

Developments

40/68 – Germany's 1968 and the Law

By Washington & Lee University GLJ Seminar Fall 2008*

A. Introduction

I. Law, Democracy, and Dissent

Democracy thrives in that narrow space that divides order from chaos; it is a balance between the order of law and government with the necessary disorder dissent and protest create.¹ The year 2008 marked the 40th anniversary of 1968—when that balance momentarily appeared to shatter in West Germany. The young democracy was still defining itself, shaping its new identity while coming to terms with its past. In 1968 this new government of the old guard, obsessed with order, clashed with a new generation that saw many of the faults of Germany's Nazi past masquerading as democracy. But the new government was built upon the old authoritarian superstructure. The youth of the 60s eventually became the establishment, and now they are turning over power to a new generation. Although the torch has been passed from Clinton and Schroeder to Obama and Merkel, the legacy of the students of 1968 continues to echo through modern times. In December of 2008, the shooting of a teenage boy by Greek police ignited violent protests that rapidly spread across the country.² Like the protests of 1968, the purpose of the protests in Greece was greater than the event that sparked it. The shooting tapped a

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¹ Law builds a structure that encourages a uniformity, which promotes efficiency and order. See A. M. HONORÉ, MAKING LAW BIND 19 (1987) (discussing concentration of power in the state and its balance with democratic freedoms).

² See Rachel Donadio, *Strife-Torn Greece Teeters Between Chaos and Calm*, N.Y. TIMES, Dec. 11, 2008, at A22 (reporting on the violent protests following the shooting of a teenage boy). The incident bears more than a passing resemblance to the shooting of Benno Ohnesorg in 1967. See *infra* Section B(III).

deeper well of unrest. Like the protests of 1968, the goal of the protesters was unclear, but the passion was unmistakable.³

What does the turmoil of 1968 have to tell us about the law? It offers us a picture of the role of law in a democratic society in the midst of change and conflict. The picture may be unsatisfying, even frustrating. The picture we are left with may not inspire, but it nevertheless reveals an important facet of law. Law may reflect the values of society, but the reflection is often skewed by those in society who make and interpret the law. In the end, the student movement may have shaped the students themselves more than anything else. The law changed only to oppose them—at least in the short term. But today's students are tomorrow's leaders and ultimately this simple reality suggests the significance of 1968.

In this article we consider the meaning of 1968 by probing the difficult relationship the law had with the student movement. We analyze this relationship first in terms of its cause. We ask why the law and the student movement came to such heated conflict and examine how the trajectory of each contributed to their ultimate collision course. Second, we consider the outcome of the collision, exploring how the law responded to and was impacted by the student movement. As a preliminary matter we consider how the student movement might be defined and how it has normally been interpreted.

II. Law and Looking Back at 1968

Forty years after the student movements of 1968 swept the globe, it is still difficult to determine whether the protests had any lasting effect on the course of social, political, or legal history. As framed by Claus Offe, understanding the student movement is a question of “what would be different today if [those] events had *not* happened that did in fact happen?”⁴ Any answer to this question demands an understanding of the motivation and philosophy driving the student movement in 1968. Only with knowledge of what the student movement was can it be possible to trace its influence into the present day.

1. Defining the Student Movement

Although differentiated by philosophy and geography, the various student movements of 1968 shared a deep distrust of and aversion to authority. Michael Löwy described the

³ See *They Do Protest Too Much*, ECONOMIST, Dec. 11, 2008 (describing the violence of the protests and the speed with which they spread); see also Anthee Carassava, *Violent Protests Flare Again in Central Athens*, N.Y. TIMES, Dec. 19, 2008 at A21 (“This month's demonstrations originally sought to protest the killing of the teenager, but have since taken on a political character.”).

⁴ Claus Offe, *1968 Thirty Years After: Four Hypotheses on the Historical Consequences of the Student Movement*, 68 THESIS ELEVEN 82, 82 (2002).

motivation of the student protesters as a type of “revolutionary romanticism, a protest against the foundations of modern industrial/capitalist civilization, its productivism and its consumerism, and a unique combination of subjectivity, desire and utopia.”⁵ He saw the movement as a “protest against the modern disenchantment of the world” which was “torn between its nostalgia for the past and its dreams for the future.”⁶ The students experimented with different social practices, particularly collectivism, and forms of artistic expression as “an attempt to reinvent a free and egalitarian human community.”⁷ Löwy broke the social critique of the students’ protest down into two parts:

(1) the social criticism, developed by the traditional labour movement, which denounces the exploitative nature of capitalism, the misery of the dominated classes and the egoism of the bourgeois oligarchy which confiscates the fruits of progress; [and] (2) the artistic critique, a radical challenge to the basic values of capitalism, in the name of freedom and authenticity, against a system that produces alienation, disenchantment, and oppression.⁸

In other words, these students felt stifled by the political and social norms of their parents and grandparents and while their protests may not have always had a common theme or goal, there was a compelling need to break free from that system of authority. Offe uses the word “code” to describe the routines that are “established [and] prescribed by holders of social and political power, if inconspicuously so.”⁹ The unconventional dress and behavior that characterized the student protest was a challenge to the code. It was a process of “articulating oxymora;” for example, high theatre performed in the streets, love in public, and students educating professors.¹⁰ The student movement was a challenge to unjust distinctions, like those based on age, race, wealth, or gender, that were given weight and significance by those in power.¹¹ It is this hypothesis that provides a connection between the student movements of 1968 and the law. If all law inherently creates distinctions between individuals and distributes power accordingly then we can look to the ways in which challenging that authority affects rulemaking and governance.

⁵ Michael Löwy, *The Revolutionary Romanticism of May 1968*, 68 *THESIS ELEVEN* 95, 95 (2002).

⁶ *Id.*

⁷ *Id.* at 97.

⁸ *Id.* at 97-98.

⁹ Offe, *supra* note 4, at 82-83.

¹⁰ *Id.* at 83.

¹¹ *Id.* at 84.

2. Examining the Impact of the Student Movements

Several theses have been posed regarding the impact of 1968, ranging from highly complementary and optimistic to borderline cynical appraisals.¹² Some scholars have argued that the protests of 1968 gave the young people of that time “a new understanding of selfhood” and marked a significant cultural transformation, even if political revolution was never achieved.¹³ Certainly, there were global societal changes that occurred during the late 1960s, including the reform of higher education, the decline of “working-class consciousness,” the increasing amount of women in the work force, the increased influence of the media, and the decreased number of marriages and children.¹⁴ This view postulates that the movements of 1968 shifted the characteristic modes of the two decades following the war.¹⁵ The transformation of the political culture of the postwar era to one that demands greater participation and transparency can be regarded as a product of 1968. The feminist and environmentalist movements along with advancements in civil liberties for ethnic, religious, and sexual minorities all find some expression in the student protests.¹⁶

Other hypotheses include the idea that these changes might have occurred without the student movement, which may have been more of a visual symptom of changes than an impetus for the change itself. It might be that these anti-authoritarian movements did nothing more than foster a lackadaisical, cynical, and resigned spirit in young people which encouraged them to stand outside of society rather than to pursue real change within the political process.¹⁷ Perhaps no single hypothesis truly captures the meaning of the student movement. The meaning may ultimately be as varied as the voices of the students that took to the streets in 1968. Our project is to explore one aspect of its meaning, and we do this by tracing the anti-authoritarian thread of the student movement and its entanglement with the law.

¹² Offe, *supra* note 4, at 84.

¹³ Peter Ginsborg, Luisa Passerini, Bo Stråth & Peter Wagner, *1968-2001: Measuring the Distance: Continuities and discontinuities in recent history*, 68 *THESES ELEVEN* 5, 8 (2002).

¹⁴ *Id.* at 6.

¹⁵ Offe, *supra* note 4, at 84 (“We think differently today than the normalcy of the two postwar decades because the movements of 1968 liberated all of us, including the generations born later, from the discursive power of those rules and codes.”).

¹⁶ *See id.* (“Without the work of destruction that the *soixante-huitards* performed at the cognitive frame of the postwar social order, there would today . . . be no insistence on participation and transparency, no feminist or environmentalist movements, no green parties, no liberating achievements for ethnic religious, and sexual minorities, and so on.”).

¹⁷ *Id.* at 87.

B. Law and the Causes of 1968

The student movement expressed a deep disappointment in the West German government driven in large part by an apparent mismatch between the rhetoric of the state and its actions. Although Germany was freshly emerged from the National Socialist era, having ostensibly repudiated everything that it represented, the students began to question whether this change was sincere and substantive or little more than a new coat of paint. It was the law that gave credence to their suspicions. First, through the Auschwitz trials, the students gained a knowledge of the past that the older generation had been reluctant to share. The students began to perceive that the authoritarian superstructure was largely still in place. In fact, they had the opportunity to experience it themselves as the power of the state manifested itself in high-profile public trials.

I. *Auschwitz Trials*

The Frankfurt Auschwitz Trial provided German students with a history lesson that their parents had denied them. The trial stands out as the “largest, most public and most important Nazi trial to take place in West German courts after 1945.”¹⁸ Concerned at its core with the Nazi genocide of the Jews, the trial represents the efforts of Germany's young Federal Republic to confront a past remarkable for its misdeeds through ordinary criminal process.¹⁹ The trial may have ultimately done little to remedy the crimes of the past, but it undoubtedly contributed to the environment that spawned the protests. As a history lesson, the trial vividly brought the real horrors of the Nazi regime before the students. Younger generations watched as their parents struggled to face the crimes of the Nazi regime. Moreover, the inability of German law to sufficiently grapple with genocide meant that a satisfactory reconciliation from which German society could move on was, in many ways, unobtainable.

Post-Nazi Germany underwent a series of transitions in the ongoing efforts to heal its wounds through the judicial process. From 1945 to 1949 there were a total of 4,419 convictions in German courts for Nazi crimes, although only fifteen of these were for crimes committed in the camps.²⁰ This early zeal was apparently short-lived, as the second period of Nazi prosecutions, from 1950 to 1958, was marked by what one historian has called a “half-hearted judicial processing of the Nazi past.”²¹ The 1950s experienced a

¹⁸ DEVIN O. PENDAS, *THE FRANKFURT AUSCHWITZ TRIAL, 1963-65: GENOCIDE, HISTORY AND THE LIMITS OF THE LAW* 1 (2006).

¹⁹ *See id.*

²⁰ *See id.* at 14.

²¹ *Id.* at 14 (quoting Gotthard Jasper, *Wiedergutmachung und Westintegration, in WESTDEUTSCHLAND, 1945-1955*, at 183 (Ludolf Herbst ed., Munich: R. Oldenbourg Verlag, 1986)).

sharp decline in Nazi investigations and trials in West German courts. The political climate viewed “war criminals” as a thing of the past, an unfortunate legacy of the occupation period best left behind.²² The transition away from the early years of the Federal Republic continued through the 1960s, until the students were confronted with the Nazi Past.²³ The reaction of the new generation, to the Holocaust in particular, was more emotional and was also coupled with a demand for radical social and political change.²⁴

1. Taking Legal Action

Fifteen years passed before a German public prosecutor began systematic investigations of members of the SS who ran the Auschwitz concentration camp.²⁵ Extensive investigations of over 1,200 accused began in Frankfurt.²⁶ Over 1,000 witnesses, including survivors and former members of the SS, gave depositions during the preliminary proceedings including case investigations and judicial inquiries.²⁷ In April 1963, after four years of intensive work, the public prosecutor’s office presented an indictment of 24 defendants to the Frankfurt District Court.²⁸ The accused included two adjutants, the leader of a protective custody camp, three SS doctors, one SS pharmacist, one muster officer, members of the camp Gestapo (political division) and medical orderlies; a prisoner-functionary was also brought before the court.²⁹ Legal action was initiated on October 7, 1963 and as the year came to a close, the trial began.³⁰

²² *Id.* at 15.

²³ See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* 391 (2005).

²⁴ See PENDAS, *supra* note 18, at 21.

²⁵ See Rebecca Elizabeth Wittmann, *The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial 1963-65*, 35 *CENT. EUR. HIST.* 345, 345 (2002). See generally VERDICT ON AUSCHWITZ: THE FRANKFURT AUSCHWITZ TRIAL 1963-1965 (DEFA Film Library 2007) (documentary by Rolf Bickel and Dietrich Wagner on the Frankfurt Auschwitz Trial).

²⁶ See VERDICT ON AUSCHWITZ (DEFA Film Library 2007).

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

2. A History Lesson

The Auschwitz Trial was a public history lesson.³¹ In mid-1960s Germany, the social impact of the post-war demographic explosion was being felt everywhere.³² Lacking direct knowledge of what had gone before, younger generations born during or just after World War II saw all Germany’s faults as failings more connected with the Republic than with Nazism.³³

The trial lasted twenty months.³⁴ To start, the public prosecutor’s office called for the expert opinion of historians to provide an overview of the SS reign of terror, the concentration camp system, National Socialist policies on Poland and extermination, as well as crimes committed against members of the Red Army.³⁵ Over the course of 183 trial sessions, over 350 witnesses testified, including 211 survivors of Auschwitz.³⁶ The testimony of survivors which was widely reported in the German and international press confronted a prosperous German society with crimes that had been repressed and forgotten. Indeed, “the trial did not merely articulate the existing historical knowledge about the Nazi past; it deliberately sought to expand it.”³⁷ In the national press there were 933 articles about the trial between November 1963 and September 1965.³⁸ Almost every newspaper in the Federal Republic reported on the trial to some extent.³⁹

In contrast to the press’ treatment of the Auschwitz Trial, much of the German public responded with “widespread ambivalence.”⁴⁰ German students watched as older generations demonstrated a “significant inner resistance” to facing the past and unable to confront their guilt, repressed it instead.⁴¹ For the students, the Auschwitz Trial

³¹ See PENDAS, *supra* note 18, at 249-250 (“The Auschwitz Trial was about the past in relation to the present, it was about the history of politics and the politics of history.”).

³² See JUDT, *supra* note 23, at 390-391.

³³ See *id.* at 417 (“The youthful radical intelligentsia of the German Sixties accused the Bonn Republic of covering up the crimes of its founding generation.”).

³⁴ See PENDAS, *supra* note 18, at 2.

³⁵ See *id.*

³⁶ See *id.*

³⁷ *Id.* at 250.

³⁸ *Id.* at 252, 258-269.

³⁹ *Id.*

⁴⁰ *Id.* at 253.

⁴¹ *Id.*

crystallized a specific set of public images of Nazism, the Holocaust, and, by extension the German present.⁴² The real value of the proceedings may have not been in the judicial process itself, but in the education it provided the German people.

3. *The Limits of Law*

Like all West German Nazi trials after the Federal Republic of Germany regained full legal autonomy in the 1950s, the Auschwitz Trial was conducted under German statutory law.⁴³ This meant that the trials were entirely limited to ordinary criminal procedure and legal categories.⁴⁴ This led to several serious jurisprudential problems when it came to prosecuting Nazi genocide and German criminal law came up against the limits of its capacity to generate socially meaningful judgments.⁴⁵

The tragedy of the Auschwitz trial is that in seeking to judge Auschwitz under the terms of German law, it repressed, distorted, or simply failed to elucidate certain vital historical and psychological “truths” about Nazi genocide.⁴⁶ These limitations were then transmitted to the public via the press and tended to resurface as a “return of the repressed” rather than being consciously integrated into the political culture of the Federal Republic.⁴⁷ Thus, although the general consensus was that the trial had done all that it could under German law; the law as it existed was ill-equipped to grapple with the crimes and issues presented at the trial.

The Frankfurt Auschwitz Trial helps to reveal the relationship between law and the causes of the 1968 student protest movement in Germany. The domestic law used proved an ineffective tool and lacked sufficient restorative capacity to achieve its purpose. The legal process of the trial instead educated German students of much recent history that their parents were actively avoiding. It provided a window into the authoritarianism of the Nazi regime, and where that level of control by the government could lead. The students now had a benchmark and a means of evaluating the actions of the government. They had the foundation for their movement.

⁴² *Id.* at 251.

⁴³ *Id.* at 2.

⁴⁴ See Wittmann, *supra* note 25, at 345-348.

⁴⁵ See *id.* at 347 (describing three basic problems with the German penal code: first, the definition that made up the distinction between perpetrator and accomplice; second, the limitations of the murder law itself; third, the debate on the Statute of Limitations).

⁴⁶ PENDAS, *supra* note 18, at 300.

⁴⁷ *Id.* at 287.

II. Remnants of Nazi Justice and Its Influence on the Student Movement of 1968

Central to the student movement of 1968 was the notion that Germany was still an oppressive society.⁴⁸ Events like the Auschwitz Trial shed light on the authoritarian regime of the Third Reich, and students were dissatisfied that many of the figures from that regime continued to wield power in the Federal Republic.⁴⁹ An examination of the post-war developments within the German judiciary reveals the continuation of the Nazi authoritarianism that the student protestors saw.

1. Old Judges in the New Judiciary

In the newly constituted Federal Republic, much of the government structure retained the authoritarian outlines of the previous regime.⁵⁰ The Allies' early efforts to purge the judiciary of former members of the National Socialist party failed to achieve even moderate success, as in some counties up to 95% of all jurists were former Nazis.⁵¹ The program of de-Nazification was eventually abandoned in the interest of maintaining law and order within the new Federal Republic, and many former party members were pardoned and allowed to reenter the civil service.⁵² Former judges and prosecutors, themselves involved in the drafting or enforcement of the Race Laws, were assigned to posts in the new government. In some cases they had responsibilities for hearing the grievances of those they had persecuted during the war.⁵³

Because many of the former Nazi jurists were absorbed back into the system, often into high-ranking positions, they lacked any incentive to make amends for the past. The ease of their reincorporation into the legal system perhaps sent the signal that they had nothing for which they needed to make amends. They felt their involvement was justified or even necessary. For instance, Erich Schwinge, formerly a presiding judge at the Military Court in Vienna, became a law professor and in 1977 published a study defending the roles of military courts entitled *Military Justice in the National Socialist Era*.⁵⁴

⁴⁸ See MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD 146 (2005).

⁴⁹ *Id.* at 144-147.

⁵⁰ *Id.* at 143-157.

⁵¹ INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 202 (1987).

⁵² *Id.* at 203.

⁵³ For instance, Gunther Shultz, who participated in Race Law decisions during the war, was later named the presiding judge of a board in Hamburg to hear the cases of war victims claiming damages. In some cases the courts were also responsible for hearing the grievances of the relatives of those they had executed. See *id.* at 202-211.

⁵⁴ *Id.* at 213.

The post-war structure of the German judiciary, populated with many authoritarian ideologues, promoted an authoritarian system—clearly recognizable to the students in light of the Auschwitz trial. German jurists ascribed all the guilt to the lawmakers and claimed that they, the jurists, were required to follow the legislation in accordance with their “positivistic” role.⁵⁵ The jurists apparently had forgotten that positivism had been abandoned by the German legal profession around 1932.⁵⁶ Nevertheless, after the war the notion of “positivistic miseducation”⁵⁷ was readily embraced and became a blanket excuse for the judicial misconduct of the Nazi-era.⁵⁸

Many of those who relied on the excuse of positivism said that it had failed the legal system and instead proposed that the system be based on the Christian natural law, where the “God-given standards of justice” and the “ultimate legal order” would prevail over the “scientific character of the present legal order.”⁵⁹ As a result, an extremely conservative judiciary began to take shape. It viewed society as something static and aimed at preserving the “traditional values from democratic developments through appeals to a status quo preordained in nature.”⁶⁰ Democracy and progressivism were deemed to be contrary to the natural law and so the old system lived on.⁶¹

2. *Judging the Past*

Unsurprisingly, the judiciary of the new Republic was responsible for upholding a number of laws reminiscent of the old National Socialist era. The Law for the Prevention of Hereditary Diseases, which led to the sterilization of 350,000 people, was not repealed

⁵⁵ See *id.* at 219 (“[L]egal positivism, with its demand that judges be strictly bound to the law, had been the unchallenged doctrine of the authoritarian state under the Kaiser.”).

⁵⁶ *Id.* at 219-220.

⁵⁷ *Id.* at 221.

⁵⁸ The prevalence of the doctrine of positivism in post-war Germany was most readily acknowledged by those who should have been held responsible for the crimes they had committed during the Nazi era. In effect, the perpetrators simply claimed to have been following the letter of the law and that it was this training and a strict adherence to the letter of the law that allowed the war-time atrocities to take place. Personal responsibility was not contemplated. *Id.* at 219-221.

⁵⁹ *Id.* at 223.

⁶⁰ *Id.* at 224.

⁶¹ Muller writes that a clear example of the persistence of the old conservative order can be taken from the relationship between the sexes and the legal status afforded to women after the war. See *id.* at 224 (“The essence of a woman is determined by nature. Motherhood is her fate, her life work; every historical development must come to a stop when confronted with this unalterable biological fact.”).

until 1974.⁶² The Federal Law on the Defense of the State, which sought to punish intentions to endanger the State was also upheld.⁶³ This statute was broad in scope and encompassed strikes, protests, and any affiliation with the Communist party. A conviction of having “intent to endanger the State” could have prevented an individual from the right to drive a car, receive a high school diploma, or to be admitted to college exams.⁶⁴

The Criminal Code was amended to set a statute of limitations on all charges of homicide (except for murder) to expire in 1960 and sentences of 15 years or less to fall under the 1960 statute of limitations.⁶⁵ The legislature further amended the Criminal Code to limit the sentence of an accomplice to murder who lacked an ascertainable personal motive to no more than 15 years. The practical effect of these amendments was that a multitude of former-Nazi perpetrators were let free. In order to be responsible for a homicide, one must have a personal motive, and anyone carrying out the wishes of a third party was merely an accomplice.⁶⁶ Consequently, the amendments to the criminal code resulted in a grant of amnesty to thousands as courts persistently failed to find ascertainable personal motives among Nazi defendants.⁶⁷ Murder, unlike other types of homicide, turns on the element of “malicious intent” in Germany and when such intent could not be found, the court simply acquitted the defendant.⁶⁸ In the end only Hitler, Himmler, and other members of the upper echelon of the Nazi party satisfied this definitional requirement.⁶⁹ The rest were simply accomplices, often without ascertainable personal motives.

In the rare instances that former Nazis were found guilty, sentences of one or two days in jail per victim were quite common, and often fell within the amnesty provision anyway.⁷⁰ Sentencing decisions could be influenced by whether the defendant was thought to have hated Germany or have been a Communist.⁷¹

⁶² MÜLLER, *supra* note 51, at 227.

⁶³ *Id.* at 232.

⁶⁴ *Id.* at 232-234.

⁶⁵ *Id.* at 243.

⁶⁶ *Id.* at 248-256.

⁶⁷ *Id.* at 243-246.

⁶⁸ *Id.* at 255.

⁶⁹ *Id.* at 246.

⁷⁰ In one instance, a man convicted of killing 26,000 people argued that his three-year prison sentence was disproportionately cruel. The court cut the sentence to nine months. *Id.* at 257.

⁷¹ *Id.* at 257.

While the system regularly found ways to acquit former party members, the law required a great deal of those few victims who were eligible for some compensation. In order to collect their reward, victims had to show that they were not “unworthy of reparations.”⁷² In other words:

the unfair pension and reparations system ensured high payment to perpetrators of Nazi crimes, even to murderers whose original loss of office and pension rights resulted from criminal convictions, and even if they remained incorrigible Nazis. If their victims remained true to their convictions, on the other hand, the tainted officials withdrew their far smaller reparations payments, although these were supposed to be merely compensation for previously sustained injuries to health.⁷³

The development of the post-war German judiciary was pragmatic: If the judges had been tried and found guilty, then it would have been impossible to acquit the numerous others who had handed down sentences on the Race Laws elsewhere or had presided at the special and Military Courts. Conviction of a single judge of the Third Reich would have started an avalanche that inevitably would have engulfed the majority of West German judges on the bench at the time. Only with difficulty could it have been prevented from reaching the judges of the Federal Supreme Court, the Federal Administrative Court, and even the Federal Constitutional Court.⁷⁴

Essentially, a judge could not have committed murder, “for this would have meant that the West German judicial system had been established by murderers in the hundreds.”⁷⁵ Obfuscation of truth that this required produced a refusal to take responsibility, and this was the very heart of the authoritarian structure and function of the German post-War judiciary. The effects and prevalence of this oppressive regime ended up becoming one of the driving forces behind the student protests of 1968.⁷⁶ The new judiciary had the same face as the old.

⁷² *Id.* at 262.

⁷³ *Id.* at 269.

⁷⁴ *Id.* at 283.

⁷⁵ *Id.* at 283.

⁷⁶ KURLANSKY, *supra* note 48, at 146.

III. Fritz Teufel and Karl-Heinz Kurras Trials

The negative and authoritarian perception German students held of the courts was further damaged by two 1967 trials directly impacting the students. On June 2, 1967, thousands of students from the Free University of Berlin gathered in what became a critical turning point for the student protest movements.⁷⁷ The Shah of Iran was coming to West Berlin and the students, opposed to the authoritarian regime of the Shah, protested his visit.⁷⁸ During the demonstration a plainclothes police officer shot and killed Benno Ohnesorg, a 26 year-old student.⁷⁹ Not only was it found that Ohnesorg had been unarmed, but it was also uncovered that the protest had been his first.⁸⁰ The officer, Karl Heinz-Kurras, was accused of manslaughter rather than murder and was shortly thereafter acquitted of all charges.⁸¹ Meanwhile, the Berlin authorities arrested student protest leader Fritz Teufel, who was then held in detention longer than Kurras on less severe charges. The German legal system’s disparate treatment of these students outraged German students and provided additional fuel for the widespread protest movement that was to erupt in 1968.⁸²

Both the German government and general public opinion blamed Ohnesorg’s slaying on the student protestors rather than finding any fault with police tactics. Prominent German newspapers, especially those controlled by the Springer press, defended the use of disproportionate force by the Berlin police.⁸³ The court essentially ignored any evidence indicating wrongdoing by the police. Although audiotapes of the event recorded by journalists were available, the court never heard them, citing time constraints.⁸⁴ The police department went to great lengths to defend Kurras, including hiring a high-powered defense attorney.⁸⁵ Kurras’s defense portrayed his actions as an act of self-defense. He claimed to have neither intentionally shot at an unarmed student nor acted negligently

⁷⁷ *Id.* at 148.

⁷⁸ *Id.*

⁷⁹ David Binder, *Trial of Student Opens in Berlin*, N.Y. TIMES, Dec. 16, 1967.

⁸⁰ KURLANSKY, *supra* note 48, at 148.

⁸¹ Reinhard Mohr, *Ein Skandal, der die Republik veränderte*, DER SPIEGEL, Feb. 4, 2008, available at <http://www.spiegel.de/kultur/literatur/0,1518532502,00.html>.

⁸² KURLANSKY, *supra* note 48, at 146.

⁸³ Shawn Boyne, *Law, Terrorism, and Social Movements: The Tension Between Politics and Security in Germany’s Anti-Terrorism Legislation*, 12 CARDOZO J. INT’L & COMP. L. 41, 50 (2004).

⁸⁴ Uwe Soukup, *Der Mann, der Benno Ohnesorg erschoss*, STERN, Jan. 16, 2008, <http://www.stern.de/politik/historie/604175.html>.

⁸⁵ Kurra’s defense attorney was reportedly paid 60,000 DM. *Id.*

with his weapon.⁸⁶ Instead, during the trial he boasted that if had he intentionally fired his weapon at the students, as he believed had been his duty, then the body count would surely have been higher.⁸⁷ The court ultimately concluded that there was insufficient evidence to convict Kurras.⁸⁸

Fritz Teufel, notorious for founding the anti-authoritarian student commune “Kommune I,” had been arrested during the protests for acting as a protest leader and allegedly throwing stones at police officers.⁸⁹ Though these original charges were dropped, the prosecution instead attempted to sentence him for “breach of the peace, injury to persons and property, and insults to authorities.”⁹⁰ Teufel spent an inordinate 148 days in pretrial detention until the presiding judge demanded his release. His trial did not begin until November 28, 1967, a week after Kurras’s acquittal.⁹¹

The German legal system’s treatment of these two cases appeared to confirm the authoritarianism of West German government and exposed a disconnect between the espoused ideals of the new post-war Germany and reality. The government’s apparent acceptance of violent police tactics evoked the authoritarianism of the Nazi regime and triggered nationwide sentiments of anti-authoritarianism.⁹² The protest movement, which had not yet become a national phenomenon, began to spread beyond Berlin and throughout the country. “Movement June 2nd” groups formed to protest the government’s authority and honor Ohnesorg’s memory.⁹³

The trials of Karl Heinz-Kurras and Fritz Teufel were conducted based on the identities of the defendants rather than the charges brought against them. The government’s heavy-handed treatment of Kurras and Teufel reveals why the new generation felt resentment toward the government and its use of power. The legal processes that followed the June 2nd protests and the death of Benno Ohnesorg drove the students to renewed action now that they were convinced of the democratic bankruptcy of the state.

⁸⁶ See Mohr, *supra* note 81.

⁸⁷ See *id.* (“Wenn ich gezielt geschossen hätte, wie es mein Pflicht ware, wären mindestens 18 Mann tot gewesen.”).

⁸⁸ *Berlin Detective Cleared in Killing of a Student*, N.Y. TIMES, Nov. 22, 1967, at pg. 37.

⁸⁹ *Student Defendant Scores Berlin Court.*, N.Y. TIMES, Dec. 16, 1967, at pg. 6.

⁹⁰ *Id.*

⁹¹ Binder, *supra* note 79.

⁹² Boyne, *supra* note 83, at 50.

⁹³ *Id.*

IV. *Spiegel* Affair

Spiegel Affair of 1962 lit the fuse that ignited the powder keg of Germany’s 1968. It began when a government official attacked a news magazine for publishing stories criticizing the government. The incident was a reflection of the lingering authoritarian tendencies of the post-war German government. The *Spiegel* Affair would last nearly five years and put Germany on the front-page of newspapers around the world.⁹⁴ The scandal resulted in little substantive change and the opposing sides appeared to reach a stalemate as passions cooled over time. Nevertheless, the *Spiegel* Affair did cause Germany to look inward. The scandal pressed the nation to examine its policies on free press and government accountability and forced the country to begin confronting the institutional legacies of the Third Reich.⁹⁵ It was a call for Germany to define its place in an emerging world order.⁹⁶ The combination of the government’s action and policies made the incident into an “Affair.” The action exposed the policy and the policy made the action more egregious. The Affair spurred public protest and primed segments of German society to begin the rumblings that would culminate in the wave of protests that swept the country in 1968.⁹⁷

1. *The Action*

Der Spiegel (The Mirror) is a newspaper that continues to be known for its strong and independent editorial voice.⁹⁸ In 1962 the paper was outspoken in its opposition to Chancellor Konrad Adenauer and the Ministry of Defense,⁹⁹ contributing to an acrimonious

⁹⁴ See SCHOENBAUM, *THE SPIEGEL AFFAIR* 11 (1968). For a more detailed account of press coverage of the events and aftermath, see RONALD F. BUNN, *GERMAN POLITICS AND THE SPIEGEL AFFAIR* 81-91 (1968).

⁹⁵ See SCHOENBAUM, *supra* note 94, at 27-28.

⁹⁶ See BUNN, *supra* note 94, at xvii.

⁹⁷ See Carl J. Friedrich, *Rights, Liberties, Freedoms: A Reappraisal*, 57 *AM. POL. SCI. REV.* 841, 847 (1963) (identifying the atypically sharp public response to the *Spiegel* Affair as an indicator of increasing constitutionalism in West Germany), and Frank Esser & Uwe Hartung, *Nazis, Pollution, and No Sex: Political Scandals as a Reflection of Political Culture in Germany*, 47 *AM. BEHAVIORAL SCIENTIST* 1040, 1056 (2004) (linking the *Spiegel* Affair to the “emerging spirit of the 1960s.”).

⁹⁸ *Der Spiegel* was founded by a young Allied soldier, Rudolph Augstein, in 1947. See BUNN, *supra* note 94, at 1. The publication’s style was based largely on *Time* magazine, though with more of an edge. See SCHOENBAUM, *supra* note 94, at 28. For a more in depth discussion of the magazine’s history, founding philosophies, and trademark approach, see Konstantin Richter, *Der Spiegel’s employee-owners gave their boss the boot. Now they must prove they can revive the venerable German magazine*, *COLUM. JOURNALISM REV.* (May/June 2008), available at http://www.cjr.org/feature/shop_stewards.php?page=1.

⁹⁹ See SCHOENBAUM, *supra* note 94, at 27 (noting *Spiegel’s* political leanings at the time, but also suggesting that many of its positions were not unique among German media sources).

relationship between the paper and Defense Minister Franz Josef Strauss.¹⁰⁰ During Strauss's first five years in office *Der Spiegel* critiques had evolved from relatively polite disagreements on policy to directed criticism with a specific motive.¹⁰¹ Strauss was on a clear path to the Chancellorship¹⁰² and *Der Spiegel* was on a mission to disrupt that trajectory.¹⁰³ Their reporting of his official actions had already led to multiple investigations of Strauss by the *Bundestag*.¹⁰⁴ Before long the paper turned its attention to Strauss's private life, peppering its stories with scathing appraisals of his character.¹⁰⁵ The tension was building between the paper and the Defense Minister and the stage was set for the events that would lead to the *Spiegel* Affair.¹⁰⁶

In October 1962, *Der Spiegel* published an article criticizing Strauss and the German military.¹⁰⁷ The article focused on a recent NATO military exercise in which Germany received exceedingly low marks.¹⁰⁸ A week after publication, government officers

¹⁰⁰ See *id.* at 42-46 (characterizing *Spiegel's* initial reception of Strauss in 1956 as "not unfriendly," but tracing the descent of their appraisal).

¹⁰¹ See SCHOENBAUM, *supra* note 94, at 45 (discussing how *Der Spiegel* continuously warned its readership of Strauss's flawed personal tendencies that could become entrenched government policy should his political ascent continue).

¹⁰² See BUNN, *supra* note 94, at 15.

¹⁰³ *Id.* at 19.

¹⁰⁴ Based on *Spiegel* reporting, a 1961 *Bundestag* investigation found that Strauss skirted blame for a *Bundeswehr* plane veering into East German airspace by falsifying the verdict of a military tribunal. See SCHOENBAUM, *supra* note 94, at 46. Strauss was also at the center of the *Fibag Affair*, which involved allegations that Strauss had improperly recommended a friend's company to contract with the Pentagon. This affair resulted in two inquiries by the *Bundestag*. *Id.* at 23-24. Strauss was eventually cleared of wrongdoing on October 25, 1962; the *Spiegel* raids and arrests began the next day. *Id.* at 25.

¹⁰⁵ According to *Der Spiegel*, Strauss had a record of contempt for courts, legal majorities, and democracy itself that would become national policy should he achieve Chancellorship. See SCHOENBAUM, *supra* note 94, at 45. The paper went so far as to draw upon Nazi imagery to criticize Strauss's leadership philosophies and warn of the perils to befall Germany should Strauss's star continue to rise: "As little as Strauss wants an atomic war, so little does he presumably want to stamp out parliamentary democracy. But the means and methods he applies with an almost naïve self-confidence are more than the successor to Hitler's Reich can tolerate." *Id.* at 46. In 1961 Strauss went so far as to bring suit against *Spiegel* to enjoin the magazine from repeating certain statements against Strauss. BUNN, *supra* note 94, at 15-17.

¹⁰⁶ Richter, *supra* note 98. See also BUNN, *supra* note 94, at 13-57; and SCHOENBAUM, *supra* note 94, at 42-47.

¹⁰⁷ *Conditionally Prepared for Defense*, DER SPIEGEL, October 10, 1962 (translated and reprinted in BUNN, *supra* note 94, at 186-216).

¹⁰⁸ See *id.* The article was part of a larger political debate over whether Germany should build its military to the degree necessary to independently match Russia's (Strauss favored this approach, while *Spiegel* was adamantly opposed); for more detailed discussion of the politics of the debate, see SCHOENBAUM, *supra* note 94, at 49-59; see also BUNN, *supra* note 94, at 29-35.

conducted a nighttime raid of *Der Spiegel’s* offices and arrested several staff members.¹⁰⁹ The magazine and its staff were accused of treason. The government alleged information within the article was not public and could compromise national security.¹¹⁰ It was not immediately clear who ordered or authorized the searches and arrests.¹¹¹ Also unclear was under what circumstances the law allowed for such measures against a media agent, or if the measures were lawful at all.¹¹²

In total, eleven people were arrested and detained in connection with the *Spiegel* Affair.¹¹³ The first round of arrests took place in the middle of the night,¹¹⁴ a move specifically permitted by court orders.¹¹⁵ Conrad Ahlers, an associate editor at *Der Spiegel*, and his wife were arrested outside of proper diplomatic channels while vacationing in Spain, also in the middle of the night.¹¹⁶ *Der Spiegel* founder, Rudolf Augstein, was jailed for 103 days.¹¹⁷ The homes of many arrestees were searched, as were *Der Spiegel* offices in Bonn and Hamburg.¹¹⁸ The search of the Hamburg office and its archives continued for thirty days.¹¹⁹ At the time of the 1966 *Der Spiegel* Constitutional Court case, a number of seized materials had not been returned.¹²⁰

¹⁰⁹ BVerfGE 20, 162 1 BvR 586/62 (August 5, 1966), available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=651 [hereinafter *Spiegel Case*].

¹¹⁰ *Id.*

¹¹¹ See SCHOENBAUM, *supra* note 94, at 97-99.

¹¹² BUNN, *supra* note 94, at xxi.

¹¹³ *Id.* at xviii.

¹¹⁴ *Id.* at 51-54.

¹¹⁵ *Spiegel Case*, *supra* note 109 (citing §§ 94, 98, 102, 104, 105, 168 of Germany’s Rules of Criminal Procedure).

¹¹⁶ BUNN, *supra* note 94, at 54.

¹¹⁷ *Id.* at 95. For the amount of time each individual spent in jail, see *id.* at 94-95.

¹¹⁸ See *id.* at 37-57 (giving detailed accounts of the searches).

¹¹⁹ *Id.* at xviii.

¹²⁰ *Spiegel Case*, *supra* note 109.

2. *The Affair*

Had German officials been straightforward about the events of October 1962, the *Spiegel* events might have drawn little concern from the students or attention from the courts.¹²¹ But German officials were not straightforward. The government's stubborn refusal to account for its actions led to comparisons with Nazi Germany and these unpleasant memories roused an incredible amount of public scrutiny, led to a highly publicized government shake-up and spawned several major court battles. Yet despite the intensity of the reaction, the Affair produced little in the way of tangible results.

a) *Student Protest*

In 1962 *Der Spiegel* had a weekly readership of half a million,¹²² including the majority of West German university students.¹²³ Within days of the raids and arrests these students began demonstrations, protests, and sit-ins in university towns around the country.¹²⁴ The students conjured images of authoritarian, Nazi-style government, carrying signs with slogans of, "*Der Spiegel* is dead – freedom is dead," "On to the total state," and "Basic rights for the Government's opponents."¹²⁵

As the student outcry grew louder, academics began to add their voices.¹²⁶ The German academic community felt obliged to join the protest, as it had passively watched throughout the 1930s as the Nazis abused authority and consolidated power.¹²⁷ Several groups of professors published open letters to the press, petitioned the legislature, and addressed the *Bundesrat* President.¹²⁸ One such open letter from fifty-four professors at the University of Tübingen stated,

[T]he Federal Government and the political system, of which we are citizens, has lost its credibility... [A] broad,

¹²¹ See SCHOENBAUM, *supra* note 94, at 146 (suggesting that at the time, German society was not prone to public unrest and the protests stemming from the *Spiegel* Affair could have been avoided with a small showing of government transparency).

¹²² BUNN, *supra* note 94, at 4.

¹²³ SCHOENBAUM, *supra* note 94, at 35.

¹²⁴ BUNN, *supra* note 94, at 59.

¹²⁵ *Id.*

¹²⁶ *Id.* at 61 (citing mid-November as the first open and serious wave of criticism from the teaching community).

¹²⁷ *Id.* at 155-157.

¹²⁸ For a more complete description of the complaints lodged by the academic community, see *id.*

and particularly among our allies in the free world the return of methods of the German past will be suspected and confirmed, that many citizens of our country, among them especially our students, ask in growing uneasiness whether the principles of constitutionalism and the rules of the democratic game remain secure.... These are facts which the Government cannot belittle... [The] Federal Government has played an unworthy and dishonest game of hide and seek with the *Bundestag* and the public... We believe that a thorough-going internal reconstruction of the Government to be a prerequisite for restoring the credibility of our political system.¹²⁹

This second wave of protest from the professional community escalated the situation into a full-blown crisis of confidence in the German political system.¹³⁰

With shadows of the Third Reich lurking in the recent past, what might have been a barely-noteworthy attempt by government to draw a line between security and free press suddenly raised questions of strength, stability, law, freedom, and democracy throughout the country.¹³¹ By the end of 1962, 96% of Germans polled had heard of the *Spiegel* Affair¹³² and almost half viewed it as the most significant political event of the year, trumping the significance of the Cuban Missile Crisis in the minds of the German public.¹³³ When asked to evaluate how the government dealt with the *Spiegel* Affair, only 22% believed the government had acted "correctly."¹³⁴

b) *Government Investigation*

The government's investigation of the *Spiegel* events produced few results. Perhaps unsurprisingly, the authoritarian approach that caused the Affair also characterized the response. Pockets of intra-government turmoil eventually led to some token gestures of accountability, but the careers of all involved continued mostly uninterrupted. The reaction of the government demonstrated an unwillingness to censure its own.

¹²⁹ *Id.* at 155-156 (quoting DER SPIEGEL, Nov. 28, 1962, at 39).

¹³⁰ *Id.* at 61.

¹³¹ See SCHOENBAUM, *supra* note 94, at 11.

¹³² BUNN, *supra* note 94, at 163.

¹³³ SCHOENBAUM, *supra* note 94, at 171.

¹³⁴ *Id.*

Throughout the investigation, Chancellor Adenauer and Defense Minister Strauss continued to display a shocking level of indignation regarding the situation.¹³⁵ For weeks after the raids and arrests Strauss continually denied any involvement, much less wrongdoing.¹³⁶ In November the *Bundestag* held three question periods concerning the actions surrounding the *Spiegel* Affair.¹³⁷ On the final day of questioning Strauss admitted to lying in previous statements, acknowledging that he had exceeded the authority of his office and arranged for the arrests that took place in Spain.¹³⁸ Despite this smoking gun, one government official dismissed the seriousness of Strauss's actions as merely "somewhat beyond the limits of legality."¹³⁹ Strauss eventually stepped down from his position, but to little fanfare or public censure.¹⁴⁰ His political career resumed almost immediately and was relatively unaffected by the outcome of the Affair.¹⁴¹

As the Affair unfolded it became known that Chancellor Adenauer had given Strauss blanket permission to react to the *Spiegel* article at least eight days prior to the searches.¹⁴² Members of the Free Democratic Party twice threatened to withdraw entirely from cabinet positions within the coalition government in an attempt to force the Chancellor to address the situation and reprimand Strauss.¹⁴³ The reprimand never came. When Strauss finally did resign Adenauer publicly thanked him for his "selfless service" and "sense of duty."¹⁴⁴ Despite his involvement and apathy, Adenauer was merely pushed to set a more concrete date for his own retirement.¹⁴⁵

¹³⁵ See generally John Gimbel, *The "Spiegel Affair" in Perspective*, 9 MIDWEST J. OF POL. SCI. 282, 284-86 (1965) (discussing in greater detail the sequence of events within the Adenauer administration following the *Spiegel* action). But see Konrad Kellen, *Adenauer at 90*, 44 FOREIGN AFF. 275, 283 (1966) (suggesting that even though Adenauer came down on the wrong side of the *Spiegel* Affair, his favor of order and restraint ultimately helped preserve German democracy during that time).

¹³⁶ GIMBEL, *supra* note 135, at 285.

¹³⁷ SCHOENBAUM, *supra* note 94, at 171.

¹³⁸ *Id.* at 170-72.

¹³⁹ *Id.* at 116.

¹⁴⁰ SCHOENBAUM, *supra* note 94, at 139.

¹⁴¹ SEBASTIAN FISCHER, *Madame Tussauds Riles Bavaria*, SPIEGEL ONLINE (July 25, 2008), <http://www.spiegel.de/international/germany/0,1518,568106,00.html>.

¹⁴² BUNN, *supra* note 94, at 172.

¹⁴³ BUNN, *supra* note 94, at xviii.

¹⁴⁴ SCHOENBAUM, *supra* note 94, at 139-40.

¹⁴⁵ *Id.* at 176.

c) Legal Détente

With the political sphere unable to provide meaningful resolution the Affair was passed on to the judiciary, which was equally unable or unwilling to provide a satisfactory response. The courts, after all, were themselves rooted in the authoritarianism of the past regime.¹⁴⁶ The first round of judicial placation came when the Federal Court of Justice refused to begin the treasonable publication trial against two *Der Spiegel* defendants.¹⁴⁷ The judge dismissed the case and suggested individual liberties may well have been violated, but declined to affirmatively state that government officials or law enforcement had acted illegally.¹⁴⁸ One source offered this skeptical summary shortly after the affair: “Ahlers and Augstein were acquitted but not rehabilitated. The question of secrecy was raised but not answered. In effect, Hopf and Strauss were convicted without being arraigned.”¹⁴⁹ The decision was written with “cautious and delimiting wording” that gave no resolution to broader questions.¹⁵⁰ Having witnessed the government’s authoritarian propensity, this vague decision left the public, particularly the West German press, pleading for a clarification of boundaries.¹⁵¹

The Constitutional Court heard a complaint stemming from the Affair in 1966, and like the Federal Court of Justice, it kept a foot on each side of the line.¹⁵² The Court issued an unprecedented split decision that confirmed the constitutionality of the police action but left its legality in doubt.¹⁵³ Although the case has come to outline the right of freedom of the press in Germany,¹⁵⁴ the Court found no wrongdoing against *Der Spiegel* because the officials who carried out the investigation and the arrests conceivably could have believed that government security was an issue.¹⁵⁵

¹⁴⁶ See Section B(II), *supra*.

¹⁴⁷ BUNN, *supra* note 94, at 174-75.

¹⁴⁸ See *id.*

¹⁴⁹ SCHOENBAUM, *supra* note 94, at 228.

¹⁵⁰ BUNN, *supra* note 94, at 175.

¹⁵¹ *Id.*

¹⁵² *Spiegel Case*, *supra* note 109.

¹⁵³ *Id.* See also SCHOENBAUM, *supra* note 94, at 228.

¹⁵⁴ See Esser, *supra* note 97, at 1052.

¹⁵⁵ *Spiegel Case*, *supra* note 109.

The authoritarian actions of the government and the courts' inability to respond led to deeper questions about the adequacy of the German legal structure.¹⁵⁶ Apart from the apparent lack of accountability, Germans were growing uncomfortable with granting unquestioned power to a state that could not differentiate between a free press that might have unwittingly published a state secret and actual treason.¹⁵⁷ These tensions were not resolved in the *Spiegel* cases, feeding societal unrest.¹⁵⁸

3. Lasting Legacy?

Recently, Madame Tussauds opened a display in Berlin featuring "Heroes and Villains" of post-war Germany and depicting key *Spiegel* Affair character Franz Josef Strauss as a villain.¹⁵⁹ This portrayal of Strauss had many Germans up in arms, standing up in his defense and insisting upon his heroism.¹⁶⁰ It is clear that even after more than forty years, Germany is still unsure how to view the *Spiegel* Affair.

The *Spiegel* Affair defies characterization or simple explanation even to this day. It evoked stirrings within the public, the government, and the courts, all of which failed to produce any meaningful results. When examined in this insular context, the Affair was dissatisfying in its failure to result in any substantive change or remedy. The true legacy of the Affair must be understood through its place in history, particularly in the context of the emerging revolutionary spirit of the 1960s.¹⁶¹ For students, the *Spiegel* Affair was an attack by the government on one of the most important institutions of free society. Not only did it reveal the authoritarian measures the government was prepared to utilize to achieve its ends, it showed the students that they could not rely on the law, as interpreted by the courts, to keep the government in check. Though the *Spiegel* protests themselves did not bring about change, they caused a skepticism toward the government to develop and fostered a realization that the public could do something about it.¹⁶²

¹⁵⁶ BUNN, *supra* note 94, at xxi.

¹⁵⁷ *Id.*

¹⁵⁸ Michael A. Schmidtke, *Cultural Revolution or Cultural Shock? Student Radicalism and 1968 in Germany*, 16 S. CENT. REV. 77, 79 (Winter, 1999 - Spring, 2000).

¹⁵⁹ FISCHER, *supra* note 141.

¹⁶⁰ *Id.*

¹⁶¹ *See* Esser, *supra* note 97, at 1056.

¹⁶² Rob Burns, *West German Intellectuals and Ideology*, 8 NEW GERMAN CRITIQUE 3, 17 (1976).

V. *Emergency Laws*

The systemic authoritarianism the students saw in the preceding cases and legal controversies congealed into an explicit textual authoritarian form that became the legal flashpoint of the student movement. On 30 May 1968 the West German *Bundestag* (Federal Legislature) passed by the requisite two-thirds majority vote¹⁶³ an amendment to the German constitution, the *Grundgesetz* (Basic Law), entitled the “Seventeenth Law To Supplement the Basic Law.”¹⁶⁴ The amendment was enacted in order to create a “new constitutional organ” with responsibilities and procedures in both peacetime and wartime.¹⁶⁵ Among the new powers given to the German government under the amendment was the authority to enact “surveillance of written and oral telecommunications for security purposes . . . reinforce civilian police manpower, establish extensive administrative regulation . . . and radically centralize the federalist distribution of powers.”¹⁶⁶

The decision to enact this amendment, which functioned as an emergency constitution, was a catalyst for the student uprisings of 1968 as well as a reactionary measure by the government to the events of that year. The emergency laws were a clear example to the students of the so-called “fascist tendencies” that had existed in Germany since before World War II. The laws were also a direct pushback by the German government against the anti-authoritarian movement sweeping the youth of Germany and other European countries. Not only did the emergency legislation contemplate legitimate necessary government action for times of war but it also established a basis for firm, centralized government control and action during times of national “stress.”¹⁶⁷ As the date for the passage of the emergency laws approached, student protests in Bonn and in the universities of West Germany increased, signifying that the amendment was in direct opposition to the growing counter-cultural movement of 1968.¹⁶⁸

1. *The Emergency Laws as a Catalyst for the 1968 Movement*

West Germany’s passage of the emergency laws was a not merely knee-jerk reaction to the student uprising of 1968. The West German government had been trying to enact emergency laws for nearly ten years prior to the anti-authoritarian movement. Since 1958

¹⁶³ GRUNDGESETZ (GG - Basic Law/Constitution) art. 79(2).

¹⁶⁴ *Recent Emergency Legislation in West Germany*, 82 HARV. L. REV. 1704, 1704 (1969).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1704-1705.

¹⁶⁷ *Id.* at 1710.

¹⁶⁸ *Id.* at 1705.

the West German government had been trying to amend the Basic Law in order to provide provisions that could be used in “an hour of crisis.”¹⁶⁹ The 1968 emergency laws represented the fruits of years of effort by the federal government.¹⁷⁰ These attempts to create emergency laws were seen as West Germany’s effort to completely rearm and integrate itself as an equal into the Western Alliance that had formed in Europe.¹⁷¹ But while the emergency laws were a long time coming, all along serving as fuel for the burgeoning student protest movement, there can be little doubt that at the same time the protests that exploded in 1968 were a catalyst for the laws finally being enacted.

One of the difficulties facing the West German government in drafting the amendment was that the parties involved felt that the legislation needed to be robust enough to withstand criticism in hard times while simultaneously rejecting the Nazi regime and “avoiding the sins of the Weimar.”¹⁷² In 1959 the Interior Ministry presented its first draft of emergency legislation to the *Land* (state) governments of Germany. That draft version was subsequently withdrawn due to intense criticism.¹⁷³ In 1965 a version of emergency laws containing strict limitations on personal freedoms was defeated in the Federal Legislature, thanks in large part to the efforts of many politically active groups, including the German Trade Union Federation which was one of the major activist arms of the German Socialist Unity Party.¹⁷⁴ The debate over this version of the amendment was so heated that it almost resulted in a fist fight between various legislative representatives.¹⁷⁵ Many in the West German government saw the eventual defeat of the amendment as allowing the “extra-parliamentary forces” to win the debate over how West Germany should be governed in times of crisis.¹⁷⁶ Anti-governmental groups, like many comprising

¹⁶⁹ Reiner Diederich, *The West German Emergency Laws*, 22 INT’L SOCIALISM 23, 24 (1965) (Stephen Castles trans.).

¹⁷⁰ *Id.* at 1705.

¹⁷¹ *See id.* at 25 (explaining that the process of integration could clearly be seen in the first emergency law bill proposed by the West German Home Minister in 1960. The bill stated that a simple majority vote in Parliament should be able to trigger a state of emergency regardless of cause; no distinctions should be made between emergencies resulting from war, revolution, or natural disaster. The purpose of such an easily enacted emergency law was to provide a simple legal means through which the government could suppress all opposition and showcase itself as a legitimate sovereign nation.).

¹⁷² *Id.* at 27.

¹⁷³ *See Recent Emergency Legislation*, *supra* note 164, at 1705 (quoting Karlheinz Rode, 19 DIE OFFENTLICHE VERWALTUNG 117 (1966), who stated that almost no other legislative program since the founding of the Federal Republic had been argued against so vigorously by so many different political groups.).

¹⁷⁴ N.Y. TIMES, June 17, 1965, at 9 col. 2. The Socialist Unity Party was steeped in Marxist/Leninist ideology and considered itself an advocate of worker’s rights.

¹⁷⁵ *See Recent Emergency Legislation*, *supra* note 164, at 1705.

¹⁷⁶ *See Diederich*, *supra* note 169, at 23.

the student movement of 1968, hailed the defeat of the legislation as a success.¹⁷⁷ These groups may have won the initial skirmish, but following the 1965 emergency law debate the stage was set for the passage of an emergency law amendment as long as it contained fewer restrictions on personal rights.¹⁷⁸

2. *The Amendment of 1968 as a Partial Reaction to the Events of That Year*

The final version of the emergency law amendment was passed and enacted into law in the spring of 1968. Its passage illustrated the chasm between the Government and the students. The amendment brought riots to streets and campuses all over West Germany, but was received with critical acclaim from all parties in both the *Land* and federal governments.¹⁷⁹ The legislation sought to isolate “different bundles of power which [were] available to meet different types of emergencies.”¹⁸⁰ The amendment distinguished between four types of emergency situations.

The “defense emergency” (*Verteidigungsfall*) [was] defined as an attack upon Federal territory with force of arms, or the immediate threat of such an attack. The “state of tension” (*Spannungsfall*) [was] not further defined in the constitutional provision, and [was] thus a potentially all-inclusive term...domestic challenges to state authority [were] subsumed under the quite broad category of “a threatening danger to the existence or the liberal democratic basic order of the Federation of a *Land*.” Finally, the legislation provide[d] for welfare emergencies...Each of these classes of emergency [was] associated with a different set of special powers.¹⁸¹

It was clear that the *Spannungsfall* and the “domestic challenge” were the situations facing West Germany before and after the enactment of the 1968 legislation. While many in West Germany believed that the new emergency constitution guaranteed many more individual freedoms than had been included in the 1965 version, others felt that it gave the federal government too much power.¹⁸² Unlike invoking emergency powers for

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *Recent Emergency Legislation*, *supra* note 153, at 1736.

¹⁸⁰ *Id.* at 1714.

¹⁸¹ See *id.* at 1714–15 (citing Basic Law arts. 115(a)(1), 87(a)(4), 91(1)).

¹⁸² See *id.* at 1715–19 (explaining that the exercise of emergency law authority was hindered only by minimal statutory and constitutional provisions. Article 9(3) of the German Constitution stated that powers based upon

Verteidigungsfall, emergency powers responding to situations of *Spannungsfall* or domestic dissent were available to *Land* and federal government officials without any procedural check.¹⁸³ This was no doubt the case so that the emergency powers related to those often volatile situations could be rapidly implemented to respond to crises before they had much time to escalate.¹⁸⁴

Given the increasingly violent nature of the student protests erupting throughout West Germany, government officials believed that the need for swift action justified the simplified process of invoking emergency powers.¹⁸⁵ Those in power pointed out that civil unrest powers consisted solely of measures to strengthen police forces and *Land* and federal administrative bodies, restrict only the personal right to travel, and were subject to a *post hoc* veto by the Federal Council (*Bundesrat*).¹⁸⁶ The limited nature of the civil unrest powers led government officials to claim that those powers were unlikely to be abused and their consequences to West Germany as a whole would be limited.¹⁸⁷

What the government did not point out, however, was that the powers to meet civil unrest and domestic disturbances, including the student protests of the time, were heavily charged with political significance and a tempting authoritarian tool for the federal government to use.¹⁸⁸ Even though the powers did not expressly grant the executive the right to suppress personal rights such as freedom of speech or freedom of political expression, a crafty executive taking advantage of the lack of legislative oversight could use those powers to great effect.

The primary effects of civil unrest powers [were] to strengthen police forces and to permit federal coordination of police action. Nevertheless, the vague standard for invoking the powers, the absence of a prior procedural check, and the weakness of *post hoc*

emergency labor drafts could be used to hinder labor disputes or strikes. Outside of this provision, there was little language either in the Constitution or in the emergency law itself that protected the right of the people to peacefully demonstrate or collectively protest. This led some to feel that existing law provided little guarantee against the misuse of emergency authority and that the emergency law provisions would have a chilling effect upon lawful and unlawful activities of protest during normal times.).

¹⁸³ *Id.* at 1720.

¹⁸⁴ *Id.* at 1719.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1720-1721.

¹⁸⁸ *Id.* at 1720.

checks leave the federal executive considerable discretion to suppress even legitimate dissent. Further, the mere existence of such discretionary power may significantly deter free expression in normal times.¹⁸⁹

What was remarkable about the civil unrest emergency laws, and probably related to the civil unrest occurring at the time, was the flexibility that was given to federal executive in implementing those powers. While the prolonged debate over what powers to give or not to give the government “significantly reduced the danger that the new provisions [would] lend themselves to a subversion of the normal constitutional order by the executive,”¹⁹⁰ the

vague standard for invoking civil unrest powers, the executive’s unilateral access to them, and the weakness of subsequent procedural checks on their use create[d] a danger that free expression [might] be deterred by the possibility of heavy-handed police and army response.¹⁹¹

This flaw in the legislation is apparent when it is noted that “elaborate procedural checks” were placed upon the invocation, use, and retention of the defense related emergency powers.¹⁹² This can no doubt be attributed to the fact that the government wanted the freedom to deploy the civil unrest powers quickly and effectively against the student counter cultural movement that was occurring during 1968.

3. *Landmark Legislation*

The West German emergency law legislation was a “landmark attempt to solve by explicit provisions a problem inherent in the nature of the constitutional government.”¹⁹³ The legislation sought to give the government an extra set of procedurally limited powers through which it could respond to different emergency situations. When it came to dealing with civil unrest, however, the emergency laws contained no procedural safeguards on government authority and contained little guidance on when and how they should be used.

¹⁸⁹ *Id.* at 1724.

¹⁹⁰ *Id.* at 1736.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1737.

It is certain that the almost ten year debate leading up the passage of the emergency law was fuel for the growing student anti-authoritarian movement. It is also certain that the government of West Germany wanted to be able to utilize the civil unrest emergency powers quickly as a direct response to the student rebellions of 1968. Ultimately, the law may have been more instrumental in fanning the flames of unrest than it was in extinguishing them because it only highlighted the legitimacy of students' fears.

C. The Law's Reaction

It is clear that the law contributed to the unrest culminating in the 1968 student protests. The law had played the role of an authoritarian institution that, far from providing a check on the abuses of the government, seemed complicit in those abuses. From the *Spiegel* Affair to Benno Ohnesorg, the students had witnessed the courts' reticence to hold the government accountable for its actions. In this section, we ask how the law reacted in the wake of 1968 in hopes of evaluating the students' impact.

I. University Reform

Jürgen Habermas remarked “[t]he protest movement originates at the universities; reforming the universities should be its first, *realistic* goal.”¹⁹⁴ Reforming Germany's fossilized university system would be challenge enough. As Michael Löwy put it, the students' aims were realistic because they “demand[ed] the impossible ...”¹⁹⁵ West Germany's 1968 had its roots, at least in part, in the students' decade-long simmering discontent with overcrowded, hierarchical, and rigidly traditional universities.¹⁹⁶ But a

¹⁹⁴ JÜRGEN HABERMAS, *The Movement in Germany: A Critical Analysis*, in TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS 31, 39 (Jeremy J. Shapiro trans. 1970) (emphasis added).

¹⁹⁵ Michael Löwy, *The Revolutionary Romanticism of May 1968*, 68 THESIS ELEVEN 95, 99 (2002). This was a play on one of the clever slogans coined by the French student movement: “be realist – demand the impossible!” See Claus Offe, *1968 Thirty Years After: Four Hypotheses on the Historical Consequences of the Student Movement*, 68 THESIS ELEVEN 82, 83 (2002).

¹⁹⁶ See TONY JUDT, POSTWAR 392-395 (2005) (“In the first place, Europe was going to need many more universities . . . All over Europe there were vastly more students than ever before—and the quality of their academic experience was deteriorating fast. Everything was crowded—the libraries, the dormitories, the lecture halls, the refectories—and in distinctly poor condition (even, indeed especially, if it was new).”). See also G. Kloss, *University Reform in West Germany*, 6 MINERVA 323 (1968). Describing the tension that resulted from the “staggering increase” in the number of students in the 1960s and the rigidly traditional and hierarchical character of German universities, Kloss noted that initial proposals to create many new faculty positions “did not basically question the stratification of university staff—the professor (*Ordinarius*) still continued to reign supreme ...” *Id.* at 326, 329-330, 334. Kloss also confirmed the students' disillusionment with the universities' curriculum. *Id.* at 333. Ultimately, Kloss concluded that “in Germany [the student protest] movement has grown over many years and has gathered much of its impetus from gradual disillusionment with the academic establishment. It has reached such proportions only because of the conservative and authoritarian reactions of the university authorities to efforts to reform the traditional system which was revived in West Germany after the Second

mere recounting of the demographic, economic and pedagogical crises facing Germany’s once-proud university system at the end of the 1960s cannot do justice to the students’ demands. The movement’s animating anti-authoritarianism alone justified making a target of the establishment institution with which the students had the most direct contact.¹⁹⁷ Habermas resolved, no doubt with great regret, that “[t]he faculty is the born opponent.”¹⁹⁸ But the students’ anti-authoritarian critique against the universities was also particularized: the faculties were littered with former Nazis and the research and curriculum were increasingly “political,” that is, capitalist and imperialist.¹⁹⁹ In any case, having fomented revolution in the familiar and secure confines of the universities, the students planned to spread the revolution to the rest of society. Rudi Dutschke explained:

Against this form of fascism [people are being moulded to organize their lives not with independence but as useful objects] we have begun our struggle in the weakest spot in the authoritarian system of imperialism of West Germany, ... We have begun with the weakest link—West Berlin—and in West Berlin, again with the weakest link—the university . . . In West Germany we can only achieve a revolutionary situation when we succeed in destroying the national and international isolation of the students.²⁰⁰

The students had a point, at least as regards their more earth-bound demands. By an objective measure Germany’s universities were in desperate need of practical reform in

World War.” *Id.* at 342. Norbert Frei identified the “education crisis and the overdue reform of the universities,” along with the opposition to the war in Viet Nam, as the animating complaints of the student movement. NORBERT FREI, 1968 – JUGENDREVOLTE UND GLOBALER PROTEST 106 (2008) (author’s translation).

¹⁹⁷ Rudi Dutschke, *The Students and the Revolution (March 7, 1968)*, in *THE GLOBAL REVOLUTIONS OF 1968* 118, 121 (Jeremi Suri ed., 2007) (“This society is characterized by the system of authoritarian institutions.”). MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD 146 (2004) (“One of the central themes of the student movement was that Germany was a repressive society.”); JUDT, *supra* note 23, at 409 (“But the accompanying Marxist rhetoric, while familiar enough, masked an essentially anarchist spirit whose immediate objective was the removal and humiliation of authority.”); Kloss, *supra* note 196, at 342 (“The protest is directed against authority in general, against the older generation, against government and parliament, against the ‘establishment’ of West German society and against the present Christian Democrat-Social Democrat coalition, ...”).

¹⁹⁸ JÜRGEN HABERMAS, *Student Protest in the Federal Republic*, in *TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS* 13, 15 (Jeremy J. Shapiro trans., 1970).

¹⁹⁹ FREI, *supra* note 196, at 81-82 (reporting on a student published brochure from 1964 describing Germany’s “Brown Universities,” a reference to Hitler’s tuggish brown-shirted paramilitaries.). Frei quoted Dutschke as declaring: “Unser Ziel ist die Organisierung der Permanenz der Gegenuniversität als Grundlage der Politisierung der Hochschulen!” *Id.* at 98.

²⁰⁰ Dutschke, *supra* note 197, at 122.

the 1960s. They were foundering on exponential increases in the numbers of students.²⁰¹ They were mired in a traditional approach to teaching and research that no longer reflected the students' and society's needs.²⁰² They were inadequately funded and,²⁰³ worse, West Germany's federalism confounded centralized reform.²⁰⁴ These were plagues to rival those Moses visited upon Egypt. This is no casual metaphor. After all, the students viewed the emancipatory democratization of university governance as the necessary reform that would address both their theoretical and practical concerns.²⁰⁵ A break from the professors' absolute dominance would help correct the universities' stagnant, ineffective and irrelevant pedagogy and curriculum. Student involvement in university decision-making also would achieve a marginal victory at the core level of the protesters' agenda: smashing the suffocating authoritarianism and oppression of a significant social institution. Such reform can only be called a "marginal victory" because, for the hardened nucleus of the movement, compromise with and assimilation into an establishment institution like the universities represented unmitigated defeat. The universities were to be attacked, opposed and critically (and continuously) recreated from the margin.²⁰⁶

²⁰¹ Kloss, *supra* note 196, at 330 and 332.

²⁰² *Id.* at 331, 333, and 338-339; JUDT, *supra* note 23, at 393 ("Haughty and unapproachable professors offered formal lectures to halls full of anonymous students who felt little pressure to complete their degrees by a deadline, and for whom being a student was as much a social rite of passage as a means to an education."). Habermas agreed with the students that the conditions they found at the universities were discouraging, not the least due to "[t]he traditionally rigidified courses of study [that] are often unclearly defined and [linked with] examinations [that] are in many cases burdened with requirements that are antiquated and oriented to the mere reproduction of facts." HABERMAS, *supra* note 198, at 16.

²⁰³ Kloss, *supra* note 196, at 331.

²⁰⁴ *Id.* at 331-332 ("Another fruit of the work of the *Wissenschaftsrat* was to force the *Länder* and the Federal Government to look afresh at the lamentable piecemeal fashion in which their higher education policy had been conducted . . . The *Länder* were reluctant to revise the [Land/Federal funding] agreement when the Federal Government proposed doing so in 1966. The agreement was not delayed by any financial aspect but by the states' reservations about the Federal Government's intrusion into what they believed to be their sphere.").

²⁰⁵ FREI, *supra* note 196, at 92 ("[H]ierzu fielen nicht erst auf dem Frankfurter Delegiertentreffen, sondern bereits in der Diskussion über die seit 1961 zirkulierende Denkschrift 'Hochschule in der Demokratie' etliche jener Stichwort, die in den nächsten Jahren zu Lieblingsvokabeln der APO werden sollten: Gefordert wurde die 'Demokratisierung' der Universitäten im Sinne der Aufhebung aller 'sachfremden Herrschaftspositionen und Abhängigkeitsverhältnisse', die Ermöglichung vom 'Partizipation' und die Überwindung 'autoritärer Strukturen'."). *But see* HABERMAS, *supra* note 194, at 45 ("From the very beginning of the movement emancipatory forces have been connected with regressive ones.").

²⁰⁶ Dutschke explained: "We within the Left-oriented student organizations could then explain to the rest of the students that these [university reform] suggestions of rationalization, these so-called 'reforms' can not be seen apart from the difficulties experienced by capital in finding new forms of returns . . . The talk of recruitment restrictions and a shortened period of study, so that studies can be more effective. But more effective for whom? Effective for you, for your individual development, your emancipation? For the emancipation and liberation of society? Or effective for the social emancipation of capital?" Dutschke, *supra* note 197, at 123-24. The solution to the seemingly irredeemable university establishment was the creation of "Gegenuniversitäten" or "oppositional universities." *See* FREI, *supra* note 196, at 98 and 125.

Reform was not an option when dealing with the “one dimensional” society²⁰⁷ by actualizing the “great refusal.”²⁰⁸

The great majority of student protesters understood the futility of all-or-nothing opposition to the “system” and concluded that participation in the processes leading to better conditions and more conscientious learning, teaching and research promised greater returns (albeit from *within* society’s institutions) than a life on the fringe or, in extreme cases, on the run and eventually imprisoned or killed as members of revolutionary terrorist cells.²⁰⁹

The students’ search for “a legitimate place in the academic community”²¹⁰ is how the mundane and technocratic legal question of co-determination in university governance came to be a central front in the law’s engagement with 1968.²¹¹ Under pressure from the protest movement German state legislatures responded with reform laws that, in greater or lesser degree, adopted the “Group University” model which promoted “effective co-determination in the collegial organs of the universities’ administration.”²¹² Habermas described the reform as having two key elements: “a) that decision-making councils ... be

²⁰⁷ HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* (1964).

²⁰⁸ HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* (1966).

²⁰⁹ Habermas rejected the “sharp demarcation” between “‘revolution’ and ‘reform,’” arguing instead that “[t]he only way I see to bring about conscious structural change in a social system organized in an authoritarian welfare state is radical reformism.” HABERMAS, *supra* note 194, at 49.

²¹⁰ Kloss, *supra* note 196, at 323; HABERMAS, *supra* note 198, at 17 (“Despite an extensive rhetoric of reform, the only comprehensive conceptions for universities in a democratically constituted industrial society have been worked out by students . . . [Aiming] at the democratization of the university. Students experience the university from a sobering perspective—from below. They see how, under the changed conditions of mass education and large junior faculty, the perpetuated authority structures of the nineteenth century noticeably inhibit creative development and the rational planning of teaching and research. They understand that they are the prime victims of the absence of university reform. This is why they want to obtain the power of joint-decision in all self-governing bodies.”).

²¹¹ *But see* KURLANSKY, *supra* note 48, at 147 (“One of the surface issues was academic freedom and control of the university. The fact that this often stated issue was not at the root of the conflict is shown by the place where the student movement was first articulated, developed most rapidly, and exploded most violently. Berlin’s Free University was, as the name claimed, the most free university in Germany. It was created after the war, in 1948, and so was not mired in the often stultifying ways of old Germany. By charter a democratically elected student body voted with parliamentary procedure on the faculty’s decisions.”); HABERMAS, *supra* note 198, at 20 (Describing Berlin’s Free University as “differing from other West German universities” in that its “liberal” constitution extended extensive rights and powers to the students; that the student body was especially politicized through West German self-selection and East German immigration; and that there was a greater number of “politically conscious and liberal-minded professors.”).

²¹² University Reform Case, 35 BVerfGE 79, 109-110 (1973) [All English-language translations from the case are the author’s.].

opened on all levels to all groups participating in the process of instruction and research and b) that decisions about all questions of practical consequence ... come from public discussion and uncompelled decision making in these councils.”²¹³ Thus, the Group University model distributed governing authority among representatives of all the university’s constituencies including student groups, graduate research assistants and, of course, the professors. Lower Saxony went so far as to extend co-determination rights to non-academic staff as well.²¹⁴

Exhibiting the reactionary authoritarianism of which they were accused by the students, professors challenged Lower Saxony’s university reform law before the German Federal Constitutional Court.²¹⁵ The professors argued that co-determination constituted a violation of their constitutionally guaranteed scholarly freedom. Article 5(3) of the German Basic Law provides: “Art and scholarship, research, and teaching shall be free.”²¹⁶ What kind of freedom, indeed, if the pedants’ decisions about course offerings, curriculum, research agendas and faculty appointments might be dictated by non-academic constituencies participating in a Group University co-determination scheme? It is almost possible to hear the disdain in the professors’ tone across all these years; looking down bespectacled noses and demanding “who do these students think they are?” While this was a view of the protest movement widely shared in Germany it certainly left a more bitter taste coming from the professors, some of whom had inspired the students to action only to find themselves later compelled to rely on the police to dislodge the protesters from academic buildings.²¹⁷

²¹³ HABERMAS, *supra* note 194.

²¹⁴ University Reform Case, 35 BVerfGE 79, 123 (1973).

²¹⁵ Kloss, *supra* note 196, at 342 (“The only concern of most of the professors, with a few notable exceptions, appeared to be the perpetuation of the existing system and the preservation of the ‘dignity of the university.’”).

²¹⁶ GRUNDGESETZ (GG - Basic Law/Constitution) art. 5(3) (F.R.G.). The right as articulated in Article 5(3) has roots in earlier German constitutions including the Prussian Constitution from December 5, 1848; the Frankfurt Paul’s Church Constitution from March 28, 1949; the Prussian Constitution of 1950; and the Weimar Imperial Constitution from August 11, 1919. With only the addition of the word “Forschung” or “research,” the text of Article 5(3) is practically unchanged from Article 142 of the Weimar Constitution. Ingold Pernice, *Artikel 5 III (Wissenschaft)*, in I GRUNDGESETZ KOMMENTAR 457, 458 para. nr. 1 (Horst Drier ed., 1996).

²¹⁷ In December 1968 students at the University of Frankfurt engaged in a series of strikes and repeatedly occupied university buildings. The protests were particularly aimed at the Sociology Department and the Institute for Social Research, the institutional home of the world renowned neo-Marxist critical theorist Theodore Adorno. Adorno followed Max Horkheimer as the Institute’s Director and as the leading light of the Frankfurt School that so significantly informed the theoretical foundation of the student protest movement. Frei described the Institute as the “intellectual wellspring of the student movement.” FREI, *supra* note 196, at 93. See Martin Klimke, *West Germany, in 1968 IN EUROPE: A HISTORY OF PROTEST AND ACTIVISM, 1956-1977* 97, 99 (Martin Klimke and Joachim Scharloth eds., 2008). Tony Judt concluded that “[t]he 1960s were the great age of Theory.” JUDT, *supra* note 23, at 398. But Adorno and his protégé Jürgen Habermas would eventually break with the students, leading the students to level bitter, recriminating accusations of betrayal and intellectual bankruptcy against the once-revered professors. See FREI, *supra* note 196, at 88-98; MARTIN BECK MATUŠTIK, JÜRGEN HABERMAS – A PHILOSOPHICAL-

The Constitutional Court began its opinion in the *University Reform Case* by defining the Article 5(3) right being invoked by the professors against Lower Saxony’s co-determination law. The Basic Law’s protection of scholarly freedom, the Court explained, provides defensive protection against all interference by public authorities.²¹⁸ But because the right is linked to the broader social value of research, namely the discovery of the truth,²¹⁹ the Court also underscored that Article 5(3) imposes a positive obligation on the state to foster research and its transmission to succeeding generations through the provision of academic personnel, finances and organizational resources.²²⁰ Respecting both the defensive and positive facets of Article 5(3)’s protection, and in light of the state’s *de facto* monopoly over higher education in Germany, the Court concluded that the Basic Law requires the state to establish organizational and administrative principles for governing universities that ensure that individuals’ scholarly freedom is not infringed and that the institutions’ competence to promote unhindered research is not undermined.²²¹

The Court then rejected the notion that Article 5(3) ordained a particular vision of university life and governance that precluded the Group University model.²²² At the same time the Court recognized that, in exercising discretion to enact principles for the organization and administration of higher education, the state risked significantly impacting the life and work of individual scholars and researchers. To resolve this tension

POLITICAL PROFILE (2001). December 1968 ended with Adorno and Habermas offering no objection to the police retaking the Sociology Department from the students, a posture the students and a number of more assertive faculty brand as “Stalinist and Fascist” and “Goebels-like.” MARTIN BECK MATUŠTIK, JÜRGEN HABERMAS – A PHILOSOPHICAL-POLITICAL PROFILE 59 (2001). Facing another student occupation of the Institute for Social Research at the end of January 1969 Adorno summoned the police himself. *Id.* See Martin Klimke, *West Germany, in 1968 IN EUROPE: A HISTORY OF PROTEST AND ACTIVISM, 1956-1977* 97, 104-105 (Martin Klimke & Joachim Scharloth eds., 2008).

²¹⁸ *University Reform Case*, 35 BVerfGE 79, 111 (1973). See Pernice, *supra* note 216, at 474 para. nr. 32 (“Every prohibition on research or teaching, every attempt by the government to influence the conceptualization, method, collection of materials, evaluation and dissemination of the results of research, every effort to steer or control the content and character of teaching is to be regarded as an interference with scholarly freedom.”) (author’s translation).

²¹⁹ *Id.* at 112. Perhaps the Court tipped its hand on the broader question of its willingness to make a radical break with Germany’s entrenched university tradition when it quoted Wilhelm von Humboldt in support of its claim that the chief aim of higher education is the discovery of the truth (“Research and teaching must remain unhindered in the search for truth, which is ‘something not yet fully discovered and not fully discoverable.’”). Kloss noted that Humboldt’s principles were at the heart of the authoritarian, hierarchical and impractical university system against which the students were protesting. Kloss, *supra* note 196, at 331. See Pernice, *supra* note 216, at 458 para. nr. 1, 459 para. nr. 4.

²²⁰ *University Reform Case*, 35 BVerfGE 79, 113-114 (1973). See Pernice, *supra* note 216, at 465-66 para. nr. 18-19, 481 para. nr. 46.

²²¹ *Id.* at 114.

²²² *Id.* at 115. See Pernice, *supra* note 216, at 482 para. nr. 48.

the Court called for a balance to be struck between these interests. The state would have to adopt organizational measures that promote individual scholars' freedom but not to the exclusion of the state's efforts to promote the universities' other obligations and give due consideration to all groups interested in the life and work of the university.

On this interpretation the Court concluded that the Group University model was compatible with the Basic Law.²²³ In reaching this conclusion the Court acknowledged the endorsement the Group University model had received from the West German Rectors' Conference in its resolution of *May 22, 1968*, itself an obvious, if hurried, reaction to the intensity of the student protests that month.²²⁴ The roar of the revolution in Berlin and Frankfurt, it seems, also could be heard in quiet and provincial Karlsruhe.

In addressing the specific provisions of Lower Saxony's law, the Court concluded that the professors' enjoyment of Article 5(3) scholarly freedom would not preclude co-determination rights for research assistants and students. The Court explained that "so long as and to the degree that research assistants and students participate in scholarly research and teaching, they also enjoy the rights secured by Article 5(3)."²²⁵ In casting students in this way, the Court used language that could only have been shocking to the professors and deeply gratifying to the student protesters. "The students," the Court said, "are not mere school kids . . . and not mere objects of the academic process. Rather, they are collaborators among those at a university who participate in the scholarly project."²²⁶ And the Court went further, finding no constitutional objection to Lower Saxony's extension of co-determination rights to non-academic staff.²²⁷ In so doing the Court credited the sometimes indispensable role support staff plays in the realization of a university's research and teaching mission.²²⁸ In any case, the Court acknowledged that the non-academic staff was equally affected by most university governance decisions.²²⁹

This, however, is where the Court's accommodation of the students' emancipatory and democratizing revolution ended.²³⁰ As deployed in the university setting, the Court

²²³ *Id.* at 123. See Pernice, *supra* note 216, at 482 para. nr. 48-49.

²²⁴ *Id.* at 123 (emphasis added).

²²⁵ *Id.* at 124.

²²⁶ *Id.* at 124-125.

²²⁷ *Id.* at 125.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ The Constitutional Court repeatedly has been called upon to address professors' Article 5(3) challenges to reforms implemented as a result of the student protest movement's demands. In these other cases the students fared no better or worse than they did in the *University Reform Case*. They might be credited with a victory in the

explained, the professors’ enjoyment of Article 5(3)’s protection of scholarly freedom must be given singular weight.²³¹ The Court concluded that the constitution must take account of the extensive trust extended to faculties for the provision of research and teaching. The Court explained: “With respect to professors’ training and education, what in many cases counts as long years of service to the academy, not to mention their experience with research and teaching, a university’s faculty has, among all others, the most meaningful academic orientation.”²³² Altogether ignoring the revolutionary restructuring of university governance the Court’s endorsement of the Group University model seemed to promise, the Court justified the priority it was ensuring for the professors with a bit of circular logic. “In light of the *prevailing structure* of the university,” the Court said with no apparent embarrassment, “professors occupy the pivotal role in the academic realm.”²³³ But this pivotal role, with its attending professorial priority, was exactly the status the Group University was meant to undo.

From this the Court concluded that the state must give special consideration to the unique role and status of professors when extending co-determination to the governance of academic affairs. This was not the free hand faculties had wielded in the past. The Court explained that Article 5(3) in no way required that professors enjoy a majority vote in university governance. But the professors are owed a margin of deference on the basis of their expertise in questions of research and teaching. The extent of other groups’ involvement under a co-determination scheme would be a fact-specific matter that takes account of the particular academic function under consideration and the nature of the various constituencies’ relationship with that function. The Court went on to proscribe in considerable detail the appropriate voting constellations under a co-determination scheme on a range of issues affected by university governance decisions. For example, the Court concluded that research assistants and students might enjoy equal authority over teaching-related issues. Excluding non-academic staff from such decisions would, however, be acceptable. In the end, after reiterating its conclusion that professors are owed priority in most questions affecting the university (but not as an absolute right under Article 5(3)), the Court was satisfied to conclude that the extent of the involvement of other groups should be in proportion to a group’s role and experience.²³⁴

Hesse University Act Case. There the Constitutional Court upheld Hesse’s law that required academics to take into consideration the “social consequences” of their research and required researchers to publically warn of the social consequences of their work if it raises “well-founded misgivings or reservations.” 47 BVerfGE 327 (1978). But in the *Bremen Model Case* the Constitutional Court reaffirmed the “special influence” professors are expected to have in the governance of universities, ultimately concluding that no Article 5(3) violation results if this professorial priority is secured by a voting majority. 55 BVerfGE 37 (1980).

²³¹ University Reform Case, 35 BVerfGE 79, 125-126 (1973).

²³² *Id.* at 126.

²³³ *Id.* (emphasis added).

²³⁴ *Id.* at 133.

In their dissenting opinion Justice Simon and Justice Rupp-v. Brünneck surely gave voice to the students' disappointment with the Court's University Reform decision. The dissenters lamented the equivocal victory the Court handed the Group University model and the student movement more broadly. In tone the Court's opinion broke with the most authoritarian facets of Germany's rigidly hierarchical university tradition, characterizing students as beneficiaries of Article 5(3)'s protection and as mature and indispensable collaborators in the university's mission. At least partially for this reason co-determination survived the professors' Article 5(3) challenge. But the dissenters rightly characterize this as largely a symbolic victory. They suspect that in practice the Court's opinion will preserve the professors' privileged participation in university self-governance.²³⁵

There is evidence of progress in the Court's opinion. The Group University reform no doubt revolutionized German higher education. But the highest ideals of the student protest movement would go unrealized in the *University Reform Case*, as they would elsewhere in German society. In this sense the Federal Constitutional Court's decision seems to confirm the general, opposing views of Germany's 1968. On the one hand, the students had rightly exposed entrenched authoritarianism throughout German society, none the least in the universities. On the other hand, it was utopian to hope to comprehensively extricate it. Yes, "under the paving stones—the beach!" But in the end, paved roads like beaches are of some use.

D. Conclusion

We have suggested that the most significant and lasting impact of the student protests may have been the effect it had on the protesters themselves. Some of the protesters would go on to become lawmakers. While the impact of the 1968 student movement cannot and should not be drawn or evaluated entirely from the personal accounts or biographies of the former student protesters, the impact the movement had on its own participants offers some insight into the legacy of the movement as a whole. Joschka Fischer was a prominent figure during the student movement in Frankfurt but went on to become one of Germany's most popular politicians.²³⁶ He has served as the German foreign minister and Vice Chancellor and a prominent leader of Germany's Green Party.²³⁷ There are rumors that he might be considered for a post in a post-constitutional European

²³⁵ University Reform Case, Dissenting Opinion of Justices Simon and Rupp-v. Brünneck, 35 BVerfGE 79, 147, 148 (1973).

²³⁶ William Horsley, *Profile: Joschka Fischer's Three Lives*, BBC NEWS, Jan. 9, 2001, available at <http://news.bbc.co.uk/1/hi/world/europe/1107628.stm>.

²³⁷ *Id.*

Union as well.²³⁸ His accomplishments bear little resemblance to the anti-capitalist revolutionary of the 1960s. Fischer publically apologized for the violent aspects of his protest, which surely eased his transition into politics.²³⁹ Despite his transformation from protestor to government official, his strong advocacy for environmental issues and global peace indicates that some of the ideals that Fischer took to the streets in 1968 followed him into government service.

Daniel Cohn-Bendit, or “Danny the Red,” was another leader of the student movement both in France and in Germany who has moved into the political realm.²⁴⁰ He was a leader of the German Green Party, and of the French Green Party and has served in the European Parliament.²⁴¹ A former compatriot of Fischer, he too has lectured at American universities,²⁴² has written books, and made films. Although he has accepted the realities of capitalism and the political process and has even asked people to stop making comparisons with 1968,²⁴³ he remains an environmental and peace activist.

It would appear that anti-authoritarianism, as a criticism of law, has its limits. Certainly the students of the young Federal Republic had good cause, supplied by both the government and the courts, to be alarmed at the way authority and law were being wielded. Yet drawing from the experiences of Fischer and Cohn-Bendit, it seems that anti-authoritarianism and political progress are fundamentally at odds. Logically, as soon as a particular individual has enough power to make dramatic political change, he or she becomes the authority and anti-authoritarianist philosophy would be self-destructive. Law is itself an institution, and whether it be wielded for good or ill, it is dependent on the authority and stability of the institution. To ask for the law to be anti-authoritarian is to ask for no law.

²³⁸ Charles Grant, *Joschka Fischer*, TIME, Apr. 26, 2004, available at <http://www.time.com/time/magazine/article/0,9171,994024,00.html?iid=chix-sphere>.

²³⁹ Roger Cohen, *German Official Owns Up to 'Wrong Done to Others'*, N.Y. TIMES, Jan. 5, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9405E6DA1F3BF936A35752C0A9679C8B63&scp=1&sq=German%20Official%20Owns%20up&st=cse>.

²⁴⁰ George Parker, *Lunch with the FT: Daniel Cohn-Bendit*, THE FINANCIAL TIMES, Mar. 22, 2007, available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto032220071610079358.

²⁴¹ *Id.*

²⁴² See Cara Hoffman, *Once revolutionary 'Danny the Red' delivers talk of reform, not revolt*, CORNELL CHRONICLE, Nov. 15, 2005, available at <http://www.news.cornell.edu/stories/Nov05/cohn-bendit.talk.doc.html>.

²⁴³ Interview by Antonia Schäfer with Daniel Cohn-Bendit, Jan. 23, 2008, available at <http://www.cafebabel.com/eng/article/23621/daniel-cohn-bendit-stop-the-comparisons-with-1968.html>.

