul von Hindenburg to issue the "Decree for the Protection of the German People." This decree authorized the police, at their own discretion, to prohibit any public gatherings or publications they deemed "calculated to endanger public security or good order."[33] Three weeks later, on February 28, in the wake of the previous evening's Reichstag fire, Hitler used those same presidential powers to nullify the Weimar constitution's most critical guarantees of personal liberties. With one stroke of his pen, the Führer abolished the freedoms of speech and publication, the rights of assembly and association, the privacy of postal and telephone communications, and the sanctity of the home and private property.[34]

It took another month for Hitler to acquire his own powers to decree. These came with the Enabling Act of March 23, passed by the new Reichstag elected earlier that month. The ground the Nazis gained in these elections, combined with their coercion of the remaining Reichstag opposition, secured for them the two-thirds Reichstag majority required to grant the chancellor (technically the Cabinet) decree powers independent of those residing with Hindenburg. Hitler immediately set about using his new authority to enact legislation on his own.[35] Within two months he succeeded in gutting the Weimar constitution of the rights and equalities its authors had tried to guarantee in 1919.

The Enabling Law allowed Hitler to tear the constitution's guarantees of equality from their moorings. He could now declare to be legal that which had been illegal. It was with these decree powers that the Nazis launched their legislative assault on the Jews. On April 7 Frick's Interior Ministry announced a "Law for the Preservation of the Professional Civil Service."[36] It empowered the new regime to dismiss several thousand employees it considered undesirable because of their political affiliations as liberals, socialists, or communists. Jews were targeted no matter what their political affiliation. The law affected far more people than those ordinarily considered to be civil servants. Judges, university professors, teachers, and those employed by the Reich railway, the Reichsbank, and even

33 Eliot B. Wheaton, *Prelude to Calamity: The Nazi Revolution, 1933–1935 – With a Background Survey of the Weimar Era* (Garden City, N.Y., 1968), 212.

34 For the Reichstag fire decree, see Sax and Kuntz, *Inside Hitler's Germany*, 134–6.

35 Ibid., 136–7. See also Hans Schneider, "Das Ermächtigungsgesetz vom 24. März 1933: Bericht über das Zustandekommen und die Anwendung des Gesetzes," *Vierteljahrshefte für Zeitgeschichte* 1 (1953): 197–221.

36 Walk, ed., *Sonderrecht*, 12.

the Reich postal service were subject to dismissal. The new law also required the Nazis to do what they had once considered a waste of time: They had to define what is a Jew. A subsequent implementation decree attached to the civil service law, issued four days after its promulgation, included the so-called "Aryan Paragraph" that stipulated that "A person is to be regarded as non-Aryan who is descended from non-Aryans, especially Jewish parents or grandparents. This holds true even if only one parent or grandparent is of non-Aryan descent."[37] One Jewish grandmother was enough to classify one as non-Aryan.

Until the Nazis redefined the Jew in the Reich Citizenship Law of 1935, the Aryan Paragraph of 1933 served as their primary legal tool for removing Jews from their positions in German society. Within days of its promulgation the Aryan Paragraph was also attached to a "Law to Prevent Overcrowding of German Schools and Universities," designed to reduce the number of Jewish students in educational institutions. In June the paragraph was expanded to define as non-Aryan anyone who was married to a Jew. Further legislation during the latter half of 1933 invariably included the Aryan Paragraph. By the end of the year Jews were excluded not only from the civil service and their numbers limited at the universities, they were also barred as medical doctors from participating in the Public Health Insurance Chambers, as journalists from practicing their profession, and as artists from taking part in officially sponsored cultural programs.[38]

The Aryan Paragraph proved contagious. Its spirit reflected the deep well of anti-Semitism from which the Nazis were drawing. Private clubs and associations swiftly adopted its provisions to purge their membership lists of Jews. In late April 1933 the German Swimming Association was the first to use it to expel Jewish members. The Union of Professional Boxers and the German Tennis Association immediately followed suit. In May the German Gymnastic Union and the German Rowing Association followed their lead, as did the German Skiing and Chess Associations in June and July. At Freiburg University the Rector Martin Heidegger invoked the Aryan Paragraph to halt tuition remissions and stipend payments to Jewish students.[39] Meanwhile, the Synod of the German Evangelical Church spent much of the year discussing the application of the Aryan Paragraph to pastors and church officials.[40] In Decem-

37 Ibid., 13.

38 Richard Lawrence Miller, *Nazi Justiz: Law of the Holocaust*, (Westport, Conn., 1995), 68.

39 For the Heidegger episode, see Raul Hilberg, ed., *Documents of Destruction: Germany and Jewry, 1933–1945* (Chicago, 1971), 17–18.

40 Doris L. Bergen, *Twisted Cross: The German Christian Movement in the Third Reich* (Chapel Hill, N.C., 1996), 88–95.

ber the regime itself completed the process by ordering the expulsion of Jews from all sporting clubs.

Radical Nazis insisted that the civil service law was still woefully inadequate, the Aryan Paragraph notwithstanding. As they understood it, the core of the Jewish problem remained unaddressed. The law dispossessed Jews only of their rights to positions in the civil service. Still left to them were the rights associated with citizenship and, more seriously, their "right," through marriage, to inject their inferior blood into that of the superior Aryan bloodstream. This core of the "Jewish problem" was at the same time the core of Nazi ideology. In *Mein Kampf* (1925), Hitler had labeled the mixing of Jewish and Aryan blood as the "original sin" (*Ursünde*) that, unless arrested, would inexorably lead to the degeneration of the Aryan race, an evil to be prevented only by prohibiting marriage between Jews and Aryans.[41]

In the wake of the Aryan Paragraph, Nazi radicals began to challenge the continued legality of "mixed marriages" with increasing fervor. Julius Streicher never tired of using his anti-Semitic slander sheet, *Der Stürmer*, to denounce race mixing in the most pornographic terms. Others took more direct action: Nazi officials at the marriage registry offices (*Standesämter*), their positions strengthened by the civil service purges, frequently refused to grant licenses for such marriages. Some cited the Aryan Paragraph as their justification; others pointed to the basic principles of National Socialism as sufficient authority for their actions. The result was disarray and confusion. Some offices would grant licenses for mixed marriages; others would not.

The Weimar constitution no longer offered protection to Jews, its powers to safeguard basic rights having been gutted by the Reichstag Fire Decree and the Enabling Act of early 1933. Nonetheless, it would take the Nazi leadership another two and a half years to resolve the question of mixed marriages. Standing in the way of a resolution were those portions of the German civil code stipulating the rights and duties pertaining to marriage. These proved more difficult for the Nazis to circumvent than had been the constitution. The civil code recognized virtually no impediments to marriage between consenting partners other than an already existing marriage or a too-close blood relationship. Foreign opinion also played a major role in hindering Nazi action on so basic and sensitive a matter as the right to marry. The Foreign Office was besieged during these years by foreign governments request-

41 Adolf Hitler, *Mein Kampf* (New York, 1939), 339.

ing explanations or expressing protests regarding Germany's policies toward Jews.[42]

Although the civil code undoubtedly was the decisive factor in delaying Nazi leaders from resolving the mixed-marriage question, it did nothing to restrain the actions of ardent Nazi officials in the registry offices. By the end of 1933 uneven enforcement of the civil code was producing chaos at the marriage registries.[43] The situation became sufficiently serious to force higher authorities to intervene. In early January 1934 Frick warned all registry officials to refrain from applying the Aryan Paragraph to situations for which it had not been intended, even if it required of them actions that "appear not to conform with National Socialist views."[44]

Frick's admonition failed to repair the situation. In July 1934 a series of court appeals finally led to the Reich's Supreme Court ruling that marriages between Germans and Jews remained legal and that registry officials should adhere to the law as spelled out in the civil code.[45] Meanwhile, the Justice Ministry began to collect data from the provinces concerning the legal history of German-Jewish marriages, discovering in the process that the authorization in civil law for such marriages went back at least as far as the Prussian civil code of 1794.[46] Clearly, the Justice Ministry planned an initiative on the question of mixed marriages that would have embedded it in a revised criminal code. On the commission to draft the revised code was the ardent Nazi Roland Freisler, who urged amending the code to criminalize marriages "between those of German blood and members of foreign blood communities." The crime committed by those concluding such marriages he labeled "racial treason."[47]

Frick's warning in January 1934 and the Supreme Court ruling in July allowing mixed marriages were largely ignored by registry officials. With increasing frequency, local courts decided cases in favor of officials who

42 In April 1933 the Foreign Office sent a memo to all German officials abroad providing them with information that would help them counter foreign "misunderstanding of the *Judenfrage* in Germany." See Karl-Heinz Minuth, ed., *Die Regierung Hitler*, pt. 1, vol. 1: *Akten der Reichskanzlei: Regierung Hitler 1933–1938* (Boppard am Rhein, 1983), 419–22, doc. no. 117.

43 Ingo Müller, *Hitler's Justice: The Courts in the Third Reich*, trans. Deborah Lucas Schneider (Cambridge, Mass., 1991), 92.

44 Ibid. 45 Ibid.

46 Bundesarchiv Berlin, R.22/454 (pp. 3ff.), microfilm copy in Yad Vashem Archives, Jerusalem. The code itself did not spell out the specific right, but Justice Ministry researchers revealed that Suarez's official commentary interpreted the code to mean that Christians and Jews were allowed to marry. See pt. 1, title 1, par. 36 of the *Allgemeines Landrecht für die Preussischen Staaten von 1794*, ed. Hans Hattenhauer (Frankfurt am Main, 1970), 356, for the relevant stipulation.

47 Bernhard Losener, "Als Rassereferent im Reichsministerium des Innern," *Vierteljahrshefte für Zeitgeschichte* 9 (1961): 281.

had refused marriage permits to "racially mixed" couples. In the summer of 1935 a local court in Wetzlar upheld officials in their refusal to allow such a marriage, citing it as a violation of the "sum total of all official and semiofficial pronouncements by the government and the National Socialist Party."[48] When a court in Königsberg decided against officials who had refused to grant a marriage license, its judgment was appealed to a higher court and overturned. The appeals court based its decision on the grounds that the status of the law in 1935 "should not lead to the erroneous conclusion that a form of behavior condemned on the basis of generally held convictions is still permissible and may even be sanctioned in a court of law. No one can doubt that a marriage between a Jew and an Aryan woman is contrary to *the German understanding of what is right*."[49] Hans Frank's *Volksseele* had spoken.

The confusion surrounding the question of mixed marriages was not removed until the Nuremberg Laws of September 1935. Yet even these laws resolved only part of the question. Although such marriages no longer could be performed, the question of what to do about the thousands of already married couples remained. These, too, violated what the Königsberg court called the "German understanding of what is right." Should these marriages now be dissolved? Most right thinking Nazis believed so. Foremost among them was Gerhard Wagner, the leader of the National Socialist Doctors' Association (Nationalsozialistischer Deutscher Ärztebund) and a rabid anti-Semite who led the drive to push the law to what he believed was its logical conclusion.[50] It was energies like this that drove the Nazi system toward Auschwitz.

Once again Nazi intentions were confounded, at least partially, by the civil code. Paragraph 1333 made the annulment of any marriage extremely difficult, limiting it to instances in which "a spouse, at the [time of] the conclusion of the marriage was mistaken as to the identity of the other spouse or about such personal characteristics of the other spouse as to have deterred him [sic] from concluding the marriage."[51] Even in these cases the complaint had to be registered within six months of the marriage. Party leaders attempted to circumvent this restriction by redefining the point at which the clock began ticking on the six-month limitation. (A suggestion to make the date of the Nuremberg Laws the starting point failed.) Until such time as the courts were completely under Nazi control, the civil code could not be ignored without creating chaos in the whole

48 Quoted in Müller, *Hitler's Justice*, 92. 49 Ibid.; emphasis added.
50 Losener, "Rassereferat," 275. 51 Paragraph 1333 in the *German Civil Code*, 296.

body of family law. Not until July 6, 1938, was Paragraph 1333 of the civil code repealed.[52]

The most self-conscious Nazi reflection on the nature of rights directly and inevitably referred to fears of race mixing. In 1936 two Interior Ministry officials, Wilhelm Stuckart and Hans Globke, co-authored the government's official *Commentary on German Racial Legislation* in elaboration of the Reich Citizenship and Blood Protection Laws. These laws, they asserted, were rooted in the communal consciousness of a racially homogeneous people, the *Volksgemeinschaft* in which Germans were bound together by common blood. This *Volksgemeinschaft* was not the product merely of "the simple adding up of individuals."[53] That notion of society they dismissed as the mistaken and outdated assumption associated with liberalism and Marxism. In the new world of National Socialism, the individual found meaning only as a member of the group, in this case the German *Volk*. Rights resided with the *Volk*, and its interests always superseded those of the individual. "An individual," Stuckart and Globke concluded, "is born into membership in a *Volk*. It is as a consequence of this membership that the individual acquires rights."[54] Individuals born outside the blood boundaries of the *Volk* had no rights, even if they lived within its geographical limits. In fact, they represented a danger to the very existence of the *Volk*. As such, their total exclusion was justified, and necessary.

52 Müller, *Nazi Justice*, 96.

53 Wilhelm Stuckart and Hans Globke, *Kommentare zur Rassengesetzgebung: Reichsbürgergesetz, Blutschutzgesetz, Eheschutzgesetz*, 2 vols. (Munich, 1936), 1:2.

54 Ibid., 53.

5

The Rights of Aliens in Germany and the United States

CHRISTIAN JOPPKE

Every modern state divides the people of the world into those who belong to it and those who do not, between "citizens" and "aliens." This reflects the fact that modern states are not only territorial organizations, characterized by the monopoly of violence within a given space, but also membership associations, characterized by space-transcendent reciprocal rights and duties.[1] In an earlier phase of modern state development, mere domicile was sufficient for membership. Beginning with Austria and France in the early nineteenth century, states introduced the more demanding criteria of place of birth and descent to distinguish between those who belonged and those who did not. The increased mobility of individuals and increased functions of the state in society (most important, poor relief) conditioned this change from domicile to birth as the criterion for membership. Once the association with a state was democratically and emotively revalued as membership in a nation, there was not only the "top-down" interest of the state but also the "bottom-up" interest of the nation to sharply demarcate citizens from aliens.

Aliens are subject to sovereign state actions that citizens are not: Aliens may be denied entry to the state, or they may be expelled. According to international law, citizens enjoy the right of entry and residence in "their" state; in addition, they cannot be involuntarily stripped of their citizenship. The rights of entry and residence are precious commodities in a world where only some states provide its members with the rule of law, democracy, and welfare. In fact, the uneven distribution of these resources motivates increasing numbers of people to leave behind the state in which they are citizens and try their luck in other states in which they are aliens.

1 For the state as territorial organization, see Charles Tilly, ed., *The Formation of National States in Western Europe* (Princeton, N.J., 1975); for the state as membership association, see Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, Mass., 1992).

What are the rights of aliens to enter and take residence in a state of their choice, how sovereign are states to prevent this from happening, and has there been a change in these capacities over time?

These are the questions that I address using the examples of the United States and Germany. Since World War II, the two have been among the most expansive immigrant-receiving countries in the world. But they have also been characterized by opposite philosophies, the United States conceiving of itself as an expansive "nation of immigrants," Germany considering itself "not a country of immigration." One might conclude from this that the domestic legal and political processes are quite irrelevant regarding the capacity of states to keep out aliens. Some scholars have recently argued that an emergent international human rights regime has invested aliens with universal human rights that states must respect and that diminishes the sovereign powers of states to dispose of aliens as they see fit.[2] In this chapter I reject this argument. Legal restrictions on the capacity of states not to admit or to expel aliens exist, but these are self-imposed restrictions of liberal states, not externally imposed restrictions by an international human rights regime. Although it is a structural element of liberal states, self-limited sovereignty became effective only when the exclusive powers of nationhood became delegitimized in the West after World War II. Accordingly, the story of alien rights could not have been told before this critical juncture.

THE TRANSFORMATION OF IMMIGRATION LAW IN THE UNITED STATES

In the United States, classical immigration law, formulated at the high noon of "official nationalism"[3] in the 1880s, had fused the principles of consent-based obligation, strong sovereignty, and restrictive national community.[4] Consent-based obligation modeled the relationship between government and alien along the lines of the private law relationship between a landowner and a trespasser, in which the former owed no obligation to the latter except those explicitly consented to. The principle of strong sovereignty was formulated by the U.S. Supreme Court in 1892: "It is an

2 Yasemin N. Soysal, *Limits to Citizenship: Migrants and Postnational Membership in Europe* (Chicago, 1994); David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore, 1996); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York, 1996).

3 Benedict R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, 1991), chap. 6.

4 Peter Schuck, "The Transformation of Immigration Law," *Columbia Law Review* 84, no. 1 (1984): 1–90.

accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[5] Applied to the institutions of government, strong sovereignty meant the unfettered "plenary power" of the political branches of government over the admission, expulsion, and naturalization of aliens. Finally, strong sovereignty was exerted on behalf of a restrictive national community in which the main dividing line was race. The benchmark of classical immigration law is the Chinese exclusion case of 1882, in which the Supreme Court refused to overturn legislation that barred Chinese laborers from entry to the United States. As the court infamously reasoned, "if Congress considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary."[6]

Since the 1960s, following a turn toward a larger "communitarian" or "participation" in public law, immigration law has moved away from the classical model.[7] Postclassical immigration law abandons the individualistic principle of consent-based obligation and "grants the alien rights according to an ascending scale as her identification with society deepens."[8] In the new communitarian model individuals are seen as invested with inalienable human rights and social ties that must be respected and protected by government. No longer allowed to get tough with aliens as illicit trespassers, government "owes legal duties to all individuals who manage to reach America's shores, even to strangers whom it has never undertaken, and has no wish, to protect."[9] This has entailed a cautious but steadily increasing assertiveness of the courts, which refused to defer to the plenary power of Congress and the executive branch in immigration affairs, and invoked constitutional and statutory norms to protect the rights of aliens. Motivated by the antidiscriminatory impetus of the civil rights era, courts have broadened the national community to include legal resident aliens, undocumented immigrants, and even first-time entrants, such as asylum seekers. However, this broadening did not come without a price. As Peter Schuck has pointed out, the legal

5 Ibid., 6. 6 Ibid., 14.

7 On "communitarian," see Schuck, "Transformation of Immigration Law"; on "participation," see Peter Schuck, "Developments in the Law," *Harvard Law Review* 96 (1984): 1286–465.

8 Ibid., 1292.

9 Schuck, "Transformation of Immigration Law," 4.

empowerment of aliens has undermined the very possibility of national self-definition, which necessarily implies the exclusion of nonmembers: "If the American community's power to define its common purposes and obligations is no greater than the power of strangers to cross our borders undetected and to acquire interests here, our capacity to pursue liberal values – to decide as individuals and as a society what we wish to be – may be critically impaired."[10]

The major resource for the legal empowerment of aliens has been a constitution that grants broad equal-protection and due-process rights to "persons," not just to "citizens."[11] Here one must distinguish between three classes of aliens who have successively been brought under constitutional protection: legal permanent residents, illegal immigrants, and first-time entrants. Legal permanent residents (LPRs) now enjoy rights and benefits that are essentially equal to those of U.S. citizens.[12] This has not always been so because under classical immigration law the states could invoke the legal "special public interest" doctrine to prohibit aliens from owning or acquiring land, working on public laws projects, or receiving welfare benefits. In *Graham v. Richardson* (1971) the Supreme Court put an end to this, ruling that states cannot discriminate against resident aliens in providing welfare benefits unless there is a "compelling state interest." Applying the language of civil rights law, the court argued that LPRs were a "discrete and insular minority," victims of "irrational discrimination" and political powerlessness, so that classification based on alien status – much like classification based on race – was "inherently suspect" and "subject to close judicial scrutiny."[13] In a typical example of communitarian reasoning, the court emphasized that aliens were active members of society who, like citizens, paid taxes and with their work and capital contributed to the economic welfare of the state. Following Graham, the Supreme Court has struck down state statutes

10 Ibid., 90.

11 The "personhood" principle was first applied to aliens in *Yick Wo v. Hopkins* (1886), in which the Supreme Court argued that the equal protection clause of the Fourteenth Amendment was "not confined to the protection of citizens" but "universal in [its] application . . . to all persons within the territorial jurisdiction." Whereas the personhood and plenary power principles were thus articulated at about the same time, the former remained little used until the 1960s.

12 Exceptions are the right to vote, to serve on juries, and to run for high elective office or federal appointment, all of which are reserved for U.S. citizens. In addition, LPRs have lesser rights to sponsor family immigration, and they are theoretically (but almost never practically) subject to deportation. See Peter Schuck, "The Treatment of Aliens in the United States," 18–27, paper presented at the German-American Academic Council/American Academy of Arts and Sciences conference, Ladenburg, Germany, July 16–21, 1995. Things have, of course, changed with the Welfare Reform Act of 1996, which excludes LPRs from most federal welfare programs.

13 The court quotations are from Schuck, "Developments in the Law," 1403.

restricting the eligibility of aliens for professions, state civil service, and public education.[14]

The second class of aliens to enter the orbit of constitutional protection is illegal immigrants. In *Plyler v. Doe* (1982) the Supreme Court invalidated a Texas statute that withheld free public education from the children of illegal immigrants. This most famous of all U.S. court rulings on aliens' rights argued that the Fourteenth Amendment's Equal Protection clause referred to all "persons" within a state's jurisdiction,[15] so that aliens, whatever their legal status, had to be included: "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[16] Procedural due process protections, for instance in deportation proceedings, had been granted to illegal aliens before *Plyler*; the novelty was to extend substantive entitlements normally reserved for lawful residents to illegal aliens. In an expansive reading, *Plyler* marked a decisive break with the principles of classical immigration law because it enlarged the national community to uncertain dimensions and patently disregarded the parallel congressional policy to contain illegal immigration. In this reading, as Schuck put it, "*Plyler* [is] the most powerful rejection to date of classical immigration law's notion of plenary national sovereignty over our borders."[17]

With first-time entrants, such as asylum seekers presenting themselves at the borders, we reach the "outermost ring of membership" in which the degree of constitutional protection is at its nadir.[18] As the authors of *Developments in the Law* emphasize, the postclassical participation model of immigration law only marginally applies in this case because "the entering alien . . . has no pre-existing stake in the community upon which a grant of rights might be based."[19] Indeed, the exclusion of aliens is inherently linked with elementary national self-definition and has accordingly

14 However, the legal empowerment of permanent resident aliens has remained at the state level. At the federal level, the plenary power doctrine has stood in the way of restricting the government's power to classify aliens. See Gerald M. Rosberg, "The Protection of Aliens from Discriminatory Treatment by the National Government," *Supreme Court Review* (1977): 275–339.

15 In *Plyler v. Doe* the Supreme Court interpreted the word *jurisdiction* in a "predominantly geographic sense." In a critique of *Plyler*, Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven, Conn., 1985), 103, have suggested a "political, consensualist understanding" of the jurisdiction requirement. The authors conclude that birthright citizenship for the children of illegal aliens is not commanded by the constitution.

16 Quoted from Justice Brennan's majority opinion, excerpts of which are reprinted in the *New York Times*, June 16, 1982, D22.

17 Schuck, "Transformation of Immigration Law," 58.

18 David Martin, "Due Process and Membership in the National Community," *University of Pittsburgh Law Review* 44 (1983): 216.

19 Ibid., 1309.

remained a bastion of sovereignty, however besieged, in which the plenary power doctrine is firmly in place.[20] "Over no conceivable subject is the legislative power of Congress more complete," the Supreme Court stated in 1909. Plenary power over the admission of aliens was reaffirmed as late as 1977 in *Fiallo v. Bell*, in which the Supreme Court held that "policies pertaining [to] the entry of aliens . . . are peculiarly concerned with the political conduct of government."[21] However, since the onset of mass asylum seeking in the early 1980s some lower courts have openly challenged the plenary-power doctrine and tried to bring first-time entrants under the umbrella of the constitution. Discussing the lower court challenge to plenary power, Schuck appropriately characterizes the "emergent law of asylum" as an exemplar of communitarian immigration law, "(enabling) any alien to acquire rights against the government to which the latter has not expressly consented."[22]

The hurdle to overcome in the empowerment of entering aliens was the so-called Knauff–Mezei doctrine, which stipulates unlimited governmental exclusion power by positioning the entering alien outside the constitution.[23] Formulated in the exclusion cases *Knauff v. Shaughnessy* (1950) and *Shaughnessy v. Mezei* (1953), this doctrine is premised on the plenary-power principle, which sees the power to exclude aliens as a special class of government power that is inherent in sovereignty and not subject to constitutional limitations. On this premise, Knauff-Mezei consists of two elements: the conception of nonresident alien admission as a "privilege," not a "right" (a distinction largely abandoned in modern constitutional jurisprudence, except immigration law); and the legal fiction that the entering alien is not on U.S. territory, so that the U.S. Constitution does not apply. The right–privilege distinction first appeared in *Knauff*: A German-born wife of an American serviceman was denied entry on security grounds, without a hearing and on the basis of confidential information. The Supreme Court rejected her challenge, arguing "Admission of aliens to the United States is a privilege granted by the sovereign United States government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe."[24] Accordingly, an alien

20 See Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," *Supreme Court Review* (1985): 255–307; Stephen H. Legomsky, "Ten More Years of Plenary Power," *Hastings Constitutional Law Quarterly* 22 (1995): 925–37.

21 Quoted in Schuck, "Developments in the Law," 1309.

22 Schuck, "Transformation of Immigration Law," 70.

23 See Martin, "Due Process and Membership."

24 Quoted in Richard Hahn, "Constitutional Limits on the Power to Exclude Aliens," *Columbia Law Review* 82, no. 5 (1982): 976.

seeking entry could not question her exclusion on either procedural or substantive grounds; the conception of entry-as-privilege eliminated the possibility of constitutional checks on executive action. As the court flatly concluded, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[25]

The legal fiction of extraterritoriality, sometimes called the entry doctrine, was first advanced in *Shaughnessy*. Here the Supreme Court upheld the exclusion, without a hearing and on the basis of undisclosed information, of a permanent resident who had lived in the United States for twenty-five years. In this most drastic of all exclusion cases, in which indefinite detention was sanctioned as "temporary harborage, an act of legislative grace," the court advanced the argument that Mezei had been "an alien on the threshold of initial entry," so that constitutional protections did not apply.[26]

As many legal commentators have pointed out, the Knauff–Mezei doctrine draws a capricious line between "excludable" and "deportable" aliens.[27] Deportable aliens, even those who have entered illegally, are considered to be on U.S. territory, so that constitutional protection via acknowledgment of "personhood" applies. This includes Fifth Amendment due process rights, such as access to federal courts and choice of country in case of a valid deportation order.[28] By contrast, excludable aliens are effectively treated as nonpersons – in dreadful reminiscence of the *Dred Scott* case, wherein the Supreme Court denied the personhood of a slave and which became the triggering event of the U.S. Civil War (1861–5). According to David Martin, upholding the fiction that aliens denied entry and subsequently detained in high-security prisons are not really in the United States requires "an almost willful shutting of one's eyes to physical realities."[29]

Knauff-Mezei, as originally formulated, implied that illegal entrants wound up in a better constitutional position than legal permanent resident aliens re-entering the United States after a short visit overseas. This was entirely consistent with classical immigration law, which only considered whether an alien was located inside or outside the country – if the former was the case, deportation rules applied; in case of the latter,

25 Quoted in ibid., 962.

26 Quoted in Hiroshi Motomura, "Immigration Law After a Century of Plenary Power," *Yale Law Journal* 100, no. 3 (1990): 558.

27 E.g., Martin, "Due Process and Membership."

28 The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property without due process of law."

29 Martin, "Due Process and Membership," 179.

admission and exclusion rules applied.[30] Yet, from the perspective of communitarian immigration law, the nondistinction between first-time entrants and re-entrants had to appear anomalous. This was redressed in *Landon v. Plasencia* (1982), where the Supreme Court extended constitutional due process protection to a returning permanent resident, thus assuring that such residents did not lose their status just by traveling abroad. But this remained the only intrusion of communitarian reasoning into the exclusion process, and it did not diminish the full force of plenary power on first-time entrants.

In the early 1980s the new phenomenon of mass asylum seeking from Cuba and Haiti caused a serious "due process crisis" regarding excludable aliens.[31] Facing the arrival of 125,000 Marielito Cubans and 15,000 Haitian boat people in 1980 alone, the Reagan administration ended the previous generous policy of "paroling" asylum seekers into the country and instead adopted an extremely restrictive mass detention and expulsion policy.[32] This policy was perhaps commanded by the imperative of containing illegal immigration, but it entailed extraordinary hardship, such as prolonged incarceration under harsh and oppressive conditions, the summary denial of asylum claims, and erratic and discriminatory treatment by the Immigration and Naturalization Service (INS). As Schuck remarked, the denial of elementary due process rights to the innocent victims of economic deprivation, civil war, and political persecution has "seared the judicial conscience as few events since the civil rights struggles of the 1950s and 1960s have done."[33] In a sometimes explicit, more often implicit challenge to the plenary-power doctrine, lower courts have acknowledged due process claims raised by human rights and public interest lawyers on behalf of detained or rejected asylum seekers, holding prolonged detention invalid, prescribing elaborate legal procedures for asylum hearings, and rebuking the INS for discriminating on the basis of national origin and race.

Martin has castigated as "procedural exuberance" the inclination of lower courts to apply constitutional due process and equal protection rules "to anyone in the world who presents himself at our borders."[34] The

30 Motomura, "Immigration Law," 556.

31 Martin, "Due Process and Membership," 168.

32 The era of general parole had lasted from 1954, when the Ellis Island Detention Center in New York closed, to 1981, when the new Reagan policy of detaining undocumented entrants was instituted. During this period detention was limited to aliens who were likely to abscond or who posed a threat to national security. See Margaret Scott, "Significant Developments in the Immigration Laws of the United States, 1983–1984," *San Diego Law Review* 22 (1985): 1123n104.

33 Schuck, "Transformation of Immigration Law," 68.

34 Martin, "Due Process and Membership," 171.

dilemma is clear: Continuing to treat excludables as nonpersons, as stipulated by Knauff-Mezei, violates the liberal and communitarian values of postclassical immigration law; but granting the constitutional status of "person" to excludables would extend constitutional protection to literally everyone in the world and stand in the way of effective immigration control.

Scrutinizing the lower court challenge to plenary power, one can detect at least three patterns: First, there were variable, often contradictory lines of court reasoning. These variations partially depended on the national origins of the plaintiffs: Regarding Haitians, who were automatically detained and categorized as "economic" refugees ineligible for asylum (whereas most Cubans were generously "paroled" into the country), some courts would point at national origin and racial discrimination; regarding detained Marielito Cubans, an alternative line of reasoning was to consider detention not as an immigration measure but as "punishment" that was subject to constitutional due process control. Second, contrary to the impression given by David Jacobson, courts were disinclined to resort to international law as a protection for asylum seekers; the major thrust has been to bring the latter under the umbrella of the domestic constitution.[35] Third, and perhaps most important, the application of constitutional norms to excludable asylum seekers has remained a lower court phenomenon; the Supreme Court has refused to deliver an equivalent to *Plyler v. Doe* for excludable aliens.

Regarding the second pattern, which is particularly relevant for the argument pursued here, consider the following detention case: In *Fernandez v. Wilkinson* (1980), a Cuban who had arrived as part of the Mariel Boat lift in spring 1980 and was deemed inadmissible because of a criminal history, claimed that his prolonged detention was tantamount to cruel and unusual punishment prohibited by the Eighth Amendment, and a violation of the due process clause of the Fifth Amendment. The district court of Kansas concluded that the plaintiff's status as an excludable alien prohibited recourse to the constitution, thus reaffirming Knauff-Mezei: "We have declared that indeterminate detention of petitioner in a maximum security prison pending unforeseeable deportation constitutes arbitrary detention. Due to the unique legal status of excluded aliens in this country, it is an evil from which our Constitution and statutory laws afford no protection."[36] However, the district court decided that arbitrary

35 Jacobson, *Rights Across Borders*, chap. 5.

36 Quoted in Farooq Hassan, "The Doctrine of Incorporation," *Human Rights Quarterly* 5 (1983): 71.

detention was a violation of customary international law, ordering the government to release the Cuban on these grounds within ninety days. Celebrated by international human rights advocates, this was the only time that a domestic court based a detention or asylum decision on international law.[37] But, as a legal commentator pointed out, this was also a questionable decision.[38] As the Supreme Court ruled in *Paquete Habana* (1900), international law is the law of the land only interstitially, "in the absence of any treaty or other public act of . . . government in relation to the matter." Accordingly, the validity of the respective detention depended on whether or not it was undertaken without presidential approval – which was never considered by the court.

Without commenting on the district court's reasoning, the Tenth Circuit Court of Appeals in *Rodriguez-Fernandez v. Wilkinson* (1981) upheld the claimant's release from detention, but on starkly different grounds. The appeals court argued that indeterminate detention in a federal prison, which resulted from Cuba's refusal to take the plaintiff back, no longer was part of the process of exclusion under immigration law; rather, it amounted to punishment, for which constitutional protection under the Fifth and Eighth Amendments applies. It is interesting that the court based its ruling on the subconstitutional ground that the INS lacked statutory authority for indefinite detention. But, in Hiroshi Motomura's terms,[39] the court used "phantom constitutional norms" favorable to aliens in its statute interpretation – "serious constitutional questions (would be) involved if the statute were construed differently," argued the court.[40] Overall, the thrust of *Rodriguez-Fernandez* was to redefine detention as punishment and thus to bring the respective would-be entrant under the protection of the Constitution; the role of international law was diminished from that of a "controlling" to a "definitional" device, as one guideline (among several) for the definition of what was due process.[41]

BASIC LAW TO THE RESCUE: ALIEN RIGHTS IN GERMANY

Alien rights in Germany are shaped by the dualism of a foreigner law enshrining the unfettered sovereignty of the state and constitutional law protecting universal human rights, independently of citizenship, from the

37 Robert J. Martineau, "Interpreting the Constitution," *Human Rights Quarterly* 5 (1983): 87–107; Hassan, "Doctrine of Incorporation."
38 Hahn, "Constitutional Limits," 964–5.
39 Motomura, "Immigration Law."
40 Quoted in Hassan, "Doctrine of Incorporation," 75.
41 Martineau, "Interpreting the Constitution," 104.

vagaries of the sovereign state. Until it was liberalized in 1990, the foreigner law of 1965 was characterized by three deficits. First, it conceived of aliens as a threat to the home population, enshrining the supremacy of state interests, with no rights whatsoever on the part of aliens. Paragraph 2(1) of the foreigner law flatly stipulates: "A residence permit may be issued if the presence of the foreigner does not harm the interests of the Federal Republic of Germany." Second, there was a lack of differentiated residence permits, and no provisions existed for more-than-temporary stays on German territory. The introduction of the so-called permanence regulation (*Verfestigungsregelung*) in 1978 stipulated conditions under which unrestricted residence permits could be issued. This entailed the introduction of a residence status akin to U.S. legal permanent resident status. A third deficit of the foreigner law was the complete absence of rules for family reunification. This was within the logic of a guest-worker regime, which conceived of the foreigner as a return-oriented, isolated carrier of labor power, devoid of family ties. Detailed rules for reunifying foreign families were not devised before 1981, and then only as a device to close off a major source of unwanted immigration after the recruitment stop.

These residence permit and family reunification provisions, meant to close the most glaring loopholes in the foreigner law, only had the status of administrative rule changes or federal government recommendations, respectively. They did not have the status of binding law. The absence of legislative reform, from 1965 to the passing of a new foreigner law in 1990, has been among the most striking peculiarities of German immigration policy. As a legal scholar complained in 1980, "The gravest deficiency [in the German foreigner law] is the absolute passivity of the lawmaker, who shirked his responsibility for years."[42] Reviewing the deficiencies of the old law on foreigners, Kay Hailbronner similarly concluded that "legal security has to replace the largely undetermined discretion of the administration."[43]

Filling the vacuum created by the passivity of the political branches of government, activist courts have expansively interpreted and defended the rights of foreigners. They could do this on the basis of a constitution that drew two fundamental lessons from modern German history, especially the history of the Third Reich: first, to subordinate state power to the rights of individuals; and second, to grant the most fundamental of these rights without respect to nationality. Regarding the latter, the first seven

42 Christian Tomuschat, "Zur Reform des Ausländerrechts," *Neue Juristische Wochenschrift* 33, no. 20 (1980): 1079.

43 Kay Hailbronner, "Zur Reform des Ausländerrechts," *Zeitschrift für Rechtspolitik*, no. 9 (1980): 231.

articles of the West German Basic Law protect universal human rights, independent of national citizenship. As Karl Doehring and Joseph Isensee write, "the broken nation of the Basic Law seeks to find its spiritual unity and self-consciousness on the basis of human rights universalism."[44] This is most emphatically expressed in Article 1 of the Basic Law, which stipulates that "the dignity of the individual is untouchable." Article 1 also introduces the principle of limited sovereignty in obliging the state to "respect" and "protect" the dignity of the individual. In a conscious departure from the German state tradition, the Basic Law puts the individual first and the state second; it is conceived in the spirit of limiting state sovereignty in regard to individual rights.[45]

Applied to immigration, the limited sovereignty of the German state is expressed in the absence of a U.S.-style plenary power doctrine. The admission and expulsion of aliens and the overall regulation of foreign migration is not deemed a prerogative of the political branches of government, in principle out of reach for judicial review. As Gerald Neuman outlined, the greater reach of constitutional limitations on German (de facto) immigration policy is due to a number of factors: most important, the specific delegitimation of unfettered state sovereignty by Nazism, but also the general advantage of a young constitution written in the era of universal human rights and untainted by older international law doctrines of absolute state sovereignty, and, finally, the absence of foreign policy considerations in German immigration policy.[46]

Although German law and policy regarding aliens is thus subject to judicial review in principle, this does not imply that the interests of the state are *eo ipso* canceled out. The supremacy of state interests in the foreigner law and of individual rights in the Basic Law are the two antipodes that courts have had to reconcile in concrete case law. This could be achieved, for instance, by means of the legal principle of proportionality (*Verhältnismässigkeit* or *Rechtsgüterabwägung*), which stipulates that restrictions of individual rights have to be in proportion to the public good to be achieved.

44 Karl Doehring and Josef Isensee, "Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland," in Vereinigung der Deutschen Staatsrechtslehrer, eds., *Berichte und Diskussionen auf der Tagung der Vereinigung der deutschen Staatsrechtslehrer in Mannheim vom 3. bis 6. Oktober 1973*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, no. 32 (Berlin, 1974), 74.

45 This constitutional aspect of German "semisovereignty" is omitted by Peter Katzenstein, *Policy and Politics in West Germany* (Philadelphia, 1987), who instead stresses federalism and neocorporatism.

46 Gerald L. Newman, "Immigration and Judicial Review in the Federal Republic of Germany," *New York University Journal of International Law* 23 (1991): 74–85.

The legal empowerment of aliens in Germany had two pillars: legal scholarship, which carved out the doctrinary principles of constitutional protection for aliens, and actual court rules putting those principles into practice. Regarding the former, the two most important legal statements are Doehring and Isensee,[47] who deduced the rights of foreigners from the principle of self-limited state sovereignty, and Gunther Schwerdtfeger,[48] who postulated that over time the constitutional rights of foreigners approximated those of citizens.

Doehring and Isensee's report, "The Constitutional Status of Foreigners in the Federal Republic of Germany," presented at the 1973 convention of the Society of Constitutional Lawyers in Mannheim, is based on an important distinction: Regarding the first admission of foreigners, state sovereignty reigns supreme, but once a foreigner has been admitted to German territory, the equal protection of the law applies, and state discretion is subsequently limited. According to Isensee, the human rights universalism of the Basic Law precludes two classical topoi of foreigner law: unfettered sovereignty and the treatment of foreigners according to a special "guest-law" (*Gastrecht*).[49] Blowing to pieces the "guest-worker" construction of German foreigner law and policy, Isensee states: "In the age of human rights the foreigner does not enjoy guest rights but rather home rights."[50]

Accordingly, foreigners are entitled to extensive civil and social rights. Even the constitutional rights limited to Germans only, such as the rights of association, free movement and residence, or occupation, are not in principle denied to foreigners. In this respect, Article 2(1) of the Basic Law, which protects the "free development of personality," functions as a general "residual right" (*Auffanggrundrecht*) that endows the foreigner with legitimate claims in those spheres that transcend the core of basic human rights. For instance, once the state has admitted foreigners to the labor market, the principles of equal protection of the law and self-limited state power prohibit certain types of discrimination, such as higher taxes, bans on joining unions, or the priority hiring of Germans. In sum, the Basic Law "empowers the foreigner with increasing status rights, to which corresponds on the side of the state a system of progressive self-limitation."[51]

Schwerdtfeger's *Recommendations to Improve the Legal Status of Foreigners in Germany*, presented at the 1980 German Lawyers Convention in

47 Doehring and Isensee, "Die staatsrechtliche Stellung der Ausländer."

48 Gunther Schwerdtfeger, *Welche rechtlichen Vorkehrungen empfehlen sich, um die Rechtsstellung von Ausländern in der Bundesrepublik Deutschland angemessen zu gestalten?* (Munich, 1980).

49 Isensee, "Die staatsrechtliche Stellung der Ausländer," 74–5.

50 Ibid., 75. 51 Ibid., 85.

Berlin, radicalize and systematize an idea that was first introduced by Isensee: With the increasing length of stay on German territory, foreigners come to share with German nationals the "legal fate of dependency" (*Rechtsschicksal der Unentrinnbarkeit*), so that their constitutional rights must approximate those of Germans. In nonlegal terms: Because they have nowhere else to go, settled foreigners must be treated like Germans. Accordingly, the degree of constitutional protection increases with the length of residence. Surveying the legal status of foreigners in crucial areas such as residence rights, state welfare benefits, and labor market participation, Schwerdtfeger concludes: "With increasing length of residence the foreigners of the first generation, as well as their children who have grown up in Germany, reach a constitutional status that is equal or close to that of Germans."[52] Like Isensee, Schwerdtfeger interprets Article 2(1) expansively as a general *Auffanggrundrecht*, which allows foreigners to enjoy the rights normally reserved for Germans (such as residence and occupational rights).[53] But its material protection is dependent on the length of residence: "The longer the stay in the Federal Republic, and the more the foreigner is dependent on developing his personality only in the Federal Republic (*Rechtsschicksal des Unentrinnbaren*), the more grows the material protection for the foreigner according to Article 2(1) of the Basic Law."[54]

This does not rule out the possibility of restricting individual rights in light of interests of state, according to the principle of proportionality. But from a certain point on, the constitutional claims of settled foreigners become so strong that only parliamentary legislation could legitimate such restrictions.[55] This was a clear hint that a restrictive foreigner policy based on administrative decrees was unconstitutional. The state was free to deny the entry and settlement of new-seed immigrants, but once they had been allowed in, and the moment of practicing strict rotation had slipped away, there was no going back. "After the state has allowed the 'guest worker wave' to happen, the automatism of constitutional law steps in. Already for constitutional reasons a return to the status quo ante no longer is possible."[56]

Isensee's and Schwerdtfeger's programmatic statements about the legal status of foreigners both reflected and further incited actual court rules

52 Schwerdtfeger, *Welche rechtlichen Vorkehrungen*, A26.

53 An expansive interpretation of Article 2(1) as a "superconstitutional right" (Kay Hailbronner, "Ausländerrecht und Verfassung," *Neue Juristische Wochenschrift* 36, no. 38 [1983]: 2113) is not uncontested in the legal literature.

54 Schwerdtfeger, *Welche rechtlichen Vorkehrungen*, A32.

55 See ibid., A132. 56 Ibid., A45.

in this area. The three most important rules, set between 1973 and 1987, concerned the residence status of foreigners and their right to be joined by family members. Taken together, these court rules confirmed that the temporary guest worker program had turned into permanent, even self-reinforcing immigration, undermining the restrictionist foreigner policy after the recruitment stop.

Enjoying the broad civil and social rights guaranteed by the federal constitution and the territoriality principle of the welfare state is contingent on a secure residence status, originally the Achilles heel in the life of de facto immigrants in Germany.[57] Two landmark rules of the Constitutional Court (*Bundesverfassungsgericht*) severely limited the discretion of the state in deporting foreigners or denying them a renewed residence permit. The so-called Arab Case, decided in July 1973, concerned the issue of deportation.[58] Previously, the primacy of state interests in the foreigner law had allowed licentious routine deportation practices, whereby settled foreigners who had committed bagatelle offenses, such as drunk driving or petty theft, were ordered to leave the Federal Republic immediately.[59] In the Arab Case, the Constitutional Court declared such deportation practices unconstitutional. The case concerned two Palestinian students who had been living in the Federal Republic since the early 1960s. After the Palestinian terrorist attack on Israeli athletes during the Munich Olympic Games in 1972, administrative courts ordered the students' immediate expulsion as "security risks" because both had been members of a Palestinian student organization suspected of harboring contacts with terrorists. The Constitutional Court ruled that the immediate expulsion orders violated the plaintiffs' constitutional liberty rights according to Article 2(1) and the principle of legal stateness guaranteed by Article 19(4) of the Basic Law.[60] Because the two students were not accused of any personal wrongdoing and the risk of their committing a terrorist act during the court consideration of the appeal was negligible, their personal liberty interests outweighed the public interest in their immediate removal. This was a momentous court ruling. For the first time the Constitutional Court affirmed that foreigners had rights protected by the constitution, which

57 Note that Isensee ("Die staatsrechtliche Stellung der Ausländer," 72) denied the existence of a constitutional right of permanent residence: "The discretion of the state to limit temporally or revoke a residence permit is not cancelled out by the constitutionally required status security."

58 *Decision of 18 July 1973* (1 BvR 23, 155/73); henceforth quoted as "Arab Case."

59 See Klaus Dohse, *Ausländische Arbeiter und bürgerlicher Staat* (Königstein, 1981), 240–4.

60 Because one of the plaintiffs was married to a German national, the court also argued that in this case Article 6(1) of the Basic Law (which protects marriage and the family) had been violated.

– according to the principle of proportionality – could outweigh the interests of the state.[61]

A second landmark ruling, the so-called Indian Case, decided in September 1978, concerned the renewal of residence permits.[62] According to the foreigner law, there is no legal difference between an initial and a renewed residence permit. Initial and renewed residence permits are essentially acts of grace in which the principle of proportionality does not apply and in which the previous length of stay makes no difference.[63] In the Indian Case the Constitutional Court found this equalization of initial and renewed residence permits unconstitutional. The case involved an Indian national who had first entered the Federal Republic in 1961 as an apprentice in the metal industry and since 1967 held continuous employment with a construction firm, all on the basis of routinely renewed residence permits. In September 1973 the local foreigner office refused to renew his residence permit, arguing that his further presence would harm the interests of the Federal Republic because he was seeking permanent settlement in Germany, beyond his original purpose of seeking occupational training. A state administrative court upheld this decision in reference to the federal government's no-immigration policy. In overturning the lower-court ruling, the Constitutional Court argued that the nonrenewal of the residence permit was in violation of Article 2(1) of the Basic Law, in conjunction with the principle of legal stateness. More concretely, the court held that the previous routine renewals had created a constitutionally protected "reliance interest" (according to the principle of *Vertrauensschutz*) in continued residence. The court added that this reliance interest outweighed the no-immigration maxim of public policy: "For a rejection of the residence permit renewal it is not sufficient to point to the general maxim that the Federal Republic is no country of immigration."[64] The Indian decision entailed a significant limitation on the government's options in foreigner policy. A policy of expulsion and forced repatriation was ruled out for constitutional reasons.[65]

61 See Jost Pietzcker, "Die neuere Rechtsprechung des Bundesverfassungsgerichts zum vorläufigen Rechtsschutz im Ausländerrecht," *Juristische Zeitschrift*, no. 14 (1975): 435–9.

62 *Decision of 26 September 1978* (1 BvR 525/77); henceforth referred to as the "Indian Case."

63 See Dohse, *Ausländische Arbeiter und bürgerlicher Staat*, 240.

64 Indian Case, 1979: 186.

65 The court added, however, that a strict indication of the temporal limitation of a residence permit could preclude the emergence of a reliance interest: "If the residence permit had been first issued with the explicit indication of its nonrenewability (after the original purpose had been realized), the plaintiff could not have counted on its renewal." By implication: A guestworker system based on strict rotation is constitutionally possible, but only if the intention to rotate is unmistakably stated from the start – which obviously was not the case in the German guestworker program.

The Arab and Indian decisions of the Constitutional Court secured the residence rights of de facto immigrants, effectively barring the government from returning to the status quo ante by means of deportation and termination of residence permits.[66] In a third landmark decision, the Turkish and Yugoslav Case of 1987, the court turned to the issue of family reunification.[67] This was a much trickier terrain because it did not involve the rights of established residents but the initial grant of new residence permits. After the recruitment stop of 1973 the chain migration of families of guest workers was (next to asylum) one of the major avenues of ongoing migration flows to Germany, in patent contradiction to the official no-immigration policy. In December 1981 the federal government recommended that the federal states (*Länder*) severely restrict the entry of foreign spouses of second-generation guest workers and to make such family reunification contingent on an eight-year residence minimum for the resident spouse and a postwedding waiting period of one year. Characteristically, the *Länder* implemented this recommendation highly unevenly. Liberal Hesse lowered the residence requirement to five years; restrictionist Bavaria increased the waiting period for spouses to three years; and hyper-restrictionist Baden-Württemberg even broke the existing elite consensus of not limiting first-generation family reunification by extending the three-year rule from second- to first-generation guest workers.

One Yugoslav and two Turkish parties challenged these restrictive rules on family reunification all the way up to the Constitutional Court, arguing that they violated Article 6 of the Basic Law, which protects the integrity of marriage and the family. In a complicated decision that betrayed a hesitation to restrict the state's capacity to control a major source of recurrent immigration, the court held that Article 6 did not imply a constitutional right of entry for nonresident spouses. But nonresident family members still possessed family rights under Article 6 that

This reasoning underlies Schwerdtfeger: "After the political branches (of government) have allowed the 'guest worker wave' to happen, the automatism of constitutional law steps in" (Schwerdtfeger, *Welche rechtlichen Vorkehrungen*, A131).

66 Still in the early 1970s, Manfred Zuleeg attacked a "divided legal state" (Manfred Zuleeg, "Grundrechte für Ausländer," *Deutsches Verwaltungsblatt*, Apr. 15–May 1, 1974, 341–9) that treated foreigners like "second-class human beings" (Manfred Zuleeg, "Zur staatsrechtlichen Stellung der Ausländer in der Bundesrepublik Deutschland," *Die Öffentliche Verwaltung* 26, nos. 11–12 [1973]: 361–70). After the Arab and Indian decisions of the Constitutional Court, Zuleeg reconsidered his earlier indictments: "One no longer can talk about a divided legal state (vis-à-vis foreigners)" (Manfred Zuleeg, "Stand und Entwicklung des Ausländerrechts in der Bundesrepublik Deutschland," *Zeitschrift für Ausländerrecht*, no. 3 [1982]: 120).

67 *Decision of 12 May 1987* (2 BvR 1226/83, 101, 313/84), in the following referred to as "Turkish and Yugoslav Case."

foreigner law and policy had to respect, according to the principle of proportionality. In this light, the court upheld the challenged eight-year residence requirement and the one-year waiting period, arguing that these measures were necessary to guarantee the social and economic integration of the resident spouse and to prevent sham marriages. But Bavaria and Baden-Württemberg's three-year waiting rule was found disproportionate because of its destructive effect on young marriages.

The court's Turkish and Yugoslav decision may be read as "retrenchment from earlier, more protective attitudes."[68] Despite invalidating Baden-Württemberg and Bavaria's three-year rules, the court ruling opened up a "wide space of action" to the political branches of government.[69] In denying the right of entry for nonresident spouses the court reaffirmed the basic sovereignty of the state to control the entry of aliens: "Legislature and executive are free to decide in what numbers and under what conditions aliens may enter the Federal Republic."[70] The court furthermore approved some government pressure on families in order to provide incentives for return migration, and even okayed the wide variations in the *Länder* regulations of family reunification. But a less restrictive court ruling, such as construing a right of entry according to Article 6, would have amounted to mandating a generation-spanning, recurrent immigration process, in direct opposition to the government's policy to prevent just that. Although less assertive than in its ruling on the rights of settled foreigners, the court's decision on family reunification still went far beyond the most liberal decisions of the U.S. Supreme Court in this area, first in constraining the government's power to regulate family-based immigration at all, and second in rejecting a quota system as unconstitutional and applying constitutional protection to aliens not residing on German territory.[71] Most important, in deducing a modicum of family reunification rights from Article 6 the court decreed that de facto immigration could not remain limited to the directly recruited guest worker

68 Newman, "Immigration and Judicial Review," 63. Accordingly, the Turkish and Yugoslav decision has been heavily criticized by some legal scholars. In "Zur Verfassungsmässigkeit der Beschränkungen des Ehegatten- und Familiennachzugs im Ausländerrecht," *Neue Juristische Wochenschrift*, no. 10 (1988): 609, Bertold Huber attacks the "reduction of constitutional rights in favor of an encompassing primacy of the state's foreigner policy"; in "Öffentliche Interessen gegen Familiennachzug," *Die Öffentliche Verwaltung*, no. 14 (1988): 587, Zuleeg even finds that the decision "leaves behind a constitutional ruin" (*verfassungsrechtlichen Trümmerhaufen*).

69 Peter Weides and Peter Zimmermann, "Verfassungsrechtliche Vorgaben für die Regelung des Famliennachzugs im Ausländerrecht," *Neue Juristische Wochenschrift* 41, no. 23 (1988): 1415.

70 Turkish and Yugoslav Case, *Decision of the German Federal Constitutional Court* (2 BvR 1226/83, 101, 313/84), 1988, 47.

71 See Motomura, "Family Reunification," 13–19.

population, but had become a recurrent, self-reproducing process for constitutional reasons alone.

CONCLUSION

The development of alien rights in Germany and the United States shows interesting commonalities and differences. Regarding the latter, the development of alien rights is shaped by different alien-citizen constellations, different relations between the legal and political processes, and different types of aliens at the center of legal and political debates, reflecting different patterns of immigration.

In the United States the boundaries between alien and citizen are permeable, and the acquisition of citizenship is the routine expectation of (legal permanent resident) aliens. American citizenship is a structurally weak concept, according relatively few privileges beyond those that already accrue to legal permanent resident aliens.[72] Personhood, not citizenship, is the key category of constitutional protection. This has provided an opening for illegal aliens and asylum seekers to wedge their foot in the Golden Door, which cannot be slammed shut as soon as personhood is acknowledged. The treatment of these two types of aliens is marred by inconsistencies: Illicit trespassers are constitutionally protected, whereas legal first-time entrants may be kept out by the legal fiction of extraterritoriality. But this very inconsistency has provoked a legal movement to claim personhood protection for first-time entrants, too. Despite a weak concept of citizenship, which is easily acquired, there has been a clear long-term trend toward strengthening the rights of aliens tout court, fired by the analogy of alienage and race in post-1960s civil rights law and discourse. But this trend is politically reversible, as the recent congressional restrictions on the welfare rights of noncitizens demonstrate.

In Germany, by contrast, the boundaries between alien and citizen have generally not been permeable (at least until recently), and the acquisition of citizenship by aliens has been the exception, not the rule. Reflecting the tradition of ethnocultural nationhood, German citizenship is a strong concept whose acquisition presupposes either descent or cultural assimilation. However, as an antidote to citizenship closed to aliens, the rights of aliens are extraordinarily well developed in Germany. Except certain political rights, legal permanent resident aliens enjoy all the civil and social rights that Germans enjoy. Not unlike the American case, these rights are

72 See Schuck, "Treatment of Aliens in the United States," 1995.

based on a constitution that protects elementary human rights independently of citizenship. More than that, the experience of Nazism has conditioned a constitution in which individual rights cannot be canceled out by the sovereign state, U.S. "plenary-power" style. Accordingly, Germany has undergone legally ordered immigration against an executive that would rather have it stopped.[73] In the 1990s the German alien–citizen constellation underwent fundamental change. After the xenophobic violence of the early 1990s, the perpetuation of alien status for second- and third-generation immigrants came to be seen by most as a deficit subject to correction. At the same time, the completion of the German nation-state has rendered obsolete an exclusionist citizenship regime targeting ethnic Germans in the communist diaspora. Accordingly, the hurdles to German citizenship have successively been lowered through the introduction in 1992 of as-of-right naturalization (which obliterates the assimilation requirement), and, most important, the introduction of *jus soli* citizenship for second-generation immigrants in the new citizenship law of 1999.[74]

A second difference in the development of alien rights in Germany and the United States concerns the relationship between the legal and political processes.[75] In the pluralistic U.S. polity, alien interests are represented by a lobby of civil rights organizations, ethnic immigrant organizations, and employers. Accordingly, American expansiveness toward aliens is not just the result of friendly courts but also of interest groups defending the rights of aliens in the political process.[76] A key example is the failure to control illegal immigration: The restrictionist control intentions in the Immigration Reform and Control Act of 1986, and in the Illegal Immigration and Immigrant Responsibility Act of 1996, have been undermined by an alien lobby defeating effective sanctions against employers hiring illegal immigrants.

By contrast, alien interests have found no comparable entry into the corporatist German polity. Since the recruitment stop in 1973 the polit-

73 This does not mean that economic migrants today enjoy the same opportunities as the guestworkers of yesterday. The new guestworker programs with Eastern Europe include legal safeguards against permanent settlement. The German state has learned from its failed guestworker policy to prevent another immigration episode. See Hedwig Rudolph, "The New *Gastarbeiter* System in Germany," *New Community* 22, no. 2 (1996): 287–300.

74 See Christian Joppke, "Mobilization of Culture and the Reform of Citizenship Law," in Rund Koopmans and Paul Statham, eds., *Challenging the Politics of Ethnic Relations in Europe* (Oxford, 2000).

75 See Christian Joppke, "Why Liberal States Accept Unwanted Immigration," *World Politics* 50, no. 2 (1998): 266–93.

76 See Gary Freeman, "Modes of Immigration Politics in Liberal Democratic States," *International Migration Review* 29, no. 4 (1995): 881–902.

ical process has been restrictive vis-à-vis guest workers. There is a vicarious "foreigner lobby" (*Ausländerlobby*) of churches, welfare organizations, and unions that has helped to liberalize but has failed to fundamentally alter the restrictionist parameters of the federal government's foreigner policy. Accordingly, German expansiveness toward aliens is, more than in the United States, the result of friendly courts working against the restrictionist intentions of parliament and government. Alien interests appeared in the political process not in the form of interest groups but in terms of an emergent moral consensus among the political elites to deal humanely with the guest workers, who had been called into the country and now could not be disposed of at will.

A third difference between the United States and Germany is the type of alien in the center of legal and political debate. Foreign students, tourists, or business executives are "aliens" too, but unproblematic ones (at least most of the time). The aliens subject to legal and political debate are unwanted aliens, whom the state would rather not accept but is forced to because of legal constraints or a sheer incapacity to keep them out. There are three major types of unwanted aliens around whom different political and legal discourses have evolved in different states: asylum seekers, illegal immigrants, and family immigrants. Asylum seekers are protected by customary international law, which prohibits receiving states from "refouling" political refugees to states where they face torture or death. This prime type of migrant protected by an international human rights regime has also been the prime target of self-protective measures by western states since the early 1980s.[77] Not by accident, first-time entrants into the United States are the type of alien against whom the plenary-power prerogative of the federal state still applies. In the case of Germany the door was wide open for first-time entrants claiming protection under Article 16 of the Basic Law. It provided a subjective right of asylum that was unique in the world. The 1993 amendment to Article 16 put Germany back in line with common state practice, in which the right of asylum is the right of the sovereign state to grant asylum, not the right of the individual to be held against the receiving state.

Even more than asylum seekers, illegal immigrants have been the type of alien in the center of American legal and political debate. The incapacity of the United States to contain illegal immigration has been the root cause of its protracted immigration debate. More than the

77 See Christian Joppke, "Asylum and State Sovereignty," *Comparative Political Studies* 30, no. 3 (1997): 291–330.

constitutional protection of personhood, a federal immigration policy under the sway of interest-group politics is responsible for this outcome. Before the concern about mass asylum seeking became prevalent in the late 1980s, family immigrants were the type of alien at the center of German (and European) legal and political debate. The family became the contested site between two opposite vectors: the state trying to close down a historically unique immigration episode, and settled guest workers invoking their constitutional right to an intact family life. Accordingly, regarding illegal immigrants in the United States, there was a conjunction of equally expansive legal and political processes; regarding family immigrants in Germany, there was an opposition between an expansive legal process and a restrictive political process.

Next to these differences, there are some interesting commonalities in the development of alien rights in Germany and the United States. The powers of nationalism to draw sharp lines between citizens and aliens have become weaker in both societies, although for different reasons. In the United States the post-1960s civil rights culture has likened alien-based discrimination to race-based discrimination. In fact, the very notion of alien has become politically incorrect. The "nation of immigrants" identity, which framed America's reopening to mass immigration, is inherently inclusive; it does not allow the state to draw legitimate boundaries between "ins" and "outs." According to postclassical communitarian immigration law, everyone who manages to reach U.S. shores is "in," so that there are (at least potentially) no "outs" anymore. In Germany the powers of nationalism have been weakened, if not outlawed altogether, by the experience of Nazism. Nationalism survived only indirectly as the homeland obligations of the Bonn republic to the oppressed ethnic Germans east of the Elbe. As if struck by guilt about this lapse, the German state compensated its ethnically closed citizenship regime with one of the world's most elaborate systems of alien rights, including – until 1993 – automatic territorial access for asylum seekers. In the absence of legitimate national boundary drawing, immigration control everywhere has taken on the smell of the underworld, a populist caning of the human right to escape misery around the world.

A second commonality is that the resources for alien rights in Germany and the United States alike have been domestic, rather than inter- or transnational. United States courts, in a nation that is very much a creature of its constitution, have been unwilling to resort to international law in their rulings on aliens. German courts, while operating under a Basic Law that has granted precedence of international to national law, have not

had to resort to international law because the human rights provisions in domestic constitutional law exceed those of international law. Accordingly, the German and American restrictions vis-à-vis aliens have been self-imposed. Self-limited, not globally limited sovereignty characterizes liberal states in an age of migration.

PART TWO

Civil and Social Rights

6

"The Right to Work Is the Right to Live!"

Fair Employment and the Quest for Social Citizenship

EILEEN BORIS

The late political philosopher Judith N. Shklar called "earning" a social right of American citizenship. "The opportunity to work and to be paid an earned reward for one's labor," she theorized, has not only brought "public respect" or the standing crucial for citizenship but separated the "American" from both the nonwork of the European aristocrat and the forced labor of the slave. Liberal inheritors of the New Deal exemplified Shklar's understanding of the "right to work" as "the comprehensive commitment to providing opportunities for work to earn a living wage for all who need and demand it."[1] Those who sought to transform the wartime President's Committee on Fair Employment Practice (FEPC) into a permanent agency to fight job discrimination on the basis of race, religion, and nationality argued in 1945 that "The Right to Work is the Right to Live!"[2]

But the FEPC met intransigent opposition from staunch segregationists who transformed the demand for economic rights into a discourse on social equality. As Mississippi Democrat Theodore Bilbo claimed, the FEPC existed to "force the white employees in the departments in Washington to eat with [blacks] and use the same toilet facilities." As his colleague James O. Eastland put it, this "Communist program for racial amalgamation" would "discriminate against the white war veteran and give the Negro preference over him."[3] Such a scenario turned fairness

1 Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass., 1991), 1–2, 99.

2 "The Right to Work," 1, unpublished typescript, in office files of Max Berking, in papers of the President's Committee on Fair Employment Practices (hereafter FEPC papers), microfilm ed., reel 3H.

3 "Memorandum to Mr. White from Julia E. Baxter, Subject: Senators Bilbo and Eastland," Aug. 6, 1945, in folder: "Eastland," in NAACP papers, Library of Congress, II-A 242; "It Can . . . Dis Happen Here on the Floor of the Senate," excerpts from remarks of Senator Eastland, *Pittsburgh Courier*, July 7, 1945, p. 5.

into advantage for the inherently undeserving. Led by these Dixiecrats and others with the support of free market Republicans, filibusters against future funding forced the FEPC to close up shop in April 1946.[4] Not until Title VII of the 1964 Civil Rights Act was Congress able to reconstitute the FEPC as the Equal Employment Opportunity Commission (EEOC).[5]

This chapter explores the official discourse of fairness promulgated by the FEPC, its supporters, and African-American leaders – headed by A. Philip Randolph of the Brotherhood of Sleeping Car Porters (BSCP), a black union of the American Federation of Labor (AFL) – that forced the president to create the FEPC in the first place. It further considers expressions of fairness presented by the black working class, which insisted on the right to earn as loyal citizens. Appealing through the universalist language of democracy and fairness, the FEPC sought to extend the privileges of citizenship to African Americans and others categorized as outsiders by race, religion, or national origin.[6] Relying on the image of the citizen-soldier who was fighting for his country, proponents engendered the discourse of fair employment even as they sought to include both men and women in the category of citizen-worker. However, the relationship of women to this discourse was complex. Women gained the right to work equally with men of their own race, religion, or nationality, due not to their sex but to social characteristics shared with men.[7]

To understand citizenship I follow the definition developed by British political theorist and Labour Party partisan T. H. Marshall as transformed by feminist scholars of gender and the state. Marshall divided citizenship into three components: civil, political, and social. Civil refers to natural rights, including legal rights, such as trial by a jury composed of one's peers. Political embraces the right to suffrage and participation in the

4 For an administrative history of the FEPC, see Marl E. Reed, *Seedtime for the Modern Civil Rights Movement: The President's Committee on Fair Employment Practice, 1941–1946* (Baton Rouge, La., 1991). For the coalition that would defeat the FEPC, see J. A. Rogers, "Rogers Says: Opposition to FEPC Safeguards Investment in Color Discrimination," *Pittsburgh Courier*, June 16, 1945, p. 7.

5 Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (New York, 1990); Paul Burstein, *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States Since the New Deal* (Chicago, 1985).

6 But of the thousands of complaints before the FEPC between 1941 and 1946, African Americans filed more than 90 percent; thus historians – like the public at the time – focus on the FEPC as an agent for black civil rights. The FEPC actually issued flyers to counteract that identification, that is, under "Popular Misconceptions About FEPC" the first point was that the commission "is concerned solely with the problem of discrimination against Negroes" (see folder: "Studies," in FEPC papers, reel 69H).

7 I analyze the gendered nature of race discrimination more completely in "The Gender of Discrimination: Men, Women, and Fair Employment," a paper presented at the conference Feminism and Legal Theory, Cornell University, June 19, 1999.

political realm. Social covers "the right to a modicum of economic welfare and security, . . . the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society."[8]

The right to a job (a civil right) and living wages (a social right) are central to citizenship, but these rights presume wage labor and exclude the unpaid labor of women. Indeed, as historian Alice Kessler-Harris reminds us, Marshall himself limited the beneficiaries of "individual economic freedom" to "all male members" by noting how married women stood apart from the community norm. These rights take on different forms for women whose responsibilities for child-bearing and -rearing often undermine accessibility to social rights constructed through wage work.[9] Unlike the majority of white women during the first half of the twentieth century, however, most African-American women engaged in wage work. But they experienced exclusion from social rights because the jobs allocated to black women remained uncovered by social security, labor standards, and union contracts. Going against the norm that married women and mothers belong in the home left black women open to a cultural construction that they were lesser women – or their men lesser men because of women's labor market participation. Whereas kinwork has curtailed access to social citizenship for black as well as white women, white women have had access to greater public as well as private benefits through family ties to white men, mitigating their gendered disability.[10]

In the U.S. polity African Americans, regardless of sex, have stood in a complex relationship to Marshall's terms of citizenship, finding themselves denied civil and political citizenship as they were struggling for social citizenship – with mixed results. World War II presented an opening for full

8 T. H. Marshall, *Citizenship and Social Class* (Cambridge, 1952). Applied to concrete historical situations, Marshall's tripartite division becomes murky, especially when we look at African-American struggles. See also G. Andrews, ed., *Citizenship* (London, 1991); Ian Culpitt, *Welfare and Citizenship: Beyond the Crisis of the Welfare State?* (London, 1992); and Lydia Morris, *Dangerous Classes: The Underclass and Social Citizenship* (New York, 1994), which quotes Marshall, 44. For modifications, see also Nancy Fraser and Linda Gordon, "Contract Versus Charity: Why Is There No Social Citizenship in the United States?" *Socialist Review* 22 (July–Sept. 1992): 45–68; and Ruth Lister, "Tracing the Contours of Women's Citizenship," *Policy and Politics* 21 (1993): 3–16.

9 Alice Kessler-Harris, "Gender Identity: Rights to Work and the Idea of Economic Citizenship," *Schweizerische Zeitschrift für Geschichte* 46 (1996): 414–7.

10 On black women's work, see Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family* (New York, 1985); on their exclusion from social welfare, see Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942* (Ithaca, N.Y., 1995); and Eileen Boris, "The Racialized Gendered State: Constructions of Citizenship in the United States," *Social Politics* 2 (summer 1995): 160–80.

citizenship, and during that time the right to work advanced perhaps more than alleviation of legalized segregation or the winning of voting rights. Industrial employment for blacks increased during these years from two percent to eight percent in war industries, further accelerating migration away from agricultural and domestic labor.[11] Fair employment facilitated social citizenship; in the postwar period greater numbers of black men especially would become eligible for social security benefits, in part because of their new employment status. But civil liberties and social security remained insecure without political rights, as the civil rights struggle over the next decades would reveal. The FEPC itself faltered, blocked in congressional committees controlled by southern Democrats.[12]

THE RIGHT TO WORK

African-American spokesmen demanded fair employment in universal terms, especially in reference to the duties of citizens. "Employment is a civil right," Lester Granger of the Urban League asserted.[13] In February 1943 the St. Louis *Argus* exemplified the reasoning found throughout the black press: "If the Negro is good enough to die for his country and his state, then we declare that he is good enough to enjoy the fruits of his sacrifices just as any other citizen." A local pamphlet by Randolph's March on Washington Movement (MOWM) protested employment discrimination as "undemocratic, un-American and pro-Hitler . . . while thousands of our sons and brothers, white and black are on the battle fronts of the world fighting and dying in the name of democracy."[14] The citizen-soldier was male, but the citizen-worker concept now included women who could make claims for citizenship on the basis of contributing to the war effort. Recognition of the citizen-worker lay behind the MOWM demands for entry into defense jobs, just as the citizen-soldier fueled calls for ending the Jim Crow army. But the dying/employment trade-off favored men even when it offered space for women to protest discrimi-

11 George Lipsitz, *Rainbow at Midnight: Labor and Culture in the 1940s* (Urbana, Ill., 1994), 73; for commentary at the time, see Robert C. Weaver, "The Negro Comes of Age in Industry," *Atlantic Monthly*, Sept. 1943, pp. 54–9.

12 For civil rights activities during these years, see Patricia Sullivan, *Days of Hope: Race and Democracy in the New Deal Era* (Chapel Hill, N.C., 1996). For blacks and social security, see Michael Brown, unpublished manuscript in author's possession; Theda Skocpol, "African Americans and American Social Policy," paper presented at the annual workshop of the Research Network on Gender, State, and Society of the Social Science History Association, Baltimore, 1993.

13 Letter to Mr. Burlingham from Lester Granger, Jan. 19, 1945, in office files of Max Berking, in folder: "Education and Legislation," in FEPC papers, reel 3H.

14 "Missouri Civil Rights Bill," *St. Louis Argus*, Feb. 5, 1943; "Statement of Facts," pamphlet passed out to public at march on Bell Telephone, St. Louis Scrapbook, p. 108, in Collection of the Brotherhood of Sleeping Car Porters, Chicago Historical Society.

nation on the basis of belonging to the African-American community. The struggle was often masculinized: The Ladies Auxiliary of the BSCP spoke of their men battling "for the right to live and labor and enjoy the fruits of their toil."[15]

The lack of economic opportunity affronted manhood. As one activist proclaimed in terms merging the male breadwinner identity with that of the father-protector, and distinguishing by gender the consequences of economic discrimination:

> I have less venom in my heart for the man who lynches me than I do for the man who deprives me of my opportunity to work. Because, when I am lynched, that is all they can do to me; I am dead: I am gone. But when I am unable to work, I cannot train my daughters, I cannot train my sons, and I am in a position where I feel that the man who deprives me of my right to work makes prostitutes of my daughters and convicts and criminals of my sons.[16]

Randolph's 1941 "Call to Negro America," that is, "To March on Washington for Jobs and Equal Participation in National Defense," appealed to a national creed of democracy, freedom, justice, and equality of opportunity (the "American creed" coined by Swedish social scientist Gunnar Myrdal, with help from Ralph Bunche and other African-American scholars).[17] He demanded fulfillment of its universal terms.[18] The "Call" declared, "if American democracy will not give jobs to its toilers because of race or color . . . it is a hollow mockery and belies the principles for which it is supposed to stand." Expressing the essence of the "Double V" campaign, the MOWM believed "that democracy, like charity, begins at home."[19] For African Americans were loyal Americans. As one black businessman seeking war contracts wired the president, "They are the largest

15 Letter, Dear Member from Ardella Nutall, Jan. 1944, in C. R. Dellums papers, Bancroft Library, University of California at Berkeley, carton 24, in folder: "Ladies' Auxiliary." On the Ladies' Auxiliary, see M. Melinda Chauteauvert, *Marching Together: Women of the Brotherhood of Sleeping Car Porters* (Urbana, Ill., 1998); Paula Pfeffer, "The Women Behind the Union: Halena M. Wilson, Rosina Tucker, and the Ladies' Auxiliary to the Brotherhood of Sleeping Car Porters," *Labor History* 36 (fall 1995): 557–78.

16 Testimony of David Grant, "Fair Employment Practices," transcript of hearing, June 6, 1944, House of Representatives, Committee on Labor, p. 82, in St. Louis Scrapbook, p. 103, Collection of the Brotherhood of Sleeping Car Porters, Chicago Historical Society.

17 Walter A. Jackson, *Gunnar Myrdal and America's Conscience: Social Engineering and Racial Liberalism, 1938–1987* (Chapel Hill, N.C., 1990).

18 White liberals and black race leaders did not consider that the gendered assumptions behind this creed for such questions were not even part of their imaginable universe. When I asked Oliver Hill, the NAACP's attorney on school equal-pay cases in Virginia, why they didn't do anything about the differential pay between women and men within racial classifications who were doing the same work, he said (perhaps with some 1990s diplomacy), one issue at a time. Conversation between Eileen Boris and Oliver Hill, June 1996.

19 *Call to Negro America*, n.d., in Dellums papers, carton 23, in folder: "March on Washington"; "Statement of Facts." On Randolph and the MOWM, see Paula Pfeffer, *A. Philip Randolph, Pioneer of the Civil Rights Movement* (Baton Rouge, La., 1990), 45–118.

bloc of simon-pure unadulterated Americans without European or foreign ties or allegiances . . . they have never betrayed America, but on the contrary have given to this country more of unrequited toil than any other element of our citizenship."[20]

Using religious cadences, Randolph linked patriotism and morality to economic demands that could potentially rearrange the social order. He explained: "Negroes seek opportunity and not alms." Defense jobs would improve the standard of living of African Americans, leading to "more education and recreation for the children, a greater security and assurance of more abundant life." But inclusion also "will help to cleanse the soul of America . . . strengthen our country's foundation for national unity and national defense and give it the moral and spiritual force to achieve the preservation of our democratic faiths."[21] As a socialist, he understood the right to work as a facilitator of social welfare. If African Americans were "dissatisfied and discontented," he threatened, "there can be no genuine national unity."[22]

The Roosevelt administration responded to Randolph's pressure by issuing Executive Order 8802 in July 1941 to end discrimination in industries vital to war production. The order created the FEPC as an independent agency; it later became part of the War Manpower Commission until a subsequent executive order, 9346, reconstituted the FEPC under the President's Office of Emergency Management in May 1943. The administration planned to sell the FEPC "to the country as primarily designed to prevent limitations of the use of all manpower rather than as a present basis for the general advance of the Negro," explained White House assistant Jonathan Daniels.[23] Although a weak agency that relied

20 Telegram from Hugh E. Macbeth to Franklin D. Roosevelt, July 26, 1941, in Dellums papers, carton 32, in folder: "FEPC July–Dec. 41."

21 Press Release, A. Philip Randolph, "The Negro March on Washington," June 30, 1941, pp. 3–4, in Dellums papers, carton 23, in folder: "March on Washington."

22 Press Release, "President Roosevelt Opposes Negro March on Washington," report on conference of June 18, 1941, 4, in Dellums papers, carton 23, in folder: "March on Washington." The administration was worried enough about black morale to conduct studies on it. See Office of War Information, Bureau of Intelligence, "Negroes and the War: A Study in Baltimore and Cincinnati," special report no. 16, Division of Surveys, July 21, 1942, box 7, in file: "OWI," in office files 4245-G, Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y. (hereafter FEPC-FDR Library).

23 Executive Office of the President, Bureau of the Budget, memorandum for Mr. Marvin McIntyre from Jonathan Daniels, Jan. 26, 1943, attached to memorandum for Honorable Francis Biddle from M. H. McIntyre, Feb. 1, 1943, box 3, in file: "Jan.–April 43," FEPC-FDR Library. My evaluation of the FEPC comes from reading the massive microfilm collection, including the closed cases for the Detroit and West Coast regions. Those working for the FEPC turn out to be a distinguished group, including Clarence Mitchell, later of the NAACP; Will Maslow, later of the American Jewish Congress; Harry Kingman, long the progressive head of the WMCA at the University of California at Berkeley; the poet John Beecher; the political scientists John

on public exposure and persuasion, with presidential withdrawal of war contracts as an ultimate, unlikely threat, the FEPC represented a beachhead for civil rights within the federal government. With a committed interracial staff, it legitimized black protest.

The FEPC's first executive secretary, Lawrence Cramer, told the National Conference of Social Work in 1943, "If for no other reason than the practical necessity arising out of manpower shortages, there is need for vigorous, prompt and effective action in eliminating irrelevant considerations other than qualification and capacity in matters of labor supply." The agency continued to stand for "no special privilege" but "a fair break." Proponents of the FEPC shared with Randolph a general rhetoric of democracy, opportunity, and fairness. Cramer, the former governor of the Virgin Islands, was a liberal moralist who offered more than a resuscitated Taylorism to justify federal intervention in the hiring and promotion practices of private businesses. He viewed human rights as a basis for national rights, reminding his audience that "any plan of action must, of course, take into account the deep-rooted and emotional character of prejudice based on race, creed, color and national origin. At the same time there must be recognition of the fact that these prejudices are the raw materials of wars and must be greatly decreased or eliminated if we are eventually to emerge into a period of prolonged world peace."[24]

Fair employment meant equality and a challenge to segregation because war plants could not afford to maintain physical barriers or duplicate equipment or facilities. For George M. Johnson, the FEPC's assistant executive secretary and dean of Howard University Law School, segregation undermined equality of opportunity. So even though the FEPC "has not taken any steps to do away with racial segregation as such," as critics charged, "the custom of racial segregation frequently presents employment problems."[25] FEPC investigators often argued that "installing of segregated duplicate facilities *cannot* but lead to discriminatory employment

A. Davis and G. James Flemming; and the sociologist John Hope II. For a rundown on some of the more prominent members of the FEPC, see Reed, *Seedtime*, 350–7.

24 On Cramer, see Reed, *Seedtime*, 24. Lawrence W. Cramer, "Available and Needed Workers Have Been Barred from Employment," speech at the regional meeting of the National Conference of Social Work in New York City, Mar. 11, 1943, in folder: "Speech – Regional Meeting," in FEPC papers, reel 75H. Cramer was the former governor of the Virgin Islands who resigned the post "over the construction of public housing that lacked plumbing facilities." For "fair break," see "Report to the President," Aug. 27, 1945, 2, in office files of Ross, in folder: "Letters to the President," reel 3H.

25 George Johnson, "The Segregation of War Workers Because of Race, Creed, Color or National Origin," Apr. 21, 1943, before the New York chapter of the National Lawyers Guild, 3, in folder: "FEPC: Johnson, George, 1941–43," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 14. On Johnson, see Reed, *Seedtime*, 24, 355.

practices and would be in violation of [the] Executive Order."[26] Because the right to earn a living is a fundamental right, "there can be no separate but equal theory applied"; thus segregation in employment constituted discrimination.[27]

The agency fought major battles against Jim Crow auxiliary unions, especially those run by the AFL Boilermakers on the West Coast. In labeling segregated unions discriminatory and finding that unions were public entities rather than private clubs the California Supreme Court in 1944 constructed its argument around segregation's restriction of "the fundamental right to work for a living" and thus provided further justification for defenders of the FEPC. Drafters of the federal FEPC bill refused to consider an AFL recommendation in 1947 that would have permitted Jim Crow auxiliaries as long as they did not deprive members of employment opportunities – a dubious proposition given the wartime record of segregated unions.[28]

Fair employment became an extension of the rights of labor, indeed of the Wagner Act, in an analogy that FEPC Chairman Monsignor Francis J. Haas used before the 1943 AFL National Convention.[29] This connection made fair employment more universal, less associated with the African-American civil rights cause that had forced its birth and perhaps easier to sell to white unionists, who could compare their own position with others denied equal rights under the law.[30] Just as "the right to organize is a natural right," so Haas viewed fair employment as "minority group members' [right] to obtain opportunity for economic security." The FEPC would open participation in the trade union with all its benefits, for it would promote the right to earn a living.[31] Other Catholic priests

26 "Western Electric Company, Baltimore, Md.," in folder: "Tension File, July 1943–Oct., 1945: Md., Baltimore," in FEPC papers, reel 75H.

27 Eugene H. Clarke Jr., "Segregation as Discrimination Per Se: In Relation to the President's Committee on Fair Employment Practices (F.E.P.C.)," May 19, 1943, report for civil rights, typescript, 12, in folder: "FEPC: General, 1944," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 12.

28 *James v. Marinship Corporation*, 155 P.2d 329 at 335; on the boilermakers, see William H. Harris, "Federal Intervention in Union Discrimination: FEPC and West Coast Shipyards During World War II," *Labor History* 22 (summer 1981): 325–47, esp. 344; Reed, *Seedtime*, 267–317; on segregated unions and bill drafts, see "Memorandum to Mr. Wilkins from Mrs. Perry," Jan. 9, 1947, in folder: "FEPC: General, 1946," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 13.

29 This was not necessarily a friendly audience; some unions in the AFL maintained white-only clauses in their bylaws; the FEPC's toughest battles would involve railroad craft unions as well as the shipyards and the boilermakers. Reed, *Seedtime*, passim.

30 This is a complex matter because the National Labor Relations Board (NLRB) favored the new CIO unions over the AFL ones, giving rights on the shop floor to industrial workers, whereas crafts workers had long fought to exclude the less skilled (including white women and minorities) from their ranks.

31 Monsignor Francis J. Haas, "Address To the Sixty-third Convention of the American Federation of Labor," Boston, Mass., Oct 6, 1943, in folder: "press releases," 1, 7–8, in FEPC papers, reel

similarly argued "that this same principle [the right to work] applies to the minority-group working man (notably the Negro) exactly as it applies to all working men, or to working men in general."[32] CIO leaders reiterated such sentiments when analogizing the obstacles faced by workers before the Wagner Act to those faced by minority workers before the FEPC legislation. In 1942 the CIO responded to black unionists by creating the Committee Against Racial Discrimination (CARD), which over the years rallied unionists in support of the FEPC.[33]

These defenses came from a reinterpretation of the Fourteenth Amendment that emphasized the rights of employees but also drew on the police power of the state to protect the general welfare. As George Johnson approvingly quoted the U.S. Supreme Court in *Truax v. Raich* (1915): "The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."[34] The FEPC stood as the last in a series of labor standards that restricted the actions of employers against the public welfare. Like child-labor and the wage-and-hour laws – the latter named the "Fair" Labor Standards Act (FLSA) – fair employment restricted freedom of action, the notion of "freedom of contract" which, when applied by the court to wage labor and corporations, had perverted the meaning of the Reconstruction amendments in the late nineteenth century. Fairness in employment thus belonged to the Roosevelt court's remaking of labor law.[35]

75H. Significantly, when Walter White suggested that the National Labor Relations Act be amended to prohibit racial discrimination by unions, administration officials rejected that idea, but said it could be incorporated into the executive order. See "President Roosevelt Opposes Negro March on Washington," 4–5.

32 Richard J. Roche, O.M.I., "F.E.P.C.: A Challenge to Democracy," extension of remarks by Hon. David I. Walsh, May 15, 1945, *Congressional Record*, 79th Congress, lst sess., 1, reprint.

33 E.g., John Gibson, state president, Michigan CIO Council, in Fair Employment Practice Council of Metropolitan Detroit, "Brief Extracts of Testimony of Michigan Citizens in Support of State Fair Employment Practice Legislation," typescript, Mar. 1945, in folder: "FEPC: Inquiries, 1944–46," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 10. On CARD and the CIO's mixed wartime racial policies, see Robert H. Zieger, *The CIO: 1933–1955* (Chapel Hill, N.C., 1995), 152–63. Both the AFL and the CIO had a representative on the FEPC. For the complicated ongoing struggle for racial equality even within a union supportive of civil rights, see Kevin Boyle, "'There Are No Union Sorrows that the Union Can't Heal': The Struggle for Racial Equality in the United Automobile Workers, 1940–1960," *Labor History* 36 (winter 1995): 5–23.

34 239 U.S. 33; Johnson, "The Segregation of War Workers," 5, 7; see also, Harold Dublirer, "Legislation Outlawing Racial Discrimination in Employment," *Lawyers Guild Review* 5 (Mar.–Apr. 1945), 1–9, reprint NAACP. He argues that "the right to life is the most basic of all civil rights," which cannot be fulfilled without "the right to work" (p. 8).

35 FEPC proponents were conscious of such connections. See "Land of the Free," a speech to be adapted to local situations in states considering FEPC legislation, in folder: "FEPC: General, 1949," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 13. See also Melvyn Dubofsky, *The State and Labor in Modern America* (Chapel Hill, N.C., 1994), 137–67; however, he has only a

The attachment of the FEPC to an overall American creed, but particularly to the rights of labor, distinguished the rhetoric of agency proponents in Congressional debates from 1944, when they first attempted to make the agency permanent, to the early 1950s. In supporting the early bills, liberal Republican Charles M. LaFollette of Indiana found justification for the FEPC in the constitutionality of the Wagner Act, the FLSA, and the Walsh-Healey Public Contracts Act. These bills proclaimed "the right to work and to seek work without discrimination" as an unabridged immunity. LaFollette emphasized a newly found property rights interest that sustained the Wagner Act rather than the state's police power that had justified other labor standards. A job had become "a form of property," moving from "the concept of a commodity . . . [to] the dignity of at least a quasi property right."[36]

This right to gainful employment constituted the legacy of the New Deal, extended through the opportunity to hold a job promised by the FEPC and through Roosevelt's 1945 State of the Union call for "a second bill of rights under which a new basis of security and prosperity can be established for all – regardless of station, race, or creed." This right became one component of "the economic rights of American citizenship," which Roosevelt, like Randolph, defined "as the right to a decent home, to a good education, to good medical care, to social security, to reasonable farm income." In demanding "an Economic Bill of Rights," Randolph could say it no better. As early as 1943 he addressed rallies of African Americans in support of a permanent FEPC organized similarly to the National Labor Relations Board (NLRB), which administered the Wagner Act.[37]

Jobs and social welfare and civil and social rights were two sides of the same equation, a fulfillment of the Declaration of Independence. As the

descriptive discussion of FEPC, 187–8. For the connections between the Fourteenth Amendment and wage labor, see Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights to Contract in the Age of Emancipation," *Journal of American History* 75 (Sept. 1988): 471–500; on the FLSA, see Vivien Hart, "No Englishman Can Understand: Fairness and Minimum Wage Laws in Britain and America, 1923–1938," in Brian Holden-Reid and John White, eds., *American Studies: Essays in Honor of Marcus Cunliffe* (London, 1991), 249–69.

36 "Fair Employment Practice Act," extension of remarks of Hon. Charles M. LaFollette of Indiana, House of Representatives, June 15, 1944, *Congressional Record*, 78th Congress, 2d sess., reprint of remarks, 2; for use of "the right to a job" as a "property right" for other legislation, see Committee on Social Legislation, Philadelphia Chapter, National Lawyers' Guild, "Brief In Support of Proposed Philadelphia Fair Employment Practices Ordinance," c. 1946, in folder: "FEPC: General, 1946," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 13; for an early bill, H.R. 3986, 78th Congress, 2d sess., 2, in folder: "FEPC: General, 1944," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 12.

37 "'State of Nation' Message: President Ignored FEPC In Recommendations to Congress," *Pittsburgh Courier*, Jan. 13, 1945, 1, 4; Daniel Bell, "A. Philip Randolph Leads Drive for Permanent FEPC," *New Leader*, Sept. 18, 1943.

New York Post put it, "for the chance to have a job is certainly an important step in his [sic] pursuit of happiness." For New York's left-wing independent Vito Marcantonio, the FEPC was "a continuation of the Emancipation Proclamation"; he too discovered "the genesis of FEPC" in the Declaration of Independence: "And when they said, 'All men are created equal,' they meant that every man had a right to work, irrespective of his race, color, and creed." His use of the Declaration pointedly omitted "pursuit of happiness" or property.[38] Lauding the "real Americanism of the FEPC," African-American Congressman William Dawson of Chicago embraced the cry of other supporters: "The right to work is synonymous with the right to live."[39]

California Representative Ellis E. Patterson associated the FEPC with full employment, a bill for which was also pending before Congress in June 1945. Both bills represented "the right to work . . . [as] one of the most basic rights for which man strives." Patterson wrapped his arguments around Roosevelt's Atlantic Charter with its call for "freedom from want," which he called, "the right to work, the right to live" defined as "the right to earn the money with which to buy food, shelter, clothing, medical attention. Without these basic bodily requirements you and I cannot live."[40] Fair employment equated with Roosevelt's "jobs for all who can work."[41]

The Atlantic Charter and Roosevelt's subsequent addresses offered a U.S. version of social citizenship, a vision of the welfare state upheld most strongly by religious liberals. The Detroit Council of Churches presented this creed when connecting the right to work through fair employment with "the right to have robust and healthy bodies, the right to a harmonious family life, the right to secure the education needed for modern living . . . and the right to provide for their families the environment that

38 For the rhetoric of the Declaration of Independence, see "Fair Shake Law," *New York Post*, June 13, 1947, editorial; Mr. Marcantonio, *Congressional Record – House*, May 26, 1944, p. 5058; "Fair Employment Practice Committee," extension of remarks of Hon. Adolph J. Sabeth of Illinois in the House of Representatives, July 17, 1945, quoting Marcantonio on July 12, *Appendix to the Congressional Record*, 1945, A3505. See also "No Second-Class Citizens," extension of remarks of Hon. Emanuel Celler of New York, House of Representatives, May 25, 1948, *Appendix to the Congressional Record*, 1948, A 3434–5.

39 Mr. Dawson, *Congressional Record – House*, May 26, 1944, p. 5059; "Fair Employment Practices Committee," extension of remarks of Hon. William L. Dawson, June 15, 1944, *Appendix to the Congressional Record*, 78th Congress, 2d sess., 1944, vol. 90, p. A3033.

40 "The Right to Live," extension of remarks of Hon. Ellis E. Patterson of California, House of Representatives, June 14, 1945, *Appendix to the Congressional Record*, 1945, p. A2882.

41 Franklin D. Roosevelt, "The Four Freedoms," *New York Times*, Jan. 7, 1941, reprinted in Paul F. Boller Jr. and Ronald Story, *A More Perfect Union: Documents in U.S. History*, 2 vols., 3d ed. (Boston, 1992), 2:165–6.

permits the development of moral character and a wholesome attitude toward life."[42] In keeping with the gender ideology of the period, this familialism assumed men as the referent to the "men" whose rights required guarantees. Full-employment legislation significantly excluded housewives and mothers from the potential labor force, a move that further illuminates the gendered meaning of the right to work.[43]

Opponents of the FEPC presented a consistent interpretation of the Fourteenth Amendment, embracing both *Plessy v. Ferguson* and the *Slaughterhouse* dissents.[44] These linked freedom of association, or the right to segregation, with freedom of contract. Some segregationists claimed that blacks' "freedom to work and earn their own way has not been denied. They own property, and the laws of the States protect them, just as they protect others." Supporters of states' rights insisted that a permanent FEPC meant the nationalization of business and, thus, federal bureaucratization, which extended its influence from economic to social relations.[45] Representative Clyde R. Hoey of North Carolina warned, "when you undertake to regulate the private lives of people and their private business with political and police power you are creating a dangerous situation." The FEPC infringed on employers and union members "to choose their associates," thus "interfering with a peculiarly intimate freedom," an Arkansas representative contended. Or, as another more forcefully exclaimed, "It would mean that the employee would be required to work side by side with individuals he would not associate with except by compulsion." The FEPC, belatedly lauded by the AFL's William Green as the antidote to Nazism, would become a Gestapo. During the initial attempt to gain congressional funding for the agency in 1944, Representative John Rankin of Mississippi asserted: "They want to dictate to you who shall work in your factory, who shall work on your farm, who shall work in your

42 "Dear Sir and Brother," letter from the Detroit Council of Churches, May 2, 1946, in folder: "FEPC: General, 1946," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 13. For church support of civil rights, see "FEPC Is Up to Us," *Michigan Catholic*, Feb. 26, 1948, p. 4; see also Mr. Sadowski, *Congressional Record – House*, May 26, 1944, p. 5061, quoting from *Catholic Action*, Jan. 1944, which associated political, economic, and educational opportunities with public welfare projects. For race and the Catholic Church, see John T. McGreevy, *Parish Boundaries: The Catholic Encounter with Race in the Twentieth Century Urban North* (Chicago, 1996).

43 Kessler-Harris, "Gender Identity," 411–26.

44 My thinking on these matters comes from synthesizing insights from legal history. On readings of labor law, see William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, Mass., 1991); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C., 1993); Judith A. Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment* (Ithaca, N.Y., 1983); and A. Leon Higginbotham Jr., *Shades of Freedom: Racial Politics and the Presumptions of the American Legal Process* (New York, 1996).

45 Mr. Stewart and Mr. Eastland, remarks, *Congressional Record – Senate*, Feb. 4, 1946, p. 806.

office, who shall go to your schools, and who shall eat at your table, or intermarry with your children." But, as Minnesota Senator Hubert H. Humphrey later countered, "we are not talking about marital relations. We are not even talking about childbirth. We are talking about employment."[46]

Others viewed the FEPC as merely interfering in the labor contract. Utah wool growers claimed, "free enterprise and production will receive serious set-back if the FEPC bill should become law." Trade union opponents asked "why not go all the way and take in discrimination against a man because he does not belong to a labor union?" The Committee for Constitutional Government, a pro-business front, charged that the FEPC was "an attempt by vote-seeking politicians to barter the individual's economic freedom for the votes of minority groups" and reprinted a speech by Georgia Senator Richard B. Russell attacking the FEPC as "unfair" for disadvantaging "average," that is, nonminority, American citizens "in the competition for jobs and promotions." Thus freedom of contract served as a code for white supremacy, which continued to rely on sexualized portraits of social equality.[47]

By the late 1940s the "right to work" had taken on another meaning, that is, the right of employers to run a nonunion or open shop,

46 "Fair Employment Practice Commission Act," extension of remarks of Hon. Clyde R. Hoey of North Carolina, Mar. 29, 1950, *Appendix to the Congressional Record*, 1950, p. A3747; "Conciliation and Consultation, Not Coercion: Answer to FEPC Problem," extension of remarks of Hon. Brooks Hays of Arkansas, Jan. 31, 1940, ibid., p. A672; Mr. Pickett, *Congressional Record – House*, Aug. 2, 1948, p. 9641; William Green, reprinted in "Proposed Antidiscrimination Legislation," extension of remarks of Hon. Irving M. Ives of New York," Apr. 21, 1947, *Appendix to the Congressional Record*, p. A1790; Mr. Williams, *Congressional Record – House*, 1948, p. 1295; Mr. Rankin, ibid., May 26, 1944, p. 5054; reprint of transcript of American Forum of the Air, "Should We Adopt the Federal FEPC," extension of remarks of Hon. James O. Eastland of Mississippi, Apr. 26, 1950, *Appendix to the Congressional Record*, 1950, p. A3026. North Carolina's Joe Ervin associated FEPC with both storm troopers and slavery. See "Shall We Again Have Slavery in the United States?" extension of remarks of Hon. Joe W. Ervin, July 2, 1945, p. A3203; "Shall We Have Storm Troopers in the United States?" extension of remarks of Hon. Joe W. Ervin, July 3, 1945, p. A3224, both in *Appendix to the Congressional Record*, 1945.

Former New Dealer Donald Richberg would offer the most scholarly attack on the FEPC as denial of "social liberty" when he argued, "The essence of the economic liberty of the employer is his freedom to organize a working force that will produce goods and services which can be sold and which will satisfy customers, either by the quality and prices of the products or by direct services to customers. Such a law would force an employer to hire employees undesirable to fellow employees, undesirable to customers, and undesirable to the employer. This is not merely restricting economic liberty. This is destroying the foundation of economic liberty, which rests on freedom of association and liberty of contract" ("The Fair Employment Practices Scheme," *Public Utilities Fortnightly* 41 [Apr. 22, 1946]: 540–2).

47 Letter to Senator Bankhead included in *Congressional Record – Senate*, Feb. 8, 1946, p. 1145; Chester G. Hanson, "Assembly Group Beats FEPC Bill," *Los Angeles Times*, Jan. 17, 1946, p. 2; "The FEPC – A Fair Labor on an Unfair Bill by Hon. Richard B. Russell," *CCG Spotlight for the Nation* (New York, 1950).

embodied in the Taft-Hartley Labor Relations Act (1947). To the consternation of FEPC supporters who associated right to work with union rights (and whose National Committee received significant funds from CIO unions), Republican National Chairman Guy George Gabrielson in 1949 defined freedom as "the right to work and to pick one's own employees."[48]

Thus, two notions of freedom existed, but both relied on a male ideal worker; neither embraced the unpaid labor of women in the home. During World War II black women, long forced into nonfamilial labor, sought upgraded occupations. White women, the referent behind the public discussion of "women," sought inclusion under the general understanding of "work" as paid labor, which ironically disparaged the reproductive activities of mother work and household maintenance for which all women were responsible.[49] FEPC defenders reflected such gendered thought. They wrote a radio skit that featured women as consumers, explaining the significance of the FEPC. A different skit portrayed union, business, and religious men discussing discrimination in the workplace. Men suffered job discrimination; women could punish such wrongs by wielding their purchasing power.[50]

By connecting production to consumption, the National Council for a Permanent FEPC became part of the larger liberal concern with planning against a depression that many feared would result from postwar reconversion.[51] Defenders understood the FEPC as sharing "the philosophy" of Social Security as well as of the FLSA, "a continuation of a Federal policy directed against the wiping out of the depressed groups in the United States."[52] New Mexico Senator Dennis Chavez introduced a bill

48 Letter to Albert B. Hermann, executive director, Republican National Committee, from Arnold Aronson, Sept. 15, 1949, in folder: "FEPC: General, 1949," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 13.

49 On myths and experiences of white women during World War II, see Karen Anderson, *Wartime Women: Sex Roles, Family Relations, and the Status of Women During World War II* (Westport, Conn., 1981); Leila J. Rupp, *Mobilizing Women for War: German and American Propaganda, 1939–1945* (Princeton, N.J., 1978); D'Ann Campbell, *Women at War with America: Private Lives in a Patriotic Era* (Cambridge, Mass., 1984); and Susan M. Hartmann, *The Home Front and Beyond: American Women in the 1940s* (Boston, 1982).

50 There are no figures on how complaints break down by sex. Indeed, statistics often divide into white and black, not male and female within such categories. Or we have white, nonwhite, and women workers but no indication of race among women. This thinking reflects how race trumps gender in the categorization of people and suggests how women of color often get lost in policy making.

51 Nelson Lichtenstein, *The Most Dangerous Man in Detroit: Walter Reuther and the Fate of American Labor* (New York, 1995), 220–36.

52 Untitled, undated, unnamed memo, points on Scanlon-Dawson Bill, in folder: "Studies," 1, in FEPC papers, reel 69H. This talking brief goes on to argue that the South lost economically through subordination of African Americans.

in September 1944 "Prohibiting Discrimination in Employment Because of Race, Creed, Color, National Origin, or Ancestry." In this bill he argued, "We cannot afford to return to the situation in which efficient workers are separated from their machines and condemned to unemployment and the social evils which grow out of unemployment merely because of their skin color, ancestry, or religion." Raising "the standard of living and purchasing power," he continued, became one of the goals of a permanent FEPC, whose enactment would also "promote . . . national harmony and efficiency," prevent race riots, and improve U.S. standing in the ideological battle for the hearts and minds of a postcolonial world.[53]

The FEPC stood as an alternative to relief or welfare, an employment policy intertwined with welfare policy. The NAACP's Thurgood Marshall warned New York state legislators that unless they passed an FEPC bill, "no blame can be attached to Negro citizens . . . who find themselves unable to provide for their families because of discrimination in employment and are thereby relegated to relief rolls." An Ohio congressman facetiously asked, "If a Negro has a right to work and no employer has an obligation to hire him for work for which he is properly qualified, then does the Government have the duty to provide such work? Or does the Negro have a duty to go on relief?" As the executive secretary of the Fair Employment Practice Council of Metropolitan Detroit testified in 1945, "Either we cotton to having both frustrated taxpayers and frustrated recipients of relief – or else we provide jobs whereby taxes can be more evenly shared by all. . . . Under an FEPC, those who are not denied equal economic opportunities will be enabled to provide housing, food and medical costs out of their own earnings." Having the right to work, they would be able to partake in the right to live; this formulation, however, was slippery. It privatized citizenship rights by suggesting that access to jobs could substitute for social benefits like the universal health insurance then projected as a next step toward social security.[54]

53 78th Congress, 2d sess., Senate report no. 1109, calendar no. 1126, "Prohibiting Discrimination in Employment Because of Race, Creed, Color, National Origin, or Ancestry," 1–2, in folder: "Annual reports," in FEPC papers, reel 69H. The FEPC also became a pawn in the growing anticommunist crusade of the late 1940s that attacked both civil rights and regulation of industry as communist.

54 "Statement by Thurgood Marshall, Representing the National Association for the Advancement of Colored People Before the Joint Committee on the Ives-Quinn Bill to Prohibit Discrimination in Employment," Feb. 20, 1945, in folder: "FEPC: General, 1949," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 13; R. Vorys, *Congressional Record – House*, July 12, 1945, p. 7477; statement of Clarence W. Anderson, in Fair Employment Practice Council of Metropolitan Detroit, "Brief Extracts of Testimony of Michigan Citizens"; see also statements of Mrs. Frederick G. Poole, Detroit State Wesleyan Service Guild and Gloster Current, Michigan Branches of the NAACP, in ibid.; Fair Employment Council of Metropolitan Detroit, "The Right to Work

Not all supporters of the FEPC interpreted it as a promise of income. Many in Congress emphasized "equal opportunity" rather than job guarantees. Their denial that the FEPC had anything to do with "racial equality or social equality" was often a disingenuous counter to Dixiecrat rantings.[55] Chairman Malcolm Ross (Haas's successor) defended "equality of work opportunity" before Congress in 1945. The FEPC,

> it would seem to me, no more involves social relationships than does the Wages and Hours law [FLSA] and the National Labor Relations Act [Wagner Act]. The mass of the American people can do as they please in their private lives but when it comes to earning a living, someone else with the hire and fire power offers the terms and conditions under which a man can earn his bread. . . . It is with any possible unfair barriers to a worker – because of the color of his skin or religious belief or national origin – that this bill is addressed.[56]

Ross presumed the male worker and the family wage, as did Catholic liberals like Haas, who believed "it is unwise to employ mothers with young children [and] school boys and old men should not be employed, if we can help it."[57] Before the NAACP in Baltimore Ross declared "that the individual worker's relationship to his job is the most important fact about his life, out of which comes the satisfaction of work done, the content of a decent family life, a sound integration of himself with his neighbors, his community and his country." Although he began his testimony by noting, "We need not waste time considering this problem as one on the social plane," it was precisely because questions of employment never existed apart from what opponents of the FEPC called "the social plane" and from what African Americans experienced in their daily lives, that the FEPC threatened existing social hierarchies.[58]

WORKING-CLASS VOICES

Randolph envisioned the MOWM as a place where "little men can tell their story their own way" about "jobs . . . sought but never got."[59] The

Is the Right to Live," 3, typescript, in folder: "FEPC: Inquiries, 1944–46," in NAACP papers, microfilm ed., pt. 13, ser. B, reel 10. On National Health Insurance, see works in progress by Colin Davis and Jennifer Klein.

55 See, e.g., "Fair Employment Practices Committee," extension of remarks of Hon. Thomas E. Scanlon, June 23, 1944, *Appendix to the Congressional Record*, vol. 90, p. A3326.

56 "Testimony of Malcolm Ross, Chairman, President's Committee on Fair Employment Practice, Before the House Labor Committee in Hearings on HR 3986 – 78th Congress, Second Session," 1, 2, in office files of Max Berking, in FEPC papers, reel 3H.

57 Haas, "Address," 10; see also Roche, "F.E.P.C.," 1.

58 Advance Release, "Test of Address by Malcolm Ross," in folder: "Baltimore NAACP Speech, Ross, June 18, 1944," 6, in FEPC papers, reel 69H.

59 A. Philip Randolph, "A Reply to My Critics," *Chicago Defender*, June 12, 1943, quoted in Pfeffer, *A. Philip Randolph*, 60.

files of the FEPC contain stories that "little men" – but also women – constructed out of the American creed of equality, fairness, and justice. The black working class drew on public discussions of fairness, which like the FEPC itself provided "a lexicon of legitimacy and authority."[60] Addressed to the president, the first lady, and the FEPC, and sometimes shepherded by a race-advancement organization, these letters protested the refusal of employers to hire or upgrade, unfair treatment by unions, and poor working conditions. Most of all, they requested better treatment, dignity, and citizenship rights. We might read them as reflections of, as well as windows on the system of meaning through which members of the black working class named the experience of discrimination. Written to initiate complaints or as pleas for redress, these letters are expressions of agency, translations of "the right to work" as "the right to life."[61]

Nearly all the letters demanded rights on the basis of being "an American citizen."[62] Like Congressman Dawson, they asked "for ourselves – the same thing that every American citizen has a right to ask for."[63] Like Randolph, they questioned a democracy that would send men to die while withholding citizenship rights. A twenty-one-year-old woman from Portland, Oregon, posed a typical question: "Is America a true democracy?" when black men could be drafted but she was denied a job. One woman pointed out: "Colored boys die side by side with white boys but the white and colored wives can't work together."[64] A Seattle woman told the president, "We are all out for double victory over here and over there." Another proclaimed, "Our Constitution declares *All* men equal, and isn't that what our boys are shedding their blood and giving their lives for in this present war?" A widow with "nephews and everybody son in the army" wrote that she "want[ed] to work to help my country by buying defense bond to help win the war. I feel it my duty to do so

60 I have borrowed this phrase from Regina Kunzel's stunning analysis of letters to the Children's Bureau in response to a *True Confessions* story; she provides the clearest statement on how to read such documents. See Regina Kunzel, "Pulp Fictions and Problem Girls: Reading and Rewriting Single Pregnancy in the Postwar United States," *American Historical Review* 100 (Dec. 1995): 1479.

61 This analysis comes from a reading of the closed cases from Region XII (West Coast) and Region V (Detroit), regions that saw a concentration of shipbuilding and tank production that also allow for a strong sample of letters from women. I have maintained the original spelling. Joe W. Trotter and Earl Lewis reprint letters with similar pleas in *African Americans in the Industrial Age: A Documentary History, 1915–1945* (Boston, 1996), 269–73.

62 Letter to president from Miss Rose M. Cawson, Vancouver, B.C., July 1, 1943, in folder: "Boilermakers' Auxiliary Union Issue, Aug. 20, 1943, Exhibit C," in FEPC papers, reel 113F.

63 Mr. Dawson, *Congressional Record – House*, July 12, 1945, p. 7485.

64 Letter to president from Miss Eunic Beryl Mott, Portland, Ore., May 16, 1942, in folder: "Boilermakers' Auxiliary Union Issue, Aug. 20, Exhibit C," in FEPC papers, reel 113F; letter to president from Mrs. Inetha Thompason, Spokane, Wash., July 6, 1944, in folder: "Armour and Co., Spokane," in FEPC papers, reel 108F.

because its everybody war."[65] Another woman expected Roosevelt to deliver "our rights" because "we voted for you in the election. . . . We pay every tax any one else pay. We buy bonds. We give in the war chest funds but yet we are denied the right to work; it isnt fair."[66] In claiming citizenship rights these women spoke of duties as well as privileges. After declaring, "I Frankie Lee Mitchell is an American Negro woman," one proud African American pled: "As an American citizen I feel we should have a fair share of jobs. So please take this letter under consideration and break that southern style of democracy that some southern try to practice here in Richmond [California]."[67]

Men also spoke of "fighting for my rights."[68] Like New York Congressman Adam Clayton Powell Jr. they believed "it is high time that we start winning the war at home as well as abroad; that we make America safe for democracy."[69] They fought those who sought "to deprive me of my rights." Men commented on how the draft board "will not refuse me because I am a Negro." A petition by young men, who realized their vulnerability to the draft, threatened, "We are going to have our rights. The Co. won't stop us, neither will the white workers, if there has to be blood shed to get our rights, we are willing to give our all. . . . Rather than die on the battle fields, we all will die in Plant #3."[70] One narrated a tale of trials and tribulations involving his arrest in a plant altercation while his wife was delivering their baby alone in a hospital. He named himself "a brain-child of America and an ardent follower of Democracy, and like

65 Letter to president from Myrtle Marsh, Seattle, Wash., Feb. 17, 1943, in folder: "Boilermakers' Auxiliary Union Issue, Aug. 20, 1943, Exhibit C," in FEPC papers, reel 113F; letter to president from Frances Carr, Seattle, Wash., Sept. 11, 1942, in file: "Union"; letter to president from Alice Jones, Oakland, Calif., Nov. 15, 1942, in file: "Moore Dry Dock," both in "Closed Cases Referred by Washington Office," 1941–6, in FEPC papers, National Archives, San Bruno Branch.

66 Letter to president from Mrs. E. L. Glower, Nov. 23, 1944, case no. 12-BR-522, in folder: "Richmond Shipyards," in FEPC papers, reel 112F. For another example of patriotism, of wanting to buy bonds and stamps if only her husband had a job that paid enough, see letter to president from Mrs. Edith P. Bryson, Hart, Mich., July 17, 1942, in file: "Dow Chemical Co.," in FEPC papers, reel 59F.

67 Letter to president from Frankie L. Mitchell, Richmond, Calif., Dec. 15, 1944, case no. 12-BR-552, in folder: "Richmond Shipyards," in FEPC papers, reel 106F.

68 Letter to Douglas Aircraft Co. from R. E. Brown Jr.; includes statement of James Houston, Mar. 15, 1945, case no. 12-BR-1470, in folder: "Douglas Aircraft, El Segundo Plant," in FEPC papers, reel 106F.

69 "Americans Betrayed," remarks of Adam C. Powell Jr., Mar. 15, 1945, *Appendix to the Congressional Record*, p. A1201.

70 In FEPC papers, see Thomas Madison Doram, "In and Before the Committee on Fair Employment Practices," statement, Nov. 18, 1943, in folder: "LA Boilermakers' Union," reel 106F; letter to Mr. F. D. Roosevelt from L. C. Washington, Richmond, Calif., Oct. 1943, case no. 12-BR-111, in file: "Richmond Shipyard #2," reel 112F; petition, Flint, Mich., July 18, 1942, to Mr. Duncan from the Negro workers in Plant #3, Joseph Wickware and Harrison Johnson, chief stewards, 4, in folder: "Chevrolet Motor Co., Flint," reel 58F.

unto the ever-loyal Job devoted to the Christ, I say to you as He said to them. . . . Though he slay me, yet will I trust him."[71]

A migrant from St. Louis to Portland, Oregon, expressed his dissatisfaction with discrimination, exposing multiple themes scattered throughout the letters. Complaining about discriminatory assignment of housing in the crowded shipyard communities, this veteran of World War I, with sons in the armed forces, viewed Kaiser's refusal to upgrade him to a leaderman as an affront to his dignity, an interference with his breadwinner status. He confided in the Roosevelts: "All you can is Nigger this, Nigger the other + I cant get living quarters for my wife + family although there are plenty vacancys set aside for white people but we colored people cant live in them." Wanting to do his part, he needed "a decent job now + I am looking to you + you only to get it for me. $50.00 per mo. compensation will not support me + my family." Rejecting segregation as unfair while African Americans fought for their country, he asked for "My race the authority + privalages the white race + foreigner have."[72] Another World War I veteran and NAACP member protested being brought out to Vancouver only to be forced from his job by his gang leader, writing the FEPC that "I am in need of your help to have a job and to care for my family."[73] One Michigan man, about to be inducted into the army, reaffirmed his manhood by defending his wife: "How do you think I feel going to lose my life for freedom an my wife back here been push an shelve around from one factory to another an talk to as if she was a dog."[74] He recognized the same irony that countless women lamented.

Whereas men objected to being deprived of the opportunity to earn for their families on the basis of race, women often claimed their right to work in terms of their relationships to husbands and sons. They became "an American Negro mother with a boy in the service, who is in need of and entitled to work."[75] Another woman wrote: "My son is in the army and I'm in need of a job." Some expressed the bitterness suffusing the African-American community: "Our fathers, son, and brothers are beginning to wonder, they fight for our country and their wifes, sisters, and

71 Statement of Ernest Mohand, Los Angeles, Calif., Dec. 8, 1944, case no. 12-GR-1435, in folder: "U.S. Navy Drydocks," in FEPC papers, reel 106F.

72 Letter to president and first lady from Jesse Bullock, Swan Island, Portland, Ore., Sept. 7, 1944, attached to case no. 12-BR-474, in file: "Kaiser Co., Swan Island," in FEPC papers, reel 110F.

73 Letter to president from Lairie White, Vancouver, Wash., Jan. 9, 1945, received, case no. 12-BR-566, in FEPC papers, reel 110F.

74 Letter to president from Mark Pruitt Jr., n.d., in file: "Budd Wheel," in FEPC papers, reel 58F.

75 Letter to Mrs. Eleanor Roosevelt from Dorothy Custer, Berkeley, Calif., May 11, 1943, in folder: "Boilermakers' Auxiliary Union Issue, Aug. 20, 1943, Exhibit C," in FEPC papers, reel 112F.

sweethearts are treated like dogs."[76] Mrs. Ake of Oakland, California, one of numerous black women denied entry into the AFL's Boilermakers' Union, declared: "I am a true American too. I have a son in a few days will join the arm force of other American and I do have a husban who is in draft age to and don't see why I cant have a decon job as other American citison." Another Oakland woman asked the chief of the U.S. Employment Service, "Are you going to allow them to kick me, and other honest mothers around?"[77] Contrasting "decent" conditions with being treated like a "dog," African-American women and men demanded respect along with the right to work. "They want our boys to defend our country and we haven't got any country – we can't go in shows, hotels – just so many places. They even treat dogs better than they do us," a domestic worker described the dignity gap generated by segregation. A woman caterer from Cincinnati captured the feelings of many when she called the United States "a stepmother, the way she treats a child," in her treatment of her black citizens. "She may not be fair to it but she is its mother." The FEPC was appealing to African Americans because most embraced a discourse of fairness; they believed in the ideal of equal rights, the right to be "treated as an American and not as a Negro."[78] Responding to the call to serve their country, they sacrificed money, effort, and family members, and expected to work at a well-paying job and be judged on the basis of their abilities alone. They not only spoke of fairness but also demanded a fair exchange.

Although they sometimes made claims on the basis of their situations as working-class black women, they also joined a conversation wherein universal talk of citizenship undermined the ideal of the citizen-worker as white man. But such a self-fashioning of citizenship was not enough. "The right to work" was more precarious for black women than for any other group. The last to enter war production, they were the first fired. They suffered discrimination because they were black and because they were women, often mothers. But most of all they faced barriers derived

76 Letter to Mr. Roosevelt from Mrs. Jean Thompson, San Jose, Calif., Nov. 30, 1942; letter to the president from Lila M. Jones, San Francisco, Thanksgiving Day, 1942, in folder: "Boilermakers' Auxiliary Union Issue, Aug. 20, 1943, Exhibit C," both in FEPC papers, reel 112F.

77 Letter to president from Mrs. Emira Ake, Oakland, Calif., Oct. 24, 1942, in file: "Unions, Closed Cases"; letter to Paul V. McNutt from Elizabeth Moody, Oakland, Calif., Nov. 15, 1942, in file: "Moore Drydock," both in FEPC papers, National Archives, San Bruno Branch. In a complaint to the FEPC a Jewish woman similarly noted that she had a son in the armed forces. See "Report of Discriminatory Hiring Practices," Palmer Bee Company, Dec. 2, 1943, in FEPC papers, reel 61F.

78 See "Negroes and the War: A Study in Baltimore and Cincinnati," special report no. 16, Division of Surveys, July 21, 1942, p. 2, also the attached "Quotations from Interviews," p. ii, box 7, in file: "OWI," FEPC-FDR Library. An African American conducted the interviews.

from their intersecting identity as black women who sought work in the white-collar sector reserved for whites and they experienced stereotyping based on their racialized gender.[79]

CONCLUSION

Those who advanced fair employment over a half-century ago placed the right to earn at the center of citizenship. They understood this civil right as facilitating social rights. The New Deal state relied on the model of the citizen-worker to establish social security benefits, thus making jobs – and better paying jobs – crucial for full citizenship. This formulation discriminated not because it directly excluded people on the basis of their race or gender but because it indirectly eliminated those who labored at uncovered occupations or whose labor-force attachment failed to meet statutory standards: mostly white women and men and women of color.

The failure to establish a permanent FEPC in the early postwar years shifted the point of debate. The federal government would prove a weak ally over the next decades when it came to the right to earn, in part because the moment of economic reform passed with the end of the New Deal, curtailed by the southern reactionaries who fought any form of civil rights. The right to earn, essential for so many other rights, relied on political clout, which was insufficient until the civil-rights movement of the early 1960s. Perhaps most significantly, rights talk faded into the language of opportunity, with the right to work turning into the opportunity, but not the imperative, to do so. Fair employment begot equal opportunity, not the economic or social justice envisioned by its World War II defenders.

79 For black women during World War II, see Karen Anderson, "Last Hired, First Fired: Black Women During World War II," *Journal of American History* 69 (June 1982): 82–97; Jones, *Labor of Love*, 211–22; and Gretchen Lemke-Santangelo, *Abiding Courage: African-American Migrant Women and the East Bay Community* (Chapel Hill, N.C., 1996).

7

Social Rights and Citizenship During World War II

MARTIN H. GEYER

During World War II neither Germany nor the United States is known to have significantly expanded or reshaped its system of social provisions in a "progressive" way. The Nazi "warfare state," with its rejection of human rights, is almost by definition the opposite of the modern "welfare state."[1] Efforts in the United States to vastly expand the responsibility of the government for the economic and social well-being of its citizens came to naught: "World War II and its aftermath did not bring consolidation of the New Deal, but rather its failure and redefinition."[2] The credit for pioneering the modern welfare state usually goes to Great Britain: Publication of the Beveridge report in December 1942 is generally considered to have set the agenda for a comprehensive welfare state not only in Britain but in other countries as well, although it was only after the war that these plans materialized.[3] In most countries, including the United States and Germany, there were debates during the war on recasting social policies, debates that centered on the critical issues of citizenship, social entitlements, and rights. This should not be surprising because these issues have loomed large from the beginning of governmental attempts at establishing social institutions. However, the war years saw the emergence of a new discourse about economic and social rights, both on the national and, toward the end of the war, international levels. The United Nations Declaration of Human Rights of 1948 can be considered an important

1 Peter Flora and Arnold J. Heidenheimer, "The Historical Core and Changing Boundaries of the Welfare State," in Peter Flora and Arnold J. Heidenheimer, eds., *The Development of the Welfare State in Europe and America* (New Brunswick, N.J., 1982), 12; see also Ewin Amenta and Theda Skocpol, "Redefining the New Deal: World War II and the Development of Social Provision in the United States," in Margaret Weir, Ann Shola Orloff, and Theda Skocpol, eds., *The Politics of Social Policy in the United States* (Princeton, N.J., 1988), 82.

2 Amenta and Skocpol, "Redefining the New Deal," 119, 121–2.

3 For a good survey of the debates concerning the Beveridge report, see John Hills et al., *Beveridge and Social Security: An International Retrospective* (Oxford, 1994).

milestone in this respect, as can the lecture given by sociologist T. H. Marshall on "Citizenship and Social Class" two years later. Marshall provided the conceptual and terminological framework to describe the evolution of modern democratic societies in terms of civil, political, and social rights.[4]

As this chapter shows, these debates cannot be understood merely by focusing on national policy making or by viewing the domestic experience of war as the sole catalyst for possible changes, as is so often the case in historical research on this topic. In order to understand the dynamics of the discourse on rights and the debate on the emerging post–World War II order, it is necessary to keep in mind the ideological battle that had been fought between the Allies and Nazi Germany. In 1940–1 Nazi propaganda for Germany's "New Economic Order" in Europe, promising full employment, posed a challenge and set the agenda for reform-minded groups in both Great Britain and the United States. It was in this context of confrontation between democracy and dictatorship, freedom and oppression, humanity and inhumanity, modernity and backwardness that the old discourse on social rights was given a new direction, a new impetus, a new language. The language of the "rights of class," which had strongly imbued the debates of the interwar period in Britain and Germany,[5] was supplanted by the language of the "rights of citizenship." The importance of Great Britain's contribution to this development, the Beveridge report, is undeniable. However, the American contribution cannot be ignored. Despite the comparatively weak foundations of its social institutions, the United States not only was a hotbed of new and in many respects innovative ideas regarding the establishment, extension, and management of the modern welfare state, but American reformers were also the pioneers of the language of economic and social rights, which became a crucial factor in legitimizing welfare states during the postwar period.

A "NEW ECONOMIC ORDER" IN EUROPE: THE GERMAN PROPAGANDA OFFENSIVE

The beginning of World War II in Europe marked a major turning point in the debates on social policies and social planning all over the world.

4 D. D. Raphael, ed., *Political Theory and the Rights of Man* (Bloomington, Ind., 1967). For a discussion of the concept of social rights, see T. H. Marshall, *The Right to Welfare and Other Essays* (London, 1981).

5 See Martin H. Geyer, "Von Europa lernen: Die amerikanische Altersversicherung und die Rezeption der europäischen Reformdebatten in den dreissiger Jahren," in Stefan Fisch and Ulrike Haerendel, eds., *Geschichte der Altersversicherung in Deutschland* (Berlin, 2000).

This was not caused solely by the nationalist environment, the appeal to national solidarity in wartime that creates ideal conditions for such initiatives.[6] The war also influenced the nature of the debates because in late summer 1940 the German propaganda machine drafted plans for a new economic and social world. These plans were the handiwork of Reich Economic Minister Walther Funk.[7] Of interest in this context is not so much the concept of how the new European economic order was to be organized around a politically and economically hegemonic Germany and its reichsmark; of greater importance are the promises of a rapidly rising standard of living, of social welfare, and, in particular, of full employment not only in Germany but throughout the new *Grosswirtschaftsraum* (greater economic sphere).

In 1940–1 Germany was on the ideological offensive both at home and abroad. After years of preaching the gospel of the scarcity of consumer goods, of low wages, and of drastically reduced social benefits, the hour of the German Labor Front (Deutsche Arbeitsfront or DAF) seemed to have arrived. Time and again its leaders argued that military strength and military preparedness would form the basis for a new social order, that in fact the politics of scarcity would make possible a greatly expanded and altogether new system of social provisions grounded in an economy with full employment. Funk's economic propaganda argued that the "New Order" was not to be established by forcing other nations into a uniform mold but rather by collaborating with them, each according to its economic capabilities, in a system that allowed freedom for development along lines natural to them.[8] The Central Office for International Social Engineering (Zentralamt für internationale Sozialgestaltung) and the publication *Neue Internationale Rundschau der Arbeit* (New International Review of Labor) propagated a new German model in which the Zentralamt was conceived as the alternative to the International Labor Office (ILO), which Germany had left in 1934. A fundamental recasting of the existing system of social services was to be part and parcel of this social

6 Anthony Giddens, *The Nation-State and Violence*, vol. 2 of *Contemporary Critique of Historical Materialism* (Berkeley, Calif., 1985), 232–5.

7 Paul Addison, *The Road to 1945: British Politics and the Second World War* (London, 1975), 121–6; for a summary, see Bundesministerium für Innerdeutsche Beziehungen, *Dokumente zur Deutschlandpolitik*, ser. 1, vol. 1: *3. September 1939 bis 31. Dezember 1941 Britische Deutschlandpolitik*, ed. Rainer A. Blasius (Frankfurt am Main, 1984), xxvii–viii; Lothar Kettenacker, *Krieg zur Friedenssicherung: Die Deutschlandplanung der britischen Regierung während des Zweiten Weltkrieges* (Göttingen, 1989), 83–102; and Karl Heinz Roth, "Vernichtung und Entwicklung: Die nazistische 'Neuordnung' und Bretton Woods," *Mitteilungen der Dokumentationsstelle zur NS-Sozialpolitik* 1 (1985): 1–44.

8 Foreign Research and Press Service, Balliol College, Oxford, "The German Attempt to Form an International Labor Office," Oct. 17, 1941, Archive of the International Labor Organization, Geneva, PWR 1/24.

reordering. When in February 1940 the leader of the DAF, Robert Ley, received the order from Hitler to start drafting a new system of old-age pensions, he had already prepared preliminary plans. In the fall of the same year these plans were incorporated into a larger scheme, the "Versorgungswerk des deutschen Volkes" (a system of social provisions for the German people). For the scheme to succeed, Germans had to be convinced that the country's war aims were not "imperialistic but social."[9] The proposed *Versorgungswerk* was to be all-encompassing. In addition to providing pensions, it was to include an altogether new publicly paid health service, a new pay-scale structure, public housing, an administration for leisure and recreation (*Freizeit-und Erholungswerk*), and a professional training administration (*Berufserziehungswerk*).

As has been noted in recent years, the plans of the DAF share some similarities with social plans that sprang up soon afterward in other Western countries. Ley has even been called a "German Beveridge,"[10] although this comparison is more provocative than substantive. The DAF proposed a blueprint for a specific German welfare state that was to recast on almost all levels the established system of social provisions. Most important are the underlying efforts, first, to redefine citizenship on the basis of the ideology of the *Volksgemeinschaft* (the community of the people) and, second, to establish the system of social entitlements not within a framework of rights but within one of duty and obligation.

The ideology of the *Volksgemeinschaft*, the basis of which was the concept of the racial equality of all Germans, had a strong egalitarian foundation.[11] It explains the strong emphasis on setting up an inclusionary system of social welfare. All Germans, including the self-employed, were to be integrated, thus abolishing the traditional structure of the German social security system that placed strong emphasis on status and

9 *Völkischer Beobachter*, July 30, 1941, quoted in Marie-Luise Recker, *Nationalsozialistische Sozialpolitik im Zweiten Weltkrieg* (Munich, 1985), 83, and chap. 3; Karl Teppe, "Zur Sozialpolitik des Dritten Reiches am Beispiel der Sozialversicherung," *Archiv für Sozialgeschichte* 17 (1977): 195–250; there is no good summary in English, and only scattered information is given in Ronald Smelser, *Robert Ley: Hitler's Labor Front Leader* (Oxford, 1988), 274–83. In Germany, the DAF's plans are intensively debated by scholars under the somewhat odd heading of "modernization" during the Third Reich. For a recent summary of the literature, see Günther Schulz, "Die Diskussion über Grundlinien einer Nachkriegssozialpolitik im Nationalsozialismus: Moderne versus traditionelle gesellschaftliche Leitbilder," in Matthias Frese and Michael Prinz, eds., *Politische Zäsuren und gesellschaftlicher Wandel im 20. Jahrhundert: Regionale und vergleichende Perspektiven* (Paderborn, 1996), 105–23.

10 Hans Günther Hockerts, "Sicherung im Alter: Kontinuität und Wandel der gesetzlichen Rentenversicherung 1889–1979," in Werner Conze and M. Rainer Lepsius, eds., *Sozialgeschichte der Bundesrepublik Deutschland: Beiträge zum Kontinuitätsproblem* (Stuttgart, 1983), 309.

11 David Schoenbaum, *Hitler's Social Revolution: Class and Status in Nazi Germany, 1933–1939* (Garden City, N.Y., 1966).

class. Abolishing the fragmentation of the complicated system of social insurance and homogenizing different levels of benefits were thus the prerequisites to creating a common social citizenship.

The original plans of the DAF in 1939 proposed flat-rate pensions for all citizens, which indeed would have realized most purely the concept of equal citizenship. The final drafts provided for a uniform minimum level of benefits for all, thus guaranteeing a minimum national standard of living for every German. On top of this national minimum was to be placed a system of graduated pensions that would allow the individual to maintain his or her standard of living. This was meant to accommodate such groups as white-collar workers, civil servants, and miners who enjoyed relatively good benefits in the existing system.

The DAF's plan was to break the "individualistic construction" of the existing social insurance system, which was based on the idea of individual contributions. The earlier contributions were to become part of the general tax system. Because these taxes were by far not high enough to finance the new system, they were to be supplemented by other public revenue. Thus, pensions became closely intertwined with the finances of the utopia of an expansionist state; at the same time this construction fundamentally redefined the nature of these entitlements. Edwin Witte, who drafted the American Social Security Act and who had strong affinities with the traditional German insurance principle, noted in 1943 that, in the DAF's scheme, benefits were based on "need" rather than "rights" with a concept "very different from social security as known elsewhere in the world."[12] This is indeed true: The individual was to receive benefits not in terms of acquired rights (resulting from contributions) but as a result of citizenship based on the concept of duty and obligation to the *Volksgemeinschaft*. This would have had important implications. Constructing a system of social provisions around citizenship made it possible to exclude not only those defined by the regime as "non-Germans," such as German Jews, but also members of the *Volksgemeinschaft* who violated their civic duties, namely, "asocials" and *Volksschädlinge* (parasites). This was the DAF's explicit aim.[13]

12 Edwin E. Witte, "Postwar Social Security" (1943), in Robert J. Lampert, ed., *Social Security Perspectives: Essays by Edwin E. Witte* (Madison, Wis., 1962), 22.

13 Within the current system of insurance these exclusionary practices were far more difficult. Whereas welfare and health policies became easily submerged in the regime's racist policies after 1933, the denial of rights was far more difficult in the existing old age and disability pension system. This can be seen with respect to the hair-raising efforts to fit the laws guaranteeing rights to the reality of people being shipped to concentration camps in the East. Despite numerous efforts to solve the issue, a formal denial of rights for Jews who had been forced to leave Germany came only in 1942–3. Petra Kirchberger, "Die Stellung der Juden in der deutschen Rentenver-

Conspicuously absent from the German plans were provisions for unemployment. This is not surprising because economic policies of the 1930s, particularly the efforts at rearmament, had eliminated unemployment. The fact that Germany had supposedly found the key to full employment was one of the core arguments of the propaganda. In fact, labor shortages emerged as one of the main threats to economic expansion, rearmament, and then, after 1939, waging the war. Economic expansion became a matter of *Arbeitseinsatz*, the management of labor, which had become the essential task of employment offices. More than anything else, the National Socialist language of labor management and labor ideology revolved around the issue of the "right to work" as guaranteed by the regime. "Work is not only a right that the worker can claim, work is at the same time a duty. It is through work that the individual serves the nation," ran the typical argument.[14] Ideologically, the social programs of the DAF were geared to this obligation to work. The duty to work implied the entitlement to benefits, benefits derived not from "liberal" principles inherent in insurance but from the membership and work of the individual in and for the *Volksgemeinschaft*.

This language of work and the emphasis put on the right to work was in juxtaposition to the language of social and political rights of the Weimar Republic. The Weimar Republic had been conceived not only as a *Rechtstaat* (a state based on the rule of law) but also as a *Sozialstaat*.[15] The entitlements to work and to an adequate level of subsistence were as much a part of this as the guarantee of a comprehensive system of social insurance, the protection of the labor force, and the creation of a comprehensive labor law. Yet, to what avail was all this talk of rights, Nazi propaganda questioned time and again. The propaganda regularly attacked the class base of Weimar's social policies, arguing that the Weimar Republic had not kept its promises and had cheated its people, just as all the "plutocratic governments" of Great Britain and the United States failed to fulfill their social promises because they never could or would resolve

sicherung," in Götz Aly et al., *Gibt es eine Ökonomie der Endlösung? Beiträge zur Nationalsozialistischen Gesundheits- und Sozialpolitik*, vol. 5 of *Sozialpolitik und Judenvernichtung* (Berlin, 1983), 11–32; Christoph Sachsse and Florian Tennstedt, *Geschichte der Armenfürsorge im Nationalsozialismus*, vol. 3: *Der Wohlfahrtsstaat im Nationalsozialismus* (Stuttgart, 1992); Norbert Frei, ed., *Medizin und Gesundheitspolitik in der NS-Zeit* (Munich, 1991).

14 "Arbeit als nationale Pflicht," *Monatshefte für NS-Sozialpolitik* 6 (1939): 101. For the ideology of work, see Martin H. Geyer, "Soziale Sicherheit und wirtschaftlicher Fortschritt: Überlegungen zum Verhältnis von Arbeitsideologie und Sozialpolitik im 'Dritten Reich,'" *Geschichte und Gesellschaft* 15 (1989): 382–406.

15 Gerhard A. Ritter, *Der Sozialstaat: Entstehung und Entwicklung im internationalen Vergleich* (Munich, 1989), 112–29.

the fundamental issue of unemployment. One of the central promises featured in German propaganda during 1940–1 was full employment in occupied countries.

A NEW BILL OF RIGHTS FOR THE UNITED STATES?

The outside world took the German unemployment propaganda offensive very seriously. Asked by the English Ministry of Information to furnish material to counter the German proposals for a new order, economist John Maynard Keynes concluded somewhat ironically that "about three-quarters of the passage quoted from the German broadcasts would be quite excellent if the name of Great Britain were substituted for Germany or the Axis, as the case may be." As he perceptively argued, the German objective was "to appeal to the wide circles and powerful interests in each country which are inclined in present circumstances to value social security higher than political independence." Counter-propaganda had to appeal not to "revolutionary sentiment in Europe" but "to the craving for social and personal *security*."[16] In internal debates of the ILO, which had been exiled from Switzerland and had moved to Canada, the same point was made particularly with respect to German propaganda aimed at South America:

> The Nazis speak a language that the Latin-Americans understand, and it is essential with them to talk in ideological terms. The statements concerning the World Order which Hitler hopes to provide, particularly for the workers, have an enormous influence in South-America, especially in those countries which were first conquered by one nation or another and then achieved freedom by war only to find that they have been reconquered by economic imperialism. They look with great interest at the promise of a new economic and social order, and neither the United States nor Great Britain has answered their need in this direction.[17]

16 John Maynard Keynes, "Proposals to Counter the German 'New Order,'" in Austin Robinson and D. E. Moggridge, eds., *The Collected Writings of John Maynard Keynes*, vol. 25: *Activities, 1940–1944* (London, 1979), 7–11, esp. 8, 10 (original italics). See also D. E. Moggridge, *Maynard Keynes: An Economist's Biography* (London, 1992), 653–5; Mathias Peter, *John Maynard Keynes und die britische Deutschlandpolitik: Machtanspruch und ökonomische Realität im Zeitalter der Weltkriege 1919–1946* (Munich, 1997), 89–95; and Tapani Paavonen, "Reformist Programmes in the Planning for Post-War Economic Policy During World War II," *Scandinavian Economic History Review* 31 (1983): 178–200. The American and British debates over and rival concepts of the "new world order" have been studied. See also Gabriel Kolko, *The Politics of War: The World and United States Foreign Policy, 1943–1945* (New York, 1968), 242–50; 280–313; and Richard Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of Our International Economic Order*, 3d ed. (New York, 1980), 40–52.

17 Minutes of Meeting held at Fayerweather Hall, Columbia University, New York City, June 16–17, 1941(?), 7, in Archive of the International Labor Organization, Geneva, PWR 1/01.

Another ILO member remarked that German propaganda had brought about a clear shift in emphasis not only within the ILO "but in governments themselves, since social policy, instead of being limited to certain departments, has become more pronouncedly part of high policy."[18]

The challenge posed by the German propaganda offensive necessitated a response. It had taken centuries to secure "precious rights and liberties," wrote British Foreign Minister Viscount Edward Halifax in December 1941 in a draft in which he developed British war aims; now these rights and liberties were being threatened by "Vandal Germany." Part of the catalog of classic individual rights was the "right to live without fear, either of injustice or of want"; Great Britain was fighting for "social principles" that included "the direction of national effort and resources to the abolition of unemployment and the creation of social security."[19] The main points of Halifax's draft could also be found a short while later in President Franklin D. Roosevelt's "Four Liberties," which he expounded in his State of the Union Message in January 1941. In it Roosevelt invoked "the essential human freedoms," namely, the freedom of speech and expression, the freedom of religion, the freedom from want, and the freedom from fear.[20] In the Atlantic Charter of August 1941 these liberties and rights were confirmed by both Roosevelt and British Prime Minister Winston Churchill as the part of the Allied war aims.[21] With regard to point five of the Atlantic Charter – "the securing for all improved labor standards, economic advancement and social security" – it was emphasized in a memorandum from the Division of Special Research on the Atlantic Charter that "it must stand comparison with the social reform programs of the Fascist nations, particularly that of Germany. . . . The Germans are deliberately attempting to purchase the political submission of these people [in occupied territories] to an authoritarian regime and

18 Ibid., 6.

19 "Draft Statement on War Aims," Dec. 13, 1940, in *Dokumente zur Deutschlandpolitik, Britische Deutschlandpolitik*, 257.

20 Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt, 1928–1945* (New York, 1938–50) (hereafter Rosenman, ed., *FDR Papers*), 663ff; Dallek, *Franklin D. Roosevelt*, 257–8. It has been argued that the "Four Liberties" speech was inspired by the Viscount Halifax draft and that Roosevelt might have received information on this draft via the American embassy in London. See Kettenacker, *Krieg zur Friedenssicherung*, 101.

21 The American ambassador in London, John Winant, the earlier chairman of the Social Security Board, later told Altmeyer that the reference to social security was included in the Atlantic Charter at his suggestion. See Arthur Altmeyer, *The Formative Years of Social Security: A Chronicle of Social Security Legislation and Administration, 1934–1954* (Madison, Wis., 1968), 28. For the Atlantic Charter, see Kolko, *Politics of War*, 242–50; Gardner, *Sterling-Dollar Diplomacy*, 40–53; and Michael Balfour, *Propaganda in War, 1939–1945: Organisations, Policies, and Publics in Britain and Germany* (London, 1978), 231–3.

to German domination by the promises of apparently equal and complete economic and social well-being for every individual from the cradle to the grave."[22]

The formulation of the Four Liberties and the Atlantic Charter had a considerable impact on the course of postwar social planning in the United States and Great Britain. The term *planning euphoria* best expresses the atmosphere. Public, semipublic, and private institutions on the national and international levels addressed the vastly diverse aspects of the postwar order and developed complex networks in which social reformers, economists, members of the labor movement, and the government elite cooperated. Reformers basically agreed on two points: First, every effort had to be made to prevent the recurrence of the mistakes of the last postwar period. If Hitler's Germany propagated a German deal for Europe, the world at large needed a New Deal. Second, planning for the postwar order was to be placed within a framework of "liberties" and "rights."

Particularly in the United States, reformers in 1940–1 made great efforts to broaden the concept of social and economic rights. A good example in this respect are the various proposals by the National Resources Planning Board (NRPB). In November 1940 Roosevelt instructed this nonadministrative agency, which was part of the Executive Office and chaired by the president's uncle, Frederic A. Delano, to formulate economic and social policies for the postwar period. Because Washington had caught "planning fever," the NRPB was also assigned the task of "correlating proposals" put forth by different agencies and private citizens for the president's consideration.[23] The NRPB worked with considerable speed, and soon the fruits of its labor were evident. The Committee on Long-Range Work and Relief Policies, formed by the NRPB in 1939, prepared an extensive study on *Security, Work, and Relief Policies* that was ready for submission by the end of 1941.[24] A series of reports and memos issued by the NRPB dealt with the possibility of creating the

22 "Comment on the Atlantic Joint Declaration of President Roosevelt and Prime Minister Churchill," Aug. 14, 1941, in Bundesministerium für Innerdeutsche Beziehungen, ed., *Dokumente zur Deutschlandpolitik*, series 1, vol. 2: *11. August bis 31. Dezember 1942, Amerikanische Deutschlandpolitik*, ed. Marie-Luise Goldbach (Frankfurt am Main, 1986), 25.

23 Marion Clawson, *New Deal Planning: The National Resources Planning Board* (Baltimore, 1981), 181–4; Philip W. Warken, *A History of the National Resources Planning Board, 1933–1943* (New York, 1979), chap. 6.; Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York, 1995), 245–50. For the task of coordinating the activities, see FDR, memorandum for Mr. Frederic A. Delano, Jan. 3, 1941, Roosevelt Library, Hyde Park, OF box 1092. For a general overview, see Edward D. Berkowitz and Kim McQuaid, *Creating the Welfare State: The Political Economy of Twentieth-Century Reform*, 2d rev. ed. (New York, 1988), 149–55.

24 Committee on Long-Range Work and Relief Policies, *Security, Work, and Relief Policies* (Washington, D.C., 1942).

institutional framework and policies that were to make full employment possible after the war.[25] One of the "masterminds" of the NRPB was Harvard economist William Hansen, an outspoken Keynesian. Hansen also worked for the private Council on Foreign Relations, which had received instructions similar to those given the NRPB to commence planning.[26] In the spring of 1941 the NRPB presented to the president a catalog of "ten promises of American life," ranging from adequate food and medical care to advancement awarded on the basis of merit and efforts to uphold the freedoms of speech and religion.[27] A couple of months later these liberties were explicitly referred to as "rights," in tune with the language of the Atlantic Charter. At the time, the president was apparently considering proposing a new bill of rights in a speech he planned to give on December 15, the 150th anniversary of the Bill of Rights. The president went through material for such a speech in June with members of the NRPB, who prepared several revised drafts in the following months. In these drafts it was argued that the "old freedoms" had to be expanded by "new freedoms," that the nation's objectives had to be restated in "modern terms." The formulation of new rights had to take into account "the industrial revolution, the rapid settlement of the continent, the development of technology, the acceleration of transportation and communication, the growth of modern capitalism, and the rise of the national state with its economic programs."[28] In what reads somewhat like a rather haphazard list of issues and is composed in language devoid of constitutional reasoning, nine rights were enumerated. As can be seen in the following, these were formulated in terms of individual rights (as opposed to collective rights for social groups, such as the unions):

1. *The right to work*, usefully and creatively through the productive years;
2. *The right to fair play*, adequate to command the necessities and amenities of life in exchange for work, ideas, thrift, and other socially valuable service;
3. *The right to adequate food, clothing, shelter, and medical care*;
4. *The right to security*, with freedom from fear of old age, want, dependency, sickness, irresponsible private power, arbitrary public authority, and unregulated monopolies;

25 See, most notably, National Resources Planning Board, *After the War – Full Employment* (Washington, D.C., 1942); and National Resources Planning Board, *After the War – Toward Security* (Washington, D.C., 1942).

26 Laurence H. Shoup and William Minter, ed., *Imperial Brain Trust* (New York, 1977), chap. 4.

27 NRPB, memorandum for the president, Mar. 14, 1941, Roosevelt Library, Hyde Park, OF box 1092.

28 For first versions, see NRPB, memorandum for the president, Mar. 14, 1941; items for conference with the president, July 23, 1941; draft message to Congress, revised as per request; NRPB, items for conference with the president, Dec. 4, 1941, point 5: Bill of Rights speech, (quotation) 5, Roosevelt Library, Hyde Park, OF box 1092.

5. *The right to live in a system of free enterprise*, free from compulsory labor, irresponsible private power, arbitrary public authority, and unregulated monopolies;
6. *The right to come and to speak or to be silent*, free from the spying of secret political police;
7. *The right to equality* before the law, with equal access to justice in fact;
8. *The right to education*, for work, for citizenship, and for personal growth and happiness; and
9. *The right to rest, recreation, and adventure*, the opportunity to enjoy life and take part in an advancing civilization.[29]

This new bill of rights was to be seen as part of the general planning for peace in the postwar period, the authors of the NRPB argued. Imperative to such peace was, "on the economic side, *full employment*; for the *individual* his *bill of rights*; and for the world, *law and order*."[30] The experience of the war would demonstrate what the country might be like with full employment: increasing prosperity for everyone, an increase of national wealth, higher national production and income, and a better standard of living. This enumerated list was to apply not just to the citizens of the United States but to those of all countries, despite the fact that programs, procedures, and practices might differ. The same was true with regard to the politics of prosperity: "The rise of living standards all over the world under real freedom will usher in a golden era of international trade and prosperity, as well as peace."[31] Economic and social reform was part and parcel of a broader "liberal internationalist" program.[32]

Roosevelt gave his speech on December 15, but there was no mention of a new bill of rights.[33] Less than a month later he sent to Congress the NRPB's "Second Yearly Report" for 1942, which contained the aforementioned references to a new bill of rights.[34] However, the president's message accompanying the NRPB's report was radically altered in Roosevelt's office. The passages referring to the "Four Freedoms" and a new bill of rights had been neutralized, making it clear that this report represented the opinions of the NRPB and not of the president.[35] It took another two years until Roosevelt, in preparation for his fourth-term election campaign, publicly took up the topic of a second bill of

29 Ibid., 5 30 Ibid., 9 (original emphasis). 31 Ibid., 7.

32 One can also see this with regard to individual persons: for Senator James Murray, who spearheaded social legislation, turning the war from "isolationist" to "internationalist," see Donald E. Spritzer, *Senator James E. Murray and the Limits of Postwar Liberalism* (New York, 1985), chap. 3.

33 Rosenman, ed., *FDR Papers*, vol. 1941, 554–7; for a history of the infringement of the Bill of Rights, see Richard Polenberg, "World War II and the Bill of Rights," in Kenneth Paul O'Brien and Lynn Hudson Parsons, eds., *The Home-Front War: World War II and American Society* (Westport, Conn., 1995), 11–24.

34 "Reconstruction Planning in the United States," *International Labor Review* 45 (1942): 306.

35 NRPB, memorandum for the president, Jan. 9, 1942, with draft message to Congress, Roosevelt Library, Hyde Park, OF box 1092.

rights.[36] The NRPB did not fare much better with its subcommittee's report on *Security, Work, and Relief Policies.* Although completed by the end of 1941, it remained known only to Washington insiders until its publication in March 1943.[37]

RIGHTS, CITIZENSHIP, AND SOCIAL SECURITY

As the social scientists close to the NRPB were concentrating on plans to secure full employment after the war, the members of the Social Security Board (SSB) were making great efforts to expand the provisions of the Social Security Act of 1935. This important piece of legislation had established a system of federal contributory old-age pensions and state-organized unemployment insurance that defined benefits in terms of entitlements, that is, on the basis of rights to benefits. This differed from the old-age and unemployment assistance programs that granted benefits on the basis of need. From the very beginning, social security was contested for a variety of reasons. Many reformers rejected the construction of the social security system on the "pure" principles of insurance with its "equity obsession" that linked the level of benefits to individual contributions.[38] Through the war years there was a strong movement calling for tax-financed pensions for senior citizens. Every American was to qualify for a pension on the basis of citizenship; benefits were to be much higher than the pitifully small pensions of the Social Security Act, which started its first old-age pension payments in 1940.[39] Defenders of the Social Security Act vehemently defended the distinction between insurance and assistance, that is, entitlements derived from individual rights as opposed to entitlements provided for the poor on the basis of a needs test. Propaganda for the Social Security Act fit well into the country's culture of conceptualizing rights as fundamentally individual and not as "collective" or "social." As Roosevelt declared in 1934, these entitlements applied "to every individual and every family willing to work." His argument that "we put those payroll contributions there so as to give the contributors

36 John Morton Blum, *V Was for Victory: Politics and American Culture During World War II* (New York, 1976), 245–54. Rosenman, ed., *FDR Papers*, vol. 1944–5, 32ff, 369ff.

37 Edwin E. Witte, "American Postwar Social Security Proposals," *American Economic Review* 33 (1943): 829.

38 Roy Lubove, *The Struggle for Social Security, 1900–1935* (Cambridge, 1968), 175.

39 For a good survey, see Theda Skocpol and John Ikenberry, "The Political Formation of the American Welfare State," *Comparative Social Research* 6 (1983): 187–214; Alan Brinkley, *Voices of Protest: Huey Long, Father Coughlin, and the Great Depression* (New York, 1982); and Abraham Holtzman, *The Townsend Movement* (New York, 1963).

a legal and political right to collect their pensions and their unemployment benefits" would often be reiterated.[40]

From the very beginning the advocates of Social Security had considered the Social Security Act only a first step toward a more comprehensive system.[41] The ink had hardly dried on Roosevelt's signature on the Social Security Act when plans for extending it began to circulate,[42] including a move to restore provisions of the original act that had been rejected by Congress. The war fueled such initiatives, and when Roosevelt in the spring of 1941 told the chairman of the SSB, Arthur Altmeyer, that he wanted a "comprehensive new social security program," the prospect of far-reaching reform seemed to materialize. Although the president apparently said that he would support the chairman in anything he recommended, Roosevelt specifically asked Altmeyer to: extend coverage of the social security system by including farm laborers and "domestics"; provide cash compensation for both temporary and permanent disability; grant federal aid to low income states for the purpose of funding assistance programs; and set up a federal system of unemployment compensation without merit rating. However, Altmeyer was not to touch medical care in order to "avoid a row with the doctors."[43] With the exception of the latter, these points reflected the long-standing program of the SSB, and a few months later the SSB did develop the outlines of an expanded social security program. On the basis of these recommendations, the first Wagner-Murray-Dingell Bill was introduced in Congress in June 1943, with little success.[44] During the debates, important blueprints for a future

40 Rosenman, ed., *FDR Papers*, vol. 1935, 291; Arthur M. Schlesinger Jr., *The Coming of the New Deal* (Boston, 1959), 308; see also Jerry R. Cates, *Insuring Inequality: Administrative Leadership in Social Security, 1935–54* (Ann Arbor, Mich., 1983), chap. 4.

41 Skocpol and Ickenberry, "Political Formation," 131.

42 Confidential memorandum, Nov. 9, 1936, B–1, B–11, in State Historical Society, Madison, Wis., Witte papers, box 33. For the strategy of incremental changes, see also Martha Derthick, *Policymaking for Social Security* (Washington, D.C., 1979), 23–7, 195–8.

43 Note by E. Witte, Apr. 21, 1941: Dr. Altmeyer on his conference with the president on Social Security Act amendments, Apr. 18, 1941, in State Historical Society, Madison Wis., Witte papers, box 213. In his own account from the 1960s Altmeyer mentions, incorrectly, that he was given instructions only in October. See Altmeyer, *Formative Years*, 130. He actually met and discussed the matter with Roosevelt during the months from spring to fall; the results were several revised proposals. Roosevelt Library, Hyde Park, OF box 1710, 2. One may only speculate on Roosevelt's intentions to have different plans set up. To keep up the latent rivalry between the NRPB and the SSB may have been one reason; furthermore, those in Congress favoring action along the lines of publicly financed citizens' pensions made a strong showing particularly in 1941; see Cates, *Insuring Inequality*, 61–70; see also John Corson, "A Comparative Chart of Bills Introduced in the 77th Congress to Establish Federal Flat Pension Systems," July 1941, in National Archives, Washington, D.C., Record Group (hereafter RG) 47, correspondence of the executive director, 1941–8, 011.1 box 7.

44 The files of the SSB testify to the close collaboration between the sponsors of the bill and the SSB; see also Spritzer, *Senator James E. Murray*, 125–6; Derthick, *Policymaking*, 114; Social

social security system emerged, some aspects of which were realized after the war. If one looks at the way social security, citizenship, and rights were conceptualized, one can sense how opposition would develop, for these plans implied far-reaching changes indeed.

First, the bill proposed to universalize membership by including not only agricultural workers, public employees, and civil servants, but also the self-employed, a demand dating back to the drafting of the Social Security Act. The bill provided an alternative to the various standing propositions for citizen's pensions, the call for which was particularly strong in Congress in 1941.[45]

Second, the aim of the bill was to establish "a practical social security program that would afford a minimum basic security upon which the people of this country could build a more complete security through their own individual efforts."[46] The situations covered were to be greatly expanded, disability insurance was added, and health insurance was also in the package.[47] In addition, the public assistance programs were to be extended, covering all needy people who were not eligible for other assistance.

Third, efforts were made to centralize the various institutions of the social security system. This boiled down to a matter of reorganizing the entire system. In 1935 Congress had discarded the original idea that a single social insurance board would administer unemployment, old-age insurance, and other social programs, whereas unemployment insurance and the various assistance programs for the elderly were to remain within the purview of the states, which adamantly defended their rights against any intrusion by the federal government. The result was a great variety

Security Board, *Extension and Expansion of the Social Security Act: A Report of the Social Security Board to the President and to the Congress of the United States* (Washington, D.C., 1941); *Eighth Annual Report (1943) of the Social Security Board* (Washington, D.C., 1944), 31–45; and summary of the proposed amendments to the Social Security Act, the Wagner-Murray-Dingell Bill, National Archives, Washington, D.C., RG 47, correspondence of the executive director, 1941–8, 011.1, box 9.

45 See Corson, "Comparative Chart."

46 Social Security Board, *Extension and Expansion of the Social Security Act*, 2.

47 The Committee for Economic Security (CES) had already considered health insurance a vital part of social security. However, when faced with the opposition of the American Medical Association and others, Roosevelt thought it politically "unwise to throw health insurance into the hopper while the rest of the program was still before Congress" (Edwin E. Witte, *The Development of the Social Security Act* [Madison, Wis., 1970], 188). Instead, Roosevelt appointed a commission to study the health care problem, which released its report in 1938. On the basis of these findings and recommendations, Senator Robert Wagner (D-N.Y.) drafted a bill in close cooperation with the SSB that embodied the commission's call for vastly expanded federal activity in the public health fields, including an increase in maternal and child care services, insurance against loss of wages during illness, and a plan for public health insurance. Faced with opposition in Congress and the public, Roosevelt did not hesitate to withdraw support for the health care bill at the end of 1939; see Spritzer, *Senator James E. Murray*, 123–5.

of schemes and the refusal of some states to implement the programs fully. Although neither the SSB nor the Wagner-Murray-Dingell Bill proposed uniform national standards of assistance benefits, the 1943 bill clearly aimed to extend federal supervision and control. In 1941 there existed only the plan to federalize the system of unemployment insurance and to combine it with Federal Old-Age and Survivors Insurance in order "to form a single Federal System of Social Insurance." The decision to nationalize the employment service, made on the heels of the attack on Pearl Harbor, is very important in this respect.[48] This move was to be the proverbial tip of the iceberg. The idea was to create an all-encompassing federal system of social security, set up through a centrally organized network of federal, state, and local offices that would not only administer the vastly extended insurance schemes (including health insurance) but would also be financed by a single contribution.

These plans were far-reaching, indeed. They not only would have strengthened the power of the federal government, they would also have redefined citizenship in terms of social rights. For example, the SSB was well aware that the "Negro workers" would have been "the main group of beneficiaries of the strengthened and extended program."[49] A system of federally guaranteed entitlements was to be extended to agricultural workers and sharecroppers at a time when many of them were excluded from the political process. The federal Social Security Administration would have gained a strong foothold in the states. This explains why the National Association for the Advancement of Colored People strongly favored the proposed extension of social insurance and assistance. Southern senators, however, feared that an extension of social security "might serve as an entering wedge for federal interference with the handling of the Negro question in the South."[50]

THE IMPACT OF THE BEVERIDGE REPORT

By the time the United States entered the war against Japan and Germany, American reformers had every reason to be optimistic. The United States

48 Altmeyer, *Formative Years*, 130–1.

49 Untitled memorandum, Aug. 19, 1942, National Archives, Washington, D.C., RG 47, correspondence of the executive director, 1941–8, 011, box 2; see also Dona Cooper Hamilton and Charles V. Hamilton, *The Dual Agenda: Race and Social Welfare of Civil Rights Organizations* (New York, 1997), chap. 4.

50 Witte, *Development of the Social Security Act*, 143–4. For the importance of the issue of race, see Hamilton and Hamilton, *Dual Agenda*, chap. 4; and Jill Quadagno, "From Old-Age Assistance to Supplemental Security Income: The Political Economy of Relief in the South, 1935–1972," in Weir, Orloff, and Skocpol, eds., *Politics of Social Policy*, 237–9.

had become a remarkable storehouse for blueprints and ideas not only for expanding social security but also for macroeconomic management of the economy. In the summer of 1942 *The Economist* published a report on the "revolutionary" policies that were emerging in the United States to redefine democracy in terms of the twentieth-century situation "and to expand its meaning in the economic and social sphere."[51] The key to all this, according to the magazine, was expanding markets and "mass consumption great enough to use mass production." In the words of Undersecretary of State Sumner Welles, the key to expanding markets was "a frontier of limitless expanse." The ambassador to England and former chairman of the SSB, John Winant, was quoted as saying that to do all this was not complicated: "When war is done, the drive for tanks must become a drive for houses. . . . The drive for manpower in war must become a drive for employment to make freedom from want a living reality." *The Economist* contrasted the enthusiasm of Americans in their efforts to build a new world order with the utter lack of vision among the English.[52]

However, the international public did not become enthusiastic about the postwar plans of the United States – mostly because they were hidden away in file cabinets and were known only to insiders – but rather about those of Great Britain. When Sir William Beveridge, a noted Liberal politician and expert in the field of social politics, published the results of the inquiry by the Inter-Departmental Committee on Social Insurance and Allied Services, it created a sensation. Within days this highly technical book full of figures and complicated cross-references became a best-seller and set the agenda for contemporary debates on social policies at home and abroad. *Social Insurance and Allied Services* sold 500,000 copies in Great Britain and about 50,000 copies in the United States.[53]

For reformers in the United States the Beveridge report was heaven sent. It demonstrated that public support could be won for postwar planning. Equally important, the report could easily be adjusted to fit conditions in the United States. American reformers were cheered by the report's support of universal membership, its call for broad health coverage, its idea of creating social protection from the "cradle to the grave" – a phrase actually coined by Roosevelt in the 1930s and often attributed

51 *The Economist*, July 18, 1942, 66–7. 52 Ibid.

53 José Harris, *William Beveridge: A Biography* (Oxford, 1977), 427–8; for detailed studies of the formulation of the Beveridge report, see chap. 16. See also Addison, *Road to 1945*, chap. 8; Peter Baldwin, *The Politics of Social Solidarity: Class Bases of the European Welfare State, 1875–1975* (Cambridge, 1990), 116–33.

to Beveridge, although he did not use it – and last but not least the use of the term *social security*, which had originated in the United States in the 1930s.[54]

In light of earlier debates over creating a new world order, it does not come as a surprise that the publication of the Beveridge report played an important role in Allied war propaganda. In summer 1941 Arthur Greenwood, the minister of reconstruction who appointed the Beveridge committee that year, was still looking for someone who could corroborate his public statement that Great Britain was the "one country in the world which had advanced its social services."[55] Now, Beveridge had pointed the way to fulfill Britain's resolve to carry out the Atlantic Charter objective of establishing both freedom from want and social security: "Reconstruction has taken on a new meaning and we have gained a new weapon in political warfare," Ambassador John G. Winant cabled to England.[56] Within days of the report's publication Germany reacted, first in its radio reports abroad and shortly afterward at home, to counteract the British Broadcasting Corporation (BBC) reports. The BBC had seized the "propaganda initiative in offering the plan as an implementation of a portion of the Atlantic Charter," noted the Foreign Broadcast Intelligence Service: "The Axis sees at stake the security of their self-appointed positions as the only young and progressive nations in Europe."[57] The Germans attacked the "plutocratic fraud on the English people" and the plan's "social backwardness" because of its reliance on contributions and thus "outdated" principles of contributory insurance. At the same time, however, arguments could be heard that some of the DAF's own ideas had been copied, at least in part.[58]

The British set the agenda, indeed. In Germany, Robert Ley had every reason to be upset. Nearly a year before the appearance of the Beveridge

54 Beveridge spoke of the "trans-Atlantic origin" of the term *social security*; however, he gave tribute to the Americans for introducing it; see his speech forwarded to the SSB by the State Department: "Social Security: Some Trans-Atlantic Comparisons," National Archives, Washington, D.C., RG 47, Correspondence of the Executive Director, 1941–48, 050.12, box 50.

55 Letters of Arthur Greenwood to Brendon Bracken, Ministry of Information, Nov. 19, 21, 1941, Public Record Office, London, Pin 8/164.

56 Winant to secretary of state, Dec. 5, 1942, National Archives, Washington, D.C., RG 47, correspondence of the executive director, 1941–48, 050.12, box 50.

57 Foreign Broadcast Intelligence Service, special report no. 32, Dec. 9, 1942, ibid., 050.12, box 50; Janet Beveridge, *Beveridge and His Plan* (London, 1954), 193–202.

58 Karsten Linne, "'Die Utopie des Herrn Beveridge': Zur Rezeption des Beveridge-Plans im nationalsozialistischen Deutschland," *1999: Zeitschrift des 20. und 21. Jahrhunderts* 8 (1993): 62–82; Fritz Gründger, "Beveridge Meets Bismarck: Echo, Effects, and Evaluation of the Beveridge Report in Germany," in John Hills et al., eds., *Beveridge and Social Security: An International Retrospective* (Oxford, 1994), 134–53.

report, in January 1942, Hitler had ordered a stop to all debates on postwar planning.[59] From the very beginning the DAF's plans had caused vicious, disruptive, and almost uncontrollable party infighting and competition among the DAF, the ministries of economics, labor, and finance, and representatives of industry and physicians. The plans were put on hold until after the war to prevent further conflict. Although Ley refused to give in easily, by the time the Beveridge report was published it had become obvious that he no longer influenced social insurance policy, which had developed along much the same lines as the existing system. With its equivalence of contributions and benefits, this system appeared to many within the party as the far more efficient way to increase labor productivity than did the Labor Front's pension plan.[60] Ironically, Beveridge appears to have been a hero for these reformers, many of whom were ardent Nazis. They referred to the English reformer when they demanded that benefits be increased, that the different branches of social insurance be consolidated, and that the system of contributions be simplified. These issues were still being fought over as the war entered its final days: "The English government and the leading groups have realized the decisive importance of social security and, as a major element of this social security, social insurance for the well-being of the people," wrote a leading official in the German Labor Ministry in September 1944. He had proposed the preceding year that leaflets be dropped over England to inform English miners how well their German counterparts fared with the new miners' insurance.[61] It is noteworthy that in the wake of the publication of the Beveridge report this party careerist had already assimilated the term *soziale Sicherheit* ("social security"), which had not been in common usage in the German language.[62]

In the United States the Beveridge report promised to break the deadlock gripping social policy in 1942. Liberal reformers and members of the labor movement had hoped that the president would "seize upon the Beveridge report as an occasion to dramatize the immediate need for sweeping congressional action."[63] However, Roosevelt remained reluctant;

59 Recker, *Nationalsozialistische Sozialpolitik*, 127.

60 The reform of the miners' insurance in 1942–3 is a case in point; see Martin H. Geyer, *Die Reichsknappschaft: Versicherungsreformen und Sozialpolitik im Bergbau* (Munich, 1987), 357–73.

61 Rundschreiben des Reichsarbeitsministers v. 27. 9. 1944; Vermerk des Reichsarbeitsministeriums betr. Fortschritte der englischen Sozialversicherung, Nov. 10, 1944, Bundesarchiv Potsdam, R 2/ 18563. One of the interesting developments of the years 1943–4 was the effort to spread social insurance to groups of foreign (forced) labor that had not been covered. See Geyer, *Reichsknappschaft*, 348–54.

62 Harris, *Beveridge*, 420n6.

63 Altmeyer, *Formative Years*, 141; see also Daniel T. Rogers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, Mass., 1998), chap. 11.

he even refused to send a special message on social security to Congress in December 1942, which he had originally told Altmeyer he would do. In March 1943 the president submitted to Congress the NRPB's report on *Security, Work, and Relief Policies* and shortly thereafter the report of the SSB. Among reformers the NRPB report was heralded as the American Beveridge plan, as a "Charter for America" (*New Republic*) or as "A New Bill of Rights" (*Nation*).[64] When Beveridge planned to mount a lecture tour of the United States and Canada in April 1943 Altmeyer urged him to postpone the trip until May because he wanted to arrange to have Beveridge testify at congressional hearings.[65] Beveridge did end up coming in May but never had the chance to testify.

British fears that they might get "out-Beveridged" by the Americans were unfounded.[66] The NRPB report did not attract widespread attention. Its academic length, its focus on historical description, and its emphasis on full employment and public works at a time of labor scarcity made it an odd and in many respects inadequate proposal indeed.[67] Undoubtedly, Southern and conservative representatives and senators did not appreciate the way it expanded the role of the federal government and infringed on states' rights. The report developed an egalitarian concept of citizenship even further than did the plans of the SSB: Taxes were to secure adequate benefits, and every citizen was to enjoy the right to a "minimum standard of security" guaranteed by strong federal control over the states' assistance programs.[68] In 1942 Congress reacted in its own way by stopping the appropriation of funds for the NRPB.[69]

The failure of these initiatives cannot be attributed solely to an electorate dulled by issues of social postwar planning or to an increasingly reluctant and conservative Congress that was eager to roll back New Deal legislation.[70] Equally important is the fact that the president did not commit himself to the issues but rather continued to make lukewarm

64 "Charter for America," special edition of the *New Republic*, Apr. 19, 1943; *The Nation*, Mar. 20, 1943, 401.

65 Altmeyer, *Formative Years*, 144; for the trip, without mention of the background, see Harris, *Beveridge*, 427–8.

66 Altmeyer, *Formative Years*, 144; Foreign Office to T. Daish, Paymaster General's office, Feb. 18, 1943, 20; Ministry of Information to Quentin Hill, Reconstruction Secretariat, Feb. 25, 1943, p. 21, Public Record Office, London, PIN 8/167. Directions were given not to make comparisons between the plans.

67 I think Amenta and Skocpol, "Redefining the New Deal," overrate the NRPB report at the expense of the plan of the Murray-Wagner-Dingell Bill, which also must be seen in the context of the Full Employment Bill of 1944.

68 Committee on Long-Range Work and Relief Policies, *Security, Work and Relief Policies* (Washington, D.C., 1942), 1, 4; for a summary, see ibid., chap. 19; Warken, *History*, 215–24; and Amenta and Skocpol, "Redefining the New Deal," 88–9.

69 Warken, *History*, 237–45.

70 Roland Young, *Congressional Politics in the Second World War* (New York, 1972), chap. 8.

allusions to what possibly would, could, and should be done. After the expectations of the reformers had been raised by Roosevelt in 1940–1, they were disappointed to discover that neither support nor outright endorsement was forthcoming from the White House. In going through the presidential files one can get the impression that the planning that Roosevelt had initiated in 1941 primarily served the purpose of preparing for entry into the war and the public's reaction to it. After the Japanese attack on Pearl Harbor, fighting the war took precedence over any other matter. This was once again evident when the Wagner-Murray-Dingell Bill was introduced in Congress. Roosevelt's 1944 economic address on the new bill of rights tacitly supported the principle behind Wagner-Murray-Dingell by calling for the right to protection against the fear of illness, accident, and old age for every citizen, but that was as far as his support went.[71] In 1943 Roosevelt instead popularized the more specific issue of benefits for veterans. The Serviceman's Readjustment Act of 1944 created a miniature American welfare state for a traditionally privileged societal group, namely, veterans: The new bill of rights turned into the "G.I. Bill of Rights," as the American Legion called the Serviceman's Readjustment Act.[72]

MAKING THE WORLD SAFE FOR SOCIAL AND ECONOMIC SECURITY

Even though legislative efforts to push forward programs of social reform stalled in 1942–3, there was little sign of defeatism among social and economic reformers. Nowhere did the war bring about immediate changes; plans were to be realized after the war. With the publication of the Beveridge report the issue of social reform developed a dynamic of its own. Beveridge became the idol and figurehead of an emerging internationalization of liberal reformers.

After touring the United States in 1943, Sir William and Lady Beveridge also visited Canada, where the ILO organized the Pan-American Conference on Social Security in which experts from eight different countries participated. As so many times on his tour, Beveridge was praised as a champion of British social reform and also – in the words of Ian Mackenzie, the Canadian minister of pension and national health –

71 The disappointment is obvious in Altmeyer, *Formative Years*, 149; for FDR's failure to make a speech on health care at the end of 1942, see Monte M. Poen, *Harry S Truman Versus the Medical Lobby: The Genesis of Medicare* (Columbia, S.C., 1979), 40–1.

72 The language of the bill was lifted from the 1943 Wagner-Murray-Dingell Bill; see Spitzer, *Senator Murray*, 28; Keith Olsen, *The G.I. Bill, the Veterans, and the Colleges* (Lexington, Ky., 1974); Brinkley, *End of Reform*, 258–9; and Amenta and Skocpol, "Redefining the New Deal," 120.

as someone who had made an impact on the "consciousness of the whole world" with his report and one who had "stimulated the interest of governments and of peoples in the question of social security to a degree without parallel in the past."[73] The ILO called this meeting at this time to obtain ideas for the drafting of an "International Charter of Social Security," to be ratified by an official international conference of the ILO. Social security was to have a "place in the world order." Mackenzie quoted Altmeyer, who a few days earlier had said at the American Labor Conference on International Affairs in New York that social security was the "embodiment of the chief moral concept which distinguishes the United Nations from the Axis powers – namely, the belief in the innate dignity and worth of the common man."[74] Social security was to be an altar in the church of democracy, with an international social charter spreading the gospel of social and economic security to the world.

The idea of an international charter on social security had various origins. Since 1940 the United States had been attempting to improve cooperation between itself and the other states in the western hemisphere in the field of social policy, not least in order to prevent the "Nazification" of Latin America. Winant and Altmeyer organized the Inter-American Committee to Promote Social Security, which aimed at furthering social reforms in those countries.[75] In Santiago, Chile, in September 1942, statutes were adopted for such an organization and a framework set up with Altmeyer serving as chairman. The aim was to make the Americas safe for social security, ironically in a way very similar to plans that were already drawn up yet far from being implemented in the United States itself.

Members of the SSB cooperated closely with the ILO on this as well as on other issues.[76] During the war the ILO pushed strongly for an

73 Remarks at conclusion by the chairman, 3, speech forwarded to the secretary of the president, E. M. Watson, by Oswald Stein, assistant director of the ILO, July 21, 1943, Roosevelt Library, Hyde Park, OF box 1710, 3.

74 Ibid.; International Cooperation in Achieving Social Security, address by Arthur J. Altmeyer at the American Labor Conference on International Affairs, New York, June 12, 1943, 4, in State Historical Society, Madison, Wis., Witte papers, box 204; for the proceedings of this conference, see "The Social Objective in Wartime and World Reconstruction: The New York Conference of the International Labour Organization," *International Labour Review* 25 (1942): 1–24.

75 Nelson A. Rockefeller, coordinator of inter-American affairs, Aug. 12, 1941; Cordell Hull, secretary of state, Aug. 28, 1942; memorandum for the president, Mar. 11, 1944, all Roosevelt Library, Hyde Park, OF 1710, 2. For other initiatives in the economic and social field, see "The Third Meeting of Ministers of Foreign Affairs of the American Republics," *International Labour Review* 45 (1942): 416–20.

76 The insurance specialists of the ILO had given much advice on the formulation of the Social Security Act and its extension. The SSB often asked the Insurance Section of the ILO very specific technical questions. The views on insurance versus assistance were very compatible; see, e.g.,

International Labor Charter that would also define the organization's role in the postwar period. A resolution of the International Labor Conference of New York in September 1941 endorsed the Atlantic Charter.[77] The Twenty-Sixth Conference of the International Labor Organization, held in Philadelphia from April 20 to May 12, 1944, passed the "Declaration Concerning the Aims and Purpose of the ILO," also known as the "Declaration of Philadelphia."[78] With this document the conference affirmed that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." Poverty constituted a "danger to prosperity everywhere"; hence, each country was to fight a "war against want." The conference recognized the "solemn obligation" of the ILO to advance programs among the nations of the world to achieve "full employment and the raising of standards of living"; a "minimum living wage to all employed and in need of such protection"; the "extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care"; "adequate protection for the life and health of workers of all occupations"; provisions for child welfare and maternity protection; the provision of adequate nutrition, housing, and facilities for recreation and culture; and the assurance of equal education and vocational opportunity. All these points, accompanied by the objective to "expand production and consumption and to avoid severe economic fluctuations," picked up on the themes propagated by liberal American social reformers. Between 1925 and 1937 the ILO adopted many conventions and recommendations on social security problems, but not until the Philadelphia Conference did it promulgate an all-inclusive social and economic security program. It built on the foundations laid by the Beveridge report, the National Resources Planning Board Report, and the Wagner-Murray-Dingell Bill. The language of social security and rights had been elevated to the lofty heights of internationalism. Reformers enthusiastically seized on aspects of this domestic American and, after 1943–4, international debate on rights – not because they believed some-

the essay by Oswald Stein, chief of the Social Insurance Section of the ILO, "Building Social Security," *International Labour Review* 24 (1941): 247–74.

77 "Social Objective," 22–3.

78 *Records of Proceedings of the 26th Session of the International Labour Conference* (Philadelphia, 1944). The different resolutions pertaining to social and economic policies that were earnestly contested cannot be dealt with here. For the conference, the ILO had prepared *Social Security: Principles and Problems*, pt. 1: *Principles*; pt. 2: *Problems Arising out of the War: Recommendations to the United Nations for Present and Postwar Social Policy* (Montreal, 1944).

thing radically new was being propagated but because these rights were easily compatible with earlier demands of the European labor movement.

Making the world safe for social and economic security was not a way of diverting attention from the domestic issues of the United States. Social reformers reasoned just the other way around: The international rights discourse was a means to press for reforms at home. When the delegates of the Philadelphia Labor Conference visited the White House shortly after the end of the conference, Roosevelt linked the American Bill of Rights and the "right of all human beings to material well-being and spiritual development" affirmed by the conference. This fit well into his domestic re-election campaign in 1944. However, it is indicative of Roosevelt's feelings on the issue that, when addressing the delegates at this meeting, he most likely left out the passage of the speech stating that if the aims of the ILO did not become "the aim of national policies, then it won't become the aim of international policies."[79]

CONCLUSION

By 1944 plans for setting up new, or reforming existing, national systems of social security were mushrooming, and a new international rights discourse was fully entrenched.[80] By itself this rights discourse does not say much about the outcome of national efforts to advance the welfare state. The struggles in the United States over the expansion of social security, the first round of which was fought during the Truman administration, testify to this.[81] The debates over inclusion in the Charter of the United Nations of clauses pertaining to social rights, and subsequent debates over the content of the United Nations Declaration of Human Rights, undoubtedly enhanced the awareness of the connection between modern citizenship and social and economic rights. The United States played a considerable role in these debates.[82] The discussions during the war paved

79 Address to the International Labor Organization conference, May 17, 1944, reprinted in Rosenman, ed., *FDR Papers*, vol. 1944–5, 128; in the much shorter text released to the press at the time and in fact most likely used by the president, this sentence was missing. Roosevelt Library, Hyde Park, OF box 499.

80 Ritter, *Sozialstaat*, 145–58; Hills, *Beveridge and Social Security*.

81 The renewed initiatives of 1945–6 cannot be dealt with here; see Altmeyer, *Formative Years*, chap. 6; Spitzer, *Senator James Murray*, 128–36; Poen, *Harry S Truman*, chap. 3; and Berkowitz and McQuaid, *Creating the Welfare State*, 156–61.

82 Georges Gurvitch, *The Bill of Social Rights* (New York, 1946); Dorothy B. Robins, *Experiment in Democracy: The Story of the U.S. Citizen Organizations in Forging the Charter of the United Nations* (New York, 1971); A. Glenn Mower, *The United States, the United Nations, and Human Rights: The Eleanor Roosevelt and Jimmy Carter Eras* (Westport, Conn., 1979), 1–86.

the way for the path traveled soon afterward, however differently, by most countries. Universal membership was a way to circumvent policies that were essentially class based; a growing number of economists thought the economy was to some degree "manageable" by way of fiscal policies;[83] economic growth promised to break what had appeared to be the iron fetters of scarcity, slow economic growth, and unemployment; and, last but not least, there emerged a broad consensus that political citizenship was to be complemented by social citizenship, that indeed social rights complemented the system of civil and political rights, as T. H. Marshall later argued in his grand teleology of modernization in Western nations.[84] Compared with European models of the British or Scandinavian welfare states, or the German model of the *Sozialstaat*, the politics of social policy in the United States undoubtedly established the weakest connection between social and political rights. Yet, one must be aware that during the war reformers in the United States had pioneered a language of economic and social rights. Inherent in it was not only a plea for a better world but also for a different United States of America.

83 Herbert Stein, *The Fiscal Revolution in America* (Chicago, 1969; reprint, Washington, D.C., 1990), 197–204; Brinkley, *End of Reform*, chap. 10; in contrast to these interpretations, see Amenta and Skocpol, "Redefining the New Deal," 89.

84 T. H. Marshall, *Class, Citizenship, and Social Development* (Garden City, N.Y., 1964).

8

Just Desserts

Virtue, Agency, and Property in Mid-Twentieth-Century Germany

MICHAEL L. HUGHES

Entitlements, or *Rechtsansprüche*, have become central in both American and (West) German political discourse. Rather than focusing on the possession of private property as the basis of security (as in the nineteenth century), individuals have increasingly demanded legally guaranteed social claims as the ultimate barrier against a fall into misery. The demands reflect past failures of private property to provide satisfactory protection against the effects of inflation and depression, for example.

Developments in postwar West Germany suggest that demands for entitlements also reflect more complex attitudes about individual rights, status, and agency. Operating in a culture of rights, twentieth-century German property holders believed that they had a right to their private property and personal status because both reflected their moral worth and efficacy as individuals. To preserve the moral order, they asserted, society must act to restore that property and status whenever human villainy or amoral material forces wiped them out. Doing so would reaffirm both the honor and the autonomy of individuals. Germans raised their claim of substantive rights for an inherently superior minority against two other discourses: laissez-faire liberalism, which recognized only economic necessity and formal rights, and the politics of victimization, which offered broad but demeaning claims for social assistance.

Although the conflict among these three discourses played itself out in various contexts, this chapter focuses on the struggle for recompense by the millions of Germans who lost most or all of their property between 1939 and 1948: The "bombed-out" had seen their businesses, homes, and personal possessions destroyed by Allied attacks; the "expelled" had been driven from their homes in Eastern Europe, usually with nothing but the

clothes on their backs; and the "currency damaged" had lost their life savings in a necessary but draconian currency reform. These impoverished "war-damaged" folk proposed a *Lastenausgleich*, a balancing of burdens: To distribute the war's losses fairly among Germans, they argued, (West) Germany must confiscate half or more of the surviving wealth from the merely lucky "undamaged" and redistribute those assets among the war-damaged (*Kriegsbeschädigte*), thereby restoring the prewar distribution of wealth and the moral order.[1] To justify their far-reaching demands, the war-damaged generated thousands of documents articulating their beliefs about property ownership, individual virtue, and social justice, arguments that the undamaged proved surprisingly willing to accept in principle. The *Lastenausgleich* law that eventuated struck a balance among economic necessity, communal obligation, and individual rights, illuminating the ways in which the neoliberal achievement society and the politics of victimization challenged but did not vanquish the culture of rights in twentieth-century (West) Germany.

The German experience between 1914 and 1948 had called into question the assumption that the individual could be secure in the ownership of private property. The German state, under three different political regimes, had created two massive bouts of inflation (1914–23 and 1935–48) that destroyed the value of people's savings and paper investments. Germany's catastrophic economic collapse in the early 1930s had driven hundreds of thousands of lower middle- to upper middle-class Germans into penury. Further, wartime devastation and the expulsion of Germans from their homes had shown that anyone's real property could be lost in an instant, leaving individuals and their families penniless. As an ad hoc group exploring a currency reform plan declared in 1947, "Experience has already taught us that the best real property can suffer just as much a disappearance of value as all other 'values' when an economy is ailing or collapses." One could argue for a moral or natural right to property, but in practice, whenever the society could not or would not uphold that right, then the individual and his or her property were surrendered to the caprices of the more powerful or of material forces.[2]

1 Reinhold Schillinger, *Der Entscheidungsprozess beim Lastenausgleich* (St. Katharinen, 1985); Michael L. Hughes, *Shouldering the Burdens of Defeat: West Germany and the Reconstruction of Social Justice* (Chapel Hill, N.C., 1999).

2 For the quotation, see Rettet die Menschen, *Geldwirtschaftliche Neuordnung unter Anerkennung aller Schäden und Erhaltung des Sparkapitals*, 1947, in Bundesarchiv Koblenz (hereafter BAK), Z 32/39; Elisabeth von Behr, in "Schreiben der Rentenempfänger an ihr Versicherungsunternehmen" (July 1948), in BAK, Nachlass (hereafter NL) Holzapfel, no. 112; and Dieter Grimm, "Bürgerlichkeit im Recht," in Jürgen Kocka, ed., *Bürger und Bürgerlichkeit im 19. Jahrhundert* (Göttingen, 1987), 162–3. See, similarly, a supporter of private property, Ludwig Vaubel, "Einführung," in Walter-Raymond-Stiftung, ed., *Eigentum und Eigentümer in unserer Gesellschaftsordnung* (Cologne, 1961), 15.

Yet, if Germans had been deluding themselves in viewing individual property as the basis of security, they could only turn back to society (which had failed to protect their property in the first place) in search of security. Social activists had long argued that, but many other Germans, including the war-damaged, could now do so as well. The goal of a *Lastenausgleich*, August Haussleiter from the Christian Social Union (CSU) argued, "must be a new social order . . . to give back to people the necessary social security" that ownership of property had failed to provide. The Central Association of Bomb-Damaged argued that Germany's relative geographic and economic smallness meant that its citizens could not depend on rebuilding from a disaster by their own efforts as one could "in rich America with its broad territory and its unlimited opportunities." Rather, Germany needed "a larger social sector" and a *Lastenausgleich* to protect its citizens.[3]

To support their demand for some socially guaranteed security, the war-damaged insisted that all Germans constituted a "community of risk" (*Gefahrengemeinschaft*) that had fought the war together, would have enjoyed the fruits of victory together, and should now bear the burdens of defeat together. Nazi rhetoric and wartime experience had strengthened the long-standing sense of community among Germans scattered across Central Europe. Virtually all (politically active) Germans accepted that such a community existed and that it entitled all Germans to justice from the community, including the just redistribution of the war's burdens among all Germans.[4]

The war-damaged defined justice as treating equals equally. Yet, as Aristotle recognized 2,300 years ago, people disagree about what constitutes equal: "For the one party, if they are unequal in one respect, for example, wealth, consider themselves to be unequal in all; and the other party, if they are equal in one respect, for example, free birth, consider themselves to be equal in all." Not surprisingly, West Germans disagreed about what "equal" meant for the purposes of a *Lastenausgleich* – equal as Germans or unequal as Germans of varying status, wealth, and experience.[5]

3 August Haussleiter, in "Tagung über Fragen des Lastenausgleichs," Karlshöhe, Aug. 13–15, 1948, Archiv für Christlich-Demokratische Politik (hereafter ACDP), NL Binder 044 C II 3B; for second quotation, see Adolf Bauser, "Unsoziale Währungsreform Sozialer Lastenausgleich," *Selbsthilfe* 22, no. 13 (July 5, 1948); for third quotation, see "Kleiner Mann – was nun?" *Selbsthilfe* 22, no. 14 (July 2, 1948).

4 Dr. Konrad Theiss (CDU), "Entschädigung oder Versorgung?" (summer 1948), in ACDP, NL Theiss, folder 005/II; Herbert Kriedemann (SPD) in "13. Sitzung des Zonenbeirates der britisch-besetzten Zone," July 8–9, 1947, in *Akten zur Vorgeschichte der Bundesrepublik Deutschland*, 5 vols. (Munich, 1982) 3:240.

5 Aristotle, *Politics*, trans. Benjamin Jowett, book 3, chap. 9; for war-damaged, e.g., "Vorschläge des Zentralverbandes der Fliegergeschädigten und Währungsgeschädigten zum Entwurf eines Gesetzes

For East Germany's communist rulers (who had no desire to recreate capitalist private property in any event) the key criterion was that all Germans were human beings. As such, they all had a claim to a *menschenwürdiges Dasein*, an existence worthy of a human being. The war-damaged had no right to any special *Lastenausgleich*. Rather, the regime included them, with some targeted assistance, in job creation, public housing, and social welfare policies available to guarantee every citizen a decent existence.[6]

Most West Germans agreed that all Germans were entitled (*Anspruch*) to an existence worthy of human beings, but many, including the left wing of the Christian Democratic Union (CDU), favored a separate social *Lastenausgleich*. They believed all war-damaged had suffered an unusual, "undeserved" blow, so that they were equal among themselves but different from, and implicitly superior to, "typical" welfare recipients. The war-damaged therefore deserved special treatment, although the guiding principle would be current need as human beings, not past wealth. As the Social Democratic Party (SPD) argued, "Therefore, the first goal of the *Lastenausgleich* is to provide a new securing of their livelihood through a [monthly] payment for all who cannot support themselves from their own work. From this perspective all are equally entitled – regardless of whether they formerly had only the subsistence minimum or more." The focus here was on the 70 percent of the war-damaged who had lost household goods, a rented dwelling, or a job – not productive assets. Indeed, supporters of a social *Lastenausgleich* usually considered the loss of a job as deserving of recompense, even if people in market economies do not normally think of workers' jobs as part of their capital.[7]

Supporters of a social *Lastenausgleich* argued only in part from a culture of rights. They seldom asserted that war-damaged had a pre-existing "right" or "entitlement" to a *Lastenausgleich*. Instead, they argued that the community had a "duty" to provide all its members a humane existence or an opportunity to earn a livelihood, or that "social justice" required some assistance for "fellow human beings who had fallen into need through no

über einen Allgemeinen Lastenausgleich," Mar. 17, 1951, in BAK, B 126/5699; BVD et al., "Zweite Denkschrift zum 8. Gesetz zur Änderung des Lastenausgleichsgesetzes," Dec. 4, 1956, Parlaments-Archiv (hereafter P-A), II 443/B 2.

6 Peter-Heinz Seraphim, *Die Heimatvertriebenen in der Soujetzone* (Berlin, 1954), 32–9, 67.

7 For the quotation by the SPD, see "Lastenausgleich! Gründe und Gegengründe der Sozialdemokratie," ca. Dec. 1950, 4–5, in Archiv der Sozialen Demokratie (hereafter ASD), NL Weisser, no. 1080; Karl Albrecht, "Nicht Lastenausgleich – Gerechte Sozialhilfe!" Nov. 3, 1948, in ACDP, NL Binder 013 B I.1; Rudolf Gerstung, "Der Lastenausgleich ist kein Konkursverfahren," *Sozialdemokratischer Pressedienst*, July 19, 1948.

fault of their own," or that the society must provide some assistance to the war-damaged to prevent their radicalization. When they did acknowledge an "inalienable right," it was to some indeterminate "aid." Because the root of the claim to assistance was not any specific individual right, society would have broad discretion in deciding how and to whom to provide assistance, leaving the individual in a dependent position.[8]

Demands for a social *Lastenausgleich* fit nicely into the politics of victimization that had been developing in Germany (and elsewhere) since the nineteenth century. Already by the 1920s, as Greg Eghigian has argued, *"The German social state . . . witnessed a proliferation of demands made on it by increasing numbers of individuals and groups all claiming the status of a deserving victim."* Deserving victims were innocent victims who could show that they were not responsible for their own misery. They could claim no natural or constitutional right to restitution, but they could appeal to their fellow citizens for some assistance to prevent abject misery. The more victimized they could claim to be, the better their case in the competition among different groups of disadvantaged for a share of the limited social resources available for redress. Victim status had become a kind of "cultural capital," one that supporters of a social *Lastenausgleich* felt quite comfortable deploying.[9]

Yet the supporters of a social *Lastenausgleich* did not want the war-damaged left dependent on the whims of others. Even those who did not admit a pre-existing right to a *Lastenausgleich* usually insisted that society must grant the war-damaged an entitlement to whatever *Lastenausgleich* aid it chose to offer. The war-damaged thereby would not be degraded to supplicants and would feel confident that they would continue to receive their recompense or assistance as long as they needed it. The politics of victimization has tended to merge (albeit not seamlessly) into a culture of rights.[10]

8 Hans Möller, *Der Lastenausgleich* (Hamburg, 1948), esp. 4; L. Wolkersdorf, *Der Leidensweg des endgültigen Lastenausgleichs* (May 1950), esp. 1–2, in BAK, B 126/5683; Gerhard Weisser, "Soforthilfe und Lastenausgleich," May 1949, esp. 1–2, 5 (quotation), ASD, NL Weisser, no. 466; *Jahrbuch der Sozialdemokratischen Partei Deutschlands 1948/49* (Hannover, 1949), 177. See also the references to *menschenwürdiges Dasein/Würde des Menschens* in Germany's 1919 and 1949 constitutions in Elmar Hucko, ed., *The Democratic Tradition: Four German Constitutions* (Oxford, 1987), 183, 194.

9 Greg Eghigian, "The Politics of Victimization: Social Pensioners and the German Social State in the Inflation of 1914–1924," *Central European History* 26, no. 4 (1993): 382 (original emphasis), 383.

10 Dr. Fauser, "Grundlagen des endgültigen Lastenausgleichs," Feb. 1950(?), in BAK, B 126/5678; "Tagung über Fragen des Lastenausgleichs, Karlshöhe," Aug. 13–15, 1948, in ACDP, NL Binder, 044 C II 3B. Hans Günter Hockerts, *Sozialpolitische Entscheidungen im Nachkriegsdeutschland* (Stuttgart, 1980), 227–8.

Those war-damaged citizens who had formerly owned income-earning property or homes wanted equals treated equally, too, but they considered themselves inherently superior to unpropertied Germans. They assumed that because they were unequal in wealth, they must be unequal in other key ways – particularly in degree of virtue – and deserving of unequal, that is, superior treatment. For these formerly propertied war-damaged, the equals who needed to be treated equally were the (formerly) propertied damaged and the (still) propertied undamaged. They defined justice as just desserts, an unequal distribution of rights and burdens among the community's members proportional to their differing inherent value.[11]

These formerly propertied appealed not to human sympathy but to a culture of natural, individual rights. As expellee leader and Bundestag delegate Linus Kather (CDU) asserted, the war-damaged believed "that a claim [to a *Lastenausgleich*] is given as a result of natural law on the basis of the collective liability of a people for a war that was fought and lost in common." Kather had to acknowledge some role for community in grounding even a natural-law claim, but he and the formerly propertied war-damaged derived therefrom an inalienable right to a social guarantee for his or her virtuously acquired property against any undeserved loss. Because they saw human communities as naturally articulated according to the varying virtue of individuals, they argued that Germans could recreate the moral order only if they restored, as much as possible, a socially just inequality reflected in the lost property, autonomy, and status of the formerly propertied. They, and most undamaged propertied, hence supported an individual *Lastenausgleich*, one devoted solely to proportionally recompensing individual capital losses. The formerly unpropertied and thus relatively unvirtuous war-damaged should expect only social aid from general government revenues, not a *Lastenausgleich*.[12]

The propertied war-damaged emphasized that superior abilities and, especially, virtuousness had enabled them to secure the lost assets they now wanted restored to them through a *Lastenausgleich*. Those who had

11 Aristotle, *Politics*, book 3, chap. 9; Linus Kather, *Gerechter Lastenausgleich!* (Hamburg, 1951), 3. In interviews in the 1980s, expellees who had lost property still tended to compare themselves with West German propertied. See Alexander von Plato, "Fremde Heimat: Zur Integration von Flüchtlingen und Einheimischen in die Neue Zeit," in Lutz Niethammer and Alexander von Plato, eds., *"Wir kriegen jetzt andere Zeiten": Auf der Suche nach der Erfahrung des Volkes in Nachfaschistischen Ländern* (Berlin, 1985), 210–11.

12 Kather in 207. Sitzung (May 6, 1952), *Verhandlungen des Bundestages, Stenographische Berichte*, 11:8977; Herbert Giersch, *Der Ausgleich der Kriegslasten vom Standpunkt sozialer Gerechtigkeit* (Dortmund, 1948), 8.

accumulated a nest egg against disability or old age emphasized their thrift and self-sacrifice. They had chosen to forgo consumption, often at considerable discomfort, so as not to burden the community when they no longer could work. People bombed out of their homes and expellees emphasized their diligence and foresight in building up productive assets and their social contributions in generating jobs and tax revenue. A former farmer, whom the Nazis had forced to sell out and whose assets currency reform had then destroyed, wrote, "That is the result of 42 years of greatest diligence and thrift, that I stand today without livelihood, home, and (nearly) assets, and all through no fault of my own." Some war-damaged could even refer to themselves as just generally virtuous. One of them, for example, referred to "the elevated and socially valuable strata of the formerly self-supporting." Moreover, the war-damaged complained bitterly that they were being punished for their hard work and self-sacrifice through the loss of hard-earned property, while the lazy and spendthrifts might be rewarded. As one protested, "It is indeed not right to give him who produced and saved nothing at all the same [*Lastenausgleich* benefits] as him who in a long life has resolutely and soberly secured for himself what was necessary for his business and social honor."[13]

Significantly, the war-damaged contended that they had a property right in their social status as well as in their material possessions. Expellee leader Oskar Wackerzapp wrote, "The war-damaged have a claim to a balancing out that opens to them the way to their earlier social distinction in the *Volksgemeinschaft*." Expellee Ministry civil servant Dr. Hinz asserted that a *Lastenausgleich* should "end social declassing resulting from war damages and re-establish social livelihoods with reference to the earlier livelihood." The war-damaged frequently asserted the need for a *Lastenausgleich* that would provide them "furnishings corresponding to their cultural level." As one bombed-out individual wrote, former businessmen had "honor" and standards to maintain; he saw being able to keep those standards as his *right*, one that society needed to recognize and protect – and that the government needed to recreate if society failed to protect it in the first place. Such claims echoed the centuries-old German notion

13 There are hundreds of references to this. For the first quotation, see Andreas Huber to Finanzausschuss beim Wirtschaftsrat, July 5, 1948, in BAK, B 126/5703; for the second quotation, Hellmuth Wissmann to Bundesminister der Finanzen, Aug. 11, 1954, in BAK, B126/27887; for the third quotation, Otto Becker to Ludwig Erhard, May 4, 1952, in BAK, B 102/8227–2; Julius Mangelsdorf to Bundesminster für Finanzen Fritz Schäffer, Mar. 4, 1951, and Sept. 30, 1951, in BAK, B 126/5760; Kather, *Gerechter Lastenausgleich!* 3. See here Dieter Grimm, "Bürgerlichkeit im Recht," 179–80.

that upstanding members of the middle classes were entitled to a *bürgerliche Nahrung*, a livelihood appropriate to an honorable citizen.[14]

Many of the war-damaged rooted their very sense of self in their formerly superior positions in a hierarchical social order. A regional group representing expelled *Gymnasium* teachers (a high-status group in Germany) complained that its members had to take low-status positions in the school hierarchy in their new homes, thus suffering not merely material losses but a "devaluation of their person." A civil servant commented, "[T]he war-damaged do not want to be considered and treated as a homogeneous mass but rather just like the portion of the population that has been spared, to be integrated again into the social order as personalities." Indeed, as Walter Seuffert (SPD) noted during a public debate, some apparently wanted their property losses legally confirmed, even if they secured no compensation, "with the sole purpose of wanting to be able to prove, because of one's honor, how rich one had once been." Such attitudes reflected broader concerns among West Germany's middle and upper classes about the loss of hierarchy, individuality, and virtue in modern mass society.[15]

Wartime calls for shared patriotic sacrifice had strengthened a long-standing mistrust of middlemen and profit. The war-damaged found it particularly odious that they – the virtuous – had lost all while other, nefarious individuals had "profiteered" in the midst of the German people's war or postwar misery. Some Germans, especially military contractors, had enriched themselves enormously. Even worse in most Germans' eyes were the sharp operators who had made fortunes in the black market by speculating in desperately needed but scarce goods. Attacks on profiteering and demands that its beneficiaries be made to pay their "immoral" profits into the *Lastenausgleich* fund were ubiquitous. "It may never be allowed," one person wrote indignantly, "that, for example, some kind of racketeer, speculator, or human question mark, who lived

14 Oskar Wackerzapp, "Lastenausgleich," *Das Blatt der Ostvertriebenen* 1948, no. 1, in BAK, B 126/5680; Dr. Hinz, "Vermerk! Betr.: Lastenausgleich," May 16, 1950, in BAK, B 150/4820; "Lastenausgleich (Alle sollen an Gesetzen mitarbeiten)," 1950(?), in BAK, B 150/3293; Kreisverband der Heimatvertriebenen Prüm/Eifel to Bundespräsident, Nov. 1950, in BAK, B 126/5696; Otto Becker to Erhard, May 4, 1952, in BAK, B 102/8227–2. For *bürgerliche Nahrung*, see Wolfram Fischer, *Handwerksrecht und Handwerkswirtschaft um 1800* (Berlin, 1955), 53–9, 83.

15 For first quotation, Philologenverband Niedersachsen, Arbeitsgemeinschaft der Kriegsverdrängten, to Flüchtlingsausschuss des Vereinigten Wirtschaftsrats, Oct. 22, 1948, in BAK, B 126/5704; for second quotation, Dr. Fauser, "Grundlagen des endgültigen Lastenausgleichs," Feb. 1950(?), in BAK, B 126/5678; for Seuffert (disputation), 34, 36, in P-A, I 332/9; Mark Roseman, "The Organic Society and the 'Massenmenschen': Integrating Young Labor in the Ruhr Mines, 1945–58," in Robert G. Moeller, ed., *West Germany Under Construction* (Berkeley, Calif., 1996), 297–99; and Helga Grebing, *Konservative gegen die Demokratie* (Frankfurt am Main, 1971), 85–6, 101, 210, 215, 217–19, 253.

high on the hog at the expense of his fellow humans" should get to enjoy his ill-gotten gains. He contrasted his compatriots, "the solid [citizens], those who through physical or mental activity . . . stood positively in life, the savers and those who used their strength and health honorably, laboriously, and true to their personal, communal, and general principles," with the "speculators, racketeers, and economic hyenas."[16]

The war-damaged had a vision of a hierarchical, morally charged social order. In that order, which implicitly corresponded with the universal moral order, modest property ownership was both the result and the sign of inherent virtue – although large-scale property ownership might well reflect greed, profiteering, or other illicit activities. The middle classes thus could feel morally superior to both the poor and the rich. A leveling of society would call this moral order into question. Not only would it suggest that virtue might not be rewarded, it would actually punish the virtuous for their self-renunciation by depriving them of the fruits of that restraint – while forcing them to see the feckless rewarded with the enjoyment of both consumption in the past and social assistance now.[17]

The war-damaged hence asserted a contingent notion of property ownership. Mere possession of property was not sufficient. One had to have deserved it, that is, to have acquired it virtuously. The Central Association of Bomb Damaged, for example, justified confiscating wartime capital gains outright because their possessors had "no moral claim to compensation." It wanted a "sifting out . . . to allow compensation to come only to that circle of persons who from the standpoint of justice really have a claim to compensation," and this could only be done by excluding those whose claims were from "easily earned rearmament profits and wartime capital gains."[18]

16 Eugen Rapp, "Vorschläge zur Währungsreform und Lastenausgleich zur Herbeiführung gerechter, solider und beständiger Verhältnisse," July 9, 1948, in BAK, B 126/5726. For long-term suspicion of middlemen, see Richard Tilly, "Moral Standards and Business Behavior in Nineteenth-Century Germany and Britain," in Jürgen Kocka and Allen Mitchell, eds., *Bourgeois Society in Nineteenth-Century Europe* (Oxford, 1993), 190–3; Martin H. Geyer, "Teuerungsprotest, Konsumentenpolitik und soziale Gerechtigkeit während der Inflation: München 1920–1923," *Archiv für Sozialgeschichte* (hereafter *AfS*) 30 (1990): 198–9, passim; Adolf Bauser, "Grundrechte," *Selbsthilfe*, Sept. 15, 1946; Dr. Hans Fülster, "Ist der Lastenausgleich möglich?" *Hamburger Echo*, Mar. 3, 1950, in BAK, B 126/5679.

17 Waldemar Kraft (BHE), in 47. Sitzung des Deutschen Bundesrates, 19 Jan. 1951, excerpt in BAK, NL Kraft, 267/38; Linus Kather, "Die Mindestforderungen," May 4, 1952, in Linus Kather, *Eingliederung durch Lastenausgleich* (Frankfurt am Main, 1952), 20. See Max Weber, "The Social Psychology of the World Religions," in H. H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York, 1975), 271.

18 Wilhelm Mattes, "Verbesserte Aussichten," *Selbsthilfe* 24, no. 12 (June 2, 1950): 1; Wilhelm Mattes, "Währungsgeschädigten in Gefahr," *Selbsthilfe* 24, no. 13 (July 1, 1950): 1; see also, e.g., "Eigentum verpflichtet," *BHE-Dienst*, Apr. 5, 1952.

The war-damaged also called the postwar property distribution into question because the capricious operation of material forces, as opposed to individual virtue, determined whose property would survive. They emphasized repeatedly the capriciousnes of war damages. Pure chance decided whether bombs would destroy Herr Schmidt's house or Frau Meyer's, and it was more or less arbitrary that those who lived in East Prussia suffered expulsion whereas those who lived in Westphalia escaped it. The war-damaged almost universally insisted that they should not have to bear their individual losses because they had suffered them "without any personal culpability," especially compared to the undamaged. For example, Adolf Bauser, the leader of the bombed-out, complained, "I would like to state, from the deepest conviction, that it is impossible and unbearable to demand of someone that they should have to do without all that they possessed, while others get to keep all they had, indeed might increase their wealth, without any fault having characterized the former or any merit being ascribable to the latter." By arguing that unculpable losses deserved recompense at the expense of unearned preservation of assets, the war-damaged reasserted the principle that moral equals needed to be treated equally and that outcomes had to depend on the relative virtue or villainy of an individual's actions, not on the capricious operation of material forces. Indeed, individuals were entitled to state intervention to assure those morally appropriate outcomes.[19]

Determined to defend their moral superiority, the war-damaged vociferously rejected any assistance that smacked of welfare or charity. They demanded superior assistance administered separately from welfare or, in the case of formerly propertied citizens, individual restitution for property losses. They insisted that they deserved more than welfare because they were more virtuous than the "typical" welfare recipient or charity case. "Everyone must see," expellee leader and Bundestag delegate Kather asserted, "that one cannot offer to the farmer who lost a farmstead, to the artisan or businessman deprived of his shop, and thereby, as a rule, of the results of a long and strenuous life's work, a so-called full support

19 For fortuitousness, see Gerhard Jaeck (received: May 7, 1948), 1, in BAK, Z 32/47; Dr. Hinz, Betr.: Lastenausgleich, Aug. 31, 1950, in BAK, B 150/4820; see here also Albrecht Lehmann, *Im Fremden ungewollt zuhaus*, 2d ed. (Munich, 1993), 145, 241. For relative innocence, see Adolf Bauser, "Innere Wiedergutmachung," *Selbsthilfe* 21, no. 11 (June 1, 1947): 2; Friedrich Karrenberg, "Lastenausgleich," *Die Stimme der Gemeinden* 2, no. 12 (Dec. 1950): 5. World War I era pensioners devastated by inflation used similar terminology for relative innocence. See David Crew, "'Wohlfahrtsbrot ist bitteres Brot': The Elderly, the Disabled, and the Local Welfare Authorities in the Weimar Republic, 1924–1933," *AfS* 30 (1990): 219; Karl Christian Führer, "Für das Wirtschaftsleben 'mehr oder weniger wertlose Personen': Zur Lage von Invaliden- und Kleinrentnern in den Inflationsjahren 1918–1924," *AfS* 30 (1990): 171.

payment that was scarcely more than welfare." The German Federation of Pensioners complained that "compensation [for savers ruined by currency reform] scarcely exceeds the welfare payments for those who did not save through self-renunciation and are rewarded for that behavior."[20]

The formerly propertied war-damaged insisted not only that they were more virtuous than the unpropertied but also that they had been and should continue to be efficacious agents. Their property could be an expression of their virtue only if they had been able to affect the external world by exercising that virtue. Moreover, they could only be sure of some control over their own lives, could only regain some of the security they had lost, if they could continue to act efficaciously in the future. This desire to establish agency for themselves, to be subjects, not objects, expressed itself in their claim that they had a right to *Lastenausgleich* and in their resistance to being considered victims.

Crucially, as long as the war-damaged had no right to restitution, they were obviously objects of forces beyond their control. As the Protestant journal *Christ und Welt* explained, the war had shattered the "normal course of things," so that many of the formerly self-reliant

> no longer could pluck up their courage and make their way with their own strength. For every clever, active, and diligent person it means a deep humiliation to have to recognize this fact. For he must out of necessity grant the state rights where formerly he knew how to help himself; he must submit to communal regulation where earlier he decided alone and was also ready to bear the responsibility.

Yet such dependence on the assessments and power, the whims, of others was dangerous. As one expellee wrote, expellees rejected a social *Lastenausgleich* (based on civil servants' assessments of current need) because "thereby, however, every objective basis for calculation would be lost, so that the amount of the compensation would in the end depend on the subjective discretion of the Welfare Office."[21]

To evade such a surrender of control to the state and its minions, the war-damaged claimed entitlement to *Lastenausgleich* and asserted their

20 Kather, *Gerechter Lastenausgleich!* 3; "Fliegergeschädigte gründen Zentralverband," *Selbsthilfe* 21, no. 18 (Sept. 15, 1947); Deutscher Rentnerbund, "Der Vorrang der Alterssicherung und die Verrentung," Jan. 1954(?), in BAK, B 126/27887.

21 "Lastenausgleich – Aufgabe ohne Beispiel," *Christ und Welt* 1, no. 7 (July 17, 1948), in ACDP, NL Theiss, 015/III; for expellee quotation, "Eine Aufgabe von fundamentaler Bedeutung," *Ostvertriebenen-Korrespondenz*, Oct. 5, 1948, in BAK, Zsg 1–204/25; see also, e.g., the angry complaint of a bombed-out victim who had to apply for welfare: Erma-Aimée Köhnke to Bundesminister für Finanzen, Mar. 22, 1952, in BAK, B 126/5700. For interwar background to this fear, Crew, "'Wohlfahrtsbrot ist bitteres Brot,'" 220–2.

agency as protectors of their own rights. In campaign literature the expellee political party's leaders emphasized its significance as an expression of the expellees taking charge of their lives and fighting for their rights. As party head Waldemar Kraft wrote, "The expellees are not supplicants and are not willing to be charity recipients. They are creditors and demand their rights, and their elected leaders are the guarantors that the struggle for [their] rights will be conducted unyieldingly and without compromise." By asserting their legal claim the war-damaged sought to reassert their status as subject as opposed to object. They were not asking the state to bestow a gift but were fighting to compel it to acknowledge a pre-existing entitlement.[22]

Because formerly propertied war-damaged emphasized their autonomy and moral superiority, they resisted being labeled as victims. The term *war-damaged* does denote victim: someone who has suffered an injury. But victimization rests on the common vulnerability of human beings as the potential object of forces beyond their control. Such a focus was risky for individuals who based their claims to privileged recompense, and their self-image, on uncommon virtue and efficacy. Yet by 1948 victim status had become so vital a weapon in the struggle for recompense that the war-damaged grudgingly began to refer to themselves as victims.[23]

Formerly propertied war-damaged, though, still preferred to emphasize their efficaciousness. Expellee Erich Dederra, for example, characterized expellees as victims, but he also emphasized their previous self-reliance, their noble efforts at overcoming despair, and their desire to be "active again in the interests of the whole people as they once were." Also, historian Albrecht Lehmann notes of expellee memories of the postwar years: "A typical mode of narration: Alongside the recounting of the random allocation of a domicile . . . a further pattern is a self-conscious presentation of individual initiative, of the tricks and the dissimulation" that enabled the clever war-damaged to overcome their miserable fate.[24]

22 "Heimatvertriebene! Landsleute!" spring 1950, in BAK, Zsg 1–54/15; Waldemar Kraft, "Was geht in Bonn vor?" *Stimmen aus dem Osten*, June 1950, in BAK, NL Kraft, no. 51; Kather in Friedrich Karrenberg, "Lastenausgleich," *Die Stimme der Gemeinde* 2, no. 12 (Dec. 1950): 8, in BAK, B 126/10444; Wiedergutmachungs-Interessen-Gemeinschaft der Total-Flieger- und Währungsgeschädigten in Bayern to Bundeskanzler, Jan. 16, 1952, in BAK, B 148V/22. See here also the stories in the revealingly titled Peter Paul Nahm, ed., *Sie haben sich selbst geholfen* (ca. 1957), passim.

23 For initial reluctance to call themselves victims, see *Selbsthilfe*, 1946–8; see also, e.g., Prof. Gerhard Albrecht et al., "Sanierung der deutschen Wirtschaft," Dec. 1947, in BAK, Z 32/42; Eghigian, "Politics of Victimization."

24 Prof. Dr. Dr. Robert Nöll von der Nahmer, "Reichsschulden und Volksvermögen," *Selbsthilfe* 22, no. 2 (Jan. 15, 1948); Erich Dederra, "Die gesamtdeutsche Aufgabe des Zentralverbandes der vertriebenen Deutschen," *Vertriebenen-Korrespondenz*, Nov. 11, 1950; Lehmann, *Im Fremden ungewollt*, 39–41, 206–7, 221–7; quotation on 41.

Contradicting their own assertions of efficacy, the war-damaged distanced themselves from any responsibility for Nazism – and from any political efficacy before 1945. People do like their victims innocent, and any who contribute to their own problems (*Mitverschuldung* in German law) can expect to find any compensation claims reduced or nullified. A few West Germans did argue that the millions of war-damaged who had supported Nazism (to varying degrees) deserved no recompense. The war-damaged hence strove to mask any responsibility for their own losses consequent to their earlier, often ardent, support for Hitler and his war. In the process they implicitly declared themselves to have been ineffective politically, even while insisting they had been efficacious economically.[25]

The moral views that drove the formerly propertied war-damaged had deep roots in German culture. To demonstrate superior virtue, lower-middle- and middle-class Germans had long striven to secure enough capital so they would not fall prey to the humiliation of having to accept charity or welfare. Scarcely a generation before, though, the impact of World War I and inflation had victimized a million formerly self-sufficient Germans, leaving them dependent on charity or welfare. Like the post–World War II war-damaged, these individuals had protested, "We pensioners have been swindled in an unprecedented manner, in that we have a life of toil behind us [and] have secured through diligence and thrift enough that we would be supported in old age and would fall as a burden on no one." They, too, demanded privileged compensation on the grounds that they were not "typical" welfare recipients and did not deserve to be treated as such.[26]

These moral views were widely shared throughout German society. Significantly, very few postwar West Germans openly questioned the pretensions of the war-damaged. Indeed, in a 1948 poll conducted by

25 For *Mitverschuldung*, see, e.g., the War-Damages Decree, §6, in Bundesministerium für Vertriebene, ed., *Dokumente deutscher Kriegsschäden* (Bonn, 1962); for possible war-damaged culpability, Prof. Dr. Wilhelm Weizsäcker, "Zur Vorgeschichte der Deutschenaustreibung aus den Sudetenländern," *Archivalischer Informationsdienst des Göttinger Arbeitskreises*, Sept. 29, 1949; for war-damaged assertions of innocence, see, e.g., Fritz Seiler to Bundesminister der Finanzen, June 25, 1950, in BAK, B 126/5696; for a recent overview of German attitudes toward Nazism, see Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge, Mass., 1997), passim.

26 Cited in Robert Scholz, "'Heraus aus der unwürdigen Fürsorge': Zur sozialen Lage und politischen Orientierung der Kleinrentner in der Weimarer Republik," in Christoph Conrad und Hans-Joachim von Kondratowitz, eds., *Gerontologie und Sozialgeschichte: Wege zu einer historischen Betrachtung des Alters* (Berlin, 1983), 340; Führer, "Für das Wirtschaftsleben," 162, 169–70, 174–6; Crew, "'Wohlfahrtsbrot ist bitteres Brot,'" 218–20, 227–9. For longer-term perceptions of middle-class virtue and proletarian vice, see, e.g., Heinz-Gerhard Haupt, "The Petty Bourgeoisie in Germany and France in the Late Nineteenth Century," in Kocka and Mitchell, eds., *Bourgeois Society*," 315–16, passim.

American occupation authorities, 74 percent of respondents (91 percent in Berlin and 89 percent in Bremen) explicitly favored a *Lastenausgleich*. Moreover, undamaged Germans from all social backgrounds and from across the political spectrum could accept such arguments. In the American poll, 82 percent of those who expected to be unaffected, and even 51 percent of those who expected to have to finance a *Lastenausgleich*, favored it.[27]

The undamaged agreed, often explicitly, that property ownership did reflect the inherent virtue of the owner and that the (formerly propertied) war-damaged were notably virtuous. The chemical industry interest group, for example, whose members would have to help finance any *Lastenausgleich*, agreed that "no one will want to deny that in the majority of cases property and wealth rest on virtue, not on unearned luck or dishonest machinations." Finance Ministry officials acknowledged that one must at least partially restore the prewar property distribution, even if at a lower level, because otherwise one would be treating the virtuous worse than the unvirtuous. The undamaged could also agree that the erratic nature of war damages made the existing property distribution illegitimate. Already in 1943–4 the neoliberal future economics minister and federal chancellor Ludwig Erhard (CDU) had written, "If one part of the German people has lost all through no fault of their own, it cannot be countenanced that other individuals, favored without having merited it, should preserve perhaps their whole capital through the war."[28]

Policymakers generally agreed when the war-damaged rejected welfare as a humiliation inappropriate to those who had fallen into misery "through no fault of their own." Even those on the Left perceived the war-damaged as different from "normal" recipients of public assistance and as deserving of more respectful treatment. A writer in an SPD publication could state, "The expellees are not objects of general welfare provisions; they are rather subjects in the construction of the necessary reordering of social relations in Germany." Implicitly, for the party of social equality, welfare recipients were objects, not subjects, and were qualitatively different from and implicitly inferior to the war-damaged.[29]

27 "Report no. 169: German Appraisals of Lastenausgleich," May 6, 1949, 3, 9, Institut für Zeitgeschichte, OMGUS, DK 110.001.

28 Arbeitsgemeinschaft, Chemie-Industrie, "Lastenausgleich und andere Steuerprobleme 1949," in BAK, B 102/8215–2; Verwaltung für Finanzen, "Memorandum, Lastenausgleich" (late 1948), in BAK, NL Blücher, no. 324; Ludwig Erhard, *Kriegsfinanzierung und Schuldenkonsolidierung: Faksimiledruck der Denkschrift von 1943/44* (Frankfurt am Main, 1977), 80 (see also 16).

29 Eugen Gerstenmaier in "Tagung über Fragen des Lastenausgleichs, Karlshöhe, Aug. 13–15, 1948," in NL Binder 044 C II 3 B; for quotation, "Hilfe für Vertriebenen," *SPD Informationen für die Flüchtlingsausschüsse der Ortsvereine*, no. 1 (1947), in BAK, Z 2/100.

This general acceptance of the self-characterization of the war-damaged reflected the shared conviction that society had an interest in convincing the mass of Germans that playing by the rules – working hard, saving, being self-reliant – would be rewarded, not punished. *Christ und Welt*, for example, rejected consigning the war-damaged to welfare because "The *Lastenausgleich* would be the highest injustice if it should once again make the provident, clever, and diligent into the simpletons, and the prodigal, stupid, and lazy into the winners." Attacking SPD calls for a social *Lastenausgleich* and celebrating the socially virtuous property owners, a writer for the *Industrie-Kurier* argued, "People are different. The one prefers to spend his income and enjoy the day; the other squirrels his money away, through self-denial, dime for dime, to become propertied and not to be dependent on the state in his old age. Such civil virtues are unfortunately never properly honored by the state, although without their cultivation it can scarcely endure."[30]

These arguments for virtue, agency, and property, for entitlement and victimhood, were rooted in historically recent, and not entirely congruous, assumptions. The culture of rights and the politics of victimization seem on a fundamental level contradictory, the former emphasizing individual efficacy, the latter recognizing the uncontrollable forces that can lead to unjustified misery. Yet they share the belief, or delusion, that human action is neither divinely determined nor morally meaningless, that some connection not only ought to but does exist between virtuous action (or at least intent) and just outcome, that people ought to and somehow ultimately do deserve their fate.

Traditionally, human existence was so tenuous that people could not hope to control their environment. They assumed that they must accept whatever fate or the divine laid on them. That view offered them little control over their lives but could imply some larger meaning to human experience, particularly in the Christian context of the Divine Providence of a just God. Job, who ultimately submits to a God who has devastated his life as part of a wager with Satan, is exemplary of such resignation. But as one of the few open opponents of a *Lastenausgleich* complained, in recent centuries "the notion of a fate that could be laid upon one as a personal task seemed shaken," replaced by "the materialistic and areligious concept of a self-evident right to restitution for material losses."[31]

30 "Vier Forderungen zum Lastenausgleich," *Christ und Welt* 1, no. 7 (July 17, 1948), in BAK, B 126/5691; "Wo stehen wir?" *Industrie-Kurier*, Feb. 3, 1951, in P-A, D 515/3. Civil servants in the 1920s expressed similar attitudes about pensioners impoverished by inflation; see Führer, "Für das Wirtschaftsleben," 173.

31 Dr. Artur Moser, "Tun wie neugeboren," *Wirtschaftszeitung*, Oct. 8, 1948, in BAK, B 126/5759.

The intellectual roots of both the culture of rights and the politics of victimhood lie in the Enlightenment. Some Europeans (the Philosophes) began to doubt that each event reflected God's active intervention in the world. This meant that human misery was not the inevitable result of divine will – but also that such misery as did occur no longer was suffused with divine meaning, leaving Europeans (and Americans) living in a desacralized world. The Philosophes did offer moral hope by arguing that a benevolent God had created a beneficent universe in which people, as formally equal, autonomous, and efficacious individuals, could establish justice and meaning if they tried. Many Europeans therefore began actively to pursue happiness as something attainable by and reflective of individual human effort. Increasingly, any human misery that did not result from individual fault came to seem unreasonable and unjust. It was also frightening because it suggested that the desacralized universe might in fact contain no moral order.[32]

One reflection of this new worldview was the politics of victimization that arose in the nineteenth century. Romanticism put a premium on sensitivity to and sympathy with others. Meanwhile, greater material security increased people's expectations and society's ability to compensate individuals for the consequences of life's disasters. Security came to seem the norm: and something to be valued. Yet if security was the norm, one should only lose it for good reason. To be punished undeservedly by forces beyond one's control seemed a betrayal of the new faith in individual efficacy and resulting moral order. One expression of the desire for moral meaning was therefore a conviction that an expanding list of "innocent" victims must not be left prey to amoral material forces.[33]

Yet abandoning oneself to the kindness of strangers seemed risky and weak, leading to the alternative emphasis on rights as the basis of human security. In Germany this emphasis reflected Kantian and Hegelian notions of property as the basis of independence and (self-) mastery. It also reflected a strong tradition, identified with the *Rechtsstaat*, of legal formalism as the most reliable basis of human freedom and security. Many Germans argued that the individual could best secure freedom and the opportunity for self-actualization if society implemented a comprehensive, consistent system of formal rights guaranteed by a neutral judiciary.

32 Max Weber, "Religious Rejections of the World and Their Directions," in *From Max Weber*, 350, 357, passim; Paul Hazard, *European Thought in the Eighteenth Century* (Cleveland, 1969), 18–25, 113, 156–7.

33 Joseph Amato, *Victims and Values: A History and Theory of Suffering* (New York, 1990), 103–17; Hans J. Cahn, *Kriegsschädenrecht der Nationen* (Zurich, 1947), 118–22; Eghigian, "Politics of Victimization," passim. "Vorwärts statt Rückwärts," *Wirtschaftszeitung*, Aug. 20, 1948, in BAK, B 126/5759.

Individuals would then face a knowable system within which they could structure their actions to achieve their freely chosen ends. Any inequality would presumably be the consequence of unequal endowments, so that, as Dieter Grimm writes, "these inequalities . . . no longer appeared as externally imposed but as ascribable to the individual and hence not unjust." Legal formalism proved unable, however, to assure morally acceptable outcomes, given the fundamental inequalities of a market society, and it certainly could not protect one against currency fluctuations, falling bombs, or expulsions. Many Germans therefore sought to assert a substantive, rather than a merely formal, right to their earlier property and position: If they lost their wealth for any reason beyond their control, society must act to restore their lost property and its value. They sought to establish a concrete right that would enable them to coerce society into securing their ends. The claim to rights by the war-damaged was, as it had been for nineteenth-century proponents of the *Rechtsstaat*, a means to assert control over the power of others and material forces.[34]

Even though the attempts of the war-damaged to morally ground property rights was deeply rooted and widely shared, it has seemed, even on its own terms, problematic. One would be hard pressed to deny that accumulating assets or preserving them in a competitive, temptation-filled world requires some degree of "virtue." Nonetheless, moral philosophers have been loathe to seek to legitimate private property by appealing to the property holder's putative virtue. Too many morally dubious individuals often own vast amounts of property. Also, if the moral basis of property is the exercise of virtue necessary to obtain it, then any property obtained through unearned fortune (for example, inheritance, gambling) would presumably be illegitimate. The wealthy are often just lucky; welfare recipients or the working poor are sometimes just unfortunate – but honorable.[35]

More important in the context of the *Lastenausgleich*, those whose character we most admire might in fact not be those able to use valuable economic resources most efficiently. The virtues that the formerly propertied claimed for themselves seem admirable enough. But in the rough and tumble of the marketplace, they may pale beside other "virtues," such as

34 Gerhard Dilcher, "Das Gesellschaftsbild der Rechtswissenschaft und die soziale Frage," in Klaus Vondung, ed., *Das wilhelminische Bildungsbürgertum* (Göttingen, 1976), 61, passim; Grimm, "Bürgerlichkeit im Recht," 151; Franz Wieacker, *A History of Private Law in Europe*, trans. Tony Weir (Oxford, 1995), 281–2, 342–9, 412–13, passim; Dieter Schwab, "Eigentum," in Otto Brunner, Werner Conze, and Reinhart Koselleck, eds., *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 9 vols. (Stuttgart, 1972–97), 2:80–4.

35 Lawrence Becker, *Property Rights* (London, 1977), 83–6.

rationality, technical competence, administrative ability – or even greed and ruthlessness. The community may be better served if the nasty but efficient hold property rather than the nice but ineffective. Moreover, in a market economy success is its own justification: The accumulation of wealth is considered prima facie evidence that one knows how to use society's resources most efficiently in response to market forces.[36]

Crucially, postwar West Germans came to accept such an "achievement society," where income and honor were to be proportional to performance. The logic of industrial-technological competitive economies had, since the early nineteenth century, tended to privilege instrumental rationality, practical competence, and entrepreneurship. But most Germans had resisted such "virtues," dismissing them as materialistic or selfishly pushy (often with an anti-Semitic thrust). The Nazis, though, had promoted these pragmatic virtues with their social-Darwinist call for an achievement community in which status derived from concrete achievements on behalf of the *Volk*. The chaos of war and defeat had strengthened the appeal of these virtues because Germans had to scramble desperately to "organize" sufficient resources to survive – by exercising practical efficiency and, often, a certain devious cleverness. As the economic miracle of the 1950s offered a new, widely admired identity based on economic success, West Germans began to glory in their achievement society. Social worth was now measured not so much in terms of permanent character (thrift, diligence, foresight) as according to current performance.[37]

Not surprisingly, then, the undamaged sought to limit the *Lastenausgleich* less by touting their own rights as property owners than by appealing to economic necessity. The chemical industry group that had praised the virtue and entitlement of individual property holders defended corporate property on the basis of its national-economic utility. The undamaged (including businesses, the trade unions, and the Social Democrats) supported a *Lastenausgleich* for the war-damaged and even a 50 percent capital levy on surviving property, but they argued that the levy's payment

36 Ibid., 81–3. See also John W. Chapman, "Justice, Freedom, and Property," *Nomos* 22 (1980): 313. Grimm, "Bürgerlichkeit im Recht," 168, notes that legally in a bourgeois order the law asks only after the "formal correctness" of individual acts and ignores "within the most extreme limits of immorality [*Sittenwidrigkeit*] all motives . . . conditions . . . and consequences."

37 Klaus Latzel, "'Freie Bahn dem Tüchtigen!' Kriegserfahrung und Perspektiven für die Nachkriegszeit in Feldpostbriefen aus dem Zweiten Weltkrieg," in Gottfried Niedhart and Dieter Riesenberger, eds., *Lernen aus dem Krieg? Deutsche Nachkriegszeiten 1918/1945* (Munich, 1992), 340–1; Karl Martin Bolte, *Leistung und Leistungsprinzip: Zur Konzeption, Wirklichkeit und Möglichkeit eines gesellschaftlichen Gestaltungsprinzip* (Opladen, 1979), passim.

provisions must be moderate enough to protect the national economy on which everyone's economic well-being depended. Current property owners could not be forced to transfer real assets immediately or to sell substantial shares of their property because that would break up "organic" production units and would "overburden" the weak post-defeat economy. Moreover, within West Germany's social-market economy one could not resort to government intervention to make drastic levies feasible because that would disturb the natural operation of market forces.[38]

Electoral calculation and political fears about the reactions of the 17 million war-damaged made some form of *Lastenausgleich* inevitable, but conceptions of social justice helped determine the form of *Lastenausgleich* legislation. Responding to the conflicting voices on the issue, the right-of-center government parties in 1952 promulgated a *Lastenausgleich* law that bolstered the market economy and the achievement society while acknowledging the claims of virtue. The law established a 50 percent levy on real assets but allowed obligors to pay it in installments over 30 years, making it a modest property tax. It devoted 50 percent of *Lastenausgleich* funds to productive economic integration measures and social-support payments that promoted economic growth while ensuring for all war-damaged, including many expelled workers, an existence worthy of a human being – but superior to welfare. To reaffirm a virtue/property connection, however, and the claim of formerly propertied war-damaged citizens to superior status and entitlement, it provided supplements for the formerly propertied within the social-support payment system and devoted 50 percent of *Lastenausgleich* funds to a privileged entitlement to compensate for material war losses.[39]

The war-damaged came to terms with the social-market economy after 1952. The expellees' political party attracted less than 6 percent of the vote in the 1953 federal elections, and most war-damaged citizens obviously preferred immediate assistance to the restoration of past wealth. The leadership of the war-damaged realized it could never secure the individual *Lastenausgleich* that the formerly propertied had wanted. By the mid-1950s it was comparing the war-damaged with other war victims to

38 Arbeitsgemeinschaft, Chemie-Industrie, "Lastenausgleich und andere Steuerprobleme 1949," in BAK, B 102/8215–2; Westdeutsches Institut für Wirtschaftsforschung, *Der Lastenausgleich wirtschaftlich gesehen!* (Essen, 1948); for SPD, see "Die nächste Aufgabe: Der Lastenausgleich," *Stuttgarter Nachrichten*, July 29, 1948, in ASD, NL Weisser, no. 1244; for economic debate, see Michael L. Hughes, "Wer bezahlt die Rechnung? Die Kosten der Regimewechsel im Deutschland des 20. Jahrhunderts," *Geschichte in Wissenschaft und Unterricht* 43, no. 9 (Sept. 1992): 544–50.

39 For *Lastenausgleich* law, see Schillinger, *Entscheidungsprozess beim Lastenausgleich*.

justify demands for increased compensation for formerly propertied and unpropertied war-damaged. Yet it continued to assert the putative virtue of the formerly propertied to maximize their recompense. Nonetheless, in the long run, 75 percent of *Lastenausgleich* expenditures have gone to economic and social assistance and only 25 percent to restitution for material losses. In the *Lastenausgleich*, the social-market economy and the politics of victimization have predominated over, while not completely displacing, the culture of rights.[40]

The culture of rights is about status, control, and meaning. The world is a dangerous place, and life is an uncertain business. The individual's status is always at risk from human or natural forces in ways that challenge human hopes for security and moral meaning. In the last two centuries many people have thought that the best strategy to minimize or eliminate that risk was to insist on their rights. These would give them a certain (more or less honorable) social position, a lever with which to coerce society into guaranteeing their security and status, and a discourse within which to argue that life makes sense. Unfortunately, Germany's recent history called the efficacy of that strategy into question. Inflation, depression, persecution, war, and defeat battered millions of Germans, seemingly at random, as formal rights proved inadequate or society proved unwilling or unable to protect individual rights and the moral status they affirmed. The politics of victimization did offer the unfortunate a basis for some minimal assistance, but most Germans perceived such aid as degrading and unreliable. The desire for superior status and effective control drove many postwar (West) Germans to struggle to re-establish their old substantive, individual property rights – even in part by an appeal to collective liability. Yet even those who unabashedly derived claims for assistance from communal obligations or social justice argued for new entitlements for the unfortunate. The culture of (individual) rights may have proved a weak reed, but it has still seemed to many the best one to lean on.

In comparing the American and German social states, commentators rightly emphasize the relative weakness of the American social state and the greater German commitment to communal action under state sponsorship. The experiences and attitudes discussed here help make clear why Germans have been less confident that private property and initiative alone could ensure security. Entitlements continue to enjoy widespread

40 See, e.g., "Einigkeit aller Geschädigtenverbände über das sogennante Lastenausgleichsschlussgesetz," *VdL Informationen* 5, no. 17 (Apr. 30, 1956): 11; and Wilhelm Ziegler, "Was erwarten wir 1957," *Selbsthilfe* 31:1/2 (Jan. 1, 1957): 1.

support among Americans, even after decades of relative economic stability. That support suggests that anxieties over certainty, status, and agency may operate in the United States as well, despite the greater expressed faith in individual initiative in what Germans call the land of "unlimited" opportunity.

9

The Political Culture of Rights

Postwar Germany and the United States in Comparative Perspective

HUGH DAVIS GRAHAM

I

In comparing the development of rights-based policies in postwar Germany and America, we are confronted at once with the unique phenomenon of two Germanys. This offers the rich potential of a three-way comparison, with one point of the triangle representing a totalitarian communist state, at least until 1989. Such a tri-national comparison, however, exceeds the scope of this chapter. The analysis presented here instead concentrates on the United States and the Federal Republic of Germany since 1945. It begins with a short discursive listing of the most significant similarities between postwar Germany and America, particularly as it relates to civil rights issues and policy, and is followed by a list of the most striking differences. Beginning this way offers two advantages: First, it provides a general orientation to cross-national comparisons that will concentrate on a specific policy field, in this case the civil rights of minorities and women. Second, it demonstrates the inadequacy of such generalist comparisons in the absence of a theoretical foundation.

Let me start by listing political variables. The first political similarity is formal and structural: Both nations are constitutional republics. In the postwar era they have been characterized by representative policy-making branches, a federal system of shared powers, a broad voting franchise, written guarantees of citizen rights, and an independent national judiciary with authority to review the constitutionality of legislation.

The second political similarity concerns procedures and values: Both nations are effective democracies, characterized by broad agreement on the legitimacy of government and its fundamental procedures, periodic elections and regime changes determined by political party competition,

civil liberties guaranteed by independent courts, and postwar expansion of citizen rights, especially concerning women.

The third and fourth similarities are economic. One again is structural: Both economic systems are capitalistic, featuring competitive market systems, collective bargaining in industrial relations, government regulation, and independent central banks. The other denotes economic performance: Both postwar economies have been successful, producing growing abundance and a prosperous middle class while struggling in recent years with global economic competition.

Fifth, both nations experienced heavy postwar immigration. This strengthened the industrial workforce but was accompanied by rising ethnic and cultural tensions and disputes over immigration and refugee policy. Sixth, in foreign policy, both nations have shared in a successful military alliance of North Atlantic democracies facing threats from the Soviet bloc.

This is a short list of core similarities, limited to a half-dozen chief characteristics. It lacks the qualifications all such broad generalizations demand, but the shared attributes it describes are powerful. They produce a great magnet of commonalities that would suggest German-American convergence over time.

Consider, by contrast, the major differences: First, and most obviously, the Federal Republic arose from the ashes of a lost war, a state and economy destroyed, followed by foreign military occupation, war-crimes trials, and a legacy of war guilt. The calamity of Nazi totalitarianism reinforced the negative distinctiveness of Germany's *Sonderweg*, a special path of historical national development marked by the comparative weakness of democratic traditions, that is, the lack of a liberal bourgeois revolution, a robust civil society, strong democratic institutions, and a liberal intellectual culture.[1] This tradition contrasts sharply with the Tocquevillian tradition of American exceptionalist claims.[2]

Second, the splitting off of the German Democratic Republic (GDR) created an irredentist prospect of reunion that set Germany apart from most nations. Although most nations were aligned with, or absorbed in their entirety within, the postwar orbit of an East or West alliance,

1 Historians in Europe and North America since the 1960s have widely attacked claims to national exceptionalism. See David Blackbourn and Geoff Eley, *The Peculiarities of German History: Bourgeois Society and Politics in Nineteenth-Century Germany* (London, 1984); and Mary Nolan, "Against Exceptionalisms," *American Historical Review* 102 (June 1997): 769–74.

2 Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York, 1996). On the democratic legacy in modern German history, see Elmar M. Hucko, ed., *The Democratic Tradition: Four German Constitutions* (Hamburg, 1987).

the turbulent experience of Korea and Vietnam underlines the extraordinary tensions brought about by stark national cleavages in Cold War competition.

Third, the Basic Law (Grundgesetz) of 1949 created in West Germany a kind of instant, modern constitution, mirroring in intensified form the democratic and egalitarian standards seen in the United Nations Declaration of Human Rights. German traditions and practices relevant to rights-based claims that differed sharply from American equivalents include the system of codified law and inquisitorial judiciary, as opposed to the case-law tradition and adversarial system of Anglo-American jurisprudence, and a comprehensive system of social welfare, as opposed to the minimalist American tradition.

Fourth, the Federal Republic developed a tradition of social partnership in industrial relations that muted tensions between capital and labor. German unions, unlike their American counterparts, maintained a powerful voice in a kind of neocorporatist power structure. American business management, however, gravely weakened labor in the postwar years by banning the closed shop. In the United States, after the Republican 80th Congress in 1947 passed the Taft-Hartley law over President Harry S Truman's veto, American firms disciplined union bargainers by threatening to shift operations to more business-friendly states in the South or the mountain West, where right-to-work laws discouraged union membership.[3]

Fifth, large-scale guest-worker immigration in Germany created problems of minority rights and assimilation, complicated by the legal tradition of *jus sangui*, or citizenship by blood or ancestry, by liberal refugee policies conditioned by war guilt, and by the return from the diaspora of ethnic Germans.[4] As Christian Joppke observes in his chapter in this book, in Germany the tradition of ethnocultural nationhood (until recently) denied citizenship to aliens and hence entry into the polity, and this

3 The Taft-Hartley law partially deregulated the industrial relations system federalized by the Wagner Act of 1935. Thereafter, states were free to pass open-shop laws protecting employees from collective bargaining agreements requiring union membership after a stipulated period (the "union" shop, common in urban-industrial states). This encouraged "free riding" by employees, who were free to enjoy higher union pay scales and benefits while escaping union dues. Consequently Taft-Hartley greatly weakened the union movement in the United States, not only in the South and mountain West but also in the industrialized areas, where employer threats to move operations and jobs were credible. See Robert Zieger, *American Workers, American Unions, 1920–1985* (Baltimore, 1986).

4 Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, Mass., 1992); Elizabeth Meehan, *Citizenship and the European Community* (London, 1993); Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago, 1994); David Cesarani and Mary Fulbrook, eds., *Citizenship, Nationality, and Migration in Europe* (London, 1996).

denied most immigrants voting rights and hence effective political participation.

Sixth, the revolution of 1989 and the commitment to German reunification created opportunities and problems without precedent in the experience of modern democracies. There is no body of experience in political economy to provide guidance for transforming a socialist command economy into a regulated market economy or for absorbing into a democratic polity millions of citizens and workers conditioned by communist rule.

In what ways has the American experience differed most significantly from that of postwar Germany? First, the American government functions under an eighteenth-century Madisonian constitution that has fragmented state power to a degree unmatched in any other industrial nation. Despite the postwar expansion of the "imperial presidency" in the United States during 1932–74, the relationships among the three federal branches of government and between the national, state, and local governments have been contested and confused. Since the 1960s the growth in the United States of public law litigation, independent counsel investigations, executive–legislative tension, judicial involvement in policy-making routines, and antifederal sentiments contrasts sharply with the relatively smooth administrative functioning of the Federal Republic.

Second, as comparative scholars of the state-building process have pointed out, the United States developed a political tradition characterized by decentralized institutions, weak administrative capacity, patronage-based party politics, low tax burdens, and antistatist predispositions.[5] In the German analog, the American political tradition has a pronounced Bavarian ring.

Third, in the realm of political culture, most Americans have traditionally valued individualism over collectivism, and hence liberty over equality. Socialism has lacked appeal, union affinity has been weak, and welfare provision by the state has been niggardly. Bourgeois America has neither a Marxist nor a Bismarckian tradition. The communitarian sense of social solidarity seen in German industrial relations and welfare policy, for example, has no effective American counterpart.

Fourth, in the realm of civil-rights problems and policies, the American history of African-American slavery, the U.S. Civil War, racial segregation, and the postwar black civil rights movement has no real

5 Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., *Bringing the State Back in* (New York, 1985); Margaret Weir, Ann Shola Orloff, and Theda Skocpol, eds., *The Politics of Social Policy in the United States* (Princeton, N.J., 1988).

counterpart among industrial democracies. Germany's legacy of racial pathology is of a different order.

The fifth difference is the American "rights revolution" itself. The success of the black civil rights agenda in the Supreme Court led by Chief Justice Earl Warren (tenure: 1953–69) sparked an extraordinary surge of rights-based public law litigation on behalf of women, Hispanics and other minorities, the disabled, students, the elderly, environmentalists, consumer advocates, gays and lesbians, and other groups. This phenomenon has counterparts in Germany and other democracies but nowhere else approaches the American use of litigation to shape public policy.[6]

Finally, there is the issue of immigration in a nation built by immigration. American immigration, unlike German, has followed the law of *jus soli*, or citizenship by birth, and hence has led to rapid political mobilization by immigrant communities. Mass immigration to America, essentially halted by World War I, was reopened in 1965 by the Immigration Reform Act and since has added more than 25 million new Americans, three-quarters of them members of protected classes according to post-1960s affirmative action policies. The sheer volume, multicultural variety, legal status, and civil rights implications of post-1960s immigration to the United States has produced political tensions on a scale unmatched in the West.

II

Such a survey of similarities and differences is useful in addressing many of the salient themes for this book, but overall it is intellectually unsatisfying. As a crude form of taxonomic triage, it is closer to journalism than social science. It offers no coherent theory, no definition of variables or assigning of values. To a historian, it seems ahistorical, comparing constitutional structures, political institutions, and socioeconomic relationships as if in snapshots, frozen in time.

To produce verifiable generalizations about the postwar development of rights policies in the United States and Germany, we need a systematic framework for comparison. Because the two national histories are so distinctive and the policy-making processes so complex, we need a theory that is simple and that centers on political behavior, because in democracies conflict over rights claims are expressed through political bargaining and electoral choice.

6 Stephen C. Halpern, *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act* (Baltimore, 1995); Stephen L. Wasby, *Race Relations Litigation in an Age of Complexity* (Charlottesville, Va., 1995).

To provide such a model I turn to the work of Byron Shafer and his colleagues.[7] I briefly summarize their method and findings, then apply them to my own topic of rights-based claims.

Their book's comparative model is captured in its subtitle: "Orders and Eras in Comparative Perspective." Political eras are periods when politics in democratic states revolve around the same substantive issues. These dominant issues in turn fall into two clusters. One is chiefly cultural, centering on issues of national and cultural integration. In the post–Civil War United States, for example, politics revolved around issues of national identity and loyalty, regional integration, the nature of racial citizenship, immigrant ethnicity, and religious culture. In that era, roughly 1865–1932, these issues privileged the Republican Party – the party of Abraham Lincoln, national union, continental expansion, industrial growth, sanctity of contract, and Protestant morality.

The other cluster centers on issues of economic distribution and social welfare. Again using an American example, in the United States following the start of the Great Depression in 1930, issues of material redistribution and welfare provision dominated the New Deal agenda and privileged the Democratic Party – the party of Franklin D. Roosevelt, business regulation, union legitimacy, social security, welfare legislation, and economic recovery.

Whereas political eras are keyed to substantive issues, political orders are keyed to structural elements that shape political behavior aimed at influencing substantive concerns. Three such structural elements are of greatest importance. The first is the underlying social base of political life – the dominant social cleavages and coalitions, including class, racial–ethnic, and geographic patterns. The second is the intermediary organization of politics, chiefly political parties and organized interest groups. The third structural level is government itself, the electoral and policy-making institutions that produce outcomes.

What gives this model its political dynamic is change over time. Why do political eras end and others begin, displacing established authorities and empowering new ones? Who are the winners and losers in these transformations and why? In the United States we are familiar with these historical shifts through the party-systems paradigm, the sun-and-moon

7 The most recent and succinct exposition of their comparative framework is found in Byron E. Shafer, ed., *Postwar Politics in the G-7: Orders and Eras in Comparative Perspective* (Madison, Wis., 1996). Shafer first published his analysis in 1995, in a book titled *The Two Majorities*, written with fellow political scientist William J. M. Claggett. See Byron E. Shafer and William J. M. Claggett, *The Two Majorities: The Issue Context of Modern American Politics* (Baltimore, 1995).

model of majority and minority parties exemplified, for example, by the New Deal system.[8]

The scholarship that produced the American party-systems model was historical but not comparative. Our understanding of the New Deal party system, for example, produced few useful insights about Germany. But the political model of orders and eras does yield comparative insights, particularly when one factors in the sequence of national issues. Under what conditions, and with what consequences, have dominant issue patterns in various countries been challenged and displaced – for example, in France during the Gaullist Fifth Republic of 1958, when cultural politics and issues of national integration associated with decolonization in Algeria displaced economic redistribution and social welfare issues. Or vice versa, as when François Mitterrand brought the socialist left to power in France in 1981.

Consider the sequence of issue dominance in the postwar Group of Seven (G-7) nations. In three of the seven – the United States, Canada, and Britain – victorious wartime governments returned to prewar, depression-era agendas of economic redistribution and social welfare provision. In this environment parties on the left were empowered and sought to expand social and economic rights. A fourth nation, France, shared this pattern but coupled it with the cultural and national integrationist need to repudiate the wartime Vichy government and begin anew with a Fourth Republic.

In all four nations postwar prosperity eased class tensions. Within a generation, however, new circumstances arose that helped opposition parties and conservative interests to use cultural issues to displace economic issues and the governments they sustained – thus ending one political era and inaugurating a new one. And although the traditional left-right dichotomy, which works well with economic issues, is problematic when applied to cultural politics, a defensible generalization is that the more conservative regimes of the new eras placed property rights over social and economic rights.

This first occurred most dramatically in France, with the Gaullist Fifth Republic in the late 1950s. At the same time, but with less discontinuity, conservatives broke the liberal hegemony in Canada. In the United States it happened in the late 1960s with the Republican victory of Richard Nixon. And in the late 1970s in Britain a new political era was

8 Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York, 1970); Everett C. Ladd Jr. and Charles D. Hadley, *The Transformation of the American Political System* (New York, 1978); Thomas Byrne Edsall, *The New Politics of Inequality* (New York, 1984).

inaugurated by Margaret Thatcher. The last to arrive, the Thatcherite revolution, was arguably the most profound.

The three remaining G-7 nations – Germany, Italy, and Japan – lost the war and suffered massive destruction in the process. For them, issues of national reconstruction and politico-cultural purification were inescapably primary. Democratic institutions and their constitutional underpinnings were reconstructed under the stern tutelage of the victors, working with conservative, anticommunist governments dominated by Christian Democrats in Germany and Italy, and by Liberal Democrats in Japan – governments often led by bureaucrats-turned-politicians, with close ties to business interests.

In these unique circumstances, questions of civil, social, and economic rights were addressed in a clinical, top-down fashion rather than in a political, grassroots context. They were constitutional abstractions, given meaning gradually as economic recovery, national sovereignty, and growing self-confidence permitted the re-emergence of suppressed political conflict over economic distribution and social welfare.

The resurgence of economic and redistributionist politics happened first in Italy in the early 1960s, then in Germany in the late 1960s, and in Japan in the early 1970s. The losers, then, reversed the pattern of the winners. And perhaps, in the process, they lost the war and won the peace, as the old canard has it, in more than just the economic realm. Germany and Japan especially show a continuity of political development and legitimacy that eased transitions to new political orders and eras.

The postwar transition of political orders and eras in Germany is described in the Shafer book by J. Jens Hesse. According to Hesse, when the Social Democrats began a new political era in German politics in 1969, it was an era not of significant socialist transformation but of "expanded incrementalism," of "adaptation and consolidation" by a social-liberal coalition that had successfully disarmed its Marxist heritage.[9] Difficult new social cleavages in Germany, such as the status of guest workers, resisted solutions. But much of the coalition's domestic reform agenda dealt with problems of urbanization, the environment, and regional disparities, problems that brought few radical departures. In 1982, when the CDU government under Helmut Kohl brought a new political era, accompanied by Thatcherite rhetoric, West Germany was nonetheless "striking," Hesse observed, "for its lack of new policy initiatives."[10]

9 J. Jens Hesse, "Germany," in Shafer, ed., *Postwar Politics in the G-7*, 166.
10 Ibid., 169.

Conflicts over rights policies in postwar Germany were similarly restrained. The detailed Basic Law pre-empted much of the terrain; together with the German tradition of business-labor cooperation through "codetermination," it therefore dampened conflicts over social and economic rights that would sharply divide politics elsewhere, for example, in Britain in the immediate postwar years and in the United States in the 1960s.

III

What then of the United States? What does the comparative model of political orders and eras tell us about postwar political change in the United States and its affects on the culture and politics of rights?

Prior to 1968 the Democrats enjoyed a majority coalition based on the New Deal's redistributionist policies on economic and social welfare issues. The social turmoil of the 1960s raised new cultural issues – crime and punishment, abortion, family values, the work ethic, religious morality in education – that favored Republican appeals to traditional values and patriotism. The realignment of the late 1960s, however, did not reverse the sun-and-moon pattern of party dominance from the previous era. Republicans did not dethrone Democrats in the elected branches of national government. Instead, the clash of cultural and economic issues created two distinct, competing opinion majorities in the United States. And crucially, the new alignments did not coincide with class divisions or party ideology. Blue-collar workers, the backbone of the Democrats' New Deal coalition, were liberal on redistributionist economic issues, but were traditionalist on cultural issues such as feminist challenges, antiwar protest, racial job preferences, and saving the environment at the cost of jobs. Conversely, affluent suburbanites embraced the Republican Party's tax-cutting, budget-balancing, and deregulation policies. But highly educated suburban voters were repelled by the intrusive morality of the Religious Right, which included demands for library and media censorship, religious education in the public schools, and banning abortion and birth-control services.

Faced with these two socially cross-cutting opinion majorities, the parties polarized, Democrats on the left on both economic and social issues, Republicans on the right. Activists used the primaries to drive both parties toward the extremes, Democrats toward McGovernism, Republicans toward Reaganism. Single-issue interest groups multiplied, reinforcing partisan polarization.

The result of this confusing mismatch was surprisingly rational: divided partisan government. The Republicans were dominant on cultural issues. These included attacks on draft dodging, flag burning, sexual promiscuity and abortion, permissive parents, teachers, and judges, and racial and gender preferences. Republicans also dominated on issues of national integration, which included nationalist positions on projecting American power and values in foreign affairs – including using military force against Libya, Grenada, and Iraq. As a consequence Republicans won primacy in competing for the presidency, where the bully pulpit of the White House maximized the president's role in symbolic politics and global leadership.

However, the Democrats, traditional custodians of welfare and service provision, prospered in Congress. There, constituent-service and "iron triangle" bargaining rewarded close ties to well-organized clientele groups and agency bureaucrats. In the new order of divided governance, Republicans seemed the natural party of the presidency, Democrats the natural custodians of Congress. Between 1969 and 1993 Republican control of the White House was interrupted only by Jimmy Carter's single term. During the same period Democrats controlled both houses of Congress, with the exception of the Senate from 1981 to 1987.

But a heavy price was paid for this partisan, functional specialization by branch: The lubricating oil of party unity was gone. James Madison and his colleagues had set the two elected branches against each other. To prevent tyranny, they purposely fragmented the American state. But by the 1840s a two-party system had developed that, by routinely awarding control of both branches of the federal government to the same party, created a quasi-parliamentary solidarity that for more than a century eased power struggles between the legislature and the executive. Majority party legislators naturally jealous of White House authority were reluctant to risk losing political patronage or their own re-election by attacking their national party leader. By the same token presidents resentful of congressional micromanaging in executive-branch affairs were reluctant to risk party disunity by quarreling with party leaders in Congress. After 1968, however, split governance removed the lubricant of party commonality and substituted partisan poison. Madison's institutionalized conflict was accelerated by party resentment and score-settling.

IV

What have been the chief policy consequences of the new era in American politics? In many ways it has been a frustrating system, one stripped of accountability by partisan finger pointing, proliferating special

prosecutors, congressional subpoenas of executive-branch officials, and circuslike confirmation hearings. Twice since 1968 the war between the elected branches has led to congressional impeachment proceedings against the president. In 1973–4 this conflict pitted a Democratic Congress against a Republican president and forced the resignation of Richard M. Nixon. In 1998, when Republicans controlled the Congress and Democrats the presidency, the House passed articles of impeachment against William J. Clinton, but the impeachment resolution failed in the Senate. In economic and social policy the results under divided, partisan governance have been mixed. On the one hand, the soaring budget deficits and debt-service obligations of the Reagan–Bush years were transformed into budget surpluses by the robust economic growth of the 1990s. On the other hand, popular tax-cutting policies combined with middle-class entitlement growth (Social Security pensions, Medicare, home mortgage deductions, college tuition aid) to depress social welfare expenditures in the face of a widening income gap. That the two elected branches switched party labels in the 1990s does not seem to have altered the basic dynamics of the divided governance system, where cultural politics fracture the New Deal coalition and economic issues center on the defense of middle-class entitlements.[11]

What have been the chief consequences of divided government for American civil rights policy? I identify six. First, the new era has not slowed the rights revolution. Expressed another way, one consequence not produced by divided government in America since 1968 is policy gridlock, even in legislation. As the Supreme Court modestly slowed the expansion of constitutional rights for minorities during the years embraced by the Nixon and Reagan presidencies (1969–89), Congress and the federal agencies more than compensated for judicial caution by significantly expanding statutory and administrative rights.[12] During the 1980s the conflict between the Reagan administration and Congress,

11 During the 1990s American voters maintained their preference for divided partisan government but reversed the pattern of party control. Democrat Bill Clinton won presidential elections in 1992 and 1996 by shifting toward traditional Republican positions on major issues, including balanced budgets, free trade, crime control, ending welfare entitlements, and reducing ("reinventing") government. Republicans, in 1994 sweeping Democrats from power in both houses of Congress, subsequently retreated from the radical campaign proposals of 1994 that threatened government benefits enjoyed by well-organized constituencies – including pledges to dismantle Cabinet agencies, amend the Constitution to permit school prayer, cut Social Security and Medicare entitlements, and end affirmative action preferences.

12 Since 1989 a conservative majority on the Supreme Court has constitutionally narrowed the reach of minority preference programs under affirmative action and limited the authority of federal agencies to regulate civil rights enforcement by state and local governments and private employers. See Joan Biskupic and Elder Witt, *The Supreme Court and Individual Rights* (Washington, D.C., 1997), 229–308.

especially the Democratic-led House of Representatives, over social security, welfare spending, and government regulation led critics of the Reagan "revolution" to complain that divided partisan control produced policy gridlock and paralyzed government.[13] The "gridlock" thesis has been challenged, however, by empirical studies showing slowed activity in some policy areas but significant growth in others.[14] In civil rights policy the power and effectiveness of the Leadership Conference on Civil Rights, a liberal umbrella association coordinating the lobbying efforts of more than 180 organizations, continued to grow after the 1960s. Moreover, most of the legislative and administrative expansions of rights protections since the 1960s have occurred under Republican presidents.

Nixon, the father of affirmative action, inaugurated minority hiring preferences under the Philadelphia Plan of 1969 and signed pioneering legislation for environmental protection, women's equality in education, and disability rights. Ford signed the age discrimination act and his administration enforced bilingual education requirements. Reagan approved minority set-aside requirements in defense and transportation contracts and signed effective fair housing enforcement legislation in 1988. Bush pushed through the Americans with Disabilities Act of 1990, adding new protections for 43 million Americans. Bush also signed the Civil Rights Act of 1991, which made sexual harassment a federal crime.[15]

Second, because Washington's coffers have been drying up in the era of divided government, the chief benefits of the rights revolution have come not from the federal treasury through agency appropriations but from regulatory agencies and courts, entities characterized by small staffs and large coercive authority to require spending by others. Thus we have the paradox that social regulation has expanded since the 1960s even as the size of the federal government, relative to population and to state and local government, has declined. In the civil rights field, for example, the federal courts continued to require school integration long after Congress prohibited federal agencies from requiring busing. Although the federal bureaucracy after 1970 generally declined in personnel and in real-dollar

13 Randell Ripley, *Congress: Process and Policy* (New York, 1983); Hedrick Smith, *The Power Game: How Washington Works* (New York, 1988).

14 David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990* (New Haven, Conn., 1991); Morris Fiorina, *Divided Government* (New York, 1992).

15 Hugh Davis Graham, "Richard Nixon and Civil Rights: Explaining an Enigma," *Presidential Studies Quarterly* 26 (winter 1996): 93–106; Graham, "The Politics of Clientele Capture: Civil Rights Policy in the Reagan Administration," in Neal Devins and David Douglas, eds., *Redefining Equality* (New York, 1997), 103–19; Graham, "Since 1964: The Paradox of American Civil Rights Regulation," in Morton Keller and R. Shep Melnick, eds., *Taking Stock: Party and Governance in Twentieth Century America* (Cambridge, 1999), 187–218.

appropriations, federal coercion grew in the form of rules issued by relatively small regulatory agencies, such as the Equal Employment Opportunity Commission, the Office of Civil Rights, the Office of Federal Contract Compliance, and the Civil Rights Division in the Justice Department.

Third, the new political order has nurtured two-tiered politics. American voters generally understand the bargains associated with traditional New Deal–Great Society programs, for example, Social Security retirement pensions, Medicare coverage, and federal aid programs to build highways, airports, and dams, and rebuild areas hit by natural disasters. American voters do not understand, however, the federal rule-making process, where intense lobbying by well-organized interest groups shapes obscure language published in indecipherable documents buried in the *Federal Register*. These arcane rules, binding on all recipients of federal dollars (meaning virtually all state and local governments, school systems, hospitals, universities, and large employers in the commercial sector) require city transit systems to buy buses with wheelchair lifts, pharmaceutical companies to design bottletops difficult to open, employers to hire or promote a workforce containing a certain mix of race, ethnicity, or gender, and school districts to teach math and science in native languages other than English. The mass electorate is "weakly articulated and greatly baffled," one expert observed, while "the world in and around the centers of government is dense with organized interests and policy advocates."[16] Regulatory politics is an inside-the-beltway game, wherein the benefits are concentrated on mobilized clienteles and the costs are distributed among uncomprehending taxpayers and consumers.

Fourth, the whiplash of cultural politics has left the nation polarized over competing claims to justice, especially as concerns racial preferences under affirmative action. On the one hand, African-American leaders point out that despite the tripling of the black middle class since the 1960s, median family income for blacks has never reached 60 percent of white median family income, and the median wealth of white households is more than ten times that of black households. On the other hand, by the 1990s, 80 percent of white men and women objected to minority preferences as unfairly penalizing individuals for immutable characteristics they were born with, or for offenses committed in generations past. In the 1960s the moral weight of social justice was monopolized by minori-

16 Wilson Carey McWilliams, "Two-Tier Politics and the Problem of Public Policy," in Marc K. Landy and Martin A. Levin, eds., *The New Politics of Public Policy* (Baltimore, 1995), 268–76.

ties and women mobilizing against generations of systematic discrimination. By the 1990s, however, opponents of minority preferences attacked the injustice of temporary antipoverty measures becoming permanent racial entitlements for advantaged minority interests while racially excluding working-class whites in economic distress.

Fifth, massive immigration to the United States, both legal and illegal, has stimulated the economy and fostered cultural diversity, but at the same time it has fueled the fires of multicultural discontent. The rise of cultural politics in America since the 1960s has combined Republican support for a larger and cheaper workforce and Democratic support for expanding minority-group constituencies. But as a consequence, low-skilled blacks as well as whites have been supplanted by low-wage job competition from immigrants. White Americans by large majorities resent affirmative-action laws that exclude whites while privileging millions of immigrants from Latin America and Asia as protected classes on the basis of ancestral discrimination in the United States. If California is the window of the American future, we see whites and Asians coalescing behind "color-blind" policies of merit competition, while tensions grow between blacks and Hispanics over the zero-sum demographics of affirmative action, because Latin American immigrants threaten to shrink black quotas in civil rights jobs.[17]

A final consequence is the growing gap between the rich and the poor in the United States. Between 1929 and 1969, the large income gap separating the top and bottom fifths of the American population was modestly narrowed by the class-based politics of the New Deal. Inequality in family income, always greater in the twentieth-century United States than in any other industrialized democracy, was narrowed significantly during the 1930s and 1940s, and more slowly in the 1950s and 1960s. Then, after 1968, the wage gap rapidly widened again.[18] Between 1975 and 1995, the share of aggregate household income received by the nation's poorest fifth of families declined from 4.4 to 3.7 percent, whereas the share of the best-off fifth increased from 43.2 to 48.7 percent.[19] Since 1968 the American labor movement has atrophied, mass immigration has flooded the

17 Wayne A. Cornelius, Philip L. Martin, and James F. Hollifield, eds., *Controlling Immigration: A Global Perspective* (Stanford, Calif., 1995), provides a comparative study of immigration policy in nine democracies: Canada, Belgium, Britain, France, Germany, Italy, Japan, Spain, and the United States. Kitty Calavita and Philip Martin write on the United States; Philip Martin writes on Germany, with commentaries by Rogers Brubaker and Elmar Honekopp.

18 Sheldon Danzinger and Peter Gottschalk, eds., *Uneven Tides: Rising Inequality in America* (New York, 1993), 6–9.

19 Andrew Hacker, *Money: Who Has How Much and Why* (New York, 1997), 46–56.

country with low-wage workers, and multiculturalism has fragmented the New Deal coalition.

In recent years the most penetrating critique of multiculturalism has come not from the stale clichés of the Right, but from the Left – from the pages of *Dissent* and from such left–progressive writers as Todd Gitlin, Lawrence Fuchs, Michael Lind, Katha Pollitt, and David Hollinger.[20] As Gitlin observed in *The Twilight of Common Dreams*, the multiculturalist obsession with group differences destroyed the commons in America by fracturing working-class solidarity. It allowed the Right to seize the White House in 1980, Gitlin said, while the Left seized English departments![21] Of all the consequences of divided government in the United States, the one most damaging to the dream of equal rights and justice in America is the widening gap between the rich and the poor. Ironically, but unintentionally, it has been worsened by the rights revolution's fragmentation of class solidarity.

V

Comparing the German and American experiences since 1945, I acknowledge that both societies have made unprecedented progress in expanding and fulfilling their peoples' rights. This is arguably the main conclusion we should draw from a postwar German-American comparison. What were the rights of Germans in 1945, especially minorities and women? What kind of equality was enjoyed by black and female Americans in 1960? Clearly, rights fulfillment is much richer in Germany and America today than it was then.

However, from an American perspective the grass looks greener across the ocean. Both German and American societies since the 1960s have faced stiffening global economic competition, rising hostility over immigration, persistent legacies of racial and ethnic tension, and persisting patterns of women's disadvantage despite significant reforms. Yet Germany's postwar climb since the collapse of the Third Reich has been vastly more epic, especially in light of the forty-year division between the democratic West and the communist East. Germany today, uniquely shouldering the burden of national reunification in an era of tightening economic

20 Todd Gitlin, *The Twilight of Common Dreams: Why America is Wracked by Culture Wars* (New York, 1995); Lawrence H. Fuchs, *The American Kaleidoscope: Race, Ethnicity, and the Civic Culture* (Hanover, N.H., 1990); Michael Lind, *The Next American Nation* (New York, 1995); Katha Pollitt, *Reasonable Creatures: Essays on Women and Feminism* (New York, 1994); David A. Hollinger, *Postethnic America: Beyond Multiculturalism* (New York, 1995).

21 Gitlin, *Twilight of Common Dreams*, 148–9, 230.

competition, nonetheless enjoys the advantages of a strong economic base, the growing protection of equal rights under the Basic Law, and the continuity and coherence of a social policy provided by unified partisan control of the elected federal government. The Federal Republic was advantaged by having to deal at its founding with profound issues of cultural and national integration and then shifting to issues of economic redistribution in the 1960s, when the political economy had recovered.[22]

The United States, by contrast, emerged from the war victorious, unified, and strong, but it made a fateful turn in the late 1960s. When insurgent social movements became radicalized in a war-poisoned environment, the resulting cultural catharsis led to the new system of divided government. That system has brought intensified conflict – between the ideologically polarized Democrats and Republicans, between the Congress and the presidency, between frustrated public opinion majorities and insider interest groups, and between the affluent and the poor. This has occurred within a social context that emphasizes multicultural group differences and widespread distrust of government itself. The American political system, effective for a century and a half under a norm of unified partisan government, was jolted by the culture shocks of the 1960s into a hostile equilibrium that, despite the balm of economic prosperity in the 1990s, appears likely to persist into the twenty-first century.

22 As Peter Pulzer has observed, the Federal Republic was further advantaged, ironically, by the postwar division of Germany, which relieved the Federal Republic of much of the historic tension between national unity and democracy. See Peter Pulzer, "The Citizen and the State in Modern Germany," in Eva Kolinsky and Wilfried van der Will, eds., *The Cambridge Companion to Modern German Culture* (Cambridge, 1998), 20–43.

10

The Emerging Right to Information

MARGARET S. DALTON

As the capacity of technology to deliver information expands, the idea that citizens have a right to information grows.[1] Access to information is, in fact, an issue of the electronic age. Until recently the question of a right to information has largely been an American concern because the development and application of information technology came first in the United States, but with information technology and networks spreading to the rest of the world, the same debates are taking place in other democratic countries. The fundamental issue is essentially the same question as in so many other areas of human need: What is the proper role of the state?

Like most of the newer rights that concern quality of life, the right to information is being defined by what is possible and by what is available, as well as by what is desirable. Issues that must be resolved range widely; they are philosophical, political, social, and economic. What information equity means is yet to be defined, who is to pay yet to be decided, and how abuses are to be prevented yet to be determined. How much of the promise and how many of the glowing predictions can be realized remains to be seen. Past experience offers only limited guidance because the world of computer-processed and digitally transmitted information is a quantum

1 Without the help of many people, this essay would not have been possible. Renata Minnich of the Mönchengladbach Stadtbibliothek got me started with some basic material on German participation in the information society. Peter Vodosek, director of the Fachhochschule für Bibliotheks- und Informationswesen, Stuttgart, and Herbert Kubicek, the University of Bremen, generously answered my requests when I found it impossible to locate information I needed on the German experience. The reference staff of the University of Alabama Libraries, particularly Barbara Dahlbach of the Gorgas Library and David Lowe of the Law Library, found indispensable information for me. R. Kathleen Molz, Columbia University, made a number of helpful suggestions that improved the final product. And my spring 1997 class of LS 562, "Computer-Based Information Systems," with good humor and real interest, helped solve the bibliographic problems of the topic.

leap beyond the world of the telephone, the environment with the most similarities. From the confusion of conflicting views and countervailing actions definitive answers are slow to emerge. Trends tend to be of short duration, and the extent to which a right to information will be affirmed is in doubt. Both the United States and Germany are in the process of rethinking the theory and practice of the welfare state, and in neither is the climate receptive to the assumption of new responsibilities by government.

Although a right to information would seem to be central in a world already in the "information age," it is not an idea that has received much public attention. When Americans were asked at the end of 1994 their opinion about the most important problems facing the United States, information was conspicuous in its absence from their responses. When they were asked to assign priorities for Congressional action, information was again absent.[2] Few individuals understand the difference that information can make in their lives, but they understand all too well the difference decent housing, health care, education, or a job can make.

Admittedly, information is not an easy concept to grasp. One of the most indefinite, ambiguous, and multifaceted words in English, a word that changes its meaning with its context, and a word that has, moreover, changed over time, the term *information* is used to convey a variety of ideas. A particular source of confusion is that it is often used interchangeably with such words as *facts* or *knowledge*. Information must be distinguished from its cousins, even if the distinctions cannot always be respected. As one witty summation puts it: "A kilo of data is as valuable as a gram of information; a kilo of information is as valuable as a gram of knowledge; and a kilo of knowledge is as valuable as a gram of understanding."[3] Information, in short, is part of a continuum. It is, moreover, particularly complex today, when technological developments make it inseparable from the means of delivery, and those same means of communication are converging.

In terms of the concept of a right to information, the most useful definition probably is "decision-relevant data."[4] This definition tells us that

2 David W. Moore, "Crime Legislation, Deficit Reduction Top Public's Wish List," *Gallup Poll Monthly*, no. 352 (Jan. 1995): 2–8.

3 Unidentified guest quoting "an American scholar," "Talkrunde: 'Aschermittwoch im Cyberspace: Lieber Onliner als Outsider? Erwartungen an die Informationsgesellschaft,' 21.02.1996," in *Informationsgesellschaft: Kongress der F.D.P.-Bundestagsfraktion, Bonn, 21./22. February 1996* (Bonn, 1996), 10.

4 Manfred Kochen, "Information and Society," in Martha E. Williams, ed., *Annual Review of Information Science and Technology* 18 (1983): 280. See also Manfred Kochen, "Evidence of Brainlike Social Organs," in Manfred Kochen, ed., *Information for Action: From Knowledge to Wisdom* (New York,

information is more than an abstraction, that it has consequences. Information can be translated into wealth, power, or a sense of well-being. It can benefit the individual. Collectively, it can benefit society.[5]

Information has been fundamental to the human race since before it was human; its essential properties, centrality, value, and adaptability are timeless. By its presence or absence information is critical in decision making. That a particular watering hole was a favorite gathering place of woolly mammoths was information that could make the difference between starvation and survival for a prehistoric family. Information has had value in every economy, no matter how primitive, even if it was left to the decade of the 1960s to call information a commodity.[6] And particular information has long been used by different people for different purposes. We have always lived in an information society, though we may not have realized it.

Only recently, however, has information as such become an object of study. If you want a specific date, 1945, the year of Memex, is a favorite.[7] Somewhat more slowly than scholarly study, popular interest began to grow. The concept of a right of access to information appeared – most often in connection with the availability of school computers – although

1975), 4–5. The National Commission on Library and Information Science had to wrestle with a definition. A 1976 document defined information as interchangeable with knowledge (*Toward a National Program for Library and Information Services: Goals for Action* [Washington, D.C., 1975], ix). Its Public Sector/Private Sector Task Force that reported in 1982 did not define information, but identified the following characteristics: it is an intangible that can be made available in many media; it is not consumed by use, but can be resold or given away with no diminution of content; its price bears little relationship to the costs of making copies available and 'first copy' cost is likely to represent most of the costs; its value is often determined more by when it is available than by the costs for making it available or even by what the actual content of it is; its value increases as the amount of data involved and the degree of analysis provided by those data increases; and information has value in the marketplace. See *Public Sector/Private Sector Interaction in Providing Information Services* (Washington, D.C., 1982), 16–17.

5 Useful discussions of definitions of information include Michael K. Buckland, "Information as Thing," *Journal of the American Society for Information Science* 42 (1991): 351–60; Anthony Debons, Esther Horne, and Scott Cronenweth, *Information Science: An Integrated View* (Boston, 1988), 1–8; and Fritz Machlup and Una Mansfield, "Cultural Diversity in Studies of Information," in Fritz Machlup and Una Mansfield, eds., *The Study of Information: Interdisciplinary Messages* (New York, 1983), 3–56.

6 Donald M. Lamberton, "Preface," *Annals of the American Academy of Political and Social Science*, vol. 412: *The Information Revolution*. (Philadelphia, 1974), ix.

7 Vannevar Bush, "As We May Think," *Atlantic Monthly* 176 (1945): 101–8, is widely regarded as the analysis that launched the discipline of information science. Memex is the device that Bush envisaged in which an individual would store his books, records, and communications, mechanically searchable with speed and flexibility; in short, an extension of his memory. Ernest J. Wilson III, "Introduction: The What, Why, Where, and How of National Information Initiatives," in Brian Kahin and Ernest J. Wilson III, eds., *National Information Infrastructure Initiatives: Vision and Policy Design* (Cambridge, Mass., 1997), 1–23, offers an interesting description of the phases of the public policy debate on information.

no single term or phrase that succinctly expresses the idea of such a right achieved general acceptance. The phrase "right to information" itself is usually used for the legal right of an individual to obtain information from government records instead of for the more general idea of equal access to (computerized) information. The term *information equity* is used by those concerned with information policy in the United States, but it is far from the only phrase used.[8] In Germany the idea of a right to information tends to be embedded in considerations of the information society. Often, it requires a paragraph with an explanation that some members of society are informationally disadvantaged. Information inequity is also occasionally considered in comparisons between countries with greater and lesser information resources.[9]

THE THEORETICAL FOUNDATIONS OF A RIGHT TO INFORMATION

The idea that someone has a right implies that someone else has a responsibility to satisfy that right: If there is a right to information, there must be a reciprocal responsibility to provide information.[10] But who has that responsibility? The obvious answer is that provider of last resort, government or society. However, this responsibility is not one that appears in classical definitions of the role of government. Aristotle's list of the responsibilities of government included religion, warfare, income and expenditure, the market, the town and its harbors, the countryside, the courts, registration of contracts, prisons, the exaction of penalties, computing and auditing of accounts, additional scrutinies of holders of office, and perhaps the regulation of private behavior in states where orderly behavior was an object of concern. But not information. Later writers added to Aristotle's list here and subtracted there, but the basic list remained substantially unchanged.[11]

When information does appear in political theory, it is usually in connection with democracy, where it is far more prominent as a responsibility to be informed than as a right to information. The premise of democracy is that power is vested in the people; citizens are both the governors and the governed. In a direct democracy like that of Athens,

8 Among the terms used to describe the idea are information rich, information poor, information haves, information have-nots, a caste system of information, and information slums.

9 Trevor Haywood, *Information-Rich – Information-Poor* (London, 1995).

10 The chapter "The Missing Language of Responsibility," 77–108, in Mary Anne Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, 1991) is a fascinating discussion of the relationship of rights and responsibilities in American law.

11 Aristotle, *Politics*, VI, viii.

citizens participated in passing judgment and holding office. In a modern representative democracy, they are expected, in some cases constitutionally obligated, to vote. In both situations it is implicit that they will act in an informed and considered manner. Thomas Jefferson, who thought more deeply than most about democratic government, was one of the first to make explicit in a positive way the connection between democracy and information: "No one more seriously wishes the spread of information among mankind than I do, and none has greater confidence in its effect towards free and good government."[12]

Not until the nineteenth century did theory appear that accommodates a right to information. Woodrow Wilson, a political science professor before he was president of the United States, made a useful distinction between constituent and ministrant functions of government. Constituent functions are the bonds of society; these are the functions that protect life, liberty, and property and are, as Wilson put it, *"not optional."* Ministrant functions, however, are not the essence of governing but rather advance the general interests of society. Ministrant functions are necessary by the standards of convenience and expedience but not by the standard of existence. They are, therefore, mutable as each society, each generation, redefines the interests of society and decides what is convenient and expedient. Information fits well with Wilson's examples of ministrant functions, the regulation of labor, the maintenance of postal and telegraph systems, the provision of sanitation, and education.[13]

EXPERIENCE WITH GOVERNMENT-PROVIDED INFORMATION IN THE NINETEENTH CENTURY

Wilson's examples were largely responsibilities that had been assumed by western governments in the course of the nineteenth century, during which the role of government changed and expanded greatly in Europe and the United States.[14] A gradual extension of the definition of public good to include the sum of individual goods took place. By the turn of the century many aspects of economic life, such as the working conditions of women and children, were commonly subject to some sort of governmental regulation. Indications of positive, proactive governmental

12 Aristotle, *Politics*, III, i; Thomas Jefferson to Hugh L. White, May 6, 1810, in *The Writings of Thomas Jefferson* (New York, 1854), 521. I owe the Jefferson citation to Karin Wittenborg, the librarian of the University of Virginia, and the reference staff of the University of Virginia library.

13 Woodrow Wilson, *The State: Elements of Historical and Practical Politics* (Boston, 1906), secs. 1473–9.

14 For a general introduction, with emphasis on the United States, see Thomas E. Borcherding, ed., *Budgets and Bureaucrats: The Sources of Government Growth* (Durham, N.C., 1977).

action, the provision of something that would benefit individuals as opposed to the group, also can be found. Bismarck's groundbreaking social program that provided accident insurance, health insurance, and social insurance is a significant example of such positive action.

The augmented governmental activity of the nineteenth century, although it did not include acceptance of responsibility for information as such, itself generated additional information. Max Weber has described records as the bureaucrat's "tools of production," and there is a strong correlation between the expansion of government functions, a larger centralized administration that accompanied the expansion, and an increase in government publishing.[15] In many cases the need of governments for information outran their bureacracies' capabilities, and ad hoc information-gathering bodies were created with increasing frequency in western countries to supplement routine channels. There is, for example, some evidence that Bismarck's efforts at social reform were hampered by a dearth of information; certainly, he sponsored numerous inquiries into labor conditions in the 1870s.[16]

This kind of special-purpose information was in addition to information that states already collected and published on a regular basis. Nineteenth-century governments might not have seen themselves as engaged in the provision of information, but they were in reality providing their citizens with a wealth of it. Census results were among the earliest information ventures to become common. Article 1 of the Constitution of the United States mandated a decennial census that has, from the first census of 1790, been published for public dissemination.[17] A modern census of Prussia dates from 1810. Other nineteenth-century series of government publications include, in both Prussia and the United States, parliamentary debates, budgets, registers of legislative and executive actions, laws and statutes, and assorted statistical series.

Governmental collection of information could be dismissed as a necessary aspect of administration, were it not that collected data were in many cases published and disseminated. Although this publication and dissemination were partly in the governments' own interests, it suggests a de facto recognition that citizens had a right to be informed about their governments' activities and, increasingly, their societies' conditions. That there was some sense of obligation to the public, as well as recognition of the

15 Weber, quoted by Ernst Posner, *Archives in the Ancient World* (Cambridge, Mass., 1972), 71.

16 Otto Pflanze, *Bismarck and the Development of Germany*, vol. 3: *The Period of Fortification, 1880–1898* (Princeton, N.J., 1990), 151.

17 The most recent census data have been published only in electronic format.

importance of informed citizens to a democracy, is confirmed by the practice of depositing publications in the libraries of the nation. In the United States the 1813 resolution that regularized the printing of congressional documents provided that each college and university library in each state, and each historical society as well, would receive a copy of each document. An 1886 resolution to expand the depository library system brought statements like the "general use and information of the people" and assertions of the relationship of information to democratic government: "The theory of this bill is that this is a Government of this Republic by the people thereof, and that the people thereof are entitled to have and . . . should have access to everything which is important that shapes the legislation of this country." In Germany the depositing of documents came in 1927 with the Weimar Republic, the country's first democratic government, although the utility for the general public of some government publications was acknowledged much earlier.[18]

Another very obvious way in which governments were involved in the dissemination of information was through the creation and maintenance of public libraries. "Information" was most likely to be used in terms of increased opportunity for individuals to become informed voters, but almost all the motivations of early founders of public libraries are information-related in some sense.[19] The information was, in this case, created or published by commercial publishers, and the government, here a local rather than national body, facilitated dissemination. By the end of the nineteenth century major cities in the United States, and many of the smaller towns as well, had libraries open to the public that were free of charge and supported by tax revenues. Germany followed the American

18 Edith E. Clarke, *Guide to the Use of United States Government Publications* (Boston, 1919), 149–51; Sarah Jordan Miller, "The Depository Library System: A History of the Distribution of Federal Government Publications to Libraries of the United States from the Early Years of the Nation to 1895," D.L.S. dissertation, Columbia University, 1980, 2 vols.; United States Senate, Senator Hoar, *Congressional Record*, 49th Cong., 1st sess., Feb. 9, 1886, 17, pt. 2: 1288, 1291; *Totok-Weitzel: Handbuch der Bibliographischen Nachschlagewerke*, 6th ed. (Frankfurt am Main, 1984), 251; Georg Schwidetzky, *Deutsche Amtsdrucksachenkunde* (1927; reprint, Nendeln, Liechtenstein, 1968), 3. My information on the German depository system I owe to Peter Vodosek and his colleague, Bernward Hoffmann.

19 Sidney Ditzion, *Arsenals of a Democratic Culture* (Chicago, 1947), esp. chaps. 4–7. There has been much debate among historians of American public libraries about ostensible versus actual motives of public library founders. Whether the intentions of the community leaders who worked to establish public libraries were as pure as their manifestos is interesting and important, but not particularly germane to the point made here. The 1994 UNESCO Public Library Manifesto (www.ifla.org/documents/libraries/policies/unesco.htm) uses the term *information* in three of its twelve stated missions: ensuring access for citizens to all sorts of community information; providing adequate information services to local enterprises, associations and interest groups, and facilitating the development of information and computer literacy skills.

lead, but the same level of public assumption of responsibility for library service came only during the era of National Socialism, and German public libraries have never been so large or so heavily used by the public as their American counterparts.[20]

EARLY INFORMATION POLICY INITIATIVES

Provision of information or provision of access to information are not, however, the same as formal recognition of an obligation to provide information. Lacking the perception that they were engaged in information activities, until very recently governments saw no need for any policy on the subject. This failure has been particularly unfortunate because only within the context of a comprehensive and systematic information policy can a comprehensive right to information be asserted. To the extent that governments could be said to have had any information policies, they were, like the information policy in Europe today, "a patchwork of regulations and practices."[21] Not that this muddle is exceptional. A democratic government's policy in almost any area is likely to be a composite, influenced by a wide range of interests and implemented by different governmental units that are often in competition with each other. Henry Kissinger once commented, "There is no such thing, in my view, as a Vietnam policy; there is a series of programs of individual agencies concerned with Vietnam."[22]

Only in 1975 were the first actions taken toward creating a national information policy in the United States. Vice President Nelson A. Rockefeller convened a Roundtable on Privacy and Information Policy to examine information issues and to discuss the need for a national information policy. The following year President Gerald R. Ford directed Rockefeller, in his capacity as chair of the Domestic Council Committee on the Right of Privacy, to review and clearly define the information policy issues that confronted federal policy makers and to determine the status of the various information policy studies that were then under-

20 Wolfgang Thauer and Peter Vodosek, *Geschichte der öffentlichen Bücherei in Deutschland* (Wiesbaden, 1978); Margaret F. Stieg, *Public Libraries in Nazi Germany* (Tuscaloosa, Ala., 1992).

21 Blaise Cronin, "Transatlantic Perspectives on Information Policy: The Search for Regulatory Realism," *Journal of Information Science* 13 (1987): 129. Between 1977 and 1987 Congress passed no fewer than 279 laws that can be considered to fall within the area of information policy. Peter Hernon and Charles R. McClure, *Public Access to Government Information: Issues, Trends, and Strategies*, 2d ed. (Norwood, N.J., 1988), 27.

22 *Washington Post*, Sept. 17, 1973, A24. I owe this quotation and the useful reminder that government "policy" is rarely unitary to R. Kathleen Molz.

way within different agencies of the executive branch.[23] The final report of the committee stressed the need for a unified approach, recommended the creation of an office of information policy, and asserted basic principles. The first of these principles aimed to encourage access to information and information systems by all segments of society, to improve the quality of life, and to enable the responsibilities of citizenship to be met. This set of principles carries the seed of the idea of a right to information.[24]

The committee's recommendations, however, had minimal impact on what followed. The popular pressure to "reduce government" that was such a feature of the 1980s and 1990s in the United States began to make itself felt in the late 1970s, and it has been within that political context that information policy has evolved. A major step was the Paperwork Reduction Act of 1980, an act that aimed to minimize the Federal paperwork burden for both private and government bodies, to reduce the cost to the government of collecting, maintaining, and disseminating information, and to establish federal information policies and practices. This act was applied with great enthusiasm by the Reagan administration, and additional policies were designed to supplement it. The overall effects have been that, as of 1997, the United States government collects less information, that less of the information the government collects is published, and that if government information is collected and published, it is increasingly likely to be published in cheaper and more difficult to access electronic formats.[25] Trends in public library services are somewhat more ambiguous, but there also have been significant reductions.[26]

There is a certain irony in the fact that this overall reduction of information has occurred at the same time that the perception has grown that American society was becoming an information society. By the 1970s terms such as *information revolution* and *information age* were in common use.[27] The outlines of the nascent information society could be discerned. The exponential increase in the volume of information flow, the shrinkage of time and distance constraints on communications, the greater dependence on information and communication services, the increase in

23 *National Information Policy* (Washington, D.C., 1976), xiii.

24 Ibid., 202.

25 For a detailed discussion of the early stages of this evolution, see Peter Hernon and Charles R. McClure, *Federal Information Policies in the 1980s: Conflicts and Issues* (Norwood, N.J., 1987).

26 E.g., Alice Gertzog and Edwin Beckerman, *Administration of the Public Library* (Metuchen, N.J., 1994), esp. chap. 3: "The Public Library Today."

27 Books with the titles *The Information Revolution*, *The Information Age*, and *The Information Society* were published in 1974, 1976, and 1978, respectively.

the interdependence of previously autonomous institutions and services, conceptual changes in economic, social, and political processes induced by increased information and communications, the decrease in the interval between social and technical changes and their impact and consequences, and the global shrinkage that characterize an information society were all identified in the 1976 National Information Policy report.[28] The work that probably did the most to explain the brave new world of information and encourage acceptance, Daniel Bell's *The Coming of Postindustrial Society*, appeared in 1973, and within two years the first translations, including one into German, had come out.[29]

In the 1960s and 1970s many regarded the arrival of the information age with some apprehension because information technology's best-known customer was the government of the United States. Increased government efficiency raised the specter of George Orwell's *1984*, and a possible threat to privacy was a source of great anxiety. Intellectuals were caught between their faith in progress and their fears of the future. The following passage conveys their uneasiness well:

> It is notorious that adopting new means in order better to accomplish old ends very often results in the substitution of new ends (inherent in the new means) for old ones. Computers and associated intellectual tools can thus, for example, make our public decisions more informed, efficient, and rational, and less subject to lethargy, partisanship, and ignorance. Yet that possibility seems to imply a degree of expertise and sophistication of policy-making and implementing procedures that may leave the public forever ill informed, blur the lines between executive and legislature (and private bureaucracies) as all increasingly rely on the same experts and sources of information, and chase the idea of federalism into the history books close on the heels of the public-private separation.[30]

THE INFORMATION SOCIETY OF THE 1990S

In the 1990s the concerns were quite different, but then much about the information society of the 1990s was quite different. Technological advances and the rapid spread of new products and services have made the promise of the 1960s and 1970s a reality, and all forms of activity, economic, social,

28 *National Information Policy*, 5.

29 Daniel Bell, *Die nachindustrielle Gesellschaft*, trans. by Siglinde Summerer and Gerda Kurz (Frankfurt am Main, 1975).

30 Emmanuel G. Mesthene, "How Technology Will Shape the Future," in Alan F. Westin, ed., *Information Technology in a Democracy* (Cambridge, Mass., 1971), 157; for a discussion of reaction to an earlier, significant improvement in the amount of information available, see Margaret F. Stieg, "The Nineteenth-Century Information Revolution," *Journal of Library History* 15 (winter 1980): 22–52.

political, cultural, and intellectual, have been deeply affected. As of 1995 in the United States there were thirty-four personal computers per hundred inhabitants, in Germany nineteen, and computers are only one aspect of the information society.[31] The question is not whether we will have an information society, but what kind of a society it will be.

What has been achieved in the last two decades has served to demonstrate the potential of the future, and predictions today are more specific and even more optimistic than those of the past. A report by the German Federal Ministry of Economics declared that the new technologies "not only make work and life easier, they take us out of isolation." The National Information Infrastructure Agenda for Action asks people to imagine the dramatic changes in their lives:

- if the best schools, teachers and courses were available to all students, without regard to geography, distance, resources, or disability;
- if services to improve health care were available online, without waiting, regardless of location;
- if telecommuting enabled them to live almost wherever they chose;
- if small manufacturers could get orders electronically from all over the world;
- if they could see the latest movies, play the hottest video games, bank, or shop from the comfort of home;
- if they could obtain government information directly, apply for and receive government benefits electronically, and get in touch with government officials easily;
- if individual government agencies, businesses, and other entities could all exchange information electronically, thus reducing paperwork and improving service.

The so-called Bangemann report defined the basic information policies of the members of the European Community and envisioned many of the same possible applications: telecommuting, distance learning, networks for universities and research centers, telematic services like e-mail, videoconferencing, and file transfer, traffic management, air traffic control, health-care networks, electronic payment, trans-European public administration, and city information systems.[32]

31 Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie, Rat für Forschung, Technologie und Innovation, *Die Informationsgesellschaft: Fakten, Analysen, Trends* (Bonn, 1995), 22, 66.

32 Jörg Menno Harnis, "Computertechnik, Telekommunikation, Unterhaltungseletronik und Medien wachsen zusammen," in Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie, Rat für Forschung, Technologie und Innovation, *Die Informationsgesellschaft: Fakten, Analysen, Trends*, 5; Executive Office of the President, Information Infrastructure Task Force, *The National Information Infrastructure: Agenda for Action* (Washington, D.C., 1993); and see the report issued by the committee chaired by Martin Bangemann, *Europe and the Global Information Society: Recommendations to the European Council* (Brussels, 1994), 25–9.

The context of these glowing visions is the evolving information infrastructure. Economists define infrastructure as the basic structural foundation of the economy as a whole, including everything from its transportation network to its educational system. The information infrastructure is "a series of components, including the collection of public and private high-speed, interactive, narrow, and broadband networks that exist today and will emerge tomorrow." It is the satellite, terrestrial, and wireless technologies that deliver content; it is the information and content that are conveyed in a wide range of formats, the computers, televisions, telephones, and other products used by people to obtain access to the networks and their content; it is the people who provide, manage, and create new information; and it is the individuals who use these networks.[33] The shift in focus from isolated information processing units to the interconnected, interacting totality affects not only what can be done technologically – the whole is considerably greater than the sum of its parts – but the terms in which the issues are discussed.

Predictions of the future are overwhelmingly positive, but some reservations have been expressed. Just as the accomplishments of the information revolution have brought a more sophisticated appreciation of the potential of the future, they have brought a more sophisticated appreciation of possible pitfalls. There is concern that the privacy of individuals is seriously threatened by the too-ready accessibility of electronic records that were never intended for public consumption. Freedom of expression, a thorny problem already, has been immensely exacerbated by the speed of dissemination, the possibility of worldwide distribution, and a lack of control in the electronic environment. The new media are readily accessible, and any participant can be both a producer and a consumer of information. Such communication can be seen as a threat to a nation's sense of community because it facilitates and strengthens the development of like-minded groups, whether quilters or right-wing radicals, at the expense of the larger group.[34]

Other concerns focus on the individual as a seeker of information. Individuals may find themselves overwhelmed by unimportant information, they may be manipulated by the unscrupulous, or they may risk an

33 U.S. Department of Commerce, National Telecommunications and Information Administration, U.S. Advisory Council on the National Information Infrastructure, *A Nation of Opportunity: Realizing the Promise of the Information Superhighway* (Washington, D.C., 1996), C 60.2:P 94, 13.

34 Steven E. Miller, *Civilizing Cyberspace: Policy, Power, and the Information Superhighway* (New York, 1996), 25–9.

increase in mental passivity. They may be unable to make use of what is available because they lack the skills to find what they need or the knowledge to evaluate what they find; the Internet is not for amateurs. Still worse, they may not be seekers of information because they are unwilling to participate. There is ample evidence that individuals do not use the abundance of information that is already available; why should electronic information be different?[35]

INFORMATION EQUITY

Few would disagree that the greatest problem of the information age is that of equity. The immense promise of the new world has made the question of access to it a matter of considerable consequence, and no one can ignore the possibility that the development of a national information infrastructure will increase rather than decrease inequality. The National Information Infrastructure Agenda for Action pronounces: "Because information means empowerment – and employment – the government has a duty to ensure that all Americans have access to the resources and job creation potential of the Information Age." The European Commission's Information Society Project Office is more matter of fact: "There is a particular preoccupation about the possible creation of a two-tier society in which part of the population can handle the techniques for a successful exploitation of all that the society can offer, while the other part is marginalized and disadvantaged by alienation from the information culture." Today virtually every politician who addresses the topic of information technology verbally genuflects before the precept that a two-class society, information haves and information have-nots, must not be permitted to develop.[36]

35 American Library Association, "Telecommunications and Information Infrastructure Policy Forum," conference held on September 8–10, 1993, in Washington, D.C.; proceedings published as *Principles for the Development of the National Information Infrastructure*, www.ifla.org/documents/libraries/policies, 7–9; William H. Dutton, "Lessons from Public and Nonprofit Services," in Frederick Williams and John V. Pavlik, eds., *The People's Right to Know: Media, Democracy, and the Information Highway* (Hillsdale, N.J., 1994), 133–7; Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie, Rat für Forschung, Technologie und Innovation, *Die Informationsgesellschaft: Chancen, Innovationen und Herausforderungen* (Bonn, 1995), 39–40; Herbert Kubicek, "Internetzugang in öffentlichen Bibliotheken – Strukturierungsbedarf und -möglichkeit beim Online–Zugang zu Information und Wissen," mimeographed paper, 9; Miller, *Civilizing Cyberspace*, 319–27; Markus Stolz, "Infoschock und Evolution," *Werben und Verkaufen*, Oct. 21, 1994, 66.

36 Information Infrastructure Task Force, *The National Information Infrastructure: Agenda for Action*, Sept. 15, 1993, Y3. L 61:2 In 3/5; Introduction to the Information Society the European Way, www.ispo.cec.be/infosoc/backg/brochure.html; Miller, *Civilizing Cyberspace*, 1–16.

The emphasis on individual rights that is characteristic of modern America and is increasingly common in other societies encourages the assumption that anything as important as information must be a matter of right, but there is no basis for such an assumption. The Constitution of the United States protects the rights of producers of information with copyrights and patents, but, in terms of access to information, comes no closer than the guarantee of free speech in the First Amendment. The German Basic Law is not much better, although Article 5, which asserts that everyone has the right freely to inform himself through generally accessible sources, at least mentions information. Both of these are no more than vague statements of general principles; there is certainly no legally enforceable right to information. Any "right" to information is rooted in the political reality that if enough people demand information strongly enough, politicians will attempt to deliver it. By so doing they strengthen the presumption of right until it is eventually perceived as a right. Education, to which information is closely akin, is well on the way to acceptance as a fundamental right. It is asserted as a right in the United Nations' Universal Declaration of Human Rights of 1948, and most nations, including the United States and Germany, act as if it is a right, even if adjudication on the subject is somewhat equivocal.[37]

Information has begun its journey to righthood. In 1992 Bill Clinton and Al Gore campaigned on the need for a high-technology infrastructure for the United States, one that would be accessible to all. Gore extended this principle to the global information infrastructure: "The final and most important principle is to ensure universal service so that the Global Information Infrastructure is available to all members of our societies. Our goal is a kind of global conversation, in which everyone who wants can have his or her say." No Republican interest in the issue could be found, but much discussion is taking place outside the party structure. Groups like the Electronic Freedom Foundation are active, and librarians have been particularly prominent in advocating information equity.[38]

In Germany political discussion appears to have been more limited and to have taken place largely within the formal political structure. The

37 "Human Rights, Universal Declaration of, 1948," in Edmund Jan Osmanczyk, *The Encyclopedia of the United Nations and International Relations* (New York, 1990), 402; Manfred Nowak, "The Right to Education – Its Meaning, Significance and Limitations," *Netherlands Quarterly of Human Rights* 4 (1991): 418–25.

38 Joe Abernathy, "Clinton Team Signals New Computer Era," *Houston Chronicle*, Dec. 21, 1992, A1; Al Gore, "Remarks Prepared for Delivery . . . International Telecommunications Union, Monday, March 21, 1994," www.nlc-bnc.ca/ifla/documents/infopol/us/goregii.txt, p. 6; www.eff.org.

emphasis has been on the information economy, and information questions have been treated as economic questions. Each German party had detailed printed documents to offer on the subject of the information society, in which they attempted to interpret the new issue in terms of their existing philosophical frameworks and traditions. They universally affirm the idea of information equity, although the emphases they place on other aspects of the creation of an information infrastructure make it clear that the Christian Democratic Union's version of a right to information would be quite different from the Bündnis '90–Green Party version.[39]

What is noticeably absent from discussions of the individual and the information society in both countries is individual responsibility, the reciprocal of individual right. There is no suggestion that the individual must seize opportunities that are made available, no expectation that individuals should use information for socially useful purposes, as well as for personal advancement and individual gratification. This absence is part of the far more general problem, the disappearance of the idea of the public good from political discourse, that affects decision making at all stages of the political process. In the context of information, at the lowest level, voters choose not to exert the effort to use the information resources that exist. At the highest level, when the public interest is not a priority, governments can limit expenditures of public monies on information systems and services and can avoid the unpopular regulatory actions that would protect it.[40]

Without the realistic possibility of exercising a right, political endorsement does not mean much, and translating the rhetoric of information equity into reality is a formidable task. The issues are wide-ranging, complex, and interdependent. A conference on the development of a national information infrastructure in the United States identified four strands in the information structure – hardware, services, applications, and the people served; at least three ways of approaching development of an appropriate policy – by experts, by bureaucrats, and through the political processes; conflict in three different realms – social and economic goals

39 Bündnis '90/Die Grünen, *Die Zukunft der Medien ist Sache aller BürgerInnen* (Bonn, 1996); CDU, *Wir gestalten Zukunft: Informationsgesellschaft* (Bonn, 1996?); Junge Union Deutschlands, *Jugend online* (1995?); SPD, Die Informationsgesellschaft von morgen (Bonn, 1995); *Informationsgesellschaft: Kongress der F.D.P.–Bundestagsfraktion, Bonn, 21./22. Februar 1996.*

40 John V. Pavlik and Mark A. Thalheimer, "Roundtable: Sizing Up Prospects for a National Information Service," in Williams and Pavlik, eds., *The People's Right to Know*, 94; Herbert I. Schiller, *Information Inequality: The Deepening Social Crisis in America* (New York, 1996), 28.

and values; relevant goals and values at three different levels – national, local, and international; and various stakeholder goals and values.

Miller analyzed information structure in terms of three simultaneous levels of conversation: the visions and goals, the strategies to be used to reach those goals, and the technologies that will serve our purposes in a manner that is cost effective.[41]

TECHNOLOGICAL AND ECONOMICS ISSUES IN INFORMATION EQUITY

Technological choices affect the realization of a right to information. Without interoperability, the interconnection of switched networks, individuals will have access to only one network rather than to all. One example of an important decision already made is the adoption of TCP/IP (Transmission Control Protocol/Internet Protocol) by ARPANET, the precursor of the Internet. This was the precondition for the communication of different computers that made possible the Internet. How an individual home is connected to the system, whether by fiber optics or an alternative, will influence affordability. What system architecture is employed, if it is distributed or not, will decide the amount of capacity and whether the connection that exists in theory is available in practice.

Often technological issues are simultaneously economic issues. Bandwidth, for example, is an object of competition. In terms of the NII (National Information Infrastructure) the bandwidth problem can be summarized as follows: "There is a three-way tension in the evolution of the network between the research needs which require very high bandwidths (gigabits for individual applications); scholarship, education and public information needs that require gigabits but which can be aggregated; and everybody else's needs for high bandwidth with an emphasis on multimedia applications and use."[42] How bandwidth is distributed will determine what the different interested parties can do. When the United States government auctioned off a section of the radio spectrum, it turned over to the giant telecommunications–cable corporations who purchased it the decision of how this resource will be used.[43]

41 American Library Association, *Principles for the Development of the National Information Infrastructure*, 4–5; Miller, *Civilizing Cyberspace*, 60.

42 American Library Association, *Principles for the Development of the National Information Infrastructure*, 5.

43 Schiller, *Information Inequality*, 83–4.

This auction of bandwidth is one indication of the answer that has been given to the economic question that underlies every aspect of the information infrastructure: How will it be financed? Vice President Gore, while still Senator Gore in 1992, had argued that the private sector wouldn't gamble on such a risky investment, and if it did, "it would build not a superhighway available to all, but a kind of private toll road open only to a business and scientific elite." He urged that it "should be a public network constructed and regulated by the Government for all Americans." The financial weakness of the United States government and the political weakness of the Clinton–Gore administration forced the substitution by private development.[44]

It is an indication of the strong American influence and perhaps of European governments' own financial weaknesses that Europe has followed this lead. In 1994 the Bangemann report, which defined an information policy for the European Community, was unequivocal: "In this sector, private investment will be the driving force. . . . The market will drive, it will decide winners and losers. . . . The prime task of government is to safeguard competitive forces and ensure a strong and lasting political welcome for the information society, so that demand-pull can finance growth, here as elsewhere." The 1996 German telecommunications law opened telecommunications, an area previously monopolized by the government, to competitive service providers.[45]

UNIVERSAL SERVICE

The role a government plays greatly influences what kind of information infrastructure emerges and the extent to which information equity is achieved. Government can provide producer subsidies. It can regulate. Governmental priorities will determine the choices, but such priorities are at odds. Yes, United States government policy, like German government policy, is one of equal access. But the building of the respective national information infrastructures also is government policy, and responsibility for building the infrastructures has been turned over to private

44 Al Gore, "Remarks Prepared for Delivery . . . International Telecommunications Union, Monday, March 21, 1994," www.nlc-bnc.ca/ifla/documents/infopol/us/goregii.txt, 5; John Markoff, "Building the Electronic Superhighway," *New York Times*, Jan. 24, 1993, sec. 3, 1; Miller, *Civilizing Cyberspace*, 78; see Brian Kahin, "The U.S. National Information Infrastructure Initiative: The Market, the Net, and the Virtual Project," in Kahin and Wilson, eds., *National Information Infrastructure Initiatives*, 150–89, for a discussion of the governmental–private sector interaction in development.

45 *Europe and the Global Information Society: Recommendations to the European Council* [Bangemann report], 8.

corporations whose activities are directed to the maximization of return on investment, not to achieving socially desirable but financially unprofitable goals.[46]

To accommodate its fundamentally incompatible goals, the United States government has adopted the formula of universal service. The Communications Act of 1934, which regulated telephone service in the United States, used language that has come to define the principle of universal service: "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and worldwide wire and radio communication service with adequate facilities at reasonable charges." Universal service was funded by a rate structure in which profits from one type of telephone service subsidized another, less profitable form of service: Rural telephone service, where wiring costs were high, was financed by the profits from densely populated areas; low rates for residential service were maintained by higher rates for business service; and long-distance users, who were mainly businesses, helped keep the cost of local calls down. A level of profit was guaranteed, and how that profit was achieved was left to the telecommunications provider.[47]

Universal service largely accomplished its purpose of providing affordable telephone service, although it no longer is as effective as it was. Changes in the telecommunications law in 1982 brought increased competition and lower rates in long-distance service, but it has been at the expense of higher rates for local calls. The number of people who can afford telephone service has decreased. In five of the six large urban areas studied by the Federal Communications Commission, the number of families without phone service increased significantly between 1988 and 1992. Not surprisingly, those without service are predominantly black, Hispanic, and low-income families.[48]

The telecommunications laws of both Germany and the United States legislate universal service for the new information environment. The American act is described as an act "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"; the German, "to promote competition through regulation of the telecommunications

46 National Information Infrastructure: Agenda for Action, www.nlc-bnc.ca/ifla/documents/infopol/us/nii.txt, 6; Miller, *Civilizing Cyberspace*, 9, 27, 76.

47 National Information Infrastructure: Agenda for Action, www.nlc-bnc.ca/ifla/documents/infopol/us/nii.txt, p. 8; U.S. *Statutes at Large*, 48, pt. 1 (1933–1934): chap. 652, p. 1064.

48 Miller, *Civilizing Cyberspace*, 88.

sector, to guarantee appropriate and adequate services throughout the country and to provide for frequency regulation." Each has a section on universal service. The American act defines universal service as the availability of quality services at fair, reasonable, and affordable rates and elaborates on the principle to make clear that it means advanced services that will be accessible in all areas, and that all providers will make a contribution to achieve universal service. The American act makes special provisions for service to elementary and secondary schools and classrooms, health care providers, and libraries at rates less than those charged to other parties. The German law defines universal service as a minimum telecommunications service to the public to which all users must have access at a price within their means, regardless of income or workplace. It does not make any exception for institutions such as schools, hospitals, or libraries. How effective these laws will be remains to be seen.[49]

ADDITIONAL EQUITY CONSIDERATIONS

Access is only the beginning of information equity. A true right to information means meaningful participation. Universal service worked well when the object was that all Americans have telephone service, but finding the right information for a particular purpose, evaluating its quality, and applying it are far more complex tasks than making a telephone call. Yet without those abilities, a right to information is so empty that it has little meaning. In addition to access there must be usability, the appropriate hardware and software for people to produce and consume information for a wide variety of purposes, training, the education that enables them to use the information systems to satisfy their needs, and a purpose that satisfies public and social needs as well as produces economic gains.[50]

The Microsoft Foundation has begun a large-scale, nationwide project in the United States that addresses some of these aspects. Motivated by concern about information inequity, the foundation is in the process of working out the best ways to provide public libraries with the hardware, software, and support that they need to use the Internet. Public libraries,

49 United States, Public Law 104–104, 110 Stat 56; Telekommunikationsgesetz vom 25. Juli 1996, *Bundesgesetzblatt*, 1996, Teil 1 Nr. 39, published in Bonn on July 31, 1996; Hilmar Hoffmann, "Die Chancen des Lesers," in Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie, Rat für Forschung, Technologie und Innovation, *Die Informationsgesellschaft: Fakten, Analysen, Trends,* 23; Herbert Kubicek, "Anforderu[n]gen an einen zukunftsweisenden Universaldienst," presentation at 4. Forum Telekommunikation, May 29–30, 1996 in Bonn, 12.

50 Miller, *Civilizing Cyberspace*, 181–2.

open to all, have been selected as the best way of making access to the Internet available to those who cannot afford it for themselves.

Economic forces are also increasing the availability of the access, equipment, and knowledge that individuals need to exercise their right to information. Sometimes governments push along the process of modernizing communications, as when the government of Saxony established the Saxon Development Organization for Telecommunications. The broad range of this organization's activities includes efforts to link schools to the Internet and working with the information industry and local businesses. Its approach exemplifies the interrelatedness of individual participation in the information society and national, or in this case regional, economic activity. Individuals are the foundation of the larger success, and skills learned for work are equally useful for other purposes – or vice versa.[51]

Although access is an obvious prerequisite to obtaining information, it is not information per se; the real purpose of a right to information is in fact the information itself. It is in this area of content that the most formidable problems lie. Some of the fundamental questions that have a direct impact on a right to information have yet to be answered, such as who shall disseminate what electronically? Who shall regulate what is disseminated? What rules, if any, apply to the use of what is disseminated? The perennial issue of censorship has been given new urgency. Traditions of the regulation of the content of media in Germany and the nonregulation of the same in the United States need to be re-examined. Intellectual property rights have been rendered virtually unenforceable. All these questions require political choices; the choices will profoundly affect the available information to which individuals have a "right."

Somewhat less politically sensitive but equally significant in terms of a meaningful right to information is the domination of content production by market forces. Herbert I. Schiller has observed that "the high expectations for the new means of transmitting messages and images are invariably thwarted by the institutional arrangements that quickly enfold the new instrumentation. This has been the fate, successively, of radio, television, cable, satellite communication, and, still underway, digitized electronic transmission." If he is right about what is happening in the new information environment, only that which produces a profit will be available. As in radio and television, minorities will have relatively little voice, and serious issues will receive minimal attention. Electronic information

51 Presentation by Howard Frederick, director, Sächsische Engwicklungsgesellschaft für Telematik, to German Fulbright Summer Seminar, June 30, 1997; *Telematics: High Technology from Saxony* (1997); *Online-Fibel Sachsen: Version 1.0* (Leipzig, 1997).

will be an integral part of economic activity, but it will be far less important to society in general. Information needs that are not on a sizable enough scale will not be met because none of the legislation passed thus far shows any concern for the development of orphan information comparable to the concern for the development of drugs. Information that relates to the public good will have at best a token presence. The training that will be available will stimulate desired consumption patterns; the ability to evaluate critically will be left to educational institutions.[52]

There are many hints that with the national information infrastructure, "instead of a healthy drink all we might get is soda pop – well-packaged and extremely sweet, but devoid of any nutritional value." The Internet offers, free of charge, much current information, information on popular subjects, and information from organizations and individuals about themselves, but at the same time trash abounds. Advertising is now common on the Internet. The government's response, to develop a second Internet to serve the serious needs of the economy and of research, does not address the issue of the individual citizen's right to serious information.[53]

Some indications point in a more positive direction. Libraries and other public institutions are making a valiant effort to make available to people necessary and desirable information that is not commercially profitable. The network for the homeless in Santa Monica, California, is a frequently cited example. The Telecommunications and Information Infrastructure Assistance Program (TIAPP) of the Department of Commerce has provided modest subsidies to several civic networks, including the Three Rivers Free-Net in Pittsburgh and Charlotte's Web in Charlotte and Mecklenburg County, North Carolina. The Bremen Public Library is participating in a pilot project to provide community information.

CONCLUSIONS

The process of affirming and effecting a right to information is under way in both the United States and Germany. Because the information revolution is essentially a global phenomenon, events in one country influence events in another, but that influence is far from equal. Thanks

52 Lawrence Grossman, *The Electronic Republic: Reshaping Democracy in the Information Age* (New York, 1995), passim. Miller, *Civilizing Cyberspace*, and Schiller, *Information Inequality*, 75, also discuss this situation.

53 Miller, *Civilizing Cyberspace*, 12; George Johnson, "Old View of Internet: Nerds. New View: Nuts," *New York Times*, Mar. 31, 1997, sec. 4, pp. 1, 6.

to its technological superiority, its demonstrated information achievements, its position as a leading exporter of culture, and its desirably strong economy, America predominates. The prevalence of the English language in debates points to how pervasive that influence is. English words are sprinkled among the German; one document distributed by the Free Democratic Party used "information haves" and "information have-nots" to describe those who have access to information and those who have not. When English is not used, the German may be a direct translation, for example, *Daten-Autobahn* (information superhighway) and *informationsarm* (information poor). American experts bulk large. Bill Gates was featured in the report of the German Federal Ministry of Education, Science, Research, and Technology, and several Americans, including Howard Rheingold, contributed to another German compilation. Nowhere is American influence more apparent than in the realm of the values that are shaping the final product. The emphasis on freedom, the discouragement of censorship, and the adoption of the principle of an individual's right to information are American priorities that have been adopted by Europe.[54]

Another source of similarities is the shared ambiguity over what is the proper role of government. In neither country have the lengths been determined to which government is willing to go to ensure equality of information. The high costs make large-scale government involvement unlikely, as does the absence of any broad-based demand for information equity. Yet at the same time political and social forces are working in opposite directions.

There are also differences between the two countries. The existing information infrastructures that form the foundation of the new information infrastructures in the United States and Germany are not the same any more than their political cultures or values are. Deliberate speed marks German progress rather than the enthusiasm of the Americans. The longstanding American faith in technology is noticeable, whereas the Germans are more concerned with culture. In Germany the emphasis is overwhelmingly on the economic aspect of the information revolution, whereas in the United States this is one among many. There are also contrasts in the conduct of the debates. Experts are dominant in German debates, and women are conspicuous by their absence. In American

54 Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie, Rat für Forschung, Technologie und Innovation, *Die Informationsgesellschaft: Fakten, Analysen, Trends* (Bonn, 1995), 12–13; Stefan Bollman, ed., *Kursbuch neue Medien: Trends in Wirtschaft und Politik, Wissenschaft und Kultur* (Mannheim, 1995).

discussions a much broader public participates, and librarians, including men and women, are far more prominent.

For both countries a fully realized right to information clearly lies in the future. There are indications that the interplay of technology, economic development, and political rhetoric is working to strengthen the theory of such a right. At the same time, there is evidence that that same interplay is corrupting the right to information. In both countries, the marked absence of attention to the reciprocal responsibility of the individual to be informed weakens the case that society is responsible for providing the means to be informed. It cannot be surprising, then, that, in both American and German information policy, rhetoric favors the concept of the right of an individual to information, but the law does little to effect it.

PART THREE

Gender, Sex, and Rights

11

Feminist Movements in the United States and Germany

A Comparative Perspective, 1848–1933

ANN TAYLOR ALLEN

The French utopian socialist Charles Fourier stated that the progress of any civilization could be measured by the emancipation of its women.[1] In both the United States and Germany, the status of women was and is a measure of democratization, not only of its progress but also of its deficits. In both countries, women's struggle for equality developed on a parallel course with other democratic movements and faced the same kinds of opposition. In both countries feminists drew on and adapted various international cultures of rights, both liberal and socialist, to justify their claims to citizenship. Both the ideology and the practice of feminism in the two countries were therefore similar in many ways. However, German and American feminists also shaped and were shaped by the national cultures that they inhabited. Some aspects of both their ideologies and their political strategies were also culture-specific, designed to take advantage of opportunities, or to overcome obstacles, that were distinctive to each political system. Thus, a comparison of the feminist movements in these two countries offers an example through which to compare the two nations and their cultures of rights. This chapter will examine some salient aspects of German and American feminist movements between 1848 and 1933, and will explore how these movements were shaped both by an international feminist culture and by the national cultures in which they operated.

A systematic comparison of German and American feminism is overdue, for the discussion hitherto has been dominated by stereotypes. Among these, the most common is that German feminists' notions of

1 Terry R. Kandal, *The Woman Question in Classical Sociological Theory* (Miami, 1988).

gender were inherently conservative or reactionary because they emphasized essential differences between men and women. Such ideas of gender difference have sometimes been interpreted as symptoms of protofascist, even National Socialist sympathies.[2] The comparison, implied or explicit, is with the feminists of the English-speaking world, who are assumed to have emphasized a more gender-neutral and thus more liberal conception of gender equality. The notion that ideologies stressing gender difference and equality are mutually exclusive, however, has been reexamined by many historians of feminism. They point out that feminists have always emphasized both the similarities and the differences between men and women. Women, feminists insisted, were similar to men in their entitlement to equality and to respect, but their lives and concerns were nonetheless different. Existing conceptions of rights, though apparently gender-neutral, in fact applied to men and required revision and expansion to protect the freedom of women. Further, because liberal notions of liberty and privacy often protected the male's control of his home and family, the assertion of women's rights sometimes even required the limitation of those conventionally accorded to men.[3] As we shall see, both German and American women developed a distinctively feminist culture of rights that asserted both gender equality and gender difference.

Among the most important factors affecting the development of feminist movements was the uninterrupted development of democracy in the United States, in contrast to its interrupted development in Germany. Both the American and German movements had their formal beginnings in the revolutionary year 1848, when Elizabeth Cady Stanton, at the Seneca Falls Convention, proclaimed the self-evident truth that "all men and women are created equal," and Louise Otto, in her periodical the *Frauen-Zeitung*, called on all women to become "citizens of the land of

2 Richard J. Evans, *The Feminist Movement in Germany, 1894–1933* (London, 1976), 253–75; Claudia Koonz, *Mothers in the Fatherland: Women, the Family, and Nazi Politics* (New York, 1987), 142–7; Nancy M. Reagin, *A German Women's Movement: Class and Gender in Hannover, 1880–1933* (Chapel Hill, N.C., 1995), 221–57. For more balanced comparative perspectives, see Seth Koven and Sonya Michel, "Mother Worlds," in Seth Koven and Sonya Michel, eds., *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (London, 1993), 1–42; Nancy F. Cott, "Early Twentieth-Century Feminism in Political Context: A Comparative Look at Germany and the United States," in Caroline Daly and Melanie Nolan, eds., *Suffrage and Beyond: International Feminist Perspectives* (New York, 1994), 234–51; Ann Taylor Allen, "Feminism, Social Science, and the Meanings of Modernity: The Debate on the Origins of the Family in Europe and the United States, 1860–1914," *American Historical Review* 104 (Oct. 1999): 1084–113; and Kathryn Kish Sklar, Anja Schüler, and Susan Strasser, eds., *Social Justice Feminists in the United States and Germany: A Dialogue in Documents, 1885–1933* (Ithaca, N.Y., 1998).

3 For contrasting views of feminist ideology, see Joan W. Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, Mass., 1996); and Karen M. Offen, "Defining Feminism: A Comparative Historical Perspective," *Signs* 14 (autumn 1988): 119–58.

freedom."[4] In 1848 both feminist movements used arguments based on equality and difference. Both challenged public and private barriers to urge that women's vocations for conflict resolution and nurturance must expand beyond the walls of the household to transform public life. Both also saw women's rights within the context of universal human rights: in America, the rights of slaves, and in Germany, those of workers.

Whereas the development of the American movement continued in the 1850s, that of feminist movements in the various German states was almost entirely quashed by the defeat of the 1848 revolutions and the reimposition of monarchical authority, enacted through the Association Law (*Vereinsgesetz*) of 1850, which forbade women membership in political parties or engagement in political activities. This law was in force in Prussia, the largest German state, until 1908, a highly repressive environment that partly accounted for some of the major differences between the American and German movements.

But the development of representative government in the two states also showed some similarities, most importantly in the granting of universal manhood suffrage after the wars of unification (the American Civil War of 1861–5 and the Prussian-Austrian and Franco-Prussian Wars, culminating in the unification of Germany in 1871). In the United States suffrage was extended to the newly liberated male but not female slaves in 1870; in the newly united Germany it was extended (at least on the federal level) to all males. In 1866 national organizations advocating women's rights had formed in both countries: in Germany, the General Association of German Women (Allgemeiner deutscher Frauenverein or AdF) and in the United States, the American Equal Rights Association, an organization composed of both feminists and male abolitionists. After 1870 feminists in both countries concluded that human rights doctrines that had linked the emancipation of women to that of other groups were ineffective in a political climate that was increasingly dominated by interest groups. Though by no means abandoning the earlier democratic idealism, German and American feminist organizations in both countries reformulated their approach to represent women as one of many groups deserving of rights because of its supposedly distinctive characteristics and its contributions to the general welfare. The American Equal Rights Association dissolved in 1869 and was replaced by two organizations: the

4 "Declaration of Sentiments" in Alice Rossi, ed., *The Feminist Papers from Adams to de Beauvoir* (New York, 1974), 417; Ute Gerhard, Elisabeth Hannover-Druck, and Romina Schmitter, eds., *Dem Reich der Freiheit werb'ich Bürgerinnen: Die "Frauen-Zeitung" von Louise Otto* (Frankfurt am Main, 1979), 39; Ute Gerhardt, *Unerhört: Die Geschichte der deutschen Frauenbewegung* (Hamburg, 1990), 60.

National Woman Suffrage Association and the American Woman Suffrage Association. Whereas the former group favored the pursuit of woman's suffrage through national strategies, the latter advocated a more gradual approach through campaigns in the individual states. Thus, suffrage continued to be a high priority for the Americans, whereas the Germans, still subject to the Association Law, concentrated on such seemingly nonpolitical activities as educational and charitable work. But for both movements, suffrage now seemed a very distant goal.

An aspect of "rights culture" that decisively influenced feminist movements in the two countries was the church–state relationship. In this area, as in its political structure, Germany was both authoritarian and conservative in comparison to the United States. Feminist movements since their beginnings had been inspired in large measure by Protestant religious ethics and activism. For example, many of the German women activists in 1848 had belonged to dissenting Protestant sects (the Free Congregations). In Germany these unorthodox movements had largely been crushed after the 1848 revolution. The mainstream German Protestant church, organized by the state, was a massive, centralized, and hierarchical structure in which women could have little real power or independence.[5]

American churches were not more feminist on average, but they were much less centralized and were supported not by the state but by their congregations. Radical sects, such as the Quakers, continued to produce feminist activists like Susan B. Anthony and many others. Although women were not allowed to serve on the governing boards of most Protestant churches, they exercised considerable influence through all-female groups, such as mission societies. These groups provided the first leaders of the Women's Christian Temperance Union (WCTU), founded in 1874 and dedicated to the prohibition of the sale and consumption of alcohol. The WCTU, which was ecumenical but distinctly Christian and Protestant, appealed to Christian women as housewives, mothers, and church members to oppose the social evils caused by alcohol.

The program of the WCTU was based on a specifically female conception of rights that applied to both the public and private spheres and placed the welfare of the family above individual rights that benefited chiefly males (in this case, the right to consume alcohol). Temperance

5 Sylvia Paletschek, *Frauen und Dissens: Frauen im Deutschkatholizismus und in den freien Gemeinden* (Göttingen, 1990); Ursula Baumann, *Protestantismus und Frauen-Emanzipation in Deutschland, 1850 bis 1920* (Frankfurt am Main, 1992); Cott, "Early Twentieth-Century Feminism"; and Gerhard, *Unerhört*, 72–4.

advocates proclaimed the right of women and children to be free of the abuses conventionally attributed to male drunkenness: spousal and child abuse, marital rape, and poverty. In the 1880s the WCTU became the largest single organization to join the suffrage movement.[6] The support of such large groups was a major reason that women's movements gained a mass following much earlier in the United States than in Germany. Although many German women became active temperance crusaders, no similar all-female organization existed in Germany, where temperance movements were mostly led by men.[7]

Another aspect of "rights culture" that shaped feminist programs was the difference in German and American conceptions of the function and extent of government, especially regarding its responsibility for the welfare of its citizens. The most prominent aspect of the difference between women and men for many American and German feminists was their dedication to a specifically female mission in the area of social reform. This mission, as variously interpreted and carried out by a host of women's groups, emphasized the right of individuals to social dependence as well as to individual independence. Feminist activism in both countries during the latter part of the nineteenth century was concentrated in private organizations working in the fields of education and social work.

Germany in the area of social legislation was relatively advanced in comparison not only with the United States but also with most other Western societies. In the German Empire social problems were addressed by a professional civil service of academically educated men under the leadership of the elite Social Policy Association (Verein für Sozialpolitik), founded in 1872. Pressure for social reform came from a militant labor movement organized within the Social Democratic Party. On the federal and local levels – starting with Bismarck's social insurance laws in the 1880s – governments actively engaged in the planning and provision of social services. In this area the relative advancement and modernity of the German system proved a serious obstacle to the growth of the feminist movement. Women's organizations, composed of volunteers rather than professionals, had a limited field of activity and little influence on public

6 Ann Douglas, *The Feminization of American Culture* (New York, 1977), 87–90; Kathryn Kish Sklar, "The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830–1930," in Koven and Michel, eds., *Mothers of a New World*, 61–2; Janet Zollinger Giele, *Two Paths to Women's Emancipation: Temperance, Suffrage, and the Origins of Modern Feminism* (New York, 1995); Ruth Bordin, *Women and Temperance, The Quest for Power and Liberty* (Philadelphia, 1981).

7 Elisabeth Meyer-Renschhausen, "Die Mässsigkeitsbewegung als Frauenkampf," in Jutta Dalhoff, Uschi Frey, and Ingrid Schöll, eds., *Frauenmacht in der Geschichte: Beiträge des Historikerinnentreffens 1985 zur Frauengeschichtsforschung* (Düsseldorf, 1986), 354–66.

policy. Official social welfare bureaucracies were extremely resistant to female participation; for example, the area of *Armenpflege* (poor relief, or social work among the poor) included very few women before the 1920s.[8]

By contrast, the relative weakness and backwardness of state social welfare structures in the United States provided a very favorable environment for the development of women's activism. In the 1870s the attempts to expand and reform civil services were defeated; cities and states continued to be governed chiefly by politicians. Pressure for social reform by an organized working class or socialist party hardly existed. The labor movement of this period had little political power and was ethnically and racially divided.[9] Social problems resulting from urbanization and industrialization, especially from the influx of immigrants, were overwhelming. This was the need to which private organizations of middle-class women responded. Women's clubs in every city, eventually consolidated in 1890 as the General Federation of Women's Clubs, took an interest in a wide variety of social issues.[10]

American women gained far more public visibility and power than their German counterparts; Julia Lathrop, a colleague of Jane Addams at Hull House in Chicago, was appointed head of the first federal agency devoted to the welfare of children, the Children's Bureau, in 1912. By then private women's organizations were so ubiquitous and energetic that they formed a "shadow welfare state."[11]

Still another right that was important to feminists was the right to education, particularly to higher education. In this area, too, feminists benefited from American backwardness and were hindered by German modernity. Until the mid-nineteenth century, American states had few public institutions of higher education or accreditation systems. This gap was filled by private institutions that operated with complete autonomy.

8 Allen, *Feminism and Motherhood*, 207–28; Christoph Sachsse, *Mütterlichkeit als Beruf: Sozialarbeit, Sozialreform und Frauenbewegung 1871–1986* (Frankfurt am Main, 1986); Elisabeth Meyer-Renschhausen, *Weibliche Kultur und soziale Arbeit: Eine Geschichte der Frauenbewegung am Beispiel Bremens 1810–1927* (Cologne, 1989).

9 Sklar, "Historical Foundations," 43–93; Kathryn Kish Sklar, *Florence Kelley and the Nation's Work* (New Haven, Conn., 1995), 200–7.

10 Allen, *Feminism and Motherhood*, 214–15; William Leach, *True Love and Perfect Union: The Feminist Reform of Sex and Society* (New York, 1980); Allen F. Davis, *Spearheads of Reform: The Social Settlements and the Progressive Movement* (New York, 1967); Sklar, "Historical Foundations," 60–75; Barbara Sichtermann, "Working it Out: Gender, Profession, and Reform in the Career of Alice Hamilton," in Noralee Frankel and Nancy S. Dye, eds., *Gender, Class, Race, and Reform in the Progressive Era* (Lexington, Ky., 1991), 127–48.

11 Sklar, "Historical Foundations," 69–75; Seth Koven and Sonya Michel, "Womanly Duties: Maternalist Policies and the Origins of Welfare States in France, Germany, Great Britain, and the United States," *American Historical Review* 95 (1990): 1076–108.

American feminists had founded women's colleges as early as the 1830s, and by 1900 a substantial number of college-educated women set the agenda for many aspects of American feminism, including both the suffrage and the social-reform movements. Women's colleges also provided a setting for women's participation in intellectual life.[12]

By contrast, Germany had a long-standing tradition of state support for, and regulation of, universities. The feminists' campaign for the admission of women to universities faced the far more difficult task of changing entrenched state structures. As a preparation for secure and lucrative civil-service careers, moreover, higher education in Germany had acquired much greater prestige than in the United States and thus was more staunchly defended as a bastion of male privilege. For these reasons, the admission of women to universities in Germany came much later than in America – the first state system to admit them was Baden in 1900; in Prussia, the largest state system, they were not admitted until 1908.[13]

Still another reason for the much greater impact and following gained by feminist movements in the United States was the differing impact of class and racial conflicts on feminist ideology and tactics. By the 1890s the many different groups had fused into large umbrella organizations: In the United States, the National American Woman Suffrage Association (NAWSA) was founded in 1891, and in Germany the League of German Women's Associations (Bund deutscher Frauenvereine, or BDF) was founded (partly in response to the American model) in 1894. But the expansion of women's movements also caused conflict. Not all women accepted the leadership of the mainstream organizations, and women's movements split along the countries' social cleavages.

In Germany class was the major social cleavage, and class issues had an impact on both the female suffrage movement and the development of women's reform programs. Even after the grant of universal male suffrage in the Reichstag elections in 1871, suffrage remained a class issue for many states, especially Prussia (the state in which the Social Democratic Party had the greatest electoral support), which still had class-based suffrage (the so-called three-class voting system). Socialist women's groups, still not allowed formal party membership, organized in the 1890s. The chiefly middle-class BDF, which cited the Association Law that banned political

12 Rosalind Rosenberg, *Beyond Separate Spheres: Intellectual Roots of Modern Feminism* (New Haven, Conn., 1982), 28–52; Helen Lefkowitz Horowitz, *Alma Mater: Design and Experience in the Women's Colleges from Their Nineteenth-Century Beginnings to the 1930s* (Boston, 1984).

13 James C. Albisetti, *Schooling German Girls and Women: Secondary and Higher Education in the Nineteenth Century* (Princeton, N.J., 1988), 204–306.

work but was also motivated by class antagonism, excluded socialist women's groups from membership. Socialist women, under the leadership of Clara Zetkin, refused all contact with bourgeois feminists, urging working-class women to strive for the overthrow of the capitalist system rather than for reforms that would benefit only the ruling class.[14]

The first suffrage organization founded by German bourgeois feminists was the German Woman Suffrage League (Deutscher Verein für Frauenstimmrecht), which opened its headquarters in Hamburg in 1902, one of the few German states that had no association law prohibiting female political participation. After the revision of the Prussian Association Law in 1908 to permit such participation the suffrage movement increased in influence, although it still had limited support. Nonetheless, socialist and bourgeois groups still refused to cooperate with each other, and the bourgeois movement was further split on the issue of the Prussian three-class voting system. Some bourgeois feminists joined the socialists in opposing this system; others upheld it by advocating the vote for women on the same terms as men. Class conflicts divided and weakened the movement to broaden German suffrage. Socialism, an important force for the improvement of the status of working men and women, nonetheless created an obstacle to feminist unity across class lines.[15]

The story of the American suffrage movement of this era is quite different: Although class tensions were in fact very deep, they were not generally understood through socialist theories of class conflict. Not only was the influence of socialism incomparably weaker than in Germany, but suffrage, because it was free of class or property qualifications, was an issue on which working-class and middle-class women, who might disagree on other issues, could unite and work together.[16] A much harder dividing line was race. The national leadership of the NAWSA respected the white supremacist views of many of its southern member organizations and often refused to condemn discrimination against black women. In somewhat the same way as socialist women in Germany, black American women created their own, separate organizations and often rejected the white women's movement's separation of women's rights from those of

14 Gerhard, *Unerhört*, 280–91; Evans, *Feminist Movement in Germany*, 145–76. On socialist feminism, see Jean H. Quataert, *Reluctant Feminists: Women in German Social Democracy* (Princeton, N.J., 1978); and Anna-E. Freier, *Dem Reich der Freiheit sollst Du Kinder gebären: Der Antifeminismus der proletarischen Frauenbewegung im Spiegel der Gleichheit 1891–1917* (Frankfurt am Main, 1981).

15 Barbara Greven-Aschoff, *Die bürgerliche Frauenbewegung in Deutschland 1894–1933* (Göttingen, 1981), 90–118; Bärbel Clemens, *Menschenrechte haben kein Geschlecht! Zum Politikverständnis der bürgerlichen Frauenbewegung* (Pfaffenweiler, 1988), 79–102.

16 Mary Jo Buhle, *Women and American Socialism* (Urbana, Ill., 1981); Nancy Cott, *The Grounding of Modern Feminism* (New Haven, Conn., 1987), 11–83.

all people suffering disadvantage.[17] Because American blacks were a much smaller and less powerful group than German socialists, however, black women's protests against the exclusionary tactics of white women could not seriously disrupt the increasingly triumphal conviction of unity and sisterhood that pervaded American feminist rhetoric in the early twentieth century.

Among the rights proclaimed by feminists at the turn of the century in both countries were the rights of mothers, which usually entailed some form of state support for child rearing. This was another attempt to broaden the existing rights culture to include specifically female rights that applied to both the public and private spheres. On these issues the position of the German feminists was arguably more "modern" than that of their American counterparts, a difference reflecting the broader differences between the German expansive and the American limited state.

Since the 1890s some German feminists, both socialist and bourgeois, arguing that motherhood was an important service that deserved state support, had developed the concept of *Mutterschutz* (protection of mothers), which included state-sponsored maternity insurance, paid maternity leave, and medical services to mothers and children. The most vocal advocates of such programs belonged to a radical organization, the League for the Protection of Mothers (Bund für Mutterschutz or BfM). But the mainstream BDF also included the demand for a "comprehensive maternity insurance" in its programs, starting in 1907.[18] With the support of the Social Democratic Party, existing national maternity leave and insurance provisions were expanded in 1914 and formed the basis for the welfare-state provisions introduced in the 1920s.[19]

In the United States, however, the minority of women who admired and urged the adoption of this German model could not persuade the majority of feminists. Adhering to American beliefs in limited government and self-reliance, most feminists feared that such governmental measures would weaken the commitment of men to their families. They therefore pushed for state-sponsored "mothers' pensions," intended only

17 Rosalind Terborg-Penn, "Discontented Black Feminists: Prelude and Postscript to the Passage of the Nineteenth Amendment," in Kathryn Kish Sklar and Thomas Dublin, eds., *Women and Power in American History: A Reader*, 2 vols. (Englewood Cliffs, N.J., 1991), 132–45; Rosalind Terborg-Penn, "Discrimination Against Afro-American Women in the Woman's Movement, 1830–1920," in Sharon Harley and Rosalind Terborg-Penn, eds., *The Afro-American Woman: Struggles and Images* (Port Washington, N.Y., 1978), 17–27.

18 The 1907 program is reprinted in Greven-Aschoff, *Bürgerliche Frauenbewegung*, 287–90.

19 Allen, *Feminism and Motherhood*, 135–228; Christoph Sachsse, "Social Mothers: The Bourgeois Women's Movement and German Welfare-State Formation, 1890–1929," in Koven and Michel, eds., *Mothers of a New World*, 136–58.

for widows or families with absent breadwinners who could meet strict standards of respectability and domestic hygiene. Such programs were enacted on the state level starting in the pre–World War I period and on the federal level in 1935 (as Aid to Families with Dependent Children). This outcome reflected not only the weakness of socialist influence among American feminists and in American society as a whole but also the strength of racial prejudice. "Deserving" was often a code word for "white," and in fact few black mothers qualified for AFDC until the 1960s.[20]

Among a small but growing minority of feminists the rights of mothers included the right to what they called "voluntary motherhood" through access to birth control technology and sometimes to abortion. The greatest difference between the German and American feminist movements at the turn of the century was the far greater and more visible attention given to these issues by the Germans than by the Americans.[21] The BfM – a small but conspicuous group – supported not only birth control and abortion rights but other forms of sex radicalism. The mainstream BDF staged an extensive and very thoughtful debate at its 1908 convention on a proposal recommending the total abolition of all laws against abortion (the proposal was voted down). American mainstream organizations, by contrast, shied away from such issues for fear of offending the public.[22] One of many possible reasons for this difference was the smaller growth and narrower base of support for the German feminist organizations. In the repressive atmosphere created by the Association Law these organizations remained much more elite and therefore (at least at their upper levels) more receptive to radical ideas, than the massive American movements that by this time included large groups of religious women. As soon as such a contingent, the German League of Protestant Women (Deutsch-Evangelischer Frauenbund), entered the BDF in 1908, the organization's tolerance for sexual radicalism (though not for the reform of laws on marriage and family) came to an end.[23]

Despite the very different wartime experiences of the two nations, German and American feminist organizations developed similarly in some respects during World War I. The war, which in both countries brought an expanded role for women's organizations, nonetheless had a divisive

20 Sonya Michel, "The Limits of Maternalism: Policies Toward American Wage-Earning Mothers During the Progressive Era," in Koven and Michel, eds., *Mothers of a New World*, 277–320; Alisa Klaus, "Depopulation and Race Suicide: Maternalism and Pronatalist Ideologies in France and the United States," in Koven and Michel, eds., *Mothers of a New World*, 188–212; Molly Ladd-Taylor, *Mother-Work: Women, Child-Welfare, and the State, 1890–1930* (Urbana, Ill., 1994), 135–66.

21 Cott, "Early Twentieth-Century Feminism," 241–4.

22 Ibid., 245. 23 Allen, *Feminism and Motherhood*, 188–205.

and chilling impact on feminist movements: The pressure on women to support the war effort created bitter factional divisions between the patriotic majority and a pacifist minority that refused cooperation and tried to continue the international contacts among feminists that had flourished before the war through such organizations as the Women's International League for Peace and Freedom.[24]

In the United States the National Women's Party (NWP), founded in 1916, dissented from the NAWSA's nonpartisan approach to party politics by actively opposing politicians who refused to support women's suffrage. When the NWP insisted on aggressively continuing the suffrage struggle even after the United States had entered the war, it was bitterly criticized by the leadership of the NAWSA for offending patriotic public opinion. The granting of suffrage to women after the war – in Germany in 1919 and in the United States in 1920 – was in both cases as much a reward for their support of their nations' war effort as for their suffrage activism. Their war experiences encouraged feminists in both countries to emphasize their respectability and patriotism, to mistrust radical social criticism, and to avoid connections to other controversial movements or causes.[25]

In the prewar period the strength of feminism in both Germany and the United States arose from a successful combination of arguments and strategies in asserting women's rights to both equality and difference. By constrast, in both countries the 1920s were a period of decline for feminist movements, in which the winning of suffrage precipitated a crisis of indecision and disunity. One major cause of this disunity was a new distinction between ideologies stressing equality and difference, which now became the focus of factional dispute.

In America the debate hinged on the Equal Rights Amendment (ERA), introduced into Congress by the NWP in December of 1923. It read "men and women shall have equal rights in the United States and in every place subject to its jurisdiction."[26] The ensuing discussion pitted

24 On feminists' wartime activities, see Linda Schott, *Reconstructing Women's Thoughts: The Women's International League for Peace and Freedom Before World War II* (Stanford, Calif., 1997); and Carrie A. Foster, *The Women and the Warriors: The U.S. Section of the WILPF, 1915–1946* (Syracuse, N.Y., 1995).

25 Cott, *Grounding of Modern Feminism*, 51–82; Greven-Aschoff, *Die bürgerliche Frauenbewegung*, 150–8; Gerhard, *Unerhört*, 292–322; Irene Stoehr, *Emanzipation zum Staat? Der Allgemeine Deutsche Frauenverein – Deutscher Staatsbürgerinnen-Verband (1893–1933)* (Pfaffenweiler, 1990), 73–90.

26 The Fourteenth Amendment, ratified in 1869, had provided that the states could not violate the civil rights of citizens; however, the decision of the Supreme Court in *Minor v. Happersett*, 88 U.S. 62 (1875), ruled that the status of women as citizens did not guarantee them the right of suffrage. See Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York, 1991), 170–4.

the advocates of legal equality, chiefly the members of the National Women's Party, against the proponents of protective legislation who feared that, in the absence of economic and social equality, "equal rights" in law could only increase the disadvantages suffered by women. The Amendment was defeated in Congress. In Germany an article providing for equal rights was introduced into the new Weimar constitution in 1919, and a similar debate concerned its wording. The paragraph read, "Men and women basically (*grundsätzlich*) have the same rights and duties"; the word *grundsätzlich* was inserted to allow for a military draft. Socialist women who were Reichstag deputies argued for the elimination of *grundsätzlich*, but were opposed by their colleagues in the Center (Catholic) and right-wing parties. The American constitution therefore acquired no equal-rights amendment, and the German constitution contained one so ambiguously worded that it had almost no practical value. Most forms of disadvantage and discrimination suffered by women in the prewar period continued into the 1920s.[27]

In the 1920s the "equality or difference" issue was fought out on the level of political strategy. Some feminists argued, chiefly from the "equality" position, that the winning of political rights had made separate women's organizations obsolete and that the struggle for equality should now be waged through the political parties, in which women now had full rights of membership. This strategy was unproductive in both countries for basically the same reason: In the male-dominated parties (whether the American Republicans and Democrats, or the multiple German parties), women's issues had very low priority, particularly because politicians discovered that women did not vote as a bloc and that as many or more of their votes went to parties that opposed than to those that supported women's rights.[28] Thus, not only did female office-holders and members of political parties fail to protect the rights of women – for example, the right of German female civil servants to tenure in their positions – but they also lacked the power to protect programs benefiting mothers and children. In Germany the public agencies set up to oversee child welfare by the Youth Welfare Law (*Jugendwohlfahrtsgesetz*) of 1922 were devastated by economic crises; in America the Sheppard-Towner Act of 1921, which allotted federal funds to infant and mater-

27 Cott, *Grounding of Modern Feminism*, 115–42; Kathryn Kish Sklar, "Why Were Most Politically Active Women Opposed to the ERA in the 1920s?" in Dublin and Sklar, eds., *Women and Power*, 175–82; Gerhard, *Unerhört*, 341–2; Greven-Aschoff, *Die bürgerliche Frauenbewegung*, 168–72.

28 Cott, *The Grounding of Modern Feminism*, 51–114; Greven-Aschoff, *Die bürgerliche Frauenbewegung*, 171–87.

nity care, was repealed by Congress in 1928 as a symptom of creeping socialism.[29]

During this decade many women's organizations in both countries argued from the "difference" position that women should rise above male-dominated political struggles to create a distinctively female, feminist agenda. In Germany the BDF continued to exist; in the United States the NAWSA dissolved itself and was succeeded by the League of Women Voters, which had its German counterpart in the German League of Woman Citizens (Deutscher Staatsbürgerinnen-Verband, the former ADF).[30] In addition, many other women's groups pursued their own conceptions of a nonpartisan feminist mission. There were two problems with this course: The first was that nonpartisanship often meant political impotence, and the second was that, as the women's spheres of activity widened, they agreed even less than in the past on the proper content and scope of the feminist agenda. In both Germany and America, women's professional organizations turned the energies of many elite women from the cause of women as a group to the defense of their own, narrowly conceived professional rights and interests. German socialist and American black women still worked in separate organizations, preferring the interests of their class or race to those of a group called "women" in which they still did not feel fully included. For example, the members of an American black women's organization, the National Association of Colored Women's Clubs, were disappointed and angered by the refusal of the NWP to regard the disfranchisement of southern black women as a "women's issue" (because black women and men were equally affected, the NWP termed this a "racial issue"). Organized black women turned their attention away from feminist to racial issues.[31]

In addition, in both countries the 1920s saw an intensification of nationalism and racism, which poisoned the political atmosphere in which women's movements operated. Women's organizations and leaders who sought to renew and strengthen international contacts came under attack from large, right-wing women's organizations: in America the Daughters of the American Revolution, and in Germany the National Union of German Housewives' Associations (Reichsverband deutscher

29 Sachsse, *Mütterlichkeit als Beruf*, 187–249; Susanne Zeller, *Volksmütter: Frauen im Wohlfahrtswesen der 20er Jahre* (Düsseldorf, 1987), 85–180; Ladd-Taylor, *Mother-Work*, 167–96.

30 Cott, *Grounding of Modern Feminism*, 83–114; Greven-Aschoff, *Die bürgerliche Frauenbewegung*, 167–79; Stoehr, *Emanzipation zum Staat?*, 91–116.

31 Terborg-Penn, "Discontented Black Feminists," 138–45; Renate Pore, *A Conflict of Interest: Women in German Social Democracy, 1919–1933* (Westport, Conn., 1981), 48–69.

Hausfrauenvereine). These groups attacked such leaders as the Americans Carrie Chapman Catt and Jane Addams, and the Germans Gertrud Bäumer and Agnes von Zahn Harnack as agents of subversion and godless Bolshevism. And in both countries the results were quite similar: Fearful of losing the support of the right-wing groups, feminist leaders moved their own programs to the right. The League of Women Voters disavowed the very notion of a women's agenda and supported only neutral "good government," and the NWP, increasingly dominated by Republican women, endorsed the Republican ticket headed by Herbert Hoover in 1928, even though the Republicans did not support the NWP's chief issue, the ERA.[32]

The most fateful result of the German middle-class feminists' turn to the right during these years was their failure to organize a vigorous protest against the rise of National Socialism, which emerged as a major political force in 1930. On this issue, the ineffectiveness of both "equality" and "difference" strategies became apparent. The women in the political parties were deprived of what little influence they had by the disruption of parliamentary government after 1930, and the BDF was constrained by its commitment to nonpartisan neutrality, which prevented it from explicitly opposing any political party.[33] The necessity of appeasing the right-wing housewives' associations (until they finally left the organization in 1931) also shaped the policy of the BDF. Individuals within the BDF and its member organization, the League of German Woman Citizens, put up a belated but courageous protest against the misogyny and anti-Semitism of the National Socialists in 1932. After the Nazi "seizure of power" in January 1933 the BDF was ordered to change its policies in order to enter a new party-led women's organization, the Women's Front (Frauenfront); the majority of its members voted to refuse the new guidelines, which included the so-called Aryan Paragraph requiring the expulsion of Jewish members, and to disband. The League of German Woman Citizens also rejected such guidelines and was forcibly disbanded.[34] Other member organizations of the BDF, however, adapted their policies to the new rules and were able to continue, at least for a time. (Most of the remaining groups were abolished or incorporated into party organizations by 1938.)

Many historical works have accused the BDF and its member organizations of passive capitulation to National Socialism and have included

32 Cott, *The Grounding of Modern Feminism*, 261; Else Ulich-Beil, *Ich ging meinen Weg: Lebenserinnerungen* (Berlin, 1961), 123–9; Gerhard, *Unerhört*, 349–59.

33 See the statement by Gertrud Bäumer, editor of the BDF journal *Die Frau* and the most prominent politician produced by feminist movements, in Gertrud Bäumer, "Das Haus ist zerfallen," *Die Frau* 40 (June 1933): 513–14.

34 Ulich-Beil, *Ich ging meinen Weg*, 135–44; Stoehr, *Emanzipation*, 131–8; Gerhard, *Unerhört*, 373–80.

feminism in a general indictment of the anti-socialist and racist proclivities of the German bourgeoisie.[35] Without in the least denying the involvement of individual feminists in the collective responsibility of German society (however this responsibility is understood) for the rise and success of the Nazis, one can question the attribution of the weaknesses and failures of feminism to any specifically German pathology. Tendencies to right-wing political agendas and to weakness and disunity were shared by similar movements in other Western countries and reflected a crisis that was international in scope.

Another argument against the causal connection of feminism and National Socialism is that, in the United States, very similar tendencies had a very different outcome. American feminists had been just as susceptible to conservatism, nationalism, and racism as their German counterparts. But with the coming of the New Deal the progressive energies of the women's organizations were revived by the elevation of several prominent women reformers to national office, including Frances Perkins, the secretary of labor from 1934 to 1945; Nellie Tayloe Ross, director of the mint from 1933 to 1952; Molly Dewson, chair of the Women's Division of the Democratic National Committee and a member of the Social Security Board; and Marion Glass Bannister, assistant treasurer of the United States from 1933 to 1951.[36]

Some historians have argued that the German feminists' continued adherence to ideologies stressing gender difference and "social motherhood" predisposed them to National Socialism. "The middle-class women's rights organizations," writes Claudia Koonz, "subscribed to an ideal of motherhood shared by Hitler and his followers, and their nationalism made women susceptible to a dictatorship that promised a restoration of order and a revival of patriotism."[37] Koonz's thesis has been vigorously disputed by the German historian Gisela Bock, whose groundbreaking study of Nazi sterilization policies argues that Nazi policies in fact rejected rather than affirmed feminist ideas of gender difference. The truly innovative aspect of Nazi reproductive policies, Bock argues, was not the pronatalist measures that encouraged childbearing among "racially qualified" women – which in many respects resembled those enacted by other contemporary Western societies – but the antinatalist measures that denied motherhood to substantial groups of "inferior" women. Such policies certainly contradicted any conception, whether

35 Koonz, *Mothers in the Fatherland*, 144–6; Evans, *Feminist Movement in Germany*, 235–75; Reagin, *German Women's Movement*, 249–57.

36 Susan Ware, *Beyond Suffrage: Women in the New Deal* (Cambridge, 1981), 145–53.

37 Koonz, *Mothers in the Fatherland*, 144; see also Reagin, *German Women's Movement*, 242–7.

feminist or nonfeminist, of a universal female vocation for motherhood or domesticity. [38]

Moreover, the Third Reich actually had little use for feminist conceptions of social motherhood, which affirmed philanthropic care and compassion for the weak and unfortunate as central values. Bock shows that Nazi policy makers excluded women jurors from the tribunals established to determine the fate of candidates for sterilization, citing women's motherly concern for all children, even the handicapped, as the disqualifying factor.[39] Bock also points out that Nazi pronatalist policies aimed to restore patriarchal dominance in the family (for example, through marriage loans contingent on a "woman quitting her jobs and payable to the husband").[40] Many other Nazi policies demonstrate the regime's hostility to feminist ideas of gender difference. Not only did the Nazis remove leading Weimar-era feminists from governmental positions – most conspicuously Gertrud Bäumer, who was forced to resign from her position in the Ministry of the Interior – but they reorganized the female-dominated professional organizations that had been among the foremost exponents of social motherhood under male leadership. For example, the new male leaders of the German Froebel Union (Deutscher Froebelverein), an organization of kindergarten teachers, denounced existing kindergarten pedagogy, which had emphasized motherly concern for the individual child, as dangerously sentimental and proclaimed new norms of masculine toughness.[41] The German Christians, the National Socialist faction within the Protestant churches, proclaimed a new, "manly" Christian faith that denigrated both the leadership of women in the church and Christian values such as humility, compassion, and love transcending national and racial differences, which they stereotyped as feminine.[42] The national cult of motherhood, exemplified by such ceremonies as pinning the Mothers' Cross on mothers of large families and the elaborate annual Mothers' Day celebrations, conferred no material advantage on women and trumpeted the masculine values of military preparedness and female subordination.[43]

38 Gisela Bock, "Gleichheit und Differenz in der nationalsozialistischen Rassenpolitik," *Geschichte und Gesellschaft* 19 (1993): 277–310.

39 Gisela Bock, *Zwangssterilisation im Nationalsozialismus: Studien zur Rassenpolitik und Frauenpolitik* (Opladen, 1986), 196.

40 Gisela Bock, "Die Frauen und der Nationalsozialismus: Bemerkungen zu einem Buch von Claudia Koonz," *Geschichte und Gesellschaft* 15 (1989): 563–79.

41 E.g., R. Benzing, *Grundlagen der körperlichen und geistigen Erziehung des Kleinkindes im nationalsozialistischen Kindergarten* (Berlin, 1941).

42 Doris L. Bergen, *Twisted Cross: The German Christians in the Third Reich* (Chapel Hill, N.C., 1996).

43 Irmgard Weyrather, *Muttertag und Mutterkreuz: Der Kult um die "deutsche Mutter" im Nationalsozialismus* (Frankfurt am Main, 1993); see also the opinion of Bock, *Zwangssterilisation im Nationalsozialismus*, 118–28, 207.

Koonz gives feminists some responsibility for the tendency of German women to retreat into a sentimentally idealized private sphere of home and family, which furnished a convenient refuge where male perpetrators could find the emotional support that enabled them to continue their grisly work. Thus Koonz establishes a direct connection between theories of gender difference and the Holocaust: "Mothers and wives," she argues, "made a vital contribution to Nazi power by preserving the illusion of love in an atmosphere of hatred."[44] But, however the familial role of women during the National Socialist era is understood (a question too complex to discuss here), such a narrowly domestic definition of women's responsibility cannot be attributed to feminist movements, which, although often praising and supporting the work of mothers in the home, always connected the home and the broader society. A comparison with the American New Deal, which by contrast to the Third Reich placed proponents of "social motherhood" in very responsible positions, shows that this form of feminism could provide a rationale for highly visible and effective public work.

This brief discussion of German and American feminist movements suggests the corrective influence that comparison can exert on the still prevalent tendency to interpret all historical phenomena within the framework of national histories. German national histories still tend to portray all aspects of bourgeois culture, including feminism, as tainted by the pattern of conservatism, authoritarianism, and racism that culminated in National Socialism. In fact, comparisons of German feminism to its counterparts in other countries, although it does reveal some differences of emphasis, shows little that is uniquely German. Feminist movements were less massive, active, and visible in Germany than in America, but this difference was attributable not only to the relatively authoritarian or conservative, but also to the relatively advanced and modern aspects – particularly the early involvement of the state in such areas as social welfare and higher education – of the German state. The welcome decline of theories of German exceptionalism will open the way to a more balanced view of the complex history of women's movements.[45]

44 Koonz, *Mothers in the Fatherland*, 17; see also Koonz's response to Bock's review, Claudia Koonz, "Erwiderung auf Gisela Bocks Rezension von *Mothers in the Fatherland*," *Geschichte und Gesellschaft* 18 (1992): 394–9; and Bock's response, "Ein Historikerinnenstreit?" *Geschichte und Gesellschaft* 18 (1992): 400–4.

45 Cf. Jean H. Quataert, "Introduction 2: Writing the History of Women and Gender in Imperial Germany," in Geoff Eley, ed., *Society, Culture, and the State in Germany, 1870–1930* (Ann Arbor, Mich., 1996), 43–66.

12

Minorities, Civil Rights, and Political Culture

Gay and Lesbian Rights in Germany and the United States

MICHAEL DREYER

The persecution of minorities has been a persistent fact of history. The modes of persecution have changed over time, and the minorities that were persecuted and the reasons forwarded for the persecution have varied greatly. But rare was a society that did not define its outsiders, deviants, and scapegoats against whom the rest of society could feel united and elevated. Democracies are by no means immune to this urge to define a real or imagined internal enemy. The way in which a society deals with its minorities can be used to measure its overall political climate and the liberalism attained in its everyday political life beyond the realm of constitutional promises. At the same time, a cross-national perspective on the fate of minorities offers valuable insight into different political cultures. The comparative value is enhanced when one looks at a group that is common to more than one country or society.

This chapter focuses on the gay and lesbian minority in the United States and Germany. The emphasis here is on the political and legal strategies employed by this minority to change its legal and social situation in both countries. Because I try to cover developments in two quite different political entities over the course of a century, a few shortcuts are inevitable. This means, mainly, that current debates are covered only in passing.[1] First, I establish an analytical framework that provides the

1 For contemporary political debates, see Barry D. Adam, *The Rise of a Gay and Lesbian Movement*, 2d. ed. (New York, 1995); Chris Bull and John Gallagher, *Perfect Enemies: The Religious Right, the Gay Movement, and the Politics of the 1990s* (New York, 1996); and Morris Kaplan, *Sexual Justice: Democratic Citizenship and the Politics of Desire* (New York, 1997). For theoretical discussions, see Mark Blasius, *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Philadelphia, 1994); Sabine Hark, *Deviante Subjekte: Die paradoxe Politik der Identität* (Opladen, 1996); and Shane Phelan, ed., *Playing with Fire: Queer Politics, Queer Theories* (New York, 1997). For legal aspects, see

conceptual means of comparing the subject matter at hand. Second, a historical overview establishes a time frame that outlines the obstacles gays and lesbians have had to overcome on the way to equal protection. Third, the respective strategies of the German and American movements are closely scrutinized. This leads, fourth and finally, to a few structural conclusions that shed some light on the political cultures in Germany and the United States. The political culture is, at the same time, our starting point.

TOOLS FOR ANALYSIS

The concept of political culture has been one of the most successful theoretical approaches in political science. Ever since the groundbreaking study by Gabriel Almond and Sidney Verba, political culture has been used as a means of analyzing and classifying political entities.[2] Broadly speaking, Almond and Verba distinguished three different ideal types of political culture: parochial, subject, and participant. Basically, these ideal types correspond to different stages of historical development, from crude beginnings to sophisticated civilizations. In real life, democratic political systems should be accompanied by a civic culture, which is based primarily on the participant political culture, with some more-or-less visible remnants from the subject and even parochial political cultures. The United States is the prime example of such a civic culture, whereas Germany during the mid-1950s, the time of Almond and Verba's original research, could still be classified as basically a subject political culture. Although the political system had been democratized since the days of the Kaiser, the German political culture did not keep pace with these changes.

However, the situation changed dramatically in the 1960s and 1970s. A later study under the same auspices revisited the civic culture and, with regard to Germany, came to the conclusion that Germany had undergone developments that had generally replaced the subject culture with a civic culture, not unlike those of the Anglo-Saxon world.[3]

These changes are bound to deeply influence the political strategies of minorities looking for betterment in their legal and social situations.

Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford, 1995); and Didi Herman and Carl Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia, 1995).

2 Gabriel Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton, N.J., 1963).

3 Gabriel Almond and Sidney Verba, eds., *The Civic Culture Revisited* (Boston, 1980).

Whereas a civic culture, dominated by the ideal "participant" type, expects its citizens to participate in political affairs and to converse freely in communal affairs, a subject political culture as a rule discourages political involvement. Open forms of protest, such as demonstrations, petition drives, or civic initiatives, are seen as disturbing the societal order. Consequently, the gatekeepers of the political system (to borrow David Easton's concept) will see to it that certain issues are never allowed to enter the political domain.[4] It should be expected that minority movements (or, for that matter, majorities) are aware of the constraints of the political system under which they operate. Strategies that offer bright prospects in a civic culture will run aground in a subject culture – and vice versa. As the political culture undergoes changes, as on the level witnessed in Germany since the 1960s, political strategies will change accordingly.

For over a century the gay and lesbian movements in Germany had to carefully map out appropriate political maneuvers in furthering their cause on the way to legal recognition. Gays and lesbians are probably the only minority that is common to both Germany and the United States, and to all other countries as well. Their percentage of the population is basically constant over time and place, but their situation within society has been anything but constant. Liberalism and tolerance on the one hand and repression and persecution on the other have taken turns in German and U.S. history, and still do on a worldwide scale.[5] The treatment of its gay and lesbian citizens can serve as an indicator of a political system's overall liberalism, and, conversely, the political strategies employed by that minority offer a good insight into the country's political culture.

A closer look at such strategies has to be prefaced, however, by a brief evaluation of the time frame and the main events in the German and American history of the gay and lesbian movement.[6]

4 David Easton, *A Systems Analysis of Political Life* (New York, 1965).

5 Take the situation of homosexuals in Islamic countries like Iran, where male homosexual behavior is still punishable by death according to Article 110 of the penal code. Lesbians face 100 lashes (Article 129). Romania, which has applied to join the European Union, punishes virtually all homosexual behavior with up to five years imprisonment. And these are just two examples.

6 For a comprehensive historical overview, see *Goodbye to Berlin? 100 Jahre Schwulenbewegung* (Berlin, 1997); and Mark Blasius and Shane Phelan, eds., *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics* (New York, 1997). Two encyclopedias are indispensable: Rüdiger Lautmann, ed., *Homosexualität: Handbuch der Theorie- und Forschungsgeschichte* (Frankfurt am Main, 1993); and Wayne R. Dynes, ed., *Encyclopedia of Homosexuality*, 2 vols. (New York, 1990). Brief and not exclusively for the academic reader but still worthwhile are Neil Miller, *Out of the Past: Gay and Lesbian History from 1869 to the Present* (New York, 1995); Helmut Blazek, *Rosa Zeiten für rosa Liebe: Zur Geschichte der Homosexualität* (Frankfurt am Main, 1996); and, for Germany, John Lauritsen, and David Torstad, *The Early Homosexual Rights Movement, 1864–1935*, 2d ed. (Ojai, Calif., 1995); James D. Steakley, *The Homosexual Emancipation Movement in Germany* (New York, 1975); and Hans-Georg Stümke, *Homosexuelle in Deutschland: Eine politische Geschichte* (Munich, 1989).

FROM PERSECUTION TO PROMINENCE, 1897–1997

Germany: The Infamous Paragraph 175

The (first) unification of Germany by Otto von Bismarck in 1871 brought in its wake a common penal code that superseded the individual penal codes of the different constituent states. Germany, unlike the United States, tolerated only minor legal differences among the states. This meant, for all practical purposes, the extension of the Prussian penal code throughout the Reich and the abolition of contrary provisions in the individual state laws.

This meant the universal application of the new Paragraph 175, which prohibited male–male sexual intercourse and made it punishable by imprisonment.[7] Paragraph 175 was identical to Paragraph 152 of the short-lived North German Federation's penal code, which in turn was based on Paragraph 143 of the Prussian penal code of 1851. In the years before Paragraph 175, however, the legal situation in the different German principalities had been anything but uniform. In 1813 Bavaria, one of the most liberal German states at that time, had decriminalized male homosexuality under the influence of Napoleon's *Code pénal* (1810), which, apparently for the first time in modern history, lifted the legal sanctions against homosexual acts. Other German states followed the Bavarian lead, but when Prussia imposed its harsher view, liberal legal traditions ceased in these states as well.[8] Still, it is worth noting that Bavaria experienced no fewer than fifty-eight years of liberalism with regard to male homosexuality in the nineteenth century.[9]

Paragraph 175 was directed exclusively against male homosexuality. Lesbian behavior was not criminalized, not necessarily out of some enlightened respect toward women but rather because women were not important enough to penalize for deviant behavior. At a time when the chances for women to live economically independent lives were severely limited, lesbianism as an open lifestyle could not play any major, visible

7 On this complex, see three articles in Rüdiger Lautmann and Angela Taeger, eds., *Männerliebe im alten Deutschland: Sozialgeschichtliche Abhandlungen* (Berlin, 1992): Rüdiger Lautmann, "Das Verbrechen der widernatürlichen Unzucht: Seine Grundlegung in der preussischen Gesetzesrevision des 19. Jahrhunderts," 141–86; Jörg Hutter, "Die Entstehung des § 175 im Strafgesetzbuch und die Geburt der deutschen Sexualwissenschaft," 187–238; and Angela Taeger and Rüdiger Lautmann, "Sittlichkeit und Politik: §175 im Deutschen Kaiserreich (1871–1919)," 239–68.

8 On Württemberg (1839), Braunschweig (1840), and Hanover (1840), see Stümke, *Homosexuelle in Deutschland*, 11.

9 If one takes the decriminalization of 1969 as a starting point, this will be duplicated in Germany in 2027.

(and threatening) role. Consequently, lesbians and the women's movement at large could concentrate on opening up educational and employment opportunities for women, in a legal situation that did not touch them. The right to vote, the abortion issue, and employment chances beyond teaching were the more urgent issues of the day.[10] But even for male homosexuals Paragraph 175, as interpreted by the courts, was not (yet) an all-out criminalization. Homosexuality as such was not a crime, and even acts like mutual masturbation remained outside the criminal realm. The law applied only to a limited range of behavior, mainly to completed male–male sexual intercourse. Naturally, these acts were hard to prove if both parties agreed to keep them secret. However, male prostitutes who, as a rule, had much less to lose than most of their clients, could always resort to blackmail. Paragraph 175 threatened to ruin the lives and reputations of many dignified citizens, even if a trial did not result in conviction.

The legal situation remained basically unchanged during the eras of the Kaiserreich and the Weimar Republic. Neither efforts for reform nor conservative attempts to tighten the law (for example, by extending it to lesbian acts) were successful, even though the general climate changed considerably during the Weimar era. Because the law proscribed only certain clearly defined acts of sexual behavior, the mere expression of homosexual feelings was outside the realm of police inquiry. Consequently, in the liberal, permissive atmosphere that characterized the first German democracy and especially its capital, Berlin, books and magazines were freely published and bars and nightclubs flourished. The books of Christopher Isherwood and Klaus Mann portray this subculture eloquently.

Once the Nazis came to power in January 1933 the status quo changed dramatically. Despite years of antihomosexual propaganda, gays had no more of a premonition as to what lay in store for them than did other groups of victims. The well-known homosexuality of Hitler's friend and trusted lieutenant, Ernst Röhm, seemed to indicate that gays could expect some sort of quiet toleration. This was not to be the case. In 1935 Paragraph 175 was drastically altered, making almost anything indicating homosexual longings punishable by law. Even suspicious looks could constitute an offense. The results were predictable: The subculture collapsed. The Nazi police established an elaborate entrapment system and the number of convictions skyrocketed.

10 This was one of the few jobs available outside of menial labor. Women had to remain unmarried in order to serve as teachers, which, of course, did not really present a hurdle for lesbians.

But a prison term was not the worst fate. Often the end of a prison term did not result in freedom but rather in transfer to a concentration camp. After the war started, this treatment became a matter of course. There is still no agreement on the number of homosexuals who perished in the camps, but it was clearly considerable.[11] Next to the Jews, gays constituted the lowest order in the hierarchy of inmates. They were routinely subjected to the most severe work assignments, and although there was no extermination policy toward homosexuals, the general conditions in the camps exerted an immense toll. It did not help that Heinrich Himmler, overseer of the camps, was obsessed with wiping out homosexuality. His hatred can only be described as pathological.[12]

Generally speaking, all of this applies only to male homosexuals. Although the Nazis discussed extending the laws to lesbians, they decided against it on the grounds that lesbianism did not preclude women from reproducing – another key goal of state policy. Individual lesbians, however, could find themselves in concentration camps, charged with antisocial behavior, which also covered prostitution. This lumping of behaviors into categories makes it quite difficult to estimate the number of lesbians sent to the camps, let alone the number who died there. In any case, estimates put the number much lower than that of male homosexuals.[13]

For homosexuals in Germany the ordeal of the concentration camps ended with their liberation by Allied forces. However, this was the only improvement in the general situation of homosexuals. After the war, persecution went on unchanged, quite often at the hands of the same officials. There still has not been meaningful financial compensation for homosexual victims of the Nazis, and even moral recognition of their

11 Rüdiger Lautmann, in "The Pink Triangle: The Persecution of Homosexual Males in Concentration Camps in Nazi Germany," *Journal of Homosexuality*, 6, nos. 1–2 (1981): 141–60, estimates the number of deaths somewhere between 5,000 and 15,000, but much higher figures have been mentioned as well; see Warren Johansson and William A. Percy, "Holocaust, Gay," in Dynes, ed., *Encyclopedia of Homosexuality*, 546–50. On the Nazi persecution, see Günter Grau, ed., *Homosexualität in der NS-Zeit: Dokumente einer Diskriminierung und Verfolgung* (Frankfurt am Main, 1993). In English, titled *Hidden Holocaust? Gay and Lesbian Persecution in Germany, 1933–45* (London, 1995). See also Erwin J. Haeberle, "Swastika, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany," in Martin Duberman, Martha Vicinus, and George Chauncey Jr., eds., *Hidden from History: Reclaiming the Gay and Lesbian Past* (New York, 1989), 365–79; Pierre Seel, *I, Pierre Seel, Deported Homosexual: A Memoir of Nazi Terror* (New York, 1995); and Richard J. Plant, *The Pink Triangle: The Nazi War Against Homosexuals* (New York, 1986).

12 Plant, *Pink Triangle*, 72, named his chapter on Himmler quite appropriately "The Grand Inquisitor."

13 See Claudia Schoppmann, *Nationalsozialistische Sexualpolitik und weibliche Homosexualität* (Pfaffenweiler, 1991).

plight has come about only recently.[14] The German Democratic Republic adopted the original and more lenient version of Paragraph 175,[15] whereas the Federal Republic of Germany retained the Nazi version of 1935.

In 1957 the Constitutional Court, Germany's highest court, dealt with a complaint brought by two men who had been arrested and tried under Paragraph 175. They claimed that Paragraph 175 constituted a part of the Nazi system of injustice and as such was void in the Federal Republic. Moreover, they claimed that Paragraph 175 violated the equal protection clause under Article 3, Paragraphs 2 and 3 of the West German Basic Law because it pertained to men but not to women. When the court handed down its verdict, it sided squarely with existing law.[16] Its arguments may be summarized as follows: (1) Male homosexuals seek to seduce innocent youths and are thus a menace to society; (2) this is not the case with lesbians, who are more interested in women of their own age. Nor are lesbians exclusively same-sex oriented, and therefore the equal protection clause does not apply;[17] (3) treating male and female homosexuals differently is justified because "the position of men in public life gives their decisions more social impact than a woman's choices in life"; (4) the persecution of homosexuals is justified because "same-sex activities are against the moral law." Thus did the highest court clarify the law of the land. The "moral inferiority" of gays for the first time in German history was imbued with a stamp of approval by the legal system of a democratic republic whose language in this regard borrowed heavily from Nazi vocabulary and concepts.

With this verdict, the road to persecution was cleared. Until 1957 the lower courts had rendered inconclusive verdicts. But now they were bound by precedent, and the jailing of gay men rose to new heights. As a direct consequence, convictions reached post-Nazi highs in 1958 and 1959.

14 On this complex, see Michael Sartorius, "'Wider Gutmachung': Die versäumte Entschädigung der schwulen Opfer des Nationalsozialismus," in Christian Schulz, *Paragraph 175. (abgewickelt): Homosexualität und Strafrecht im Nachkriegsdeutschland – Rechtsprechung, juristische Diskussionen und Reformen seit 1945* (Hamburg, 1994), 88–128. In 1985 President Richard von Weizsäcker mentioned the gay victims of Nazism in his famous speech on the 40th anniversary of the end of World War II – apparently the first such recognition.

15 I cannot investigate the situation in the German Democratic Republic within the confines of this chapter. On this subject, see Kurt Starke, *Schwuler Osten: Homosexuelle Männer in der DDR* (Berlin, 1994).

16 *Bundesverfassungsgerichtsentscheidungen* 6 (Tübingen, 1957), 389–443. It is remarkable to note that the petitioners did not make a claim according to art. 1 GG, which pertains to the dignity of man.

17 The same argument was used in the 1930s, when the Nazis decided against including lesbians in their new version of Paragraph 175; see Grau, *Homosexualität in der NS-Zeit*, 101–15, esp. 104.

Table 12.1. *Number of convictions under Paragraph 175 over time*

Convictions of male homosexuals (§175)	Kaiserreich (1882–1918)	Weimar Republic (1919–1933)	Third Reich (1934–1941)	Federal Republic (1950–1965)
Total cases	18,365	10,110	45,602	44,987
Mean (per year)	496	674	5,700	2,811
Highest number (year)	761 (1912)	1,107 (1925)	9,536 (1938)	3,530 (1958–9)
Lowest number (year)	118 (1918)	89 (1919)	1,069 (1934)	1,920 (1950)

Source: Hans-Georg Stümke, *Homosexuelle in Deutschland: Eine politische Geschichte* (Munich, 1989), 26, 90, 147.

The numbers in Table 12.1 speak for themselves.[18] Nazi practices were alive and well, including entrapment and "pink lists." The pinnacle was reached in 1962, when a thorough reform of the outdated penal code, which by now clashed with everyday life in many respects, was proposed. The reform bill was produced in the last years of the conservative Adenauer era, and in the area of law regulating sexuality, the authors ran amok. Instead of liberalizing and simplifying the code, they added numerous new sections. Their view of homosexuality was not a friendly one. The official motives attached to the bill read like a list of every evil ever associated with gays. They regarded homosexuality as an acquired vice that could, therefore, be easily controlled: "It must be assumed that the majority of men who broke the law could have led a proper life if they had pulled themselves together."[19] The continued criminalization of homosexuality was vital for society and civilization at large: "Whenever the same-sex vice has become contagious to any large degree, it has resulted in the depravity of the people and in the decline of its moral capacities."[20]

But this language, which seemed to emanate straight from the Third Reich, was too much for 1962. Medical and legal authorities ripped the proposed bill apart for a whole variety of reasons, and when the final bill passed the Bundestag in 1969, it had changed substantially. By that time

18 It should be kept in mind that the postwar figures pertain only to the Federal Republic, whose population was much lower than the population of the Reich. Persecution, therefore, was even more severe than it looks at first sight.

19 Deutscher Bundestag, Drucksache 4/650 (Oct. 4, 1962), in *Drucksachen* 80, 375.

20 Ibid., 377.

the composition of the government had changed as well, and the Social Democrats, who had advanced from maligned opposition to junior partner (soon to become senior partner), took a somewhat more liberal view. Although the idea of the moral repugnancy of homosexuality was still very much alive, its criminalization was basically a dead letter.[21] In two steps, in 1969 and 1973, the substance of Paragraph 175 was gutted. The last step was finally taken in 1994, when the age of consent for heterosexual and homosexual acts was made the same and when the remnants of the infamous Paragraph 175 were altogether eliminated from the penal code – to the extent that no new section got listed under the now permanently tainted "175."[22]

The United States – Federalism at Work

The legal situation in the United States for the same period is both more complicated and easier to deal with. It is more complicated because a unified penal code does not exist for the entire country; rather, there are fifty state legal systems. And whereas the individual states differed sharply in their penal codes, they invariably had some form of criminalization of homosexuality on the books. Illinois, in 1961, acquired the distinction of being the first state to formally decriminalize homosexuality by adopting the model penal code drawn up by the American Law Institute.[23]

But laws and penalties on the books have never been the main concern when it comes to the individual American states. That makes the analysis less complicated because it shifts the focus from strictly legal questions to the political arena. Unlike Germany, the American legal tradition allows for a gradual change in the application of the law up to the point where a law may still be on the books but is not enforced.

These informal changes can lead to rather absurd situations in which some of the most liberal American states might still carry in some forgotten corner of their penal codes sections that are clearly outdated but that for some strange reason are still technically in force.[24] The perils of

21 See Rüdiger Lautmann, *Seminar: Gesellschaft und Homosexualität* (Frankfurt am Main, 1977).

22 It used to be eighteen for male homosexuals exclusively; after 1994 it became sixteen for everyone; for the changed climate of the debate, see *Verhandlungen des Deutschen Bundestages* 173 (Mar. 10, 1994), 18698–706.

23 John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970* (Chicago, 1983), 146. Connecticut followed suit in 1969 to become the second state eliminating the penalization pre-Stonewall.

24 A case in point is Massachusetts, where homosexual anal and oral sex technically constitute a violation of the law; see the *Second ILGA Annual Report 1997*, www.pangea.org/org/cgl/ilga/ilgae.html.

the law-making process in bicameral states with no real party discipline and numerous paths to an untimely death for most bills may have contributed to a benign disregard for outdated laws.

This necessitates for most of the time under review here a concentration not on legal questions in the narrow German sense but rather on discriminatory employment practices, on censorship of gay publications, on police raids on gay bars, and on general discrimination.[25] This focus from the outset has prompted a different strategy for gay rights activists in the United States.

THE PENAL CODE AND SOCIETY AT LARGE

The differences with regard to the law point to even more pertinent differences between Germany and the United States, which leads us once again to the concept of political culture.

Historically, legitimacy in Germany is attached to legality, that is, a social movement has to rid itself of a legal outlaw status before it can embark on legitimizing whatever goals it might have.[26] The idea of *Rechtsstaat*, which roughly but not entirely coincides with the American concept of "the rule of law," has been much stronger in Germany than the idea of political democracy. Consequently, given the existence of Paragraph 175, activists for the homosexual rights movement knew they had to work predominantly for the abolition of this law. Social acceptance would not be the necessary precondition for the abolishment of Paragraph 175; rather, it would be its consequence. That does not mean that there were no activities to educate the public and generate support. On the contrary, the movement included such measures from the very beginning. But the major step had to be accomplished in another sphere: The political elite in the Reichstag had to be induced to scrap Paragraph 175, and everything else would subsequently fall into place.

This had far-reaching consequences. Most important, chances for coalition building are much slimmer when a group focuses on a single section of the penal code (as in the German case) instead of on a broad range of social issues (as in the American case). In the latter case, each group that has experienced similar discrimination and whose discrimina-

25 Official documents on these practices are collected in *Government Versus Homosexuals* (New York, 1975).

26 For an insightful, if devious, theoretical discussion, see Carl Schmitt, *Legalität und Legitimität* (Munich, 1932).

tion might be attributed to the same sources (broadly speaking, a repressive state or society) is a potential ally for the cause. In the former case, the quest for reform is so particularized that only the immediate victims can have a genuine interest in it. This still leaves room for solidarity or for strategic alliances of mutual support for the respective interests of different groups. Indeed, the women's movement and the homosexual rights movement did cooperate in Germany, but their sporadic cooperation was to no avail, as could be expected, because it lacked the politically indispensable binding force of enlightened mutual self-interest.[27]

The situation could not have been more different on the other side of the Atlantic. The participatory civic culture of the United States invited political activism to the point of expecting it. At the same time, the well-established practice of letting parts of the penal code fall into disuse called for a substitute goal. Although it may have seemed impossible early on to think about changing the penal code, this also was not the most promising path available. If reformers could create a climate of tolerance and social acceptance, the discriminatory sections of the criminal code would no longer be applied. Practical day-to-day discrimination would end along with the disappearance of harassment by law enforcement officials. This fact placed the issue squarely into the arena of general political and social problems.

In this realm each minority could become a potential ally. Discrimination can be manifold, but tolerance and liberalism provide answers to many a grievance. Theoretically, therefore, when minorities band together, or perhaps even just learn from each other, they all stand to gain in the process. And there was (and is) certainly no scarcity of minorities with their own grievances in the United States.

Differing political cultures and the accompanying divergent goals highlight the reasonable expectation that gay rights movements in Germany and in the United States would find it in their interest to pursue different paths both with regard to long-term strategies and with regard to tactics in the realization of these strategies. So far we have looked at the legal settings and at the structural variables shaping the political landscape in which the gay movements had to operate in Germany and in the United States. Now we must turn to the movements themselves, and to their leaders.

27 On the problem of cooperation, see Michael Dreyer, "Politische Kultur, rechtliche Diskriminierung und Reformstrategien," in Stefan Etgeton and Sabine Hark, eds., *Freundschaft unter Vorbehalt: Chancen und Grenzen lesbisch-schwuler Bündnisse* (Berlin, 1997), 28–58.

STRATEGIES AND TACTICS: PETITIONS, PROPAGANDA, PROTESTS, AND PARADES

The Scientific–Humanitarian Committee

The starting point for the German gay rights movement can be dated quite clearly: On May 14, 1897, a small group of men founded the Scientific–Humanitarian Committee. Its first location was in Charlottenburg (Berlin) in the flat of a young doctor and psychiatrist, Magnus Hirschfeld, who was to become the most prominent spokesman for gay rights until 1933.

The founding of the Scientific–Humanitarian Committee was not the first gay rights initiative in Germany. As early as 1867 the lawyer Karl Heinrich Ulrichs tried in vain to interest the German Bar Association, at its annual conference in Munich, in the impending criminalization of homosexuality in the penal code of the North German Federation. His colleagues ignored his arguments. He was not allowed to deliver his speech, even though Munich, the capital of Bavaria with its longstanding tradition of legal tolerance toward homosexuality, might have been a logical place to cry "danger" – even more so as the danger was actually at the doorstep. Ulrichs could not make himself heard; nor could Heinrich Hössli and Karl Maria Kertbeny impress mid-nineteenth-century Germany with their calls for the decriminalization of homosexuality. Today, they are rightly regarded as pioneers, but to their contemporaries they were unknown.[28]

This disregard changed when the energetic and versatile Hirschfeld assumed the reins of the gay rights movement.[29] He was a well-known medical doctor, and even though he was questionable in more than one respect, the Jewish Social Democrat Hirschfeld nevertheless came to be known as one of the leading experts in the relatively uncharted area of human sexuality, including deviant sexual behavior.[30]

The Scientific–Humanitarian Committee set out to accomplish three goals: to educate the public on the nature of male and female homosexuality, to define the scientific debate by editing a yearbook that would comply with the highest standards of modern science, and to petition the

28 Both Lautmann, ed., *Homosexualität*, and Dynes, ed., *Encyclopedia of Homosexuality*, feature articles on all three. Blasius and Phelan, eds., *We Are Everywhere*, provide translations from Ulrichs (63–6) and Kertbeny (67–79).

29 On Hirschfeld, see Manfred Herzer, *Magnus Hirschfeld: Leben und Werk eines jüdischen, schwulen und sozialistischen Sexologen* (Frankfurt am Main, 1992).

30 Dr. Hirschfeld was regularly asked to testify as an expert witness in trials based on Paragraph 175.

Reichstag for the abolition of Paragraph 175 in light of abundant medical and legal evidence demonstrating its baselessness and harmfulness.

These goals remained on the agenda from 1897 to the demise of the committee in 1933 – which attests to both the stubborn tenacity of its efforts in the face of constant difficulties, including financial problems, a world war, a revolution, hyperinflation, and a lack of success with regard to its main objective.

The educational goal was pursued with public lectures and popular, cheap brochures written by Hirschfeld and others explaining the facts about homosexuality as Hirschfeld saw them. One of the most successful endeavors of the committee was the publication of its scientific journal, the *Yearbook for the Intermediate Sex*.[31] The title came straight out of Hirschfeld's theory of homosexuality, which postulated the existence of a group of virile women and effeminate men standing between the normal sexes as an intermediate group – put there by nature. Homosexuality was inborn, although Hirschfeld did not go so far as to declare it "natural." In any case, the criminalization of homosexuality was not a punishment made to fit the crime but rather unnatural in itself. Hirschfeld's theory became known as the theory of the "third sex,"[32] a theory obsolete today. Most of his contemporaries did not follow the doctor in his beliefs, but the yearbook was open to competing theories as well, provided that they held a basically sympathetic point of view. The committee succeeded, indeed, in establishing the yearbook as a well-respected forum for debate and information. Its heavy, leather-bound, gold-embossed exterior breathed an aura of respectability essential to the committee's work. Anyone who peered into the yearbook hoping to find juicy stories or pictures would have been disappointed. It contained articles on medicine and psychology, on criminology and history, on foreign countries, and on past, impeccable dignitaries in the arts and sciences and from the realm of politics who were homosexual. The occasional article on lesbian interests could not hide the fact that the entire endeavor was definitely male dominated. There were illustrations to some of the articles, but they were almost clinically decent. The only more or less general informational parts of the yearbook were stories on famous homosexuals in history. Two other permanent columns in the yearbook deserve to be mentioned: Each volume contained a lengthy list of attempted or

31 *Jahrbuch für sexuelle Zwischenstufen*, 23 vols. (1899–1923).

32 Magnus Hirschfeld, *Berlins Drittes Geschlecht*, ed. M. Herzer (Berlin, 1991). The first edition appeared in 1904. On the third-sex theory, see also Adam, *Rise of a Gay and Lesbian Movement*, 16–18.

successful blackmailings, of persecutions, and of suicides related to real or imagined fears stemming from Paragraph 175. The other column was an annotated bibliography of nonfiction that demonstrated the large amount of scientific research on homosexuality at the time. Its sheer scope is impressive; there can be little doubt that the topic was in the air and that it was discussed both in medical and criminological circles. The scientific debate was launched in no small measure thanks to the endeavors of the committee and its yearbook, and it was conducted open-mindedly and with a seriousness befitting the Wilhelmine professors and intellectuals who partook in it.

But debate was only a preliminary goal of the committee. Its main goal was to influence the Reichstag toward abolishing Paragraph 175. Its main tool was a petition presented to the Reichstag in 1897, which asked for the decriminalization of consensual homosexual acts, provided that both partners were at least sixteen years of age and that public decency laws were obeyed. The petition offered a whole array of medical and criminological arguments that were well known from Hirschfeld's writings. It deliberately de-emphasized the sexual aspects of homosexuality, maintaining that "according to the investigations of all specialists *coitus analis* and *coitus oralis* occur comparatively rarely in homosexuals. In any case, it is not practiced among them more often than among 'normal' people."[33] The Reichstag was not convinced by these somewhat misleading tactics; Paragraph 175 was not altered. The changes advocated by the committee's petition remained a desideratum for nearly a century. They were almost identical with those enacted into law in 1994, when Paragraph 175 was finally abolished.

More interesting is the way in which Hirschfeld presented his petition. For starters, petitioning the Reichstag was not necessarily the means of the political activist but rather the cautious citizen's way of dealing with politics. The wording of the petition was chosen very carefully to emphasize the orderly, respectable, and highly scientific objectives of the petition. When Hirschfeld and his allies went looking for signatures, lists of which were regularly published in the yearbook, they did not seek volume. Instead, they took pains to solicit exclusively well-respected, impeccable figures of Wilhelmine society. Because the argument was presented mainly along the lines of medicine (homosexuality is not acquired

33 Blasius and Phelan, eds., *We Are Everywhere*, 136. The original version can be found in "Petition an die gesetzgebenden Körperschaften des deutschen Reiches behufs Abänderung des §175 des R.-Str.-G.-B. und die sich daran anschliessenden Reichstags-Verhandlungen," *Jahrbuch für sexuelle Zwischenstufen* 1 (1899): 240.

but inborn) and criminology (the dangers of blackmail) it made sense to invite mainly doctors and lawyers to sign the petition – and several thousand of them did, in addition to professors, artists, merchants, teachers, and all other conceivable authority figures. There are no women or workers among the signatories; Hirschfeld's committee was not interested in them.

Respectability through science and reform through apolitical means were the strategies employed. Such strategies were narrowly tailored to capture the benevolence of the upper-class bourgeois culture that constituted Wilhelmine society, much of the Reichstag, and, one should not forget, the Scientific–Humanitarian Committee as well. Admittedly, Hirschfeld himself was an outsider in more ways than one. But he was a respected scientist, and so were all his companions who united in the cause of gay liberation. They did not demand it as a political right, nor did they refer to a bill of rights in the German constitution (there was none); rather, they stuck to science and quiet educational work. There is no reason to assume that, apart from their homosexuality, they did not share the basic set of beliefs, agenda, and chauvinism (both male and national) that characterized their "normal" compatriots of comparable standing. The petition and the general aims of the committee do not seem to be born out of a desire to foster a separate gay identity but rather to join Wilhelmine society in a complete and meaningful sense.

There seems to have been just one political action (in the narrower sense) in the twenty years between the founding of Hirschfeld's committee and the end of the Kaiserreich: In 1912, before the Reichstag elections, the committee sent out a questionnaire to all the candidates inquiring about their position on reforming Paragraph 175.[34]

Hirschfeld had no use for anyone who threatened to rock the boat, but not everyone fighting for gay rights liked this careful approach. As early as the turn of the century, some activists took issue with the strategy of the committee. The dissidents, led by the author and publisher Adolf Brand, finally separated from the committee when it included lesbians and women's rights advocates among its allies; to Brand this amounted to treason against the ideas of homosocial friendship and culture.[35] He founded the Community of the Special, whose very title alluded to the anarchic writings of Stirner.[36]

34 "Zur Reichstagswahl," *Jahrbuch für sexuelle Zwischenstufen* 12 (1911–12): 259–65.

35 See Ursula Sillge, "Frauen im Wissenschaftlich-humanitären Komitee," in Lautmann, ed., *Homosexualität*, 124–6.

36 The title *Gemeinschaft der Eigenen* referred to the individualistic anarchism of Max Stirner's *Der Einzige und sein Eigentum* (Stuttgart, 1981), which was originally published in 1844.

One of Brand's favorite tactics was the exposure of well-known society figures, and when he (falsely) included then Chancellor Bernhard von Bülow, he wound up in jail. This anarchist firebrand was exactly the type of individual Hirschfeld had no use for. There was no love lost between the movement's two wings, some brief periods of cooperation notwithstanding.[37]

The committee's strategies remained virtually unchanged during the entire Weimar era. It agitated more openly during that period, its public education efforts intensified, and the state granted nonprofit tax-exempt status to the organization, which made it eligible for tax-exempt contributions. New organizations enjoyed their fifteen minutes of fame as well. The short-lived Action Committee for the Repeal of Paragraph 175 tried to embrace all factions of the movement with rather limited success.[38] But the most remarkable attribute of the continuing political culture was to be found in the continued employment of the same political strategies by the movement. The political system had changed, but the political culture had not. The gay rights movement continued to employ the same tactics, to use the same personnel in its pursuits, up to the day the Nazis stormed Hirschfeld's institute.

After World War II, theoretically speaking, the gay rights movement could have picked up the reins and continued from where they had stopped in 1933. However, this did not happen, for four reasons: First, most of the earlier leaders of the movement were either dead or in exile. It was, therefore, less a question of resuming the quest than of relighting the flame with a new generation of leadership. But where would they come from? Second, the years of the Third Reich had amply demonstrated the perils of being openly gay in Germany. The leaders of the early movement trusted the benevolence of the state; the experiences of the immediate past made it clear that this trust was dangerously naive at best, suicidal at worst. Third, the persecution continued in postwar Germany. True, the concentration camps were abolished, but discovery of one's homosexuality could still mean either the ruination of one's career and life or a few years in prison. The Nazi law of 1935 remained intact; who would dare come out and establish himself as a leader under these circumstances? Fourth, the breakdown of a relatively homogeneous bour-

37 On the feud, see Blasius and Phelan, eds., *We Are Everywhere*, 153–69; Harry Oosterhuis, "Homosexual Emancipation in Germany Before 1933: Two Traditions," *Journal of Homosexuality* 22, nos. 1–2 (1991–2): 1–27; and Joachim S. Hohmann, ed., *Der Eigene: Ein Blatt für männliche Kultur; Ein Querschnitt durch die erste Homosexuellenzeitschrift der Welt* (Frankfurt am Main, 1981).

38 Blasius and Phelan, eds., *We Are Everywhere*, 170–1.

geois society took away the kind of class solidarity that, all things considered, had still shielded Hirschfeld and his kind. The veil of silence, which had covered up so much for the elite few, was no more.

It is not surprising, under these circumstances, that there was no gay rights movement in Germany in the 1950s and 1960s. Some individuals tried to revive the spirit of the 1920s, but their efforts were in vain.[39]

However, in one respect Hirschfeld's strategy belatedly paid off: When the reform bill of 1962 promised to tighten existing laws instead of reforming them, it was doctors and lawyers, Hirschfeld's main target audience, who rose in protest. Science finally had its say. The reform of 1969 was brought about not by political pressure but rather by expert scientific opinion in the areas of medicine and law. It is amazing how Hirschfeld's keen judgment finally bore fruit – seven decades late yet still the way he had envisioned it in 1897, parliament following the concerted scientific advice of the professors. This is also a profound tribute to the change in Germany's political culture over time.

It might be expected that the American movement proceeded in other directions. And so it did.

From Mattachine to Stonewall

As an organized human rights effort the American gay movement started much later than its German counterpart. Only after World War II did the Mattachine Society organize to advance gay issues within the political arena. Earlier efforts had proven to be ephemeral. One remarkable forerunner was the Society for Human Rights, founded by German émigré Henry Gerber in Chicago in 1924.[40] Although the police soon discovered the "perverted" nature of this society and moved in quickly to shut it down, it is remarkable on two accounts: First, the driving spirit was a German and one familiar with Hirschfeld and the Scientific–Humanitarian Committee; second, although the German group obviously served as an inspiration to Gerber, the title he chose for his group alluded neither to science nor to humanitarianism, but instead to human rights. This emphasis, from the outset, indicated the different political culture in which the American groups operated.

Although Gerber's efforts proved to be futile at the time, recent research has demonstrated the perseverance of a gay subculture far more

39 Karl-Heinz Steinle, "Homophiles Deutschland – West und Ost," in *Goodbye to Berlin*, 195–210.
40 On this early period, see Blasius and Phelan, eds., *We Are Everywhere*, 220–30.

elaborate than previously thought. George Chauncey's seminal work, *Gay New York*, presents an array of gay entertainments, businesses, and social networks thriving in a hostile legal, social, and law enforcement environment that had only one missing aspect: politics.[41]

It is hard to speculate why the political movement came into being half a century after its German counterpart. One might argue that the gatekeepers of the political system kept all minorities out of it, not just gays and lesbians. In addition, one should bear in mind that outright attempts to work on political improvement and organization, as Brand had tried in Germany, had failed dismally in the United States as well. Hirschfeld's committee, after all, had cloaked its objectives in scientific and legalistic arguments. The political arena of the United States, however, had no use for that type of argument in the struggle for human rights. Because gays and lesbians could not enter the political arena cloaked in science, it took them longer to enter it at all. At the same time, there was no galvanizing single "enemy" like Paragraph 175. The legal situation varied from state to state, and even within the states enforcement of the law was by no means uniform.

All this is a symptom of the degree of federalism and political decentralization in the United States that surpassed German federalism by far. One therefore could assume that the gay rights movement would be pluralistic, regionally diverse, and fragmented from its very beginning. And so it was. From its very beginning in the early 1950s there were differences as to its objectives and its means of attaining them. The Mattachine Society, named after medieval, masked jesters, with its most important chapters on the two coasts,[42] dealt mainly with the needs of gay men. Lesbians formed their own organization, the Daughters of Bilitis.[43] A major area of activity was the fight against job discrimination. Gays were thought to be unfit and were seen as security risks not only in the armed forces but also in the federal government. Known homosexuals were routinely dismissed from their jobs, and the courts upheld this practice.

It is significant that the Mattachine's fight was not so much against one abstract paragraph of the penal code but against existing governmental practices. This suggested tactics that had proved effective in other labor-related disputes. Scientific brochures could serve in addition, and they were certainly used, but the prime activity had to be of a political nature.

41 George Chauncey, *Gay New York: The Making of the Gay Male World, 1890–1940* (London 1995).

42 On the Mattachine, see Adam, *Rise of a Gay and Lesbian Movement*, 67–9; D'Emilio, *Sexual Politics*, 57–91; and Blasius and Phelan, eds., *We Are Everywhere*, 239–308.

43 On the Daughters of Bilitis, see Blasius and Phelan, eds., *We Are Everywhere*, 327–66.

One of the great risks for gay men looking for sexual encounters was the possibility of encountering undercover police agents who were out to entrap them. This practice was well established by vice squads in numerous cities, although enforcement varied greatly both from city to city and over time.[44] Again, a look at the American and German responses to this problem is revealing. Hirschfeld's committee did not deal with this problem at all – it was part of the larger legal problem that would be solved by the abolition of Paragraph 175.

In the United States, in Los Angeles, the guiding spirits behind the Mattachine formed the Citizens Committee to Outlaw Entrapment in 1952, once again with a clear civil rights emphasis.[45] It proceeded with letters and resolutions aimed at local political leaders, and with articles and brochures that stressed the aspect of rights being violated.

The Mattachine Society and the Daughters of Bilitis developed a vast array of activities, most of them in the realm of politics. The journals of the two groups, *One* and *The Ladder*, respectively, did contain some scientific (or pseudo-scientific) articles on the origins of homosexuality, on its natural, unthreatening features, and the like. But it never came anywhere close, nor was it intended to do so, to matching the weighty scientific orientation of Hirschfeld's yearbook. These journals were meant to inform activists, not enlighten a broad public.[46] Letters to elected officials were routine, as was the mailing of the journal to public figures. It is a well-known story that J. Edgar Hoover, himself a deeply closeted homosexual, begged to be taken off the Mattachine's mailing list, apparently for fear of being discovered. At the same time, the leaders of the Mattachine were rightly afraid that the FBI would try to infiltrate their organization.[47] They had all the more reason to fear so because several of the leaders, including Harry Hay, the most active member from Los Angeles, were avowed communists.[48] Internal disputes over the movement's aims, commitments, and tactics were inevitable, and as early as 1953 the society removed Hay from his leadership position.[49] In a way, this split can be

44 See Chauncey, *Gay New York*, 86.

45 See Miller, *Out of the Past*, 335; and D'Emilio, *Sexual Politics*, 70.

46 The same is true for the organization's later publication, the *Mattachine Review*, 12 vols. (1955–66), whose individual issues contain a mixture of news, law, medical news, and much on literature. The layout clearly indicates the amateurism of the editors.

47 Frank Kemeny, the foremost activist of the Washington, D.C., chapter of the Mattachine, relates the Hoover story in Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945–1990: An Oral History* (New York, 1992), 100–2.

48 For a brief discussion of the background, see Adam, *Rise of a Gay and Lesbian Movement*, 60–5. Hay was the guiding spirit behind the organizing efforts in Los Angeles. See Stuart Timmons, *The Trouble with Harry Hay, Founder of the Modern Gay Movement* (Boston, 1990).

49 See D'Emilio, *Sexual Politics*, 80–1.

compared to the split within Hirschfeld's committee. In that case Brand and his followers left the larger organization out of disgust with Hirschfeld's relations to other emancipation groups, most notably the women's movement. In this case the argument was purely political in nature. In moving away from its left-wing origins, the Mattachine opted for an assimilationist approach.[50] This did not happen without a challenge. Society activists associated with the journal *One* formed a rival organization that took a much more radical view than both the Mattachine Society and the Daughters of Bilitis; they "projected an image of defiant pride in their identity; they intentionally tried to shake their readers out of a resigned acceptance of the status quo."[51] *One* focused increasingly on the question of homosexual rights, and the criticism of its rival's apologetic tone foreshadowed, although on a much smaller scale, the activist groups of the post-Stonewall era.

More radical chapters of the Mattachine on the East Coast opted for a targeted political approach, which is best illustrated by the picketing of the federal government, resorted to several times by the Washington chapter in the mid-1960s. The pickets against discrimination were a major step, but they were still a far cry from the later flamboyant gay pride parades. In a sense, the Hirschfeldian aura of respectability was on public display here.[52] The men usually wore conservative business suits, the women wore equally conservative dresses. The orderly fashion of these protests, the conservative attire, and the nonthreatening behavior of the few people who attended them was borrowed to a large degree from the successful beginnings of the black civil rights movement.

It was the rapid success, albeit against tremendous resistance and odds, of the black civil rights movement, and the generally changing atmosphere of the 1960s, that allowed the gay rights movement to emerge solidly as a thoroughly political movement. The watershed year was 1969, both in Germany and in the United States. And it is once again telling how the different political cultures brought about different changes. In Germany the federal parliament rendered Paragraph 175 ineffectual as part of an overall reform of the penal code. There was little debate, no homo-

50 D'Emilio describes this as follows: "In sum, accommodation to social norms replaced the affirmation of a distinctive gay identity, collective effort gave way to individual action, and confidence in the ability of gay men and lesbians to interpret their own experience yielded to the wisdom of experts" (ibid.).

51 Ibid., 108. See also Blasius and Phelan, eds., *We Are Everywhere*, 309–26.

52 See Adam, *Rise of a Gay and Lesbian Movement*, 69; Mattachine terminology "became virtually synonymous with the assimilationist strategy at this time." That may be so, but it was still a *political* strategy.

sexuals participated in what debate there was, and there was most assuredly not the feeling among politicians that the decriminalization of male homosexual behavior put anything akin to a moral seal of approval on that behavior. On the contrary, the representative who had the duty to report on that part of the reform bill made his discomfort known to his sympathetic colleagues.[53] Nevertheless, the legal and scientific arguments together with a changed political climate (and a gradually emerging civic political culture) brought about the quantum leap from the earlier dictates of Paragraph 175 and the Nazi-inspired illegality after 1935 to the legal expression of deviant sexuality.

The corresponding catalyst in the United States was the Stonewall Riots of late June 1969 in New York City. The patrons of a gay bar fought back against yet another of the nearly constant police raids. The spirit of civic unrest and rebellion, already quite manifest in the black civil rights struggle, the antiwar movement, and the women's movement, now embraced the gay rights movement as well.

In Germany legalization meant that organizations could now mushroom, periodicals and books could be published more freely, and gay bars and a gay subculture could emerge from hiding. In the United States the Stonewall Riots, celebrated yearly in ever-growing gay pride parades all over the country, triggered the emergence of a new civil rights movement. Platforms, protests, and parades quickly superseded the picket lines.

STONEWALL AND BEYOND

It would be beyond the scope of this chapter to examine closely the tactical and strategic developments of the political gay and lesbian civil rights struggle after 1969.[54] The most important feature within the analytical framework employed here is the evolution of German political culture since the early 1970s to the point where it now resembles the American civic culture. This has been noted time and again by political scientists, and the consequences have been immense. The emergence of civil protest movements, *Bürgerinitiativen*, has continued to expand. Their scope has been wide-ranging. Anti–nuclear power groups were the first to emerge,

53 The speaker who introduced the part of the reform bill dealing with homosexuality started his speech by complaining that "parliamentary life is cruel. . . . To speak on Paragraph 175, as my party ordered me to do, is not exactly easy" (*Verhandlungen des Deutschen Bundestages* 70 [May 5, 1969], 12787).

54 On the immediate activism of these days, see Donn Teal, *The Gay Militants: How Gay Liberation Began in America, 1969–1971* (1971; reprinted, New York, 1995). The development since then is amply documented by Blasius and Phelan, eds., *We Are Everywhere*, and numerous other works.

and they were soon followed by groups for all sorts of local or larger environmental concerns, by women's groups, and by civil rights groups that were (and are) often religiously inspired and that might deal with anything from individual rights in Tibet to child labor in India, to the plight of asylum seekers in Germany. This vast array of causes would not have been thinkable in the 1960s, let alone the 1950s. Although the largest of these movements, the peace movement, was not successful in its fight against NATO's stationing of Pershing II missiles in Germany, it nevertheless created an atmosphere of citizen participation, which, ironically, although directed mainly against American policies, looked like American participatory movements. A lasting result of the changes in the political culture and the change to a more postmaterialist value structure is manifest in the success the Green Party has enjoyed in German electoral politics.

The gay and lesbian movement in Germany was not at the forefront of these changes, but it undoubtedly profited immensely from them. And it borrowed its strategy and tactics even more directly than most other social groups from the United States. Although a certain amount of anti-Americanism was – and is – quite common for the German Left, this was generally not the case among gays and lesbians. The rapid advances of their American counterparts, not to mention the burgeoning gay subculture, gave cities like New York and San Francisco the character of a promised land. It is significant that the main annual event, the gay pride parade, has a different name in Germany: It is called Christopher Street Day, after the Greenwich Village street where the Stonewall Riots took place in 1969.

The partial convergence of political strategies has led to an organizational framework in Germany that in some ways resembles its American counterparts. Gay lobbying groups are now part of the German political scene. One can summarize these developments in seven closing statements, which at the same time serve as an outlook.

(1) The term *civil rights* was only appropriate for the American gay rights movement. The earliest German groups chose the path of scientific and legalistic persuasion, not the assertion of civil rights. Since the advent of a participatory civic culture in Germany, however, civil rights can be used to describe the movement's goals in both countries.

(2) The AIDS crisis dramatically politicized the movement during the 1980s. It forced public officials and politicians to deal with homosexuality in an open-minded way in order to contain the epidemic. At the same time, it revealed the homosexuality not only of numerous prominent public figures but also of seemingly "normal" neighborhood people, thus

giving homosexuality a human face. It may sound cynical, but it remains a fact that the tragedy of AIDS enhanced the visibility of gays as no other event has done.

(3) The collaboration between male homosexuals and lesbians took on different forms. Whereas the gay rights groups in the United States usually boost some form of co-equal double leadership, in Germany lesbians tend to be active in the general women's movement.

(4) The goals to be achieved still vary somewhat. Whereas the German movement is bent on full equality and integration into society, the American movement seems to be headed toward the assertion of some kind of minority status. This reflects their different social climates and environments. Although there is a tradition of minority representation in the United States, there is nothing even remotely comparable in Germany. Hence, the different agenda.

(5) The means to achieve these goals are still imbedded in the histories of the respective countries' political cultures. Whereas the movement in the United States seems to rely on the Fourteenth Amendment and the Bill of Rights, in Germany science and scholarship still claim front-row seats in the arguments of the gay rights movement. Civil rights arguments in the American tradition are quickly gaining in Germany, however.

(6) In the United States, given the complicated and protracted law-making procedures, the medium of choice by which to advance goals in the political realm are mainly the courts. In Germany, although lawsuits have gained prominence, change occurs mainly via legislative action. The Green Party, itself a child of the protest movements of the late 1970s, has become a staunch advocate of gay rights, fostering numerous parliamentary initiatives. The most prominent spokesperson for the gay rights movement, Volker Beck, has become a member of Bundestag for the Greens. It should be noted, however, that there is a certain irony in these political venues: The American movement chooses the courts for a genuinely political, civil-rights-oriented argument, whereas the German movement uses the legislative body to argue in a legalistic and scientific manner.

(7) The issue that promises to hold center stage both in Germany and in the United States seems to be the question of same-sex marriage.[55] It will be interesting to see whether this will lead to a further convergence of political styles and tactics.

55 On this debate, see Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con; A Reader* (New York, 1997).

The growing number of similarities between the goals and strategies employed by groups in Germany and in the United States highlight the similarities that exist in two modern – or, rather, postmodern – highly pluralistic societies. The dissimilarities, however, remain just as striking even today and point to differences in national political heritage and political culture.

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