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History Against Free Speech: The New German Law Against the "Auschwitz" -- and Other -- "Lies"

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HISTORY AGAINST FREE SPEECH: THE NEW GERMAN LAW AGAINST THE “AUSCHWITZ” — AND OTHER — “LIES”†

Eric Stein*

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I. THE PROBLEM

Each society that respects basic values determines the position of freedom of expression in relation to other freedoms according to its own history, institutions, sense of security, and tolerance of dissent. Although in the United States the reach of freedom of expression has not been static, the contemporary Supreme Court speaks of this freedom in almost absolute terms and attributes to it a commanding priority over other competing liberties.¹

In the Federal Republic of Germany, the Basic Law (*Grundgesetz*) guarantees freedom of opinion and speech but makes it expressly subject to limitations defined in "the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour."² The experience with the abuse of freedoms that contributed

1. In the United States the contemporary view points heavily in the direction of the unconstitutionality of restraints on racial hatred speech. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (neo-Nazis allowed to march through a section inhabited largely by survivors of the holocaust). However, "[a]s long as *Beauharnais* [*Beauharnais v. Illinois*, 343 U.S. 250 (1952)] exists, at least, the law must be taken to be somewhat unsettled." Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 621 (1982). *Beauharnais* confirmed the constitutional validity of group defamation laws. But cf. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See generally L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

2. GRUNDGESETZ [GG] art. 5(2) (English translation from THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (Press and Information Office of the Government of the Federal Republic of Germany 1977)). On the concept of "general laws," see Starck, *Herkunft und Entwicklung der Klausel "allgemeine Gesetze" als Schranke der Kommunikationsfreiheiten in*

to the demise of the Weimar Republic and the suppression of these freedoms by the National Socialist regime left a deep imprint upon the Basic Law and subsequent legislation:³ the democratic, pluralist system with an elaborate bill of rights, established by the Basic Law in abhorrence of the totalitarian past, was to be secured against those who would invoke the protection of basic rights as a cover for attacking the constitutional order,⁴ and all Germans were given the right of resistance — in the absence of other remedies — against anyone who attempted to overthrow that order.⁵ The doctrine evolved by the Federal Constitutional Court postulates a community employing the law in the defense of the Basic Law's political values: free speech claims must be weighed against the values of human dignity and personal honor that are grounded in the Basic Law itself.⁶

The Criminal Code, a prime example of the "general laws" by which certain basic freedoms may be limited, contains far-reaching provisions outlawing political organizations and activities hostile to the Basic Law — including public speech and writings — which would hardly stand up to constitutional scrutiny in American courts. The postwar resurgence of neo-Nazi activities has led to legislative reforms designed to strengthen these provisions still further. Left-extremist terrorism and propaganda, abetted by the uneasy propinquity of the totalitarian empire, have also served as the basis for legal countermeasures.

The latest reform of the Criminal Code, the law of June 13, 1985,⁷ first proposed in 1982 in the face of a rise of neo-Nazi incidents,⁸ was

Artikel 5 Abs. 2 des Grundgesetzes, in IM DIENST AN RECHT UND STAAT 189 (H. Schneider & V. Götz eds. 1974). This approach is neither novel nor specifically German; it is comparable to other European constitutions. See, e.g., DENMARK CONST. of 1953, art. 77, in 4 G. BLAUSTEIN, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 24 (Feb. 1985); NETHERLANDS CONST. art. 7 (amended 1983), in 11 *id.* at 4 (Jan. 1984); SPAIN CONST. art. 20 (1978), in 14 *id.* at 5 (Oct. 1979); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, in L. SOHN & T. BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 125, 129 (1973); American Convention on Human Rights, art. 13, in *id.* at 209, 214-15.

3. Bubnoff, *Die strafrechtliche Bekämpfung rechts-extremistischer Aktivitäten*, 1982 ZEITSCHRIFT FÜR RECHTSPOLITIK 118, 120.

4. GG art. 18.

5. GG art. 20(4); see also, e.g., GG art. 9(2) (prohibition of associations directed against the constitutional order); art. 21(2) (unconstitutionality of political parties directed against the basic democratic order); art. 5(3) (obligation of loyalty of university teachers toward the constitution). According to Steinberger, this form of a "militant" democracy which is capable of protecting itself is unique among modern democratic constitutions. H. STEINBERGER, KONZEPTION UND GRENZEN FREIHEITLICHER DEMOKRATIE 8-9 (1974).

6. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 693 (1980) (with citations to case law).

7. Einundzwanzigstes Strafrechtsänderungsgesetz, 1985 Bundesgesetzblatt [BGBl.] I 965.

8. See Schmude, *Aufgaben und Grenzen des Strafrechts im Kampf gegen Neonazismus*, 1981

motivated primarily by the perceived need to facilitate prosecution of an increasingly employed propaganda theme, the so-called "Auschwitz lie" — the claim that the extermination of European Jews by the National Socialist regime never took place, that such reports were a deliberate lie.

This theme has become an aspect of multifarious efforts to revise the history of the National Socialist regime in the service of diverse and often contradictory ideologies: antisemitism of the neo-Nazi hue, anticommunism of the extreme conservative right, anti-Zionism, German nationalism and varied nationalisms in the Eastern European countries, libertarian pacifism, and Marxism of the extreme left.⁹

A French scholar who has surveyed the proliferation of tracts, "scholarly" and outright propaganda books, brochures, mimeographed pamphlets, video-cassettes, and periodicals with or without scholarly pretensions, suggests that it would be an exaggeration to speak of "a vast international enterprise," although "undoubtedly" the center for the collection and distribution of all this literature is located in California.¹⁰ Only in France have the "revisionists" obtained access to respectable press and managed to entangle academic historians in a "debate."¹¹ More or less obscure individuals or groups are active in Canada, the United States, the United Kingdom, Australia, and Sweden, as well as in the German Federal Republic.¹²

RECHT UND POLITIK 153, 154-55 (explanation of proposed legislation by Minister of Justice); see also text at notes 98-99 *infra*.

9. This section relies on Professor Pierre Vidal-Naquet of the Ecole des Hautes Etudes en Sciences Sociales in Paris. See P. VIDAL-NAQUET, *LES JUIFS, LA MÉMOIRE ET LE PRÉSENT* 195-279 (1981); Vidal-Naquet, *Thèses sur le révisionnisme*, in *L'ALLEMAGNE NAZIE ET LE GÉNOCIDE JUIF* 496, 501-06 (1985). The statement in the text is from *id.* at 502.

10. Vidal-Naquet, *Thèses sur le révisionnisme*, *supra* note 9, at 501.

11. See Vidal-Naquet, *Thèses sur le révisionnisme*, *supra* note 9, at 505; see also note 55 *infra*. In June 1985, the University of Nantes awarded a doctorate to Henri Roques, a 65-year-old agronomist, for a 371-page thesis that asserted there was no firm evidence to prove that the Nazis had gassed prisoners in concentration camps. The paper, which received special honors, provoked a storm of protests. The French government ordered that the doctorate be withdrawn because of improprieties in the examining process, and that the head of the examining board be suspended. See Miller, *Frenchman Assailed for Denying Nazi Crimes*, N.Y. Times, June 13, 1986, at 4, col. 1; *France Revokes Thesis That Denies Nazi Acts*, N.Y. Times, July 3, 1986, at 2, col. 2. In Germany, the doctorate of a seventy-year-old former judge of a Hamburg court was revoked in 1983 by the president of the University of Göttingen on the ground that the judge had authored a book entitled *The Auschwitz Myth — Legend or Reality*, in which he questioned the death of six million Jews. The Administrative Court of Braunschweig upheld the president's action. *Der Tagesspiegel* (Berlin), Jan. 31, 1986, at 7, col. 1. A Swiss high school teacher and military judge in the Swiss army who questioned the existence of World War II Nazi gas chambers in public statements, news conferences, and right-wing newspapers edited by her husband has been formally barred from teaching history (but would be able to teach French). *Swiss Doubter of Nazi Camps Is Forbidden to Teach History*, N.Y. Times, Feb. 22, 1987, at 10, col. 3.

12. In Sweden, an Austrian-born Jehovah's Witness publishes a periodical and organizes summer trips to Auschwitz and to other localities in Poland to demonstrate that "nothing serious had taken place there." In Australia, it is the former secretary of the Victorian Council for Civil

An American observer would expect the central issue in the public debate to be the conflict between the constitutionally protected values of individual freedom of expression on the one hand and public security and personal honor on the other. This, however, has not been the case. To the contrary, the constitutional issue has played a marginal role in the legislative process, and it has been resolved by the courts with obvious ease in favor of the constitutionality of the previous legislation on the same general subject. There is every reason to believe that the new law will also be upheld, even though, as we shall see, it potentially restricts freedom of speech still further. Moreover, it has been widely assumed (albeit with some dissent) that law and the courts have a significant role in protecting against the infamous and the ignorant who propagate the "Auschwitz lie." The core issue in public discourse has been the scope and the modalities of this contribution.

In this essay I propose, first, to outline the state of the legislation before the enactment of the new law; second, to illustrate the travail of the courts in applying that legislation; third, to identify the principal legal and political issues that have emerged in the wide-ranging debate surrounding the genesis of the new law and in the lawmaking process itself; and fourth, to consider early reactions to the law and its implications in the broader context of contemporary Germany.

II. THE CRIMINAL CODE

Three provisions of the German Criminal Code¹³ are crucial to this inquiry. The first two, articles 130 and 131, fall within the group of serious crimes against "public peace."

Liberties, in Italy a "small libertarian and Marxist group." Vidal-Naquet, *Thèses sur le révisionisme*, *supra* note 9, at 504-05. In the United States a survivor of the Auschwitz camp sued the Legion for Survival of Freedom and its subsidiaries, including the Institute for Historical Review and Liberty Lobby, claiming that they reneged on an offer to pay \$50,000 to any person who offered proof that millions of Jews had been gassed by National Socialists. The plaintiff demanded the payment of the prize and damages. In a settlement approved by the Los Angeles Superior Court, the defendants agreed to pay the \$50,000 prize and \$50,000 damages for emotional distress and libel and to offer a formal apology acknowledging the judicial recognition that Jews were gassed to death in Auschwitz in the summer of 1944. *L.A. Times*, July 25, 1985, at 1, col. 1. The same plaintiff also sued a Swedish citizen in the Los Angeles court on the ground that he had been emotionally tortured by the defendant's assertions that the holocaust was a fiction. The jury awarded the plaintiff \$500,000 in compensatory damages and \$4.75 million in punitive damages for libel and intentional infliction of emotional distress. The defendant did not answer the complaint and was not represented in court, but the plaintiff's attorneys are reported as hoping to have the default judgment enforced in Sweden. *N.Y. Times*, Jan. 18, 1986, at 7, col. 4. On an American "expert," see note 55 *infra*.

13. Translations from the German original, STRAFGESETZBUCH [StGB], are my own. For an English translation of the entire Criminal Code as of April 1, 1961, see *THE GERMAN PENAL CODE OF 1871* (G. Mueller & T. Buergenthal trans. 1961).

A. *Attack on Human Dignity by Incitement to Hate: Article 130*

Article 130 replaced a provision of the Criminal Code of the German Empire which penalized breach of the peace (public order) by incitement to class hatred.¹⁴ Its antecedent was a proposal offered in 1950 by the Social Democratic group in Parliament in response to a series of antisemitic incidents including increased circulation of antisemitic tracts. An earlier version of the governmental bill was opposed on constitutional and policy grounds, and it was put aside until a new wave of desecration of synagogues and cemeteries in 1959 had brought about a radical change in the legislative atmosphere. The outcome of the notorious *Nieland* case in Hamburg was the last straw, which helped to sweep away all arguments that new legislation was neither necessary nor desirable.¹⁵

In that case Nieland, a Hamburg businessman, distributed two thousand copies of a brochure primarily among federal politicians. The brochure stated that "international Jewry" ("the devils of the earth") was responsible for the two World Wars (financing Hitler), for planning the third, and for spreading the "monstrous lie of a butchery of the six million Jews by the Germans under Hitler." All Jews, it said, must be removed from positions of influence since it was "almost impossible" to look into the Jewish hearts in order to determine which ones belong to "international Jewry." The defendant was charged under the then-existing provision of the Criminal Code prohibiting dissemination of writings hostile to the Basic Law.¹⁶ In addition, a Jewish member of the Hamburg state legislature filed a petition for prosecution of a criminal libel ("insult") under article 185.¹⁷

The trial court refused to institute the proceeding on the ground that it was not possible to disprove the defendant's allegation that his target was not "Jews in general" but only the "clique" of "international Jewry." The private petition was also rejected because there

14. See STGB art. 130 (1871). For an English translation, see *THE CRIMINAL CODE OF THE GERMAN EMPIRE* 221 (G. Drage trans. 1885).

15. For a detailed history, see G. Krone, *Die Volksverhetzung als Verbrechen gegen die Menschlichkeit* 1-54 (dissertation, Johannes-Gutenberg-Universität Mainz, Law & Economics Dept., 1979); see also Schafheutle, *Das sechste Strafrechtsänderungsgesetz*, 15 *JURISTENZEITUNG* [JZ] 470, 470-72 (1960); P. Paepcke, *Antisemitismus und Strafrecht* 164 (dissertation, Albert-Ludwigs-Universität Freiburg i. Br., 1962). See generally Cobler, *Das Gesetz gegen die "Auschwitz-Lüge": Anmerkungen zu einem rechtspolitischen Ablasshandel*, 18 *KRITISCHE JUSTIZ* 159 (1985).

16. Article 93 made punishable by imprisonment the production, stocking, and dissemination of writings aimed at the impairment of the existence of the Federal Republic or the suppression of democratic freedoms. STRAFGESETZBUCH art. 93 (1953). Article 93 was abrogated by a later law.

17. The German term is *Beleidigung*. Article 185 of the Criminal Code is the last of the three provisions mentioned above. It is discussed in the text at notes 38-45 *infra*.

was no evidence that the petitioner was a member of the "closely circumscribed circle of Jews (international Jewry)."¹⁸ The state appeals court rejected the Chief Prosecutor's urgent complaint without explanation.¹⁹

Although it was beyond the Federal Supreme Court's power to order the opening of the prosecution, that court did approve, in a separate proceeding, the seizure of the remaining copies of the brochure — and in an elaborate opinion it reached conclusions diametrically opposite those of the Hamburg courts. It found that the tract was contrary to the prohibition against writings designed to impair the existence of the Republic and to suppress democratic freedoms by undermining basic constitutional principles.²⁰ The reasoning, if not the decision, of the Hamburg judiciary is said to have evoked "much astonishment, even disgust."²¹ The mayor of the city of Hamburg is reported to have traveled to Bonn to appeal to Chancellor Adenauer, and it was the latter's intervention that led to the prompt adoption of the new article 130 on May 20, 1960, by a unanimous Parliament.²²

The motivating idea behind article 130 was the feeling that although the courts in most cases were able to impose punishment under the prevailing law (and that they should have done so in the *Nieland* case), that law did not "strike at the core of the evil . . . , that is, the attack on humanity, human dignity, and general public peace."²³ Thus, rather than aiming at the protection of private individual or group honor, which is assured by the criminal libel ("insult") provision, the new criminal provision is motivated by the public interest in safeguarding public peace.²⁴

18. Decision of Nov. 26, 1958, Landgericht Hamburg, 14 JZ 176 (1959).

19. See 14 JZ 176-78 (1959) (complaint by the Chief Prosecutor against the decision below, Az. 14a Js 236/57; brief of the State Prosecutor General, Az. 2 OAR 801/58; decision of June 1, 1959, Hans. Oberlandesgericht [OLG] Hamburg, Ws 724/58).

20. Judgment of Feb. 28, 1959, 13 Bundesgerichtshof in Strafsachen [BGHSt] 32. The court applied the original article 93. See note 16 *supra*.

21. Küster, *Anmerkung zum vorstehenden Beschluss des OLG Hamburg*, 14 JZ 178, 179 (1959).

22. See G. Krone, *supra* note 15, at 32-33.

23. Schafheutle, *supra* note 15, at 471. The author was an official of the Ministry of Justice which drafted the law. For the text of article 130, see the Appendix to this essay.

24. On the concept of "public peace" in this context, see E. DREHER & H. TRÖNDLE, STRAFGESETZBUCH UND NEBENGESETZE, art. 130, no. 2 (42d ed. 1985); see also N. ANDROULAKIS, DIE SAMMELBELEIDIGUNG 99-100 (1970). See, most recently, decision of Mar. 25, 1985, OLG Munich, 40 JZ 807, 807-08 (1985) (citations omitted):

The protected good in Criminal Code art. 130 . . . is the public peace (unanimous view). But it is disputed whether the dignity of the individual is an added protected good. . . .

. . . A member of a religious community or of a part of the population, however, is not directly injured by an attack such as the incriminating statement in this case because he is not a carrier of the public peace; only the community organized in the state is the carrier.

Article 130 introduces the concept of human dignity which is also enshrined in the Basic Law of the Republic.²⁵ It prohibits attacks against human dignity "apt to breach the public peace," committed in the form of acts of "particular gravity"²⁶ against "parts of the population."²⁷ The proscribed acts consist of (1) incitement to hatred ("stirring up enmity in an invasive manner, beyond mere rejection or contempt"); (2) provocation to violent or arbitrary acts (that is, acts of violence or lawlessness against personal freedom);²⁸ and (3) insult, ridicule, and defamation (not just "mere expression of disrespect" or "disparaging assertions whose truth or untruth cannot be proven").²⁹

When requested to elucidate the concept of "attack on human dignity," the Justice Ministry's spokesman drew an analogy with the established doctrine on degrading treatment of subordinates in the

25. See GG art. 1(1): "The dignity of man shall be inviolable." Moreover, "[t]his inviolability of human dignity is not a mere programmatic statement but a 'directly effective norm of the objective (constitutional) law . . .'" Judgment of Feb. 28, 1959, 13 BGHSt 32, 35 (citing 1 H. V. MANGOLDT & F. KLEIN, DAS BONNER GRUNDGESETZ 147 (2d ed. 1955)).

26. Schafheutle, *supra* note 15, at 473.

27. The enumeration of the protected groups contained in the earlier versions ("a national, racial, religious, or ethnic group") followed article 220a of the Criminal Code, implementing the Genocide Convention. G. Krone, *supra* note 15, at 35. This formulation was replaced by the neutral "parts of the population" in response primarily to the concern expressed by the Central Council of the Jews in Germany lest the text create a *privilegium odiosum* for the Jews. The Jewish group ultimately approved the final text. *Id.* at 37; P. Paepcke, *supra* note 15, at 168 n.1.

On its face "parts of the population" could be read as including political, social, and economic groups, but such potentially unconstitutional application is precluded, it is said, by the requirement that the act must constitute an attack on human dignity. *Id.* at 164-65.

The first legislation against racial hatred was the Law of the State of Bavaria of March 13, 1946, 3 Bereinigte Sammlung des bayerischen Landesrechts 1802-1956, at 149 (1957). This law was expressly preempted by the new article 130. Schafheutle, *supra* note 15, at 473. See in this context article 20(2) of the United Nations International Covenant on Civil and Political Rights of 1966 (in force 1976), providing that "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 178. See also article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (in force 1969), requiring prohibition of advocacy of racial hatred and incitement to racial discrimination and violence. 660 U.N.T.S. 195, 218. There is no corresponding provision in the European Convention on Human Rights. But see Resolution of the Committee of Ministers of the Council of Europe on Measures to be Taken Against Incitement to Racial, National, and Religious Hatred, Res. 68 (30) of Oct. 31, 1968, 1968 Y.B. EUR. CONV. ON HUM. RTS. 94 (Eur. Commn. on Hum. Rts.); the model law defining the offense of incitement to hatred adopted by the Consultative Assembly of the Council of Europe, *Recommendation 453 on Measures to be Taken Against Incitement to Racial, National and Religious Hatred*, Eur. Consult. Ass., 17th Sess. (Texts Adopted by the Assembly) (1966). See generally Lerner, *International Definitions of Incitement to Racial Hatred*, 14 N.Y.L.F. 49 (1968).

28. Cf. STGB arts. 234a, 241. [All STGB citations are to the current code, unless otherwise indicated.]

29. The statements in parentheses are by Schafheutle, *supra* note 15, at 473. For definitions of the terms "insult," "ridicule," and "defamation," see E. DREHER & H. TRÖNDLE, *supra* note 24, art. 130, no. 7. It has been suggested that the constitutionally protected freedom of opinion precludes penalization of any of the above acts except those that incite to violence or lawlessness. N. ANDROULAKIS, *supra* note 24, at 96.

Military Criminal Law (*Wehrstrafgesetz*): article 130 would reach "not any expression of disrespect," but only an attack "on the core area of [the victim's] personality," a denial of the victim's "right to life as an equal in the community," or his treatment as "an inferior being excluded from the protection of the constitution."³⁰

One writer questions the analogy between degrading treatment of a soldier, which envisages a personal confrontation, and the attack on human dignity; he believes that such an attack can exist only in cases of incitement to violence or lawlessness. But he "would not hesitate for a moment" to brand statements such as "Jews are inferior beings (*Untermenschen*)" as an attack on human dignity; because of the "unavoidable connection with the cruel persecution of Jews . . . it is nothing less than an endorsement of the call for a revival of the terrible extermination"³¹

B. Race-Hatred Writings: Article 131

Article 131, also within the category of crimes against public peace, is said to be "almost without parallel in foreign legislation."³² Its reach was substantially broadened in 1973.³³ The clause that concerns us here makes punishable the production or dissemination of writings "which incite to racial hatred."³⁴ Reports on contemporary events or history are protected by an express exclusion.³⁵ As in the previous article, it is "the inner peace of the society" that is protected;³⁶ the clause in question is directed "primarily at the incitement

30. Dr. Schafheutle, Ministerialdirektor, before the 99th Session of the Legal Committee of the German Bundestag, Mar. 17, 1960, quoted in G. Krone, *supra* note 15, at 51-53 (emphasis added); see also Schafheutle, *supra* note 15, at 473: "Jews out" or "Negro half-breeds living in Germany should be gassed" would qualify as attacks under article 130.

31. N. ANDROULAKIS, *supra* note 24, at 96-97. The penalty for violating article 130 is imprisonment for three months to five years or a fine. See also StGB art. 47(2) (amount of fines). Today more than 83% of all sentences rendered by German courts impose fines rather than imprisonment. See E. DREHER & H. TRÖNDLE, *supra* note 24, art. 40, no. 1.

32. E. DREHER & H. TRÖNDLE, *supra* note 24, art. 131, no. 1; see also A. SCHÖNKE & H. SCHRÖDER, STRAFGESETZBUCH KOMMENTAR, art. 131, no. 1 (21st ed. 1982). For the text of article 131 see the Appendix to this essay.

33. The concept of "race hatred" was taken from article 112 of the Law Against Writings Endangering Youth of June 9, 1953. Judgment of Oct. 28, 1980, OLG Cologne, 34 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1280, 1281 (1981).

34. Also included in the prohibition are writings which "describe cruel or otherwise inhuman acts of violence against humans in a manner which glorifies or minimizes such acts of violence or represents the cruel or inhuman aspects of the occurrence in a manner offending human dignity." The forms of dissemination (including broadcasting) are defined in para. 1(1)-(4) and in para. 2. A critical note is Gehrhardt, *Die Beschränkung der Gesetzgebung auf das Unerlässliche*, 28 NJW 375 (1975).

35. StGB art. 131(3). The penalty is imprisonment up to one year or a fine.

36. E. DREHER & H. TRÖNDLE, *supra* note 24, art. 131, no. 1.

of hatred against Jews."³⁷

C. "Insult": Article 185

The third of the triad, article 185, has been a part of the Criminal Code from its inception. It makes punishable an offense against personal honor, "insult."³⁸ Proof of the truth is no defense "when the insult arises from the manner in which the assertion was made or disseminated or the circumstances in which it was made."³⁹ Until the modification brought about by the 1985 law, prosecution could be instituted only on the basis of a petition "by the person insulted."⁴⁰

In the period between the coming into force of the Criminal Code in 1871 and the fateful year of 1945, the German Supreme Court (*Reichsgericht*) consistently refused to apply this article to insults against Jews as a group⁴¹ — although it gave the benefit of its protection to such groups as "Germans living in Prussian provinces, large landowners, all Christian clerics, German officers, and Prussian troops who fought in Belgium and Northern France."⁴² It has been said that during that period the courts were quite ready to extend group protection to the "pillars of the throne and the altar," while denying it to the Jews on the basis of an "often suspect argumentation."⁴³ A more charitable interpretation would point to the avid desire of many German Jews to shed the characteristics that would mark them as a group and to be assimilated as rapidly as possible. The "hopefully unconscious onesidedness"⁴⁴ of the Supreme Court vanished, as we shall see,

37. *Id.* at art. 131, no. 6. Another commentary suggests, however, that in contrast to article 130 the incitement to race hatred need not be such as to potentially disturb public peace, and that races that do not form "a part of the internal population" are also protected. A. SCHÖNKE & H. SCHRÖDER, *supra* note 32, art. 131, no. 3. In the same commentary it is said, however, that the "legal good" protected is "ultimately here also public peace." *Id.* at art. 131, no. 1.

38. This offense is punishable by imprisonment of up to one year or by a fine, but when it is committed by a physical act (*Tätlichkeit*) the punishment is up to two years of imprisonment or a fine. See also STGB arts. 186 (damage to reputation consisting of factual statements insulting a third person), 187 (defamation), 187a (persons in political life), 189 (disparaging the memory of the dead). For the text of article 185 see the Appendix to this essay.

39. STGB art. 192.

40. In case of the death of the offended person, the right of petition passes to his family — and if he or she died as a result of a "violent or arbitrary dominance" (*Gewalt- und Willkürherrschaft*), to which the insult is related, the requirement of a petition is dispensed with. STGB art. 194(1)-(2).

41. See P. Paepcke, *supra* note 15, at 81-87, 92; N. ANDROULAKIS, *supra* note 24, at 12-23 (citing the relevant case law). German law distinguishes between insult of a group and insult of individuals by statements directed against a group. See A. SCHÖNKE & H. SCHRÖDER, *supra* note 32, Vorbemerkungen 3-8 to arts. 185-200.

42. P. Paepcke, *supra* note 15, at 86.

43. N. ANDROULAKIS, *supra* note 24, at 32-33.

44. P. Paepcke, *supra* note 15, at 92.

after 1945.⁴⁵

In summary, the principal instrumentalities in the criminal-law armory against the spreading of the "Auschwitz lie" consist of the prohibitions against attacks on human dignity by incitement to hatred (article 130) and against dissemination of writings instigating hatred (article 131), both conceived as serious offenses against the public peace, and finally, the less weighty offense of insult, protecting primarily a private good which — until the 1985 reform — required a private petition.

III. ON THE CONSTITUTIONAL QUESTION

The Federal Constitutional Court, the only tribunal that may declare a federal law unconstitutional, was faced with a challenge to the constitutionality of articles 130 and 131 in a case in which a defendant, a member of the "Action Front of the National Socialists (ANS)," was convicted for taking part in an event organized by this group in the center of Hamburg.⁴⁶ The group was dressed in Nazi-type black clothing with Nazi paraphernalia, and it marched in military formation with Nazi salutes. Three members of the group carried signs which read: "I, a donkey, still believe that Jews were 'gassed' in German concentration camps. I, a donkey, believe the 'gassing' lies and want to pay, pay, pay to Israel. I, a donkey, still believe the propaganda lies of the 'victors.'" The courts below found the defendant guilty of an attack on human dignity in conjunction with incitement to race hatred.

In a preliminary proceeding, the screening committee of the Constitutional Court refused to accept the defendant's complaint of unconstitutionality on the ground that it had no prospect of success, since the "interpretation and application of articles 130 and 131 by the competent courts did not disclose any violation of basic freedoms."⁴⁷ The court also rejected the "due process" claim that the courts had disregarded the complainant's offers of evidence:

The complainant, who does not deal even with the numerous generally accessible sources about the mass destruction of the Jews, not to speak of trying to reach an independent opinion through a thorough consideration, is not impaired either in his right to a hearing nor to an effective protection of law *when the courts judge this mass destruction to be com-*

45. See notes 88-97 *infra* and accompanying text. After the war, the Jewish population in the Federal Republic amounted to 30,000, down from the original 500,000 in the *Reich*. See Judgment of May 8, 1952, BGHSt, 5 NJW 1183, 1184 (1952).

46. Decision of Apr. 27, 1982, Bundesverfassungsgericht, Vorprüfungsausschuss, 35 NJW 1803 (1982).

47. *Id.*

monly known and consider irrelevant the mere offering of the names of individual witnesses.⁴⁸

If other courts had harbored any doubt about the constitutional issue they would have been required by the prevailing law to refer the question to the Federal Constitutional Court. There is no record of any such referral. The Federal Supreme Court, the highest tribunal in civil and criminal matters, entertained no such doubt. In a case involving a prosecution for criminal insult based on a leaflet branding the murder of millions of Jews as a "Zionist swindle," the Court gave short shrift to the defense argument:

[N]o one who denies the historic fact of the murder of the Jews in the "Third Reich" can invoke the guarantee of freedom of opinion (Art. 5, para. 1 GG). Even in a confrontation on a question that concerns substantially the public as is the case here, no one has a protected interest to publicize untrue allegations. The documents about the destruction of millions of Jews are overwhelming.⁴⁹

The lower tribunals have taken essentially the same view of the alleged constitutional conflict, to the extent they have given it any attention at all.⁵⁰

IV. THE LAW IN THE COURTS, 1960-1985

Most of the courts and prosecutors have tried to do their best in coping with a law that contains some novel concepts unrelated to established criminal law doctrine, formulated in vague language, motivated by a traumatic collective experience, and saturated with political

48. *Id.* (emphasis added). It should be kept in mind that the decision was taken not by the complete *Senat* (chamber) but by a committee of three judges who probed into the merits only to the extent necessary for them to find the complaint "manifestly groundless" and thus inadmissible, not worthy of consideration by the full *Senat*. However, the brief language quoted above gives a good indication of what the outcome would have been in the full *Senat*.

49. Judgment of Sept. 18, 1979, 75 Bundesgerichtshof in Zivilsachen [BGHZ] 160, 161, 33 NJW 45, 45 (1980). The Court pointed out that the defendant himself admitted the murder of millions but questioned the figure of six million as being too high. But the "objective content" of his statement did not sustain such limitation. *Id.*

50. See, e.g., Judgment of July 23, 1980, Landgericht Bochum, No. 8 Ns 33 Js 287/79, at 22. [Copies of unpublished opinions cited in this essay are on file at *Michigan Law Review*.] The court stated that in addition to the inapplicability of GG art. 5, the defendant could not rely on the protection of freedom of science clause in GG art. 5(3)(1). See also Judgment of Oct. 28, 1980, OLG Cologne, 1981 NJW 1280, 1281 (admitting that general criminal law must be interpreted in the light of, and in observance of, basic rights: "Whoever downright denies the historical fact of the destruction of the Jews may no longer claim the guarantee [of art. 5] — at any rate when the denial occurs in an injuring form.") (citations omitted). For the same reason this court approved the rejection of a reporter's claim of privilege under StGB art. 131(3). The court stressed that the defendant knew and intended all the factual elements of the crime. As another striking example, a 72-page appellate opinion of the Frankfurt *Landgericht* in five consolidated cases contains not a mention of the constitutional issue. Judgment of Mar. 25, 1981, Landgericht Frankfurt, No. 4 Ls 32/76 (Ns) (appeal from five judgments of the Amtsgericht-Schöffengericht Frankfurt).

considerations of the day. In carrying the burden of protecting the democratic system of the young Republic, the judiciary has received relatively little assistance from the scholarly community, which would normally analyze and classify the legislative and case material with a view to helping develop an acceptable doctrine. The burden of providing a rational framework and guidance for the lower courts has rested heavily on the Federal Supreme Court.

A. *Case Categories: The Issues*

Depending upon the Code provisions applied, the cases penalizing the "Auschwitz lie" may be grouped in three basic categories: (1) attacks on human dignity (article 130), alone or in conjunction with race-hatred incitement (article 131) or — if private petition is lodged — insult (article 185); (2) incitement to race hatred (article 131), alone or in conjunction with articles 130 or 185; (3) insult (article 185), alone or in conjunction with article 189 (disparaging the memory of the dead) or articles 130 or 131.

The principal problem facing the courts has been to determine whether a given fact situation fell within the ambit of the serious crime of article 130. Where a private party lodged a petition, the court, in reality, could turn to the less weighty alternative of an insult under article 185. This has been a crucial determination because in some courts, at any rate, a conviction under article 130 may carry a sentence of one year's imprisonment, as against six months or merely a fine for an insult.⁵¹ Yet the line between the two fact situations is drawn, as we shall see, largely by the judges' intuitive reactions, with only a few somewhat more general criteria emerging. With some exceptions, the trial courts have been reluctant to follow the "attack on human dignity" route, and their judgments of acquittal on this count have been subject to frequent reversal by the state courts of appeal and, even more consistently, by the Federal Supreme Court.

The following are the issues with which the courts have had to grapple:

- (1) What is an attack on human dignity?
- (2) When is an act apt to breach public peace? The courts have not entered into the discussion of "objective" or "subjective" public peace that one encounters in other contexts.
- (3) What constitutes incitement to race hatred?
- (4) Are Jews "a race"?

51. See Judgment of Mar. 25, 1981, Landgericht Frankfurt, No. 4 Ls 32/76 (Ns); see also note 50 *supra*.

(5) Is the court required to admit evidence designed to disprove the existence of the extermination camps?

Some specific issues have arisen in prosecutions for "insult" under article 185:

- (1) Are Jews as a group protected against "insult"?
- (2) Which acts involving "the Auschwitz lie" are capable of causing injury?
- (3) Who is a legitimate petitioner?

B. *On Judicial Notice*

In German as in common law, courts may take notice of generally known facts without the need of formal proof.⁵² German courts do not seem to agree whether judicial notice may or must be taken of the extermination of Jews or whether appropriate evidence must be placed on the record to prove the falsity of "the lie."

Although the Federal Supreme Court held in 1976 that the essential facts of the Jewish persecution were "generally" and even "publicly known," it suggested that such facts must be introduced in the trial and that "this can be done expediently by hearing a historian as an expert witness."⁵³

In a later case the High Court spoke of the "historical fact of the murder of the Jews in the 'Third Reich,' " without, however, any reference to the problem of proof.⁵⁴ It was on this statement that the appeals court in Bochum relied when it refused to entertain any evidence designed to prove the "Auschwitz lie." The court assumed as true the defense allegation that a French professor, Robert Faurisson, "after a thorough working through the 'gas chambers' complex," and an American Professor Butz, "after five years' research of all sources available to him," had reached the conclusion that the mass murders of Jews had not taken place; but this fact, the court held, represented only the research results of the two witnesses and did not upset "historically secure and thus generally accepted knowledge."⁵⁵ On similar

52. See STRAFPROZESSORDNUNG (Code of Criminal Procedure) art. 244(3)(2).

53. Judgment of Nov. 11, 1976, Bundesgerichtshof [BGH], No. 2 StR 508/76 (unpublished), quoted in Cobler, *supra* note 15, at 168. On the view of the screening committee of the Federal Constitutional Court, see text at note 48 *supra*.

54. Judgment of Sept. 18, 1979, 75 BGHZ 160, 161, 33 NJW 45, 45 (1980). For more on this case, see notes 88-97 *infra* and accompanying text.

55. Judgment of July 23, 1980, Landgericht Bochum, No. 8 Ns 33 Js 287/79, at 17, 19 (appeal from judgment of Jan. 17, 1980, Schöffengericht Witten); see also note 50 *supra* & note 74 *infra*. Robert Faurisson, Maître de Conférences (Lecturer) at the University of Lyon, has published and broadcast a number of statements asserting "the Auschwitz lie." He has been the subject of civil and criminal proceedings. See, e.g., Judgment of June 28, 1983, Cass. Crim., Fr., 1983 Bulletin des arrêts de la Cour de cassation, chambre criminelle 518, which affirmed the judgment of the Court of Appeal of Paris upholding Faurisson's conviction for group defamation

grounds of irrelevancy the court upheld the refusal to hear witnesses claiming personal knowledge of the nonexistence of the camps, to obtain expert opinions on when the camps were built (it was alleged that they were constructed after the war), and to hear a photographic expert who would prove that the purported photographs of the camps were recent falsifications.⁵⁶

In another case, the court in Frankfurt emphatically proclaimed the existence of the extermination measures to be an "established" and "historically proven" "historical fact" which "does not need any proof" and that no evidence need be admitted on this issue. Nevertheless, "manifest historical facts were merely introduced into the proceedings by means of Professor Broszat's opinion."⁵⁷ In what appears to be an isolated instance, reflecting perhaps the observation by the Federal Supreme Court in the earlier case, the court evidently preferred to accept an authoritative confirmation of the facts which it felt mandated to take as proven.

C. *The Case Law*

In this area of the law, consideration of the facts of the cases, in more or less detail, is vital for a meaningful analysis of the judicial posture.⁵⁸ The stories behind the cases reveal a good deal about certain dark corners of life in contemporary Germany.

1. *The Federal Supreme Court on Articles 130 and 131*

In 1981, the Federal Supreme Court had before it an appeal from the court of Braunschweig.⁵⁹ In that case the defendant was charged with distributing a brochure denying that "Hitler's gas chambers" had existed and that the "genocide" of the Jews had taken place, and claiming that such "six-million lies" and "horror tales" of essentially Zionist origin had brought about a gigantic political and financial swindle, principally for the benefit of the State of Israel. Also included was a picture of a gallows with a person beneath it, and a text to the

and his sentence of three months' imprisonment (suspended), a fine of 5000 francs, and damages to the complainant. The court of appeal had reversed the conviction by the trial court for incitement to race hatred, and the *Cour de cassation* agreed. As of the fall 1985, A.R. Butz was Associate Professor of Engineering at Northwestern University. See A.R. BUTZ, *THE HOAX OF THE TWENTIETH CENTURY* (1976).

56. Judgment of July 23, 1980, Landgericht Bochum, No. 8 Ns 33 Js 287/79, at 17-19.

57. Judgment of Mar. 25, 1981, Landgericht Frankfurt, No. 4 Ls 32/76 (Ns), at 43-44.

58. Unhappily, in this as in other areas not all cases of even the highest courts are published, and in most instances the published texts provide a bare minimum of facts.

59. Judgment of Jan. 14, 1981, BGHSt, 1981 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 258.

effect that on this gallows people were tortured and blackmailed by their Jewish accusers to give false evidence and were murdered "in an assembly line" manner. The defendant was convicted and fined for disseminating writings that incited to race hatred (article 131). He was, however, acquitted of the more serious charge of attacking human dignity by incitement to hatred under article 130. The trial court concluded that although the brochure could be seen as an attack on the honor of the Jews as a population group, it was not an attack against human dignity; it was not apt to disturb public peace because it could not be assumed that the circle of persons to whom the brochure was sent could feel threatened in their sense of security.

The Federal Supreme Court reversed; it affirmed the conviction under article 131 but disagreed with the trial court's refusal to apply article 130. In the context of article 131, the Supreme Court came to grips with the issue of whether Jews could be considered a "race" for the purpose of this provision. It dismissed as irrelevant the defense argument that there could not be a crime of incitement to race hatred since the Jews did not form a race in a biological-anthropological sense. "The concept of race hatred," the Court declared,

falls within the conceptual world of racial ideology. This is not based on a scientifically grounded, clearly delimited race concept. Rather it proceeds from merely an approximate anthropological classification of humanity into human races, that is, according to common hereditary, predominantly physical characteristics, as a starting point for a theory pursuant to which biological diversity of the "races" is supposed to be the cause of their relative superiority or inferiority and corresponding different value. The emotionally heightened hostility of the provocation directed against the Jews is one of the phenomena of the incitement to race hatred which the lawmaker wanted to include in article 131.⁶⁰

In reversing the acquittal under article 130 the Supreme Court confirmed that an attack against human dignity exists only if "it is directed against the unrenounceable (*unverzichtbar*) and nonincidental (*unausbleibbar*) core of a personality of another, against him as a human being, and only if it denies his value." This language clearly recalls the rationale offered by the government spokesman for the new article 130 and mentioned earlier as part of its legislative history.⁶¹

Contrary to the court below, however, the Supreme Court found that there was such an attack in this case, because the brochure "was apt to provoke an emotional, hostile stance toward the Jews." The distributor appeared to identify himself with the fundamental National Socialist outlook

60. *Id.*

61. See text at note 30 *supra*.

which classifies the Jewish fellow citizen as a member of an inferior "race," that branded him formally by forcing him to wear the Jewish star, deprived him of all rights, and treated him no longer as a fellow human being. In such cases involving similar allegations, the Supreme Court has approved the findings that writings which aim at stirring up hostile feelings against the Jews in general and against the Jews living in Germany in particular constituted attacks against human dignity.⁶²

The High Court thus rejected the notion of the court below that it is the sense of security of the brochure's addressees (rather than their potential response to the incitement) that should be the yardstick in finding a breach of the public peace. The same Court had made it clear in an earlier case that article 130 does not require proof of an actual breach of public peace:

It suffices that there are justified grounds for the apprehension that the attack will shatter confidence in legal security, even if it is only on the part of the population group against which the attack is directed. That this is true of an antisemitic smear tract destined for distribution needs no further explanation in light of the historical experience.⁶³

In an observation bearing upon general methods of interpretation, the Court found that the trial tribunal should not have limited its evaluation to the contents of the printed text "along with the generally known facts," but was obligated to include "also other circumstances that are significant for the facts of the case"; the reasoning of the contested judgment did not make clear that the defendant's "eventual identification with the National Socialist ideology" was taken into account.⁶⁴

2. *Lower Courts on Articles 130 and 131*

a. Teachers in trouble. In the nature of things, only a small fraction of litigated cases reaches the high federal tribunal. But a broad range of activities has been prosecuted — all the way from a teacher's casual remark in a classroom to a "one-man propaganda machine" spouting open letters, thousands of postcards, periodic publications, placards, etc. The "Auschwitz lie" has appeared also in a variety of versions, ranging from a simple "I am a donkey — I still believe the

62. 1981 NSrZ 258 (citing judgment of Nov. 10, 1976, BGH, No. 2 StR 508/76; decision of Apr. 25, 1979, No. 3 StR 74/79 [S]; decision of Apr. 9, 1980, No. 3 StR 506/79 [S] (reversing, among others, acquittals for attacks on human dignity (incitement to hatred) in the judgment of May 23, 1978, Landgericht Nuremberg-Fürth, No. 1 KLS 91 Js 27 412/76, and judgment of May 18, 1979, Landgericht Nuremberg-Fürth, No. 1 KLS 91 Js 4500/78)).

63. Judgment of Apr. 21, 1961, 16 BGHSt 49, 56-57 (an antisemitic tract about a bankers' conspiracy in the United States held hostile to the Constitution and as inciting hatred (StGB arts. 93, 130)).

64. Judgment of Jan. 14, 1981, BGHSt, 1981 NSrZ 258. The Supreme Court was clearly concerned lest history be omitted from the relevant context.

lies about the extermination camps," to greatly embroidered pronouncements of elaborate offensiveness.

A court in Goslar made the following findings of fact. A middle-aged teacher (a family man with several children) in a vocational school discussed in his class an impending class excursion that was to include a visit to the Dachau concentration camp. In this context, the teacher observed that there were no concentration camps or killings of Jews in the Third Reich: there were only work camps in which Jews lived peacefully with their families. When several students mentioned films about the extermination of Jews the defendant observed that they were American-made; he had at his home documentary evidence which anyone was welcome to inspect. At the end of the class he asked that his statements not be passed on because they were prohibited "and he has a family to support." When the story began to make the rounds in the school, the editor of the student paper obtained a written statement from four students confirming that the controversial assertion had been made. Thereupon the defendant assembled the entire class with the exception of "the four"; in response to his plea for help, all students present signed a paper denying that he had made the allegations attributed to him and that he had ever questioned the existence and inhumanity of the camps. With this paper in hand the defendant then visited the parents of the four "dissidents" and threatened them with court action and other "difficulties" (hinting at possible trouble with the immigration authorities in the case of one family of Portuguese nationality). A few days later, when the teacher's approach to the parents became known, the entire class signed another statement revoking, in effect, the earlier paper and confirming the allegations against the defendant.

A Hamburg Jew, whose wife, mother, and brother had died in the concentration camps, and the Hamburg Jewish community filed a petition of criminal insult. In the proceedings the defendant denied making the contested statements and claimed that his efforts to stimulate a balanced class discussion were intentionally distorted by the students in revenge for poor grades he had given in a physics test.

After hearing some twenty witnesses the court found the defendant (who was without prior criminal record), guilty of an attack against human dignity (article 130), in conjunction with insult (article 185) and disparagement of the memory of the dead (article 189); it imposed a suspended sentence of six months' imprisonment.⁶⁵ In an elaborate, carefully reasoned opinion (which incidentally provides some insight

65. Judgment of Mar. 27, 1981, Amtsgericht Goslar, No. 6 Ls (0) 303 Js 3643/80. The original sentence of seven months was reduced by eliminating a conviction for duress against the

into the teacher-student relationship in a newly multi-ethnic community), the court followed the interpretation of the attack-on-human-dignity concept and the breach-of-public-peace prerequisite as given by the Federal Supreme Court.⁶⁶

Another teacher's trouble was the subject of a case before a court in Schleswig.⁶⁷ A letter to the editor, published in a periodical for which the defendant was responsible, noted a news story that a history teacher was fired because he branded the "destruction of six million Jews" a lie: "Thus, once more," the letter stated, "one who opposes Jewish propaganda is silenced while Jews (!) are trained as teachers for German children." In an editorial annotation to the letter the defendant signaled that he approved of its contents.

The trial court found that although the contents of the letter fell within the scope of article 130 the charge must be dismissed on the grounds that the editor could not be held criminally responsible for the contents of a letter addressed to him and published as such. The appeals court reversed. The letter to the editor, the court reasoned, incited hatred against the Jews in that it denied their ability to teach German children and pretended that the destruction of the Jews was a lie based on Jewish propaganda. The aim was to make Jews, as a part of the population, contemptible and inferior by attacking the human dignity of each individual Jew, "in its indispensable personality core."⁶⁸ The letter was apt to disturb public peace by potentially shaking the sense of security of the attacked group or by provoking the "incited" group to insults.⁶⁹ The defendant was liable for publishing such a letter.⁷⁰

Another case, drawn also from a school setting, is one of a number that came out of the aftermath of the showing of the television film *Holocaust*. It concerns a youngster who at the age of six had been

parents. Decision of Sept. 21, 1981, Landgericht Braunschweig, No. 31 Ns 303 Js 3643/80. The judgment has become final.

66. See text at notes 55-58 *supra*. There are potential breaches of public peace when the entire population loses confidence in legal security, or the attacked group alone feels threatened, or when there is a strengthening of the tendency to violate the law on the part of the group which has inclinations toward violations of the law. The defendant's statements, the court held, were objectively apt to disturb public order by fueling the newly increased neo-Nazi tendencies and impairing the sense of security of the Jews in the Republic; the statements were made in "a large circle" of young persons by a teacher whose duty it was to educate them for democracy, with a potential for a "multiplying" effect; the defendant "knew that his statements do not correspond to the truth." Amtsgericht Goslar, No. 6 Ls (O) 303 Js 3643/80, at 13, 18.

67. Judgment of Dec. 14, 1977, OLG Schleswig, 32 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 333 (1978).

68. *Id.* (citing judgment of Nov. 15, 1967, 21 BGHSt 371, 22 MDR 255 (1968)).

69. OLG Schleswig, 32 MDR 333.

70. *Id.*

enrolled by his parents (born in 1918 and 1920) in the Viking Youth, a right-wing organization, and was brought up in a right-wing atmosphere. A high school graduate, age nineteen, he and his teenage girlfriend appeared as responsible editors for a student periodical that was distributed in an edition of ten thousand copies in local and other schools. In a story directed particularly at young people and commenting on *Holocaust* ("a horror show of the worst Hollywood make"), the National Socialist terror and murders were characterized as falsifications: "renowned historians" including the "famous American Professor Butz with his book on *The Hoax of the [Twentieth] Century*" had provided the "breakthrough." Other books and documentations were cited to disprove the "monstrous lying provocations." The "gas chambers" were mock-ups built under the direction of the American military, and camp inmates died of illness and undernourishment owing to war conditions.

The juvenile court in Cologne held both defendants guilty of violating articles 130 and 131.⁷¹ The young man was sentenced to a fine (ninety "daily rates" of fifteen marks), while his friend, who had withdrawn from the co-editorship, got away with a warning and forty days of service for the public good. The court noted that, in addition to the usual allegation of the "Auschwitz lie," Jews, particularly American Jews, were pictured as inventors of the "legend." Although such allegations were quoted as the opinions of others, they were approved without reservation.

The state appeals court affirmed.⁷² In embracing the trial tribunal's analysis, the court stressed that even the "revelations" in the form of extensive citations from historical literature may tend to stir hostility against the Jews, and in this case young readers were exhorted "to protect themselves" against "the lies." The potential for disturbance of public peace existed from the sole fact that the story had appeared in a high school student paper and was addressed — combined with a direct challenge — to young people still in a state of intellectual development. Here also the court rejected the argument, paradoxically advanced by the defense, that since Jews were not a race in a biological-anthropological sense there could be no race-hatred incitement.⁷³

71. Judgment of Feb. 21, 1980, Amtsgericht Cologne, No. 652 (253) Ls 340/79 jug. — 121 Js 145/79.

72. Judgment of Oct. 28, 1980, OLG Cologne, 34 NJW 1280 (1981). This judgment is final.

73. *Id.* at 1281. For the discussion of the constitutional issue in this opinion, see note 50 *supra*. In May 1986, a Koblenz court found a 49-year-old high school teacher guilty of insult and incitement to hatred for making statements to students, e.g., that Auschwitz was "an American invention." The court sentenced him to one year's imprisonment, suspended on good behav-

b. *Pamphleteers: the trend.* The "run of the mill" cases deal typically with production and dissemination of "Auschwitz lie" variants by means of brochures, placards, periodicals, open letters to public officials and mass media, or books. More often than not the defendant, young or old, is a hardened extremist with a prior record of neo-Nazi activity.⁷⁴

It is difficult to discern a consistent pattern in the judgments of the various courts, and the sentences differ from one court to another. The indeterminate language of article 130 allows for substantial judicial discretion. The varied degrees of offensiveness in the language employed necessarily involve a subjective evaluation and make com-

ior, and barred him from teaching for a period of three years. If the sentence becomes final the defendant may lose his status as a government official. The fact that state and local school supervisory authorities failed to intervene over a period of years in the face of mounting complaints was considered a mitigating circumstance. The court observed that "powerful protectors must have been at work," as the defendant is said to have threatened his supervisor with "his wide-ranging political connections." *Frankfurter Allgemeine Zeitung*, May 17, 1986, at 4, col. 6; see also judgment of July 23, 1984, Niedersächsischer Disziplinarhof (Disciplinary Tribunal of Lower Saxony), 39 NJW 1278 (1986) (affirming a salary reduction and ordering a demotion of a high school teacher (*Oberstudiendirektor*)).

74. As an example, the Landgericht Bochum upheld the conviction under article 130 of a tax accountant, born in 1920, for producing a brochure, entitled *Maidanek Forever?*, which advertised a book by J.G. Burg, a "Jew, [an] anti-Zionist writer" who "makes short shrift of the mass destruction lie" and "the Zionist million-size swindle." Extensive quotations from the book are given. Judgment of July 23, 1980, Landgericht Bochum, No. 8 Ns 33 Js 287/79. The sentence was for six months' imprisonment, suspended on good behavior. According to the brochure, Maidanek was "a model camp." "There were no doubt inconspicuous slips on the part of the personnel, but murders, and of this magnitude . . . ! Never!" *Id.* at 7-8. The defendant claimed that as a former SS man who was criminally prosecuted as such after the war, he was interested in clearing up the history; the Zionists wanted to bring about a new antisemitism in Germany by spreading the "Auschwitz lie" since that was necessary for the survival of the State of Israel; the Burg book was designed to bring about a reconciliation between the Jews and the Germans. The court noted that the quotations from the book are replete with offensive epithets and the Zionists are blamed for spreading "the lie" in order to get reparations. On the court's refusal to call professors and other witnesses or experts, see text at notes 55-56 *supra*. The court ordered the seizure of copies of the brochure. Some fifteen proceedings were previously instituted against the defendant, most of which were terminated because of the short statute of limitations.

See, similarly, judgment of Mar. 25, 1981, Landgericht Frankfurt, No. 4 Ls 32/76 (Ns). Defendant, born in 1914, son of a teacher, lost his father at the age of three, was brought up by a "national-conservative" grandfather, was unable to study beyond *Gymnasium* for financial reasons. He joined the National Socialist Party in 1933, served as a soldier in Russia, became an interpreter and journalist; since 1976 he had been living on support from relatives and political sympathizers and had devoted himself to two organizations (*Aktionsgemeinschaft Nationales Europa* and *Kampfbund Deutscher Soldaten*) which he had founded. *Id.* at 7-8. The "Auschwitz lie" was the principal theme in leaflets written in German and English, letters to broadcasting executives, to a general, etc. With his collaborators he started the "I am a donkey" campaign. With proceedings pending against him in two other courts, he was convicted in Frankfurt of eight separate cases of insult, two attacks on human dignity of Jews (including a charge of falsification of the Anne Frank diary), one disparagement of the memory of the dead, two cases of aggravated calumny, and one case of attempted duress. He received a "comprehensive sentence" of two years and eight months imprisonment. *Id.* at 3. The medical expert found him intelligent, spiritually alert, and responsible ("neither a paranoiac nor a sick fanatic") and related his "one-dimensional" insistence on the "Auschwitz lie" to his "emotionally grounded basic beliefs such as love of the fatherland, honor, loyalty, good character." *Id.* at 46.

parisons difficult. A court passing upon the text of two leaflets distributed by the same defendant would explain a lower sentence in one case on the ground that the text was "less embellished" and thus of "lower intensity" than in the other.⁷⁵ Courts, particularly those at the trial level, incline to the view that a "simple" denial of mass extermination, which is not accompanied by a "specific or at least incidental charge" against the "Zionists" for originating the "gassing lie," would not constitute an attack on human dignity.⁷⁶ Even where such a charge was made against "Zionists and other professional liars" a lower court acquitted a defendant, publisher of a periodical, of a charge of incitement to race hatred, since the Jews were not attacked for belonging to a certain race but rather were merely accused of ignominious behavior ("peddling a lie"). The appeals court rejected this reasoning and reversed the acquittal.⁷⁷

Another trial court acquitted a defendant of an article 130 charge where the "Auschwitz lie" was a minor component in a book which called for an elaborate scheme of an "Aryan Europe" based on the "Führer principle." This court viewed the contents as not exceeding the bounds of legitimate criticism of a democratic state, but the judgment of acquittal was reversed, in this instance by the Federal Supreme Court itself.⁷⁸ Finally, as mentioned earlier, the highly controversial refusal by the Hamburg courts to prosecute was justified on

75. Judgment of Mar. 25, 1981, Landgericht Frankfurt, No. 4 Ls 32/76 (Ns).

76. Decision of Feb. 17, 1982, OLG Celle, 35 NJW 1545 (1982) (citing cases from courts in Frankfurt, Segeberg, Nuremberg-Fürth, Goslar, as well as prosecutors in Nuremberg).

77. Judgment of Feb. 3, 1981, OLG Hamm, 1981 NSrZ 262. In the appeals court's view, the court below failed to distinguish between the true reason for the hatred and the means employed. Although under article 131 the feelings of hatred must be directed against others for the sole reason that they belong to a certain race, the characteristics attributed to them need not be present only in that race. *Id.* The court stressed that article 131 was designed to serve the struggle against the revival of racism and antisemitism in Germany, in view of the historical experience of the danger of "racially" motivated persecutions. This court and others have refused to draw the distinction urged by the defense between "the Jews" and the "Zionists."

78. Judgment of Aug. 24, 1977, BGH, No. 3 StR 229/77 (S). In this case the publisher of the German translation of a book entitled *Is Race Consciousness Reprehensible?*, originally published by a "Canadian scientific institute," was prosecuted for illegal activities against the state, defamation of the state, and violation of article 130. The book rejected democracy in favor of the "Führer principle," eulogized the Aryan race, minimized the Nazi crimes and euthanasia, and called for an Aryan Europe, a Federation of Aryan Nations, the removal of the nonwhites, reducing Jews to guest-people, and a prohibition, under the penalty of sterilization, of mixed marriages. The trial court (Landgericht Flensburg), pointing to passages where race separation is advocated as self-survival, and race-hatred and racist zealots are repudiated, acquitted on the ground that the contents did not exceed the bounds of legitimate criticism of the democratic state; although presenting "a presumptuous and overbearing valuation of the Aryan, [it does] not contain an attack on human dignity of the undervalued persons in the sense of [article 130]." *Id.* at 3. The Supreme Court vigorously disagreed with the legal interpretation, reversed, and remanded. Note also the reversal of acquittals on two counts for race-hatred incitement and two counts of insult by the Frankfurt *Landgericht*. Judgment of Mar. 25, 1981, Landgericht Frankfurt, No. 4 Ls 32/76 (Ns), at 2-3.

the ground that the defendant's target was not "Jews in general" *but only* "the clique of international Jewry."⁷⁹

The apparent inclination of the lower courts to avoid convictions under articles 130 and 131 is perhaps even stronger in cases where a private party lodges a petition. In that situation the courts, if they do not acquit, may opt for a conviction under article 185 for an insult, at times limiting the penalty to a fine.⁸⁰ On the other hand, to add to the diversity, some sentences for an insult under that article match in severity, or even exceed, those imposed for the more serious offense against human dignity.

In general, the Federal Supreme Court and — with some interesting exceptions⁸¹ — the state appeals courts have often tended to reverse judgments of acquittal because they have taken a more serious view of the "Auschwitz lie" than the trial courts. One can only speculate about the reasons behind this pattern of judicial interaction. For one thing, trial judges are generally of a younger generation, without oppressive memories and — understandably — without a sense of personal guilt. Lacking extensive experience, they may feel less confident in handing down convictions for a distinctly political crime. Perhaps they also are more in tune with local attitudes than the higher-level judiciary, and are less responsive to the national policy that has reflected both the recent historical experience and a sensitivity to international considerations.⁸²

3. *The "Insult" Alternative*

The trials and tribulations in the application of the insult article 185, prior to its modification by the 1985 law, are illustrated in two cases.

a. The case of the "Sons and Daughters of Deportees from France." This case arose out of a 1980 demonstration in Cologne of mostly French Jews, the "Sons and Daughters of Deportees from France," at the occasion of a Nazi war criminal trial held in that city. The defendant distributed to the participants, journalists, and bystanders several copies of a leaflet which he himself had produced. Under the heading "Incitement to Hatred" the leaflet declared that, contrary

79. Decision of Nov. 26, 1958, Landgericht Hamburg, 14 JZ 176 (1959). Here the appeals court affirmed the refusal.

80. See, e.g., Judgment of Mar. 25, 1981, Landgericht Frankfurt, No. 4 Ls 32/76 (Ns), at 17, 19, 68.

81. Decision of Feb. 17, 1982, OLG Celle, 35 NJW 1545 (1982); judgment of May 2, 1978, OLG Koblenz, 12 KRITISCHE JUSTIZ 193 (1979).

82. Due to the limited availability of trial court opinions, the above considerations are necessarily based on not more than a sample of cases.

to the opinions of federal judges and prosecutors and contrary to the presentation in the film *Holocaust*, there had been no mass destruction of Jews through gassing, as witnessed by the statements of varied historians, first and foremost by the "Jewish historian" J.G. Burg. The reverse side of the leaflet contained a report on the earlier "I am a donkey" demonstration in Hamburg,⁸³ without, however, any mention of the banners carried in that demonstration in which Israel was blamed for the "gassing lies." Burg, the report continued, supported the Hamburg demonstration, but a criminal proceeding was instituted against the participants upon complaint by the Hamburg Jewish community.

The trial court interpreted the defendant's leaflet as purporting to brand those who believed in the mass destruction stories as liars, prevaricators, and falsifiers of history and to attribute to the Jews at least a part of the responsibility for the "gassing lie." It found the defendant guilty of an attack on human dignity — incitement to hatred — according to article 130 and sentenced him to imprisonment for a year and three months. The *Landgericht* reduced the penalty to ten months, but the state appeals court in Celle reversed the conviction.⁸⁴

In the appeals court's perception, the leaflet attributed the belief in the holocaust only to the German federal authorities ("the Jewish historian Burg" holding the opposite view) but not to the Jewish population in the Federal Republic (the participants in the Cologne demonstration being predominantly French Jews not covered by article 130): "it cannot, without more, be concluded that the leaflet flatly accused the local Jewish population of originating the 'gassing lie.'" There could be no finding of an attack on humanity where the denial of the mass destruction was not accompanied by "qualifying characteristics," that is, by particularly offensive and inhuman invectives such as a charge that the Jews themselves were the perpetrators of the "gassing lie."⁸⁵ Because of the absence of such characteristics, which delimit article 130 from article 185, the appeals court quashed the sentence and remanded the case to the *Landgericht* with the directive to determine whether the facts warranted a conviction for an insult pursuant to the latter article, provided the requisite petition was filed by an authorized person.

In the proceeding on remand the defendant was in fact convicted

83. See text at note 46 *supra*.

84. Decision of Feb. 17, 1982, OLG Celle, 35 NJW 1545 (1982).

85. The court cites unpublished judgments of other tribunals and distinguishes the case from judgment of Sept. 18, 1979, 75 BGHZ 160, 33 NJW 45 (1980). 35 NJW at 1546.

of an insult and sentenced to a fine (eighty-five "daily rates" of fifteen marks). However, on a new appeal by the defendant the appeals court rendered a judgment of acquittal of the insult conviction on the ground that "upon further inquiry by the Senate [chamber]" it transpired that the petitioner was not a Jew.⁸⁶ Only "full Jews" (*Volljuden*) or "Jewish mixed breeds" (*jüdische Mischlinge*) "who were persecuted in the Third Reich or who would have been persecuted had they been living at that time" were entitled to file the petition; although the petitioner sympathized with the Jewish participants in the demonstration he was not offended by the statements in the leaflet because they were not directed against him as a "non-Jew."

Some of the inferences drawn by the court are curious. Thus, according to the court's interpretation of the leaflet, the belief in the existence of the holocaust could not be imputed to the Jews ("the Jewish historian Burg" did not believe in it). And, even accepting the court's assumption that the French Jews deported to Germany by the National Socialists and returning there were not protected by article 185, there was no evidence to support the court's belief that the leaflet with a text commonly distributed elsewhere in Germany was directed exclusively at them (even though the demonstration was "predominantly" by the French deportees).⁸⁷

Nevertheless, the court's refusal to consider the distribution of this particular leaflet a serious crime against the public order is not, as we have seen, out of line with lower jurisdictions elsewhere, as the text omitted the usual charge against Jews of having originated "the lie" and contained no other aggravating statements. In dismissing the case for the absence of a legitimate complainant, the Celle court relied on a judgment of the Federal Supreme Court in the second of the two principal cases in this field, which is discussed in the next section.

b. The Federal Supreme Court and the Nuremberg racial laws. In this case⁸⁸ the defendant posted a leaflet on a public wall declaring that the claim of the murder of millions of Jews in the Third Reich

86. Decision of Jan. 30, 1985, OLG Celle, No. 1 Ss 126/84 — 10 Js 228/80 StA.

87. 35 NJW 1545 (1982).

88. For the final judgment, see 75 BGHZ 160, 33 NJW 45 (1980); *see also* text at note 49 *supra*. This case is relied upon in the judgment of Feb. 24, 1981, Landgericht Frankfurt (juvenile criminal chamber), No. 50 Js 29.138/79 Ns (confirming, with a modification, the sentence below). A juvenile with a record of persistent right-extremist activities, including a previous conviction, currently deputy chairman of the statewide "People's Socialist Movement of Germany" which wants the National Socialist Party restored, printed and distributed more than 1000 leaflets in which the "historical fact" (the court's words) of the mass extermination in gas chambers is denied; German and foreign professors are cited, and the allegation is made that thus far no witness has appeared to confirm a "gassing." The "provocative question" (the court's words) is posed: "What shall we do? We have no taste for lying." The Jewish Community of Frankfurt filed a petition. The court upheld the conviction but reduced the sentence from eight months to

was a Zionist swindle that "could not be accepted." According to the line of decisions described above there may have been a basis for prosecution under article 130, as the text went beyond the "simple" denial of the "gassing lie." However, the proceeding was instituted upon private petition under article 185 rather than under article 130. The *Landgericht* in Mainz prohibited the posting of the offensive statements,⁸⁹ but the appeals court in Koblenz reversed and dismissed the complaint.⁹⁰

The Federal Supreme Court reinstated the prohibition in a broad-ranging opinion that dealt with four issues: (1) Was the prohibition compatible with the Basic Law? (2) Were the statements capable of causing personal injury? (3) Did "the Jews" constitute a group that was delimited with sufficient clarity to allow prosecution for an insult? (4) Was the complainant personally injured and therefore entitled to file a complaint?

seven months and two weeks (suspended on good behavior) because the court below had mistakenly taken into account a previous conviction.

89. Judgment of Apr. 6, 1977, *Landgericht Mainz*, 11 KRITISCHE JUSTIZ 189 (1978). The defendant, a gardener, used the wall regularly for posting "radical-right" publications. *Id.* at 190.

90. Judgment of May 2, 1978, OLG Koblenz, 12 KRITISCHE JUSTIZ 193 (1979). This was a proceeding before the *Zivilsenat* grounded in BÜRGERLICHES GESETZBUCH (Civil Code) art. 823, as well as in StGB art. 185. Here are the court's principal arguments:

(1) The Federal Supreme Court had held in a 1958 decision that the 30,000 Jews presently living in Germany and formerly persecuted by the Nazis formed a sufficiently defined group for the purposes of article 185. Decision of Feb. 28, 1958, 11 BGHSt 207; *see also* judgment of Apr. 21, 1961, 16 BGHSt 49, 57. Although the Supreme Court did not say so expressly, relatives of the persecuted persons were not included. The plaintiff, a student and the grandson of a Jewish grandfather who perished in Auschwitz, himself "not a Jew" and only a relative, did not belong to such a group. Moreover, the "arguments of the Supreme Court are contradictory and thus do not persuade." 12 KRITISCHE JUSTIZ at 195.

(2) The defendant did not aim the insult expressly at the Jews and their relations but rather at all those, Jews and non-Jews, who denied the "Auschwitz lie" — and of these there were so many that they clearly could not be viewed as "a group."

(3) The very denial of the mass extermination by the defendant excluded any implication of his approval thereof.

(4) The question of the origin of "the lie" was left open in the leaflet — the beneficiaries of "the lie" were presumed to be "political or ideological groups," not necessarily Jews. The defendant rejected the charge of antisemitism and cheap-talk Goebbels propaganda; his purpose was to express his discontent with the official historiography and the postwar prevailing political conditions. The words "Zionist swindle" could not necessarily be attributed to all Jews ("not all Jews or Israelis are Zionists").

For a critical comment see Thomas Blanke in the left-leaning *Kritische Justiz*. Blanke, *Anmerkung*, 12 KRITISCHE JUSTIZ 197 (1979). Blanke believes the above decision would be acceptable if it were based on a consistent liberal premise which, as a matter of principle, would exclude political controversy from the reach of the criminal judge. This, however, he feels has not been the case (citing Nettelbeck, *Meinungsausserung und Tatsachenbehauptung: Ein Bericht über Eindrigkeiten in der Zivilgerichtsbarkeit*, 11 KRITISCHE JUSTIZ 135 (1978)), because the protection of honor in both civil and criminal law has been manipulated in favor of the political right. Blanke, *supra*, at 198. He points out that if the Koblenz view were to be upheld, in the foreseeable future, when the last of the persecutees will have died, the Jews would again be exposed to "racist incitement and pogrom campaigns." *Id.* at 199.

The court's view on the *first* issue has been described earlier, in the context of the judicial posture toward constitutional questions.⁹¹

Dealing jointly with the *second* and *third* issues, the High Court attempted to draw a line between a mere falsification of history and an injurious invective. No one can claim personal injury, the court reasoned, from a mere presentation of a false version of history, even if it is expressed in strong words causing shock and indignation. There are other means for seeking historically secured truth than a recourse to the courts. The statement in the leaflet, however, was not directed toward a specific understanding of history. Denying the fact of the racial murder of the Jews amounted to disavowing their "inhuman" and "unique" fate which

gives every one of them a claim to recognition and respect, above all on the part of the citizens of the land burdened by this past. . . . The very historical fact that humans were segregated according to their origin under the so-called Nuremberg laws and were robbed of their individuality with a view to their extermination, gives the Jews living in the Federal Republic a special personal relationship with their fellow citizens; in this relationship the past is present even today. They are entitled, as a component of their personal self-image, to be viewed as a part of a group, singled out by fate, to which all others owe a particular moral responsibility, and that is an aspect of their honor. The respect of this self-image constitutes for every one of them one of the guarantees against a repetition of discrimination and a basis for their life in the Federal Republic. Whoever attempts to deny these events deprives each and every one of them of the personal worth to which they are entitled. For the affected person such denial means a continuation of the discrimination against the group of people to which he belongs, and simultaneously a direct discrimination against his own person.⁹²

With these words, in striking contrast to the pre-1945 case law,⁹³ the court confirmed that, despite its restrictive approach to other collectivities, the Jewish citizens of the Federal Republic have become, "at least since the special legislation of the National Socialist State . . . a sharply demarcated group."⁹⁴

It has been suggested that the High Court, in addition to recognizing the Jews as a group, has created a new personal right to the recognition of past persecution of the group, which belongs to every Jewish citizen of the Republic whether or not he himself actually suffered persecution; and the question was raised at the time whether such a right

91. See text at note 49 *supra*.

92. Judgment of Sept. 18, 1979, 75 BGHZ 160, 161-63.

93. See text at notes 41-45 *supra*.

94. "The fate imposed upon them by National Socialism binds them into a unit which sets them off from the generality and is embodied in everyone who belongs to it." 75 BGHZ at 163 (with citation to earlier opinions).

could be claimed by members of other groups such as minorities, refugees, and German expellees from Eastern Europe. We shall see that the 1985 law, as interpreted by its legislative history, appears to supply an affirmative answer at least in regard to the German expellees.⁹⁵

It was the *fourth* issue, the petitioner's standing, that had determined the disposal of the case by the appeals court below. That court dismissed the complaint because the petitioner was not a Jew and did not fall within the circle of the persons "insulted." With this the Supreme Court disagreed. It reached the opposite conclusion on the basis of a scrutiny of a page-long list of the Nuremberg laws. According to these laws the complainant would be classified as a *Mischling* of the second degree because he had one Jewish grandfather; he thus would still have been subject to substantial discrimination. As long as the past of the "horrible events" is still present, it is not possible to separate individuals from their group. "This may happen only when these events become merely a part of the historical process. In the Federal Republic such distance does not yet exist."⁹⁶

It is, to say the least, somewhat bizarre to see the Supreme Court "apply," albeit for this benign purpose, the infamous laws that it had excoriated earlier in the very same judgment. It was, as we have seen, the appeals court of Celle that subsequently carried this argument to its logical conclusion: it acquitted a defendant of a charge of an insult because the petitioner was neither a "full Jew" nor a "*Mischling*."⁹⁷ It is therefore not surprising that — as we shall see — in the final phase of the legislative process leading to the adoption of the 1985 law, the Celle case was invoked in support of the provision that did away with

95. Professor Edwin Deutsch sees here a new addition to private personal rights such as the right to one's own picture, one's own *Charakterbild* (against unauthorized psychological attempts), one's own life story. He is concerned about a possible extension of such "privatization." Is there a claim for damages for suffering? Can the right be attributed to other groups, such as minorities or refugees and expellees? He doubts it. Deutsch, *Anmerkung*, 33 NJW 1100 (1980); see also Judgment of May 8, 1952, BGH, 5 NJW 1183 (1952).

96. 75 BGHZ at 166. In a 1984 case, however, the Federal Supreme Court indicated that the principles enunciated in the above opinion with respect to the denial of the mass murder of the Jews would not apply to the denial of other factual situations, such as the setting up of the Warsaw ghetto and the shooting of the inmates by the German occupation personnel. The court gave no reason for this observation. Judgment of Jan. 27, 1984, BGH, No. StR 866/83, at 4-5. In this case the Hamburg *Landgericht*, relying on the Federal Supreme Court's opinion in 75 BGHZ 160, see text at notes 88-96 *supra*, had held that a defense counsel who in his plea in another case had argued that the Warsaw ghetto was organized and the order to shoot was given by the Germans in an effort to stem a typhus epidemic, was guilty of an insult and of disparaging the memory of a decedent. The Federal Supreme Court quashed the conviction for the above and several other reasons and remanded for further proceedings. On remand the Hamburg court convicted the defendant again of the same crimes but increased the fine from 8100 to 8400 marks. *Frankfurter Allgemeine Zeitung*, Apr. 25, 1986, at 10, col. 5.

97. See text at note 86 *supra*; see also Cobler, *supra* note 15, at 166.

the requirement of the private petition and thus authorized ex officio prosecution for an insult.

V. HOW THE NEW LAW CAME TO PASS

A. *The Original Version: A New Crime*

In September 1982, just two days before its demise, the minority Social Democratic government of Chancellor Helmut Schmidt submitted a proposal for a new law. As in the case of the 1960 reform, the reason given was that "the number of right-extremist, especially neo-Nazi activities most recently has increased substantially," and there was "a gap" in the law that needed to be filled for effective prosecution.⁹⁸ In fact, according to the official statistics the number of reported illegal acts of this type reached a new peak in 1981, having increased from 1643 acts in 1980 to 1824 acts in 1981, with threats of violence rising by fifty-four percent. The number of violent crimes decreased somewhat, due possibly to "resolute prosecution and other governmental countermeasures."⁹⁹

The government bill envisaged three modifications of the existing law. The first two did not bear upon our problem; they proved non-controversial and were included in the final text.¹⁰⁰ The third change would have introduced a new crime of rewarding, approving, denying, or minimizing the National Socialist genocide in public statements or publications. The then Minister of Justice justified this proposal by

98. Bundesrat [BR] Drucksache [Dr.] 382/82, Sept. 29, 1982. This reason was recited in all subsequent proposals. It was as far back as 1979 that the Social Democratic Minister of Justice Hans-Jochen Vogel had called for stronger measures to deal with neo-Nazism and for closing legal loopholes. *The Week in Germany*, Nov. 28, 1979, at 5. See generally *Irrungen — Wirkungen: Der wechselhafte Gang des Gesetzgebungsverfahrens zum 21. Strafrechtsänderungsgesetz, 1985 DEUTSCHE RICHTERZEITUNG [DRiZ] 225* [hereinafter *Der wechselhafte Gang*].

99. Sixty-six percent of all the right-extremist violations were of the neo-Nazi type; 936 cases (721 in 1980) involved smearing, pasting, and posting of placards; antisemitic tendencies were found in 323 violations, a rise from 263 in the previous year; there were 42 (49 in 1980) desecrations of Jewish cemeteries or places of worship. The membership in 73 right-extremist groups rose slightly from 19,800 to 20,300. The number of periodic publications rose from 85 to 98, although their circulation dropped by 1.2% to 324,000. VERFASSUNGSSCHUTZ 1981, at 5, 21, 52 (Federal Minister of the Interior 1982). The Minister's report for 1982 shows generally identical trends, the total of violations rising to 2047. VERFASSUNGSSCHUTZ 1982, at 5 (Federal Minister of the Interior 1983). An increase was also reported in left-extremist activities. VERFASSUNGSSCHUTZ 1981, *supra*, at 6, 7. In the 1985 debate, Representative Lowack, a Christian Democrat, denied that there was an increase in neo-Nazi activity most recently or that there was a need for a new law. He nevertheless said he would vote for the new law as "a symbol of reconciliation." Bundestag [BT] 10. Wahlper., 135. Sitz., Apr. 25, 1985, at 10,086.

100. One of these modifications expanded the existing prohibition on the use and distribution of emblems of anti-constitutional organizations to include production, stocking, and import of such emblems. (There was at the time a sharp increase of imports of Nazi material from abroad). The other change clarified the authority to confiscate left- and right-extremist writings even after the brief statute of limitations had precluded criminal prosecution. BR Dr. 382/82, Sept. 29, 1982, art. 1.

the need to provide criminal sanctions for such statements which, although eschewing direct hate attacks against the Jews, denied or "minimized" their mass extermination "in the guise of apparent objectivity and often with reference to alleged 'proofs.'" It was not enough that such acts could be prosecuted for insults of individual honor on a private petition in accordance with the ruling by the Federal Supreme Court; the current provisions on crimes against the public peace needed to be expanded to comprise such acts since they endangered "the constitutionally guaranteed peaceful coexistence of all citizens and the protection of human rights." The new version was to be limited exclusively to denying the National Socialist genocide.¹⁰¹

When the new center-right coalition between the Christian Democratic Union/Christian Social Union (CDU/CSU) and the Free Democratic Party (FDP) took over the government in the fall of 1982, the new Federal Minister of Justice Engelhard pressed the bill of his predecessor in the Bundesrat (Upper Chamber), but that body disapproved it. This prompted the Social Democratic Party (SPD) group, this time as a part of the opposition, to resubmit the bill.¹⁰²

After all pending bills had lapsed with the dissolution of the ninth Bundestag (Lower Chamber), the new government presented the same bill once more to the Bundesrat in April 1983,¹⁰³ but that chamber reaffirmed its negative posture.¹⁰⁴ In January 1984, it was the Social Democratic group that again took the initiative by resubmitting an identical bill.¹⁰⁵ The Bundestag gave the bill its first reading on April 12, 1984, a day after the government transmitted the same text to that body.¹⁰⁶ Annexed to the government bill was a statement of the Bundesrat opposing the government's proposal on several grounds: it did not take into account the views of the administrations of justice of the *Länder* (the component states of the Federal Republic), it was vague and constitutionally questionable, and it would turn courts into propaganda fora. In its response, which was also attached, the government suggested that a denial of other actions "comparable" to the National Socialist genocide might be included in a new article 131.¹⁰⁷

101. Art. 1(4) in BR Dr. 382/82 would have added a new paragraph to article 140 of the Criminal Code. The punishment was to be imprisonment up to one year or a fine. Schmude, *supra* note 8, at 154-55. Article 131 does not apply, since a cruel and inhuman manner of description is not present, nor would article 130 cover such acts of mere denial. BR Dr. 382/82, at 12-14.

102. BT Dr. 9/2090, Nov. 10, 1982; *Der wechselhafte Gang*, *supra* note 98, at 227.

103. BR Dr. 158/83, Apr. 8, 1983.

104. *Der wechselhafte Gang*, *supra* note 98, at 227.

105. BT Dr. 10/891, Jan. 18, 1984.

106. BT 10. Wahlper., 67. Sitz., Apr. 12, 1984, at 4752-54; BT Dr. 10/1286, Apr. 11, 1984.

107. BT Dr. 10/1286 (annex 2-3).

The Bundestag referred the bill to its Legal Committee. Thereafter it disappeared "in the Bermuda Triangle" of the government coalition,¹⁰⁸ to be resurrected in 1985 by the Social Democrats. That group placed it on the Bundestag's agenda with the request that the law be adopted before the eighth of May of that year, the fortieth anniversary date of the final defeat of National Socialist Germany in 1945.

The Social Democrats and the FDP (liberal party) Minister of Justice Engelhard were the protagonists of the bill in the ensuing public debate. With both the government and the opposition (albeit in reversed roles) offering the same bill, one might have expected clear sailing. Only the stance of the Bundesrat and the brief response by the government foreshadowed the future imbroglio.

B. *The Public Controversy and a "New" Idea*

The thrust of the criticism of the bill in the legal literature and in the press of the day was directed against the idea of establishing a new crime. Those who agreed that a gap in the law needed to be filled to cope with the serious wrong urged that, instead of creating a new crime, the "public peace" articles 130 and 131 should be clarified to include unmistakably the "Auschwitz lie."¹⁰⁹ On the other hand, others felt that only "justiciable facts" should be covered and questioned the practicality and effectiveness of the proposed text.¹¹⁰

Early in February 1985, the bill became entangled in a squabble within the governing coalition over internal security policy. At a Berlin conference of legal experts "a deal" was reached according to which the CDU/CSU would support the proposed legislation in exchange for the FDP liberals accepting, first, a stiffening of an anti-demonstration law strongly desired by the Christian Democrats and, second, a broadening of the proposed new crime to cover the denial not only of the National Socialist genocide but "any genocide," including the violent expulsion of the German population from Eastern Europe after 1945. The Bavarian CSU was said to have insisted on the second condition. For one reason or another, however — the FDP was

108. Representative Schmidt (SPD) in BT 10. Wahlper., 67. Sitz., Apr. 12, 1984, at 4754.

109. Bubnoff, *supra* note 3. A letter of the Evangelical Church addressed to the President of the Bundestag spoke of "an attack on our common existence." Quoted in BT 10. Wahlper., 135. Sitz., Apr. 25, 1985, at 10,080.

110. Eschen, *Das 21. Strafrechtsänderungsgesetz — eine stumpfe Waffe gegen den Rechtsradikalismus: Stellungnahme des Vorstandes des Republikanischen Anwaltsvereins zum Referentenentwurf eines 21. Strafrechtsänderungsgesetzes*, 16 ZEITSCHRIFT FÜR RECHTSPOLITIK 10 (1983) (statement of the board of the Association of Republican Attorneys); Münchner Merkur, quoted in Der Tagesspiegel (Berlin), Feb. 10, 1985, at 2, col. 5. By "justiciable facts" are meant perhaps situations that are fit for adjudication by a court, presumably excluding disagreements over history.

said to have backed away from the bargain — the deal promptly collapsed.¹¹¹

During the often-adjourned, ten-week deliberation in the Legal Committee of the Bundestag, opposition to the bill mounted. "The [government] proposal is harmful in its core. Therefore it will be withdrawn," declared Mr. Dregger, the leader of the CDU/CSU Bundestag group; he added that Chancellor Kohl and his group almost unanimously agreed.¹¹² The head of the CSU, Bavarian Prime Minister Strauss, speaking in Tel Aviv, said that no new law was needed; the opposition Greens Party and even the Bavarian branch of the liberal FDP agreed.¹¹³ On the other hand, the German Federation of Judges, the spokesmen for German Jewish groups, and the apparently unanimous Social Democrats voiced their support for the original text and opposed with particular emphasis the extension of criminal sanctions to the denial of other acts of violence (such as the expulsion of Germans) on the ground that it had a "ring of the loathsome setting-off-against mentality."¹¹⁴

It was at the insistence of the Social Democrats that a date was finally agreed upon for plenary consideration in the Bundestag. At this stage Minister Engelhard indicated to the press that although his party would "under no circumstances" deviate from the principle of an automatic prosecution of the "the Auschwitz lie," it would accept a compromise, according to which prosecution would be instituted ex officio for an "insult," without the prerequisite of a private petition. In that case the idea of a change in the substantive criminal law could be dropped.¹¹⁵ A day before the date set for the Bundestag consideration there was still no agreement within the government coalition.

111. Frankfurter Allgemeine Zeitung, Feb. 16, 1985, at 10, col. 2; Der Tagesspiegel, Feb. 20, 1985, at 8, col. 4; Der Tagesspiegel, Mar. 1, 1985, at 7, col. 1.

112. Der Tagesspiegel, Mar. 13, 1985, at 6, col. 3.

113. Der Tagesspiegel, Mar. 1, 1985, at 7, col. 1; Frankfurter Allgemeine Zeitung, Mar. 2, 1985, at 1, col. 1. In the same vein, see Badische Neueste Nachrichten (Karlsruhe), *quoted in* Der Tagesspiegel, Mar. 9, 1985, at 2, col. 5. For the criticism by the Bundesrat, see text at note 107 *supra*. The Greens Party is anti-growth, anti-nuclear, pro-environment.

114. Chairman Leonardy of the *Deutscher Richterbund* (German Federation of Judges) on the Saar Radio, *quoted in* Der Tagesspiegel, Mar. 7, 1985, at 2, col. 3 (also quoting the deputy leader of the Social Democratic group in the Bundestag, former Justice Minister Schmude); Der Tagesspiegel, Mar. 14, 1985, at 2, col. 2 (the chairman of the Jewish Community of Berlin); Der Tagesspiegel, Mar. 10, 1985, at 2, col. 5 (Central Council of Jews in Germany); Der Tagesspiegel, Mar. 16, 1985, at 2, col. 2.

115. Der Tagesspiegel, Mar. 14, 1985, at 2, col. 2. The Minister suggested in a later debate that this solution was considered under both of his Social Democratic predecessors. BT 10. Wahlper., 135. Sitz., Apr. 25, 1985, at 10,081-82. Deputy leader of the Social Democratic group Emmerlich declared to the press that the above idea was a "step in the direction" of the SPD demand for effective punishment of the "Auschwitz lie." Der Tagesspiegel, Mar. 14, 1985, at 2, col. 2.

C. *The Report of the Legal Committee: A Compromise*

In March 1985, the Social Democrats forced a round of debate on the floor of the Bundestag, before the Legal Committee was able to agree on a report; but they did not succeed in having the House formally set a deadline for the committee report.¹¹⁶ When this report, accompanied by a new government proposal, was finally distributed at the end of April, it confirmed that the coalition majority had embraced in essence the Engelhard compromise idea described in the preceding section.¹¹⁷

According to the committee majority, the need for a new crime provision that motivated the original government proposal had been met in the meantime by the decision of the Federal Supreme Court sanctioning prosecution for an "insult" pursuant to the current Criminal Code provisions;¹¹⁸ but since the offended Jewish citizen could not be expected to defend himself personally against the insult, possibly having to prove that he was Jewish, the requirement of a private petition should be removed. However, this dispensation should benefit a person insulted as a member of a group persecuted not only by the National Socialists but also by any "other violent and arbitrary dominance" (*Gewalt- und Willkürherrschaft*), a phrase drawn from another article of the Criminal Code.¹¹⁹ This, in the majority view, was not an attempt "to compare the incomparable"; nor did it evidence a failure to recognize "the historical uniqueness of the mass murder perpetrated in an organized and technological manner."¹²⁰

The Social Democratic member of the committee considered the recourse to the "insult" provision inadequate and believed that a special crime provision was still necessary, because the denial of the mass murder meant "whitewashing the National Socialist regime and thus an attack on public peace" through impairment of the "basic consensus of our society." Moreover, since the National Socialist genocide was a unique event, any equation with other violence, such as the crime of the expulsion of the Germans, must be avoided. In any case, there was no need for criminal sanctions against denial of such other crimes, because no one denied their existence; they are, in contrast

116. BT 10. Wahlper., 126. Sitz., Mar. 14, 1985, at 9315-26. The SPD sought to have the House express a wish that the committee complete its work by April 25, 1985. *Id.* at 9326; Frankfurter Allgemeine Zeitung, Mar. 16, 1985, at 5, col. 4.

117. BT Dr. 10/3242, Apr. 24, 1985.

118. See notes 38-40, 88-97 *supra* and accompanying text.

119. See StGB art. 194(2). The new text in fact amends article 194(1) & (2). See Appendix to this essay.

120. BT Dr. 10/3242, Apr. 24, 1985, at 8-9.

with the National Socialist genocide which is a generally known fact and needs no proof, not "justiciable."¹²¹ The member of the opposition Greens Party viewed criminal law as an improper means for combatting neo-Nazism; nevertheless, he supported the elimination of the private petition. Both opposition groups submitted their views in the form of specific legislative proposals.¹²²

D. *The Bundestag Acts*

The emotional debate on the floor of the Bundestag had distinctly partisan overtones.¹²³ Speakers from all four parties vied with each other in passionate professions of their abhorrence of neo-Nazism, and they all conceded that the menace must be met primarily in public discourse, in the school, and in the family circle. Beyond this there was sharp disagreement. Virtually identical arguments were employed and the same positions taken as in the Legal Committee.

The Social Democrats taunted the government for opposing its own original proposal and accused it of procrastination and lack of seriousness and sensitivity. With two exceptions, the FDP liberals, led by Minister Engelhard, stood solidly behind the government;¹²⁴ they sought to emphasize their attachment to freedom of opinion and to justify their grudging acceptance of the restriction on that freedom. The CDU/CSU also closed ranks behind the government, but the "young" CDU Representative Lowack refused to believe that there had been an increase in neo-Nazi activities and warned that the House was being diverted by "a bogey" from more important problems.¹²⁵ The Christian Democratic rapporteur provoked a sharp skirmish with the Social Democrats over their alleged opposition, in 1959, to special protection for Jews in criminal legislation.¹²⁶

The spokesman for the Greens disclosed that a substantial minority of the group supported the original proposal for a special crime, but a majority would settle for the "insult" compromise; the entire group, however, was opposed to the juxtaposition of the National Socialist persecution with other instances of violence: with such a provision "no law is better than this law" (quoting the chairman of the

121. *Id.* at 9. On "justiciable facts," see note 110 *supra*.

122. BT Dr. 10/3256, Apr. 24, 1985 (Social Democrats); BT Dr. 10/3255, 10/3260, Apr. 24, 1985 (Greens).

123. BT 10. Wahlper., 126. Sitz., Mar. 14, 1985, at 9315-26; 135. Sitz., Apr. 25, 1985, at 10,075-89; 136. Sitz., Apr. 26, 1985, at 10,122-24.

124. The FDP exceptions were Frau Dr. Hamm-Brücher, who voted for the SPD proposal, and Rep. Schäfer, who abstained. BT 10. Wahlper., 135. Sitz., at 10,086-89.

125. *Id.* at 10,086; Frankfurter Allgemeine Zeitung, Apr. 27, 1985, at 6, col. 4.

126. Frau Dr. Hellwig, BT 10. Wahlper., 135. Sitz., at 10,076-77.

Berlin Jewish Community).¹²⁷

In fact, this juxtaposition caused the most acrimonious exchange in the chamber. The only dissenter in the government coalition ranks, a member of the FDP, declared:

I am concerned with the political and moral core of this change [from the original government bill]. The words "or other violent and arbitrary dominance" signify at least indirectly the political intent which [former Federal President] Theodor Heuss branded as a "ghastly setting-off" and which he bluntly rejected as the "behavior of the morally empty."¹²⁸

On the other hand, the Christian Democratic leader Dregger was moved to interject: "Crimes are crimes by whomever and against whomever committed."¹²⁹

Chancellor Kohl's speech at Bergen-Belsen, his "promise" to Israel, the appeals from the Israeli Parliament, and the positions of the Federation of German Judges and of Jewish groups were invoked in support of the original bill and against the "juxtaposition." Even the controversial "Bitburg visit"¹³⁰ and the much-discussed reunion of former SS men were brought into the debate. The fateful date of May 8, 1945, was repeatedly mentioned. Both sides signaled a sensitivity to the reaction abroad.¹³¹

When it came to voting, the two uncontested items in the government's proposal¹³² were accepted without opposition. The alternative proposals by the Social Democrats and the Greens¹³³ were defeated by the coalition majority.¹³⁴ On the third reading, the entire law as recommended by the Legal Committee was adopted on a voice vote "by a

127. Rep. Mann (Greens Party), *id.* at 10,083.

128. *Id.* at 10,087 (Frau Dr. Hamm-Brücher).

129. BT 10. Wahlper., 126. Sitz., at 9321. Rep. Schmidt (SPD) claimed that the limitation to the genocide of Jews was not acceptable to the CDU group particularly because of the opposition of the expellees and Rep. Dregger. BT 10. Wahlper., 135. Sitz., at 10,081.

130. President Reagan's visit to a German military cemetery with, among others, graves of some *Waffen-SS* men. For the reference to Chancellor Kohl's speech, see BT 10. Wahlper., 135. Sitz., at 10,075-76, 10,078.

131. Rep. Schmidt (SPD), BT 10. Wahlper., 126. Sitz., at 9316; 135. Sitz., at 10,078-79; Minister Engelhard (FDP), BT 10. Wahlper., 126. Sitz., at 9320.

132. See note 100 *supra* and accompanying text.

133. See text at notes 121-22 *supra*.

134. BT 10. Wahlper., 135. Sitz., at 10,087-92. The SPD modifying proposal was defeated by 246 votes and 10 (nonvoting) Berlin Representatives (all of the CDU/CSU, all but 2 of the FDP, and 18 Greens) against 140 votes and 7 Berlin Representatives (all of the SPD and Dr. Hamm-Brücher, FDP), with 4 abstentions (3 Greens and one FDP). The proposal of the Greens was defeated by 229 and 9 Berlin Representatives against 156 votes and 8 Berlin Representatives, with three abstentions. See also *Frankfurter Allgemeine Zeitung*, Apr. 27, 1985, at 6, col. 4. The SPD text, BT Dr. 10/891, was also defeated by a majority vote. BT 10. Wahlper., 136. Sitz., at 10,122.

large majority with a number of abstentions."¹³⁵ It was published on June 13, 1985, and came into effect on August 1, 1985.¹³⁶

E. *The New Law*

The essence of the new law¹³⁷ is the elimination of the private petition requirement for insult, if (a) the act is committed by disseminating or by making publicly accessible a writing, or in an assembly or in broadcasting;¹³⁸ (b) the insulted party is a member of a group that was persecuted "under the National Socialist or another violent and arbitrary dominance"; and (c) this group is (at the time of the act) a part of the population of the Federal Republic.¹³⁹

According to the Legal Committee, the insulted party, a member of the group ("e.g., the Jews or the Silesians") must *himself* have been persecuted *because* of his membership in the group:

It is not enough that the group as such was persecuted; rather the insulted party must himself have been exposed to persecution, and that is assumed to be so in the case of the Jews who lived within the reach of the power of the National Socialist regime and were subjected to the racial legislation.¹⁴⁰

The committee minority questioned the prerequisite of personal persecution on two grounds: first, because the provision will lose any meaning at the latest when there are no longer any directly affected persons alive in the Federal Republic; and second, because the courts may be misled "unintentionally" to believe that the legislator intended to "overrule" the Federal Supreme Court and require a showing of personal persecution not only under the new law but also in cases instituted by a private petition under the current law.¹⁴¹ Indeed, as

135. BT 10. Wahlper., 136. Sitz., at 10,124.

136. 1985 BGBl I 965; see also 40 JZ (Gesetzgebungsdienst) 45 (1985).

137. For the controversial portion of the new law, see the Appendix to this essay.

138. According to the Legal Committee's report, an insult by a spoken word in private conversation is excluded (e.g., "beertable talk") but can be prosecuted on private petition as before, "since it only has meaning for the circle to which it was actually addressed." BT Dr. 10/3242, Apr. 24, 1985, at 10. This exclusion is criticized by Ministerialrat Vogelgesang who feels that the rationale for removing the prerequisite of a private complaint ("opening old wounds") applies equally to an insult in a private circle. Vogelgesang, *Die Neuregelung zur sog. "Auschwitzlüge"* — *Beitrag zur Bewältigung der Vergangenheit oder "widerliche Aufrechnung"*?, 38 NJW 2386, 2388-89 (1985). "Making publicly accessible" does not require a public place, only a place that is accessible to an indeterminate number of persons who are not "personally linked" to the defendant. An "assembly" consists of any "significant number" of persons, and need not be open to the public. BT Dr. 10/3242, at 10.

139. Foreign groups are excluded. The term "group" is not defined. Cf. StGB art. 220a (implementing the United Nations Genocide Convention). The minority in the Legal Committee objected that the term could be interpreted as not encompassing resistance fighters or persecuted members of political parties. BT Dr. 10/3242, at 10.

140. BT Dr. 10/3242, at 10.

141. *Id.*

indicated earlier, the Supreme Court has recognized the standing of a Jew living in the Federal Republic to file a petition regardless of whether he was personally persecuted or even born after the demise of the National Socialist regime.¹⁴² Vogelgesang believes, however, that what appears to be "a step back" will have limited practical effect, since a person who did not suffer personal persecution may find it emotionally less difficult to file a petition and thus need not be freed from that burden.¹⁴³

Still according to the new law, the insulted party who is not interested in a criminal prosecution is given the procedural right to oppose it, but this cannot stop the prosecution with respect to other insulted parties.¹⁴⁴ One may wonder how — in the absence of a private complainant — the courts will interpret the provision regarding the right of opposition to the criminal proceeding.¹⁴⁵ A more serious question remains: Although the burden of proving Jewish origin is lifted from any private party, it will presumably still be necessary for the prosecutor to prove that there are Jewish injured parties, and for the courts to determine the fact. Will the courts continue to perform the theater of the absurd by employing the Nuremberg racial laws as a yardstick?

The Federal Supreme Court has fashioned a rationale of a special and unique relationship between German Jews and their fellow citizens. It would be interesting to see whether and how the Court will construe a similar rationale with respect to other groups whose members were persecuted under "another violent and arbitrary dominance."

By avoiding a change in substantive criminal law and by tinkering instead with procedure, the legislature conjured up a hybrid: A norm originally designed to protect a private good is injected with a new public interest, not as strong as the avoidance of a breach of public

142. Judgment of Sept. 18, 1979, 75 BGHZ 160, 33 NJW 45 (1980); see text at note 92 *supra*; see also judgment of May 8, 1952, BGH, 5 NJW 1183 (1952); Vogelgesang, *supra* note 138, at 2389.

143. Vogelgesang, *supra* note 138, at 2389. A new provision was also inserted into article 194(2), which dispenses with the complaint requirement also when a deceased has lost his life as a victim of the Nazi or other violent dominance and the insult (disparagement of the memory of the deceased) is related to that fact. In that case the insult may be punished ex officio after the death of the victim. In other cases specified family members of the deceased have standing to lodge a petition. StGB art. 194(2).

144. StGB art. 194(2). The opposition is final and cannot be withdrawn.

145. It is clear from the cases discussed above that the statements of the "Auschwitz lie" are not directed at any particular person. In theory, at any rate, what will be the outcome if, in a prosecution instituted without a private complaint, one "insulted person . . . persecuted as a member of a group," StGB art. 194(1), objects, but any other such "insulted person," or an organization of such persons, or for that matter the prosecutor himself insists that the proceeding should take its course?

peace but strong enough to turn the offense into an *Offizialdelikt*; yet the person who suffered impairment of the protected private good is given the personal right to stop the ex officio prosecution. Moreover, the essentially private-good protection under this provision is granted to offensive utterances made in public only.

It could nevertheless be argued, if one accepts the underlying analysis of the political and legal context, that this pragmatic patching-up has met the need of the day. It is a temporary expedient: when the last Jew who lived in Germany during the National Socialist regime (or the last Silesian who was expelled from Silesia) dies, things will revert to the original state as far as the criminality of the "Auschwitz" or other "lies" is concerned.

VI. A SUMMARY AND TWO PERCEPTIONS

A. *The New Law: Pro and Con*

The attitudes toward the new law have ranged from total rejection to isolated instances of warm embrace.

1. *The Law Is Bad on Grounds of Principle and Practicality*

Voices opposing "crimes of opinion" (*Gesinnungsdelikte*) on constitutional grounds are on one end of the spectrum. There is no legal duty to tell the truth except where the law so specifies; morality and legality are two different categories, and any opinion, regardless of its moral color, must be free as long as it does not impair in actual fact the freedom of others.¹⁴⁶ Vagueness of terminology exacerbates the problem.¹⁴⁷ "To declare history a protected legal good means to open the door to government despotism under the guise of judicial truth-finding."¹⁴⁸

Contrary to the official government position, the need for new legislation was questioned particularly in certain CDU/CSU circles, and the concern was expressed that the law might lead to a "stream of hardly bearable procedures."¹⁴⁹ Although the courts have generally accepted the genocide of the Jews as a historical fact, what, if any, evidentiary procedures will be required to prove "other" acts "of violent and arbitrary dominance"?

146. Köhler, *Zur Frage der Strafbarkeit des Leugnens von Völkermordtaten*, 38 NJW 2389, 2390 (1985); Eschen, *supra* note 110, at 11.

147. Ostendorf, *Im Streit: Die strafrechtliche Verfolgung der "Auschwitzlüge"*, 38 NJW 1062, 1065 (1985) (pointing to GG art. 103).

148. Cobler, *supra* note 15, at 166; *see also* Leicht, *Die Lügner würden bleiben*, *Süddeutsche Zeitung*, Mar. 5, 1985, reprinted in 1985 DRiZ 199.

149. *Frankfurter Allgemeine Zeitung*, Apr. 27, 1985, at 12, col. 1.

The experience with the earlier legislation shows, the argument continues, that its application at the prosecution, trial, and sentencing stages has posed serious problems of effectiveness, practicality, and consistency; almost without exception the defendants, young and old, remain convinced if not strengthened in their conviction of the truth of their allegations; individual as well as general deterrence purposes fail, and there is a danger of a "backlash"; the lie is forbidden but liars remain.¹⁵⁰ The judicial process is not equipped to carry the burden of education that is incumbent upon the family, the school, and political discourse, all of which have failed in this area. On the contrary, the courts have become a forum for neo-Nazi propaganda that helps make new heroes and martyrs for the movement.¹⁵¹

2. *The Law Does Not Go Far Enough*

At the opposite end of the spectrum are those who deplore the "trivialization" and "privatization" of the crime of the "Auschwitz lie": instead of reducing it to a mere "insult," the provisions dealing with the serious crimes of breach of the public peace should have been modified or a new special crime should have been added, as was contemplated in the original government and SPD bills. The Social Democrats, the executive director of the Association of German Judges, and the Jewish groups have taken this view (although the idea of a modified insult provision is said to have originated earlier in the Central Council of Jews). At any rate, court proceedings are important to help educate the ignorant, particularly the immature young, and to flag the new danger of neo-Nazism.¹⁵²

3. *The Law Would Be Good but for the "Set-off"*

In the "Auschwitz lie" cases, the courts have been reluctant to find the necessary prerequisites (breach of the public peace, aggravating factors) for finding the serious crimes against human dignity or incitement to race hatred, so that there was a danger — and actual instances — of widely criticized acquittals. The Federal Supreme Court approved the "insult" route; thus, to make it possible to prosecute for an insult, without the requirement of a private petition, is the proper solution to the problem, particularly because it relieves the offended party from the burden of proof, including the showing that he is a Jew. What makes the law unacceptable, however, is the extension of the

150. Leicht, *supra* note 148; Ostendorf, *supra* note 147, at 1063.

151. Cobler, *supra* note 15, at 167-68.

152. See Marqua, *Dennoch: ein schlechter Kompromiss*, 1985 DRiZ 226; text at note 121 *supra*.

provision to "lies" about acts of "dominance" other than the National Socialist genocide — such as the expulsion of German nationals from Eastern Europe after 1945, brought about as a result of, and in revenge for, the aggression and atrocities committed by the National Socialists against the local populations:

It may indeed . . . be a testimony to the deplorable spiritual state of the nation and a declaration of the bankruptcy of its public educational institutions that the act of denying historical truth must be made subject to a penalty. But that is the effect of a decade-long cover-up, minimizing the terrible crimes and balancing them against others.

Who actually denies the crimes of expulsion? And what have they in common with the factory-type extermination of millions of human beings by the National Socialists? What else lurks behind this demand than the terrible mentality of those Germans who, in the manner of children caught at mischief, point to "the others" who were "no angels either."

. . . The inability to acknowledge without any ifs, ands, or buts that a unique crime was committed by Germans and to feel ashamed of it will also bring a revenge in the future.¹⁵³

This was, after some oscillation, the position of the Greens Party.¹⁵⁴

4. *The Law Is Good*

To the extent that a vote on a compromise provides evidence of the views of the political parties, the entire government coalition (with only two dissents) favored the law as adopted. One official of the executive branch who welcomed the law added that he would have wanted it stiffened to prohibit "Auschwitz lie" statements made in private as well as in public (as is the case with ordinary insult) and to increase the penalty.¹⁵⁵ He defended the juxtaposition with other acts of "dominance" on the ground that other articles in the Criminal Code, although enacted with National Socialist actions in mind, are formulated in general terms and do not stipulate a special treatment for such actions.¹⁵⁶

153. Cornelsen, *Schreckliche Aufrechnung*, *Frankfurter Rundschau*, Apr. 18, 1985, reprinted in 1985 DRiZ 199. (The *Frankfurter Rundschau* is a leading left-oriented daily.)

154. See text at note 127 *supra*; see also Jung, *Strafrechtliche Massnahmen gegen die "Auschwitzlüge"*, 26 JURISTISCHE SCHULUNG 80 (1986). Although Prof. Dr. Jung sees some good in the "procedural solution," he believes that the inclusion of "other violent and arbitrary dominance" makes the principal purpose of the law "relative" and "could be (mis)understood in the sense of a 'setting-off-against mentality.'" He sees some difficulty with the requirement that the protected group must be part of the population at the time the criminal act occurred; and he regrets the loss of the prosecutor's discretion to deny public interest in the matter and refer it to the private complaint procedure. *Id.* at 80-81; see also Boehlich, *Wasch mir den Pelz*, *TITANIC*, July 1985, at 26 (sharply critical of the new law).

155. Vogelgesang, *supra* note 138, at 2388-89. The penalty for insult is imprisonment for up to one year (two years "if the insult is committed by a physical act") or a fine. STGB art. 185.

156. Vogelgesang, *supra* note 138, at 2388 & n.29. Vogelgesang lists STGB arts. 86, 86a, 90a,

A less technical and more eloquent defense comes from a commentator in the conservative *Frankfurter Allgemeine Zeitung*.¹⁵⁷ In this clamorous and emotional quarrel no responsible person has suggested that the guilt of the National Socialists for the Jewish mass extermination could be annulled by the reference to the postwar mass crimes against the Germans. Those politicians who were accused by the SPD of a "setting-off-against mentality" wanted to facilitate, not to avoid, the prosecution of the "Auschwitz lie," but they wanted to apply the new procedure to the postwar genocide of the Germans as well. For the first ten to fifteen years after the war many Germans wanted "to push aside" the crimes against the Jews. But this silence changed in the early sixties at the latest, due to the important "Auschwitz trial" in Frankfurt. "The destruction of Jews has penetrated everybody's consciousness and has remained there." The opposite has occurred with the crimes committed against the Germans. These were widely discussed in the first postwar years, but later on the Germans turned to the "new affluence" and no longer wanted to hear about what had happened in the East. In 1969 the government commissioned a study of the events in the East but, by a decision of the SPD-FDP government in 1974, the resulting massive documentation had been kept from the public until the present coalition government lifted the publication bar.¹⁵⁸ "But there is no way of making up the knowledge gap caused by this blackout maneuver." The dreadful atrocities were not placed on record in any court proceedings; the perpetrators were not

130, 131, 140, 194(2). Article 86, however, does mention specifically National Socialist organizations. It should be noted that before the new law article 194(2) contained the general clause "violent and arbitrary dominance," to which the words "National Socialist or another" were added by the new law. See Appendix.

157. Reissmüller, *Der Betrug mit dem "Aufrechnen,"* *Frankfurter Allgemeine Zeitung*, June 18, 1985, at 1, col. 5.

158. See in this context DOKUMENTATION DER VERTREIBUNG DER DEUTSCHEN AUS OST-MITTELEUROPA (4 vols.) (T. Schieder ed. 1953-57) (Federal Ministry for Expellees). The documents assembled and analyzed by a commission of historians deal with the forcible expulsion from the territories east of the Oder-Neisse line, Hungary, Rumania, and Czechoslovakia. They suggest, for instance, that of the more than ten million Germans living east of the Oder-Neisse line in 1939, 2.15 million perished as a result of the war and the expulsion, 1.6 million of them in the process of expulsion. DIE VERTREIBUNG DER DEUTSCHEN BEVÖLKERUNG AUS DEN GEBIETEN ÖSTLICH DER ODER-NEISSE 158-59 E (T. Schieder ed.) (Vol. I of DOKUMENTATION DER VERTREIBUNG DER DEUTSCHEN AUS OST-MITTELEUROPA).

I received the following information from an official source after completion of this manuscript. "Dokumentation von an Deutschen begangenen Vertreibungsverbrechen" ("Documentation on Crimes Perpetrated Against Germans in Connection with Their Expulsion") was prepared in 1974 for the information of the Federal Government; this documentation has been made available at the Federal Archives in Koblenz for use by scholars and publicists; beyond that, it is expected that the documentation will shortly become available in bookstores. This will in a certain way supplement the documentation prepared by T. Schieder, cited in the first paragraph of this footnote. Letter from G. Menke (Federal Ministry of the Interior) to Dr. R. Dolzer (Mar. 4, 1986).

prosecuted but on the contrary were specifically relieved of any legal accountability.¹⁵⁹ The mass murders such as the "intentional decimation [of Germans] in Yugoslavia" with clear genocidal characteristics must not fall into oblivion any less than the genocide of the Jews.

The basic argument advanced by this commentator reflects the position taken by some CDU/CSU participants in the Bundestag debate.¹⁶⁰ It may or may not be indicative of things to come that, even before the new law had become effective, a sociology professor in Mainz is reported to have invoked it against the exhibitors of a Soviet film which he claimed "minimized and played down" the acts of violence committed by the Red Army against thousands of German women in 1945.¹⁶¹

B. *The Trend*

At the outset of this essay I suggested that each society must decide for itself where to draw the line between freedom of expression and the demands of public order and security for its institutions and people. It is not surprising that coping with "the Auschwitz lie" has proved to be a particularly arduous task.

One may recall that another lie — that Germany had lost the First World War because of the "stab in the back" at home, rather than because of defeat on the battlefield — had served as an important rallying theme for the enemies of the Weimar Republic. The spreading of the "Auschwitz lie" is viewed by the authorities as a serious matter. An unofficial list compiled by a federal ministry in 1981 shows no less than thirty-two books elaborating the false allegations. As mentioned earlier, official statistics show a sustained rise in right-wing incidents and terrorism,¹⁶² although the current government appears to view the threat from the left as more pressing.¹⁶³

A public opinion survey commissioned by the Chancellor's office in 1979-1980 purported to find that thirteen percent of the electorate held on to the National Socialist ideology and a further thirty-seven

159. See, e.g., the Czechoslovak Law 115, May 8, 1946, providing that acts occurring between 1938 and 1945, "designed to contribute to the struggle for regaining liberty by the Czechs and Slovaks or aimed at a just recompense for the acts of the occupants or their helpers, are not illegal even if they would be subject to penalty under the prevailing law." 1946 Sbírka zákonů a nařízení republiky Československé 922.

160. See especially text at note 129 *supra*.

161. Frankfurter Allgemeine Zeitung, July 5, 1985, at 5, col. 5.

162. See note 99 *supra*.

163. In his 1983 annual Report on the Protection of Constitution, the current Minister of the Interior, in contrast with his predecessors, deals with left-extremist activities ahead of right-extremist actions, devoting 94 pages to the first and 49 pages to the second category. VERFAS-SUNGSSCHUTZBERICHT 1983 (Federal Minister of the Interior 1984).

percent felt threatened, lost, disoriented, powerless, in the grip of a *Kulturpessimismus* characterized by antipluralist, partly anti-democratic features, arrogating solely to the German nation, excluding all others, the "typically German" traits of loyalty, industry, and sense of duty.¹⁶⁴ However, both the method and the interpretation of the results of this survey have been questioned. Other tests have shown on the one hand an impressive growth of public support for democratic institutions (seventy-one percent in 1978), and on the other hand a rising perception of the National Socialist regime as criminal (from fifty-four percent in 1964 to seventy-one percent in 1978).¹⁶⁵ Still another survey prepared for the Ministry of the Interior in 1979 identified 4.4 percent of the entire population as showing "left-protest potential," while only 1.5 percent appeared oriented toward a "right-protest potential."¹⁶⁶

The Minister of the Interior concluded in 1982, when the new law was first contemplated, that the right-extremist and neo-Nazi groups remained isolated and did not enjoy the backing of the population at large; they had no chance in elections. He pointed out, however, that more than half of the population had grown up after the Second World War and had had no first-hand experience of National Socialist rule: thus, political education and enlightenment must take on right-extremist ideas at an early time.¹⁶⁷

There appears to be a consensus in the political arena that criminal law must continue to supplement the enlightenment process. The legislature evidently accepts the view expressed by the Federal Supreme Court in 1979 that "the past is still present," and that the past events have not become as yet "merely a part of the historical process."¹⁶⁸

Between 1982 and 1985, however, owing principally to the shift of governmental power from the Social Democrats to the center-right coalition, a change occurred in the ideas on how to improve the criminal law tools for combatting "the Auschwitz lie." The original proposal

164. *Rechtsextremistische politische Einstellungen in der Bundesrepublik Deutschland*, in GEWALT VON RECHTS: BEITRÄGE AUS WISSENSCHAFT UND PUBLIZISTIK 207, 210, 218 (Federal Ministry of the Interior 1982) [hereinafter GEWALT VON RECHTS] (poll by the Sozialwissenschaftliches Institut Nowak und Sörgel — SINUS). See in this context the medical profile of the defendant before the Frankfurt court, discussed at note 74 *supra*.

165. Reumann, *Studie über Rechtsextremismus — Fallen statt Fragen*, in GEWALT VON RECHTS, *supra* note 164, at 221, 222-23 (reporting studies of the Institut für Demoskopie Allensbach).

166. INFRATEST WIRTSCHAFTSFORSCHUNG GMBH, POLITISCHER PROTEST IN DER BUNDESREPUBLIK DEUTSCHLAND: BEITRÄGE ZUR SOZIALEMPIRISCHEN UNTERSUCHUNG DES EXTREMISMUS 19, 20 (1979).

167. Baum, *Vorwort*, in GEWALT VON RECHTS, *supra* note 164, at 5, 5-6.

168. Judgment of Sept. 18, 1979, 75 BGHZ 160, 166; see text at note 96 *supra*.

of creating a special crime was abandoned in favor of facilitating prosecution for an "insult." The option of a prosecution for more serious crimes of breach of the peace under articles 130 or 131 remains, but we have noted the reluctance of at least some lower courts to hand down convictions for these political crimes. With the passage of time, as the past fades from memory, such reluctance is likely to increase, particularly in cases of a "simple" version of "the lie" eschewing other offensive adornment. The legislative history of the new law may provide additional encouragement to prosecutors to rely on the "insult" route.¹⁶⁹ That route, as we have seen, was opened by the Federal Supreme Court¹⁷⁰ and widened by the new law. That law, it should be kept in mind, at the same time extended the area of a potential restraint on freedom of expression by making punishable the denial of other "lies."

C. *Two Perceptions*

The lawmaking process — and the new law itself — were directly affected by the intense nationwide debate over the implications for Germany's present of her 1945 defeat, a debate anticipating the fortieth anniversary of Germany's surrender on May 8, 1985. The respected Swiss *Neue Zürcher Zeitung* concluded that overall the debate about the complex "mortgage" left by the Third Reich deserved respect because of its openness, intensity, and soberness.¹⁷¹

An American observer, on the other hand, saw in this debate "tendencies to rewrite and prettify the past" running "stronger than impulses to recollection and contrition"; themes of Germans as victims of Allied bombing and Red Army pillaging were being turned by government spokesmen from a "sense of victimization into a weapon of outrage."¹⁷²

Like the debate surrounding it, the new law itself, with its controversial clause, may be subject to two perceptions. It may be viewed in the first place as an instance of a fatuous compromise dictated by the politics of the day, such as occurs from time to time in any working democracy, but as a compromise which nonetheless contains positive features. The other perception would see the law as a symptom of

169. The suggestion that articles 130 and 131 be amended to remove any doubt of their applicability in this context, see Bubnoff, *supra* note 3, at 118-20, was not pursued.

170. 75 BGHZ 160, 161-63; see text at note 92 *supra*.

171. Reprinted in *Frankfurter Allgemeine Zeitung*, Apr. 27, 1985, at 2, col. 3.

172. Markham, *Bonn's President Seeking to Shift Guilt for Nazis From the Young*, *Intl. Herald Tribune*, June 26, 1985, at 9, col. 1 (referring particularly to the debate over President Reagan's visit to the Bitburg military cemetery).

darker currents in the stream of German society. The idea that the administered genocide was unique, an unparalleled crime, provided the rationale for earlier legislation and judicial decisions;¹⁷³ that idea has now been jettisoned by the legislator, and with it went — it can be argued — an important premise underlying the stance of postwar Germany toward its past.

It would be a mistake to exaggerate the importance of the legislation. With the profound changes in the postwar social structure, German democracy today appears secure — at any rate barring an economic collapse such as would threaten the stability of any society. The holocaust is widely discussed in the mass media, and only a miniscule minority questions its reality as a historical fact. Yet the controversy in the Parliament and the adoption of the juxtaposition clause reveal an ambiguity regarding the way of dealing with the burden of history.

In an address delivered before the Bundestag on the fateful anniversary day, Federal President Richard von Weizsäcker stated: "Indeed, there is hardly a state which in its history always remained free of culpable entanglement in war and violence. But the genocide of the Jews is without precedent in history."¹⁷⁴ It is open to question whether this statement represents today a part of the national consensus.

History abounds with large-scale atrocities, some matching the Nazi genocide in number of victims if not in "modus operandi." It is axiomatic that as a general proposition "a crime is a crime," and any genocide must be recognized as such. The crucial need is for any people to recognize their responsibility for a crime committed in pursuance of a policy of their established government. As time and generations pass, governments, educators, and other opinion leaders, as well as individuals, face a dilemma: To allow the sense of responsibility to vanish from the collective memory would distort history and

173. In an opinion upholding the seizure of an antisemitic tract, the Federal Supreme Court held:

When the legislature . . . expressly and especially protected the prohibition of arbitrary acts as a constitutional principle, it proceeded from the experience with the crimes of the National Socialist violent and arbitrary dominance. . . . But it is necessary to counteract even the beginnings of such occurrences, before new racial persecutions, in which violence and despotism appear under the guise of a law or an administrative act, again poison public life. Judgment of Feb. 28, 1959, 13 BGHSt 32, 37; *see also* 75 BGHZ 160, 161-63.

174. R. v. WEIZÄCKER, ZUM 40. JAHRESTAG DER BEENDIGUNG DES KRIEGES IN EUROPA UND DER NATIONALSOZIALISTISCHEN GEWALTHERRSCHAFT 4 (Bundeszentrale für politische Bildung 1985). See in this context Vice-President Bush: "Our challenge today is to insist that time will not become the Nazis' friend . . . that time will not fade our sense of the specificity, of the uniqueness of the Holocaust . . . that time will not lead us to make the Holocaust into an abstraction." N.Y. Times, May 11, 1986, at E7, col. 1.

would harbor the danger of new excesses. To make people wallow in nightmares of guilt so as to impair the self-confidence of the young and their positive view of the future might bring about a destructive backlash against democratic institutions. The problem is one of a delicate balance; there is perhaps a modest role for law and the courts in helping to maintain it.¹⁷⁵

APPENDIX

EXCERPTS FROM THE WEST GERMAN CRIMINAL CODE

Article 130

Inciting to hatred. Whoever, in a manner apt to breach the public peace [public order] attacks the human dignity of others by

1. inciting to hatred against parts of the population,
2. provoking to violent or arbitrary acts against them,
3. insulting, maliciously making them contemptible, or defaming them,

shall be punished by a term of imprisonment of three months to five years.

Article 131

Representation of violence. Instigating race hatred.

(1) Whoever

1. disseminates,
2. publicly exhibits, posts, presents, or otherwise makes accessible,
3. offers to, leaves with, or makes accessible to a person below the age of eighteen, or
4. produces, subscribes to, supplies, stocks, offers, announces, recommends, undertakes to import into, or export out of, the territory in which this law applies, in order to use them, or pieces derived from them, in the manner indicated in 1 to 3 above, or to enable others to do so,

175. See in this context the current dialogue among German historians and philosophers described vividly in Miller, *Erasing the Past: Europe's Amnesia About the Holocaust*, N.Y. Times, Nov. 16, 1986, § 6 (Magazine), at 30, 33.

writings (art. 11, para. 3) that incite to race hatred or describe cruel or otherwise inhuman acts of violence against humans in a manner which glorifies or minimizes such acts of violence or represents the cruel or inhuman aspects of the occurrence in a manner offending human dignity, shall be punished by a term of imprisonment of up to one year or by a fine.

(2) The same punishment shall apply to any person who disseminates a presentation with the contents indicated in paragraph 1 by means of broadcasting.

(3) Paragraphs 1 and 2 are not applicable when the act is in the service of reporting on current events or history.

(4)

Article 185

Insult. Insult shall be punished by imprisonment for a term of up to one year or by a fine, and, if the insult is committed by a physical act, by a term of imprisonment of up to two years or by a fine.

Article 194

[As amended by the *Einundzwanzigstes Strafrechtsänderungsgesetz* (Twenty-first Law Modifying the Criminal Law), June 13, 1985.¹⁷⁶ New text is italicized; deleted text is struck through.]

(1) Prosecution for insult shall be instituted only upon petition. *When the act is committed by disseminating or by making publicly accessible a writing (art. 11, para. 3), or in an assembly or by means of a broadcasting, a petition is not required, if the insulted person was persecuted as a member of a group under the National Socialist or another violent and arbitrary dominance, if the group is a part of the population and the insult is connected with such persecution. However, there can be no prosecution ex officio if the injured person opposes it. The opposition may not be withdrawn.* If the injured person dies, the right of petition and of opposition passes to the next of kin specified in art. 77, para. 2.

(2) If the memory of a decedent is disparaged, the next of kin specified in art. 77, para. 2, have the right to lodge a petition. ~~If the decedent left no persons entitled to lodge a petition or if they died before the lapse of the deadline for the petition, no petition is required if the decedent lost his/her life as a victim of a violent and arbitrary dominance and the disparagement is connected with it. If the act is committed by disseminating or by making publicly accessible a writing~~

176. 1985 BGBl I 965.

(art. 11, para. 3), or in an assembly or by means of a broadcasting, a petition is not required, if the insulted person was persecuted as a member of a group under National Socialist or another violent and arbitrary dominance and the disparagement is connected with it. However, there can be no prosecution ex officio if the person entitled to lodge a petition opposes it. The opposition may not be withdrawn.

. . . .