

2-28-2019

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Recommended Citation

Amos N. Guiora and Kristine J. Ingle, *Militant or Bystander: How to Protect Democracy*, 33 BYU J. Pub. L. 31 (2019).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol33/iss1/6>

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Militant or Bystander: How to Protect Democracy

Amos N. Guiora and Kristine J. Ingle***

I. INTRODUCTION

Over the course of the last two and half centuries, democracy has enfranchised millions across the globe, promoted the advancement of technology, encouraged the end of colonialism, and fostered peace in war- and conflict-plagued places. It is unfortunate, then, that democracy has also facilitated the rise of some of the most murderous regimes in modern history.

Mussolini and Hitler did not, after all, rise to power with the force of an army. They did not need armies. Pre-existing democratic institutions provided ample means with which to establish their new political orders, and the consequences for their formerly democratic societies and institutions have been thoroughly documented and endlessly discussed and analyzed.

Within this context, we ask two core questions: how does the democracy pendulum swing so far in a dangerous direction and, because it can, how can we prevent it from doing so? These two questions are as relevant in 2018 as they were in 1922 and 1933; perhaps more so, given the dramatic political events taking place worldwide. A casual glance at today's headlines illuminate attacks on democratic values, norms, and institutions. Such attacks come from within the very societies they threaten to crumble, from all quarters, from both the political left and right, and from traditional and immigrant communities alike.

The question of how to resolve these tensions is a complicated one. Both the protection of democracy and the failure to protect it can, and

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** JD (2018), S.J. Quinney College of Law, University of Utah. Ms. Ingle was the recipient of a Quinney Fellowship for the academic year 2017-2018; the research and writing of this article was under the auspices of the Fellowship. The authors would like to thank Professor Paul Cliteur both for his guiding hand in the writing of this article and for his gracious reading of previous drafts; and the Rev. Dr. John C. Lentz, Jr. and Anne-Marie Cotton for their insightful comments on previous drafts. This article is part of a larger project that will include, amongst others, a book co-written by Professors Cliteur and Guiora (ABA Publishers, 2020 forthcoming).

do, have disastrous consequences. History is replete with tragic examples of unwarranted, unlimited, and unrestrained manifestations of political, ideological, and religious extremism.

The notion that democracy—its values and institutions—is under attack should be the key concern of elected officials, pundits, the general public, jurists, and thought leaders. To suggest that this attack on democracy is a crisis is not an exaggeration. The question is how best to protect what is at risk. Protection is the central theme we address in this article.

How to protect democracy is a most complicated inquiry, which cuts across inter-disciplinary lines, delving into jurisprudence, philosophy, security, and politics. How democracies respond in 2018 will have both short-term and long-term impact. To that end, this article presents both a practical (tactical) and jurisprudential-philosophical (strategic) discussion. Given the threats to democracies and democratic values, there is a pressing need for this conversation.

This article examines the pressing need of the hour through two distinct perspectives: militant democracy and bystander democracy. As will be explained in the pages that follow, the term *militant democracy* was coined by Professor Karl Loewenstein in the alarming years of the 1930s, prior to the terrible events of the Second World War. Bystander democracy reflects our spin on the original term in an effort to capture the unwillingness to directly confront pressing and immediate threats. The two terms, as we will come to see, are polar opposites. One reflects recognition of threats and the need and willingness to respond. The other suggests a failure to recognize threats, an unwillingness to confront threats, or a combination of the two.

It is, however, insufficient to recognize threats. It is necessary to develop mechanisms, subject to the rule of law, that enable application of protective measures. The condition of these measures must be a respect for the rule of law, subject to separation of powers, checks and balances, and judicial review. There is great tension and risk in this undertaking. In an effort to preserve democracy, there is always the possibility of over-stepping, resulting in unwarranted—and unintended—negative ramifications. In other words, protections have costs. Sometimes those costs are justified to achieve the desired goal; other times, overstepping—in an effort to protect—results in unwarranted minimization of individual rights.

As history has shown, it is a particular challenge to balance these competing interests. Similarly, as repeatedly demonstrated, it is very

difficult to undo the damage of limiting rights. In other words, putting the proverbial genie back in the bottle poses great challenges to democracies seeking to protect themselves from internal threats.

The questions we pose in this article are at the forefront of the challenges facing contemporary democracies. This is, then, a three-step process: does the nation-state recognize an internal threat? And, if so, what measures does it take to protect against that threat? If the nation-state fails to recognize a threat, what are the consequences of that failure, deliberate or otherwise?

To best illustrate our analysis, this article is comparative, in that we examine these questions through the contemporary lens of three different countries. In doing so, we seek to show how the three countries—Israel, Germany, and the Netherlands—resolve distinct domestic threats. In undertaking a comparative analysis, we do not aim at equal billing amongst the three examined countries. Rather, we hope that by providing examples from the three countries we can sufficiently and compellingly demonstrate the profound dissonance between militant and bystander democracy.

Recognizing the threat is an important step. The more difficult inquiry is how does democracy protect itself and what are the limits of such efforts. While protection is essential, democratic values and principles impose limits and restraints. Otherwise, democracy is doomed to fail. In the same breath, democracy is at risk if protection measures are not considered, much less applied. Balance and limits are critical concepts. The thin line between protection of democracy and tolerance of challenges is tenuous.

The failure to recognize—and respond—to an internal threat reflects bystander democracy. However, threats are nuanced. There are real and perceived threats. Mistaking one for the other can result in unjustified minimizations of individual rights, liberties, and privileges. Conversely, failing to recognize a direct threat can endanger individuals and the state alike.

A perceived threat may ultimately prove itself to be real, but acting on perceived threats can be dangerous. There is a chance that a government may overreact to a perceived threat or that persons in power may exploit public fear, resulting in an unwarranted minimization of individual rights and leaving the individual with unavailable or limited recourse.

On the other hand, waiting for a perceived threat to actualize is also risky. By the time the risk is direct—rather than perceived—the

opportunity to mitigate its impact may be significantly minimized and the proverbial point of no return may have been crossed. That conundrum highlights the militant-bystander tension. The question is who deserves protection, and from what aggressor? This is an essential query in determining the limits of democracy.

There is a normal give and take in a democracy—like players in a contact sport switching from defense to offense over the course of a match. A vibrant democracy is comprised of engaged, determined, and sometimes aggressive constituents, whose discourse can be brusque and occasionally offensive. Such discourse is far preferable to an authoritarian regime that does not tolerate dissent and where disobedience is harshly punished. Protecting democracy must allow for strident voices. The debate cannot be vanilla, or devoid of tension and strife. However, there is importance in line drawing regarding limits on personal liberties. Unlimited liberties for one, after all, limit the liberties of another.

II. UNDERSTANDING MILITANT DEMOCRACY AND ITS LIMITATIONS IN MODERN DEMOCRACIES

We come to this project from the perspective that protecting democracy, particularly from devolution into anarchy and authoritarianism, is essential. Democracy is designed to protect itself; failing to protect is self-destructive. However, this effort should not require sacrificing essential democratic institutions in the name of preserving others. But we can place specific, narrowly-crafted limitations on certain institutions to prevent anti-democratic forces from using democratic institutions to dismantle democracy.

Such a concept is not novel. In the years before World War II, Professor Karl Loewenstein coined the term “militant democracy.”¹ Loewenstein was a German Jew, fortunate to leave Germany in the immediate aftermath of Hitler’s rise to power and find safety and an intellectual home in the United States. Militant democracy is a term used today in parts of Europe with the understanding that different countries assign their own meaning. Put simply, a militant democracy is a democracy that protects itself by limiting certain liberties. In Loewenstein’s words:

1. Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417, 423–24 (1937).

If democracy is convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant. . . . Democracy and democratic tolerance have been used for their own destruction. Under cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally. Calculating adroitly that democracy could not, without self-abnegation, deny to any body of public opinion the full use of the free institutions of speech, press, assembly, and parliamentary participation, fascist exponents systematically discredit the democratic order and make it unworkable by paralyzing its functions until chaos reigns. They exploit the tolerant confidence of democratic ideology that in the long run truth is stronger than falsehood, that the spirit asserts itself against force. Democracy was unable to forbid the enemies of its very existence the use of democratic instrumentalities. Until very recently, democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city. To fascism in the guise of a legally recognized political party were accorded all the opportunities of democratic institutions.

The main principle of democracy is the notion of legality. Fascism therefore officially annexed legality. Since experience acquired in other countries does not commend the *coup d'état* for the immediate conquest of the state, power is sought on the basis of studious legality. If possible, access is obtained to national and communal representative bodies. This purpose is facilitated by that gravest mistake of the democratic ideology, proportional representation. Democracies are legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties under the condition that they conform outwardly to the principles of legality and free play of public opinion. It is the exaggerated formalism of the rule of law which under the enchantment of formal equality does not see fit to exclude from the game parties that deny the very existence of its rules.²

Importantly, while it is often conceptualized as protection of majority rule, militant democracy protects the interest of minorities and majorities alike. Every modern democracy places limitations on majority rule, which in turn protects the interests of minority groups. *Successful* militant democracies must tailor limitations of certain liberties with the interests of protected minorities in mind.

2. *Id.*

Nevertheless, as the term is used here, militant democracy refers to the limitation of certain freedoms in order to respond to an internal threat that seeks to destroy democracy from within its institution. But because of the very nature of democracy, limiting liberties in an effort to prevent democracy's destruction must be "narrowly tailored"³ to meet the threat.

In tension with the concept of a militant democracy is a bystander democracy. It reflects a critical discussion point in contemporary society, and recalls Winston Churchill's tragically prescient warnings in the face of Neville Chamberlain's "peace for our time"⁴ after signing the Munich Agreement. The bystander democracy is a democracy that fails to preserve itself by willfully turning a blind eye to current or clearly foreseeable threats. Specifically, bystander democracies are those that fail to answer threats seeking to dismantle democracy through its own institutions. In other words, those very institutions are at risk from within.

A. Israel, Germany, and the Netherlands

This article discusses the tension between militant and bystander democracy in Israel, Germany, and the Netherlands. We chose these three countries both for practical and research purposes. From a practical perspective, one of us lives in Israel and travels to all three. From a research perspective, the three countries are at the epicenter of many of the tensions inherent to the militant-bystander democracy debate. We have also chosen to reference specific examples in the United States, as they provide important contemporary illustrations.

The three countries face a contemporary threat to democracy that, like all true and lasting threats, has been fostered from within. In the Netherlands, the country faces a growing jihadist movement among

3. We use this term with the understanding that "narrowly tailored" has a specific meaning in United States law.

4. Neville Chamberlain, Prime Minister of the U.K., Address after the Munich Conference: Peace for Our Time (Sept. 30, 1983).

Dutch-Moroccans.⁵ In Germany, as evidenced by the most recent election,⁶ it is the combined rise of the far-right and an increase in anti-Semitism amongst immigrant communities.⁷ In Israel, it is a palpable racism directed at Israeli Arabs and fostered by active right-wing ideologues, who identify the “left” and the “media” as enemies of the state.⁸ The legal and political responses to these threats manifest the militant-bystander democracy tension.

To avoid repeating history’s mistakes, Israel, Germany, and the Netherlands must resolve how to address threats they face today. In examining the militant-bystander democracy tension and proposing resolution mechanisms, we are all too aware of the consequences for failing to do so. The litany above illustrates the consequences resulting from dangerous elements, and their supporters, who legally abuse democracy. That is, when societies lose their balance, moral compass, firm grounding, and any semblance of humanity. It is for that reason, then, that democracies must be on full alert to anything that potentially undermines their core, stability, and essence. In the examples below, we discuss how those dangerous elements, when in positions of

5. *Dutch Muslims are Becoming More Religious, New SCP Report Shows*, DUTCHNEWS.NL (June 8, 2018), <https://www.dutchnews.nl/news/2018/06/dutch-muslims-are-becoming-more-religious-new-scp-report-shows/>; Rob Bertholee, *Jihadism on the Rise in Europe: The Dutch Perspective*, WASH. INST. FOR NEAR E. POL’Y (Dec. 4, 2014), <http://www.washingtoninstitute.org/policy-analysis/view/jihadism-on-the-rise-in-europe-the-dutch-perspective>; COUNTER EXTREMISM PROJECT, THE NETHERLANDS: EXTREMISM & COUNTER-TERRORISM, https://www.counterextremism.com/sites/default/files/country_pdf/NL-07132017.pdf (last visited Oct. 18, 2018).

6. Paul Kirby, *German Election: Why This is a Turning Point*, BBC NEWS (Sept. 25, 2017), <https://www.bbc.com/news/world-europe-41094785>; Elizabeth Schumacher, *German Election Results: Disappointing Victory for Angela Merkel as CDU Sinks, Nationalist AfD Surges*, DW (Sept. 25, 2017), <http://www.dw.com/en/german-election-results-disappointing-victory-for-angela-merkel-as-cdu-sinks-nationalist-afd-surges/a-40666430>.

7. Amos Guiora, Opinion, *Germany Must Confront Its New Wave of Anti-Semitism – Even If Those Behind It Aren’t German*, WASH. POST (May 9, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/05/09/germany-must-confront-its-new-wave-of-antisemitism-even-if-those-behind-it-arent-german/?utm_term=.aae59711d361 [hereinafter Guiora, *Germany Must Confront Its New Wave of Anti-Semitism*]; Amos Guiora, *Wannsee Villa and the Bystander in the Holocaust*, FOREIGN POL’Y RES. INST. (May 4, 2018), <https://www.fpri.org/article/2018/05/wannsee-villa-and-the-bystander-in-the-holocaust/> [hereinafter Guiora, *Wannsee Villa*]; Cnaan Liphshiz, *No Link Between Muslim Immigration and Anti-Semitism, German Study Says*, TIMES OF ISR. (May 30, 2018), <https://www.timesofisrael.com/no-link-between-muslim-immigration-and-anti-semitism-german-study-says/>; *German-Jewish Girl, 14, Found Raped and Murdered*, JEWISH TELEGRAPHIC AGENCY (June 7, 2018), <https://www.jta.org/2018/06/07/global/german-jewish-girl-14-found-raped-murdered>.

8. Prime Minister Netanyahu has made this very clear. See TOI Staff, *Full Text of Netanyahu’s Speech at Likud Rally*, TIMES OF ISR. (Aug. 10, 2017), <http://www.timesofisrael.com/full-text-of-netanyahus-speech-at-likud-rally/>.

power and influence, have managed to undermine democracy by using democratic means.

How far to go in preserving this balance is a complex inquiry. One approach reflects a case-by-case perspective; another suggests that a bright-line strategy structures the discussion best. Both perspectives have validity and weaknesses alike. We will address this in the pages that follow. We will focus our discussion through the lens of limits on free speech and, in particular, the banning of political parties.

B. Freedoms and Their Limits

Freedom of speech, especially in the political context, is a cornerstone of every modern democracy, including Germany, the Netherlands, and Israel. Freedom of association, as manifested in political parties, has been essential to the development of each of the democracies we discuss. Together, these two liberties assure that the marketplace of ideas flourishes and the individual's right to political representation is preserved.

Nevertheless, history's lesson is that limitless speech and limitless representation are dangerous tools in the hands of those who would seek to undermine democracy. It is possible that democratic processes might be used to topple a democracy. The question, then, is at what point does limiting political liberties preserve democracy?

Pointing an accusatory finger against a paper tiger is easy and dangerous. Recognizing the true threat—and acting against it—is more complicated and fraught with political risk. To highlight, the seemingly endless attacks by Prime Minister Netanyahu against the Israeli media—very similar to President Trump's tweets against “fake news”⁹—portray the media as “the enemy” endangering Israeli society and national security.¹⁰

Both Trump and Netanyahu take an approach that reflects political calculations and considerations. From a purely electoral perspective, their actions are understandable, satisfying the desires of their

9. See Matt Viser & Yan Wu, *11 Months, 1 President, 2,417 Tweets*, BOS. GLOBE, <https://apps.bostonglobe.com/opinion/graphics/2017/12/president-twitter/> (last visited Nov. 20, 2018).

10. See Dan Perry & Josef Federman, *Channeling Trump? Beleaguered Netanyahu Assaults Media*, AP NEWS (Aug 10, 2017), <https://www.apnews.com/3c08b1e8e17c41d58115be5f48463f7a>; James Doubek, *Hundreds of Newspapers Denounce Trump's Attacks on Media in Coordinated Editorials*, NPR (Aug. 16, 2018), <https://www.npr.org/2018/08/16/639125774/hundreds-of-newspapers-denounce-trumps-attacks-on-media-in-coordinated-editorial>.

“base.”¹¹ It does not, however, reflect the militant-bystander democracy paradigm at the core of our analysis. Nevertheless, it is important to note the danger of pointing a finger at, if not attacking, easy targets as compared to the forces that genuinely threaten democracy and the state. The distinction between the two is essential to understanding the militant-bystander democracy discussion.

With the problem framed in this manner, we reference an extraordinary speech by Professor Rudolph Pabus Cleveringa, Dean of the Faculty of Law, University of Leiden (the Netherlands). Cleveringa delivered his speech on November 26, 1940 after Jewish faculty members at the University of Leiden were dismissed. Amongst those dismissed was Professor Meijers, who that morning had received a letter from the Department of Education, Arts, and Sciences informing him of his dismissal in the aftermath of the German occupation of the Netherlands.¹²

The speech unsparingly articulated deep anxiety about the threats the Netherlands faced:

I pass on this message to you, stark as it is, and make no attempt to qualify it further. I fear that any words I could find, however I might choose them, would fail to convey the grievous and bitter emotions that this message has aroused in me and in my colleagues, and, I am convinced, also in you and in countless other people within and – in so far as this comes to their notice – beyond our borders. I believe I am relieved of any need to interpret these emotions because I sense that the same thoughts and feelings are being communicated back and forth between us, without the need for words, yet completely and precisely understood by all of us.

It is not for the purpose of any such interpretation that I request permission to address a few words to you; if I had no other aim than to emphasise [sic] our state of mind, I would, I believe, have no better

11. Perhaps no Israeli politician does it in such a crass and strident manner as the Minister of Sport and Culture, Miri Regev, whose outrageous reaction to the Argentinian decision to withdraw from a “soccer friendly” with the Israeli national team manifests “playing to the base” in its most vulgar manner. See Michael Bachner, *Culture Minister: Argentina Soccer Match Canceled Over Terrorism, Not a Boycott*, TIMES OF ISR. (June 6, 2018), <https://www.timesofisrael.com/culture-minister-argentina-soccer-cancellation-not-a-boycott-its-terrorism/>; Ravit Hecht, *Thank You, Miri Regev*, HAARETZ (June 8, 2018), <https://www.haaretz.com/opinion/.premium—1.6157186>; TOI Staff, *Most Think Minister Wrong to Move Argentina Soccer Match to Jerusalem—Poll*, TIMES OF ISR. (June 7, 2018), <https://www.timesofisrael.com/most-think-minister-wrong-to-move-argentina-soccer-match-to-jerusalem-poll/>.

12. Germany occupied the Netherlands on May 14, 1940.

instrument than to end here and to leave you to the icy oppressiveness of the horrifying silence that would immediately descend upon us. Nor shall I with my words try to direct your thoughts towards those people who were the originators of this letter, the contents of which I have reported to you. Their very act speaks for itself. All I desire is to remove them from our sight, leaving them beneath us, and to direct your eyes upwards to the resplendent figure of the person to whom we owe our presence here.¹³

Hearing the unvarnished truth is essential in framing the protection debate. Cleveringa did not soft-pedal his concern regarding the gravity of that time. That was not his intention. Without utilizing the term, he issued a clear warning to his audience of the perils of acting as bystanders in the face of the Nazi threat and warned of the consequences of failing to protect democratic institutions.

In the spirit of Professor Cleveringa's, our discussion will articulate the gravity of the threats that Israel, Germany, and the Netherlands face today.

III. THE MILITANT-BYSTANDER DEMOCRACY PARADIGM

As noted previously, militant democracy is a concept proposed and developed in the mid-twentieth century by German scholar and émigré Karl Loewenstein. For our purposes, bystander democracy points to a failure to protect democracy from internal threats and challenges. Ultimately, bystander democracy resigns itself to the actions of anti-democratic threats; institutions, society, and people bear the consequences.

While the engineers of bystander democracy may foresee the dangerous ramifications of their inaction, they nevertheless choose not to minimize the threats posed by those forces. In other words, they turn a blind eye to potential dangers. The challenge, needless to say, is to correctly identify the threats, rather than creating—for purposes of political expedience—false enemies.

The bystander democracy is similar to the “pacifist” democracy suggested by Loewenstein in the 1930s.¹⁴ Pacifist democracies are not

13. Rudolph Cleveringa, Dean of the Faculty of Law, Univ. of Leiden, Protest Address by Professor Cleveringa, (Nov. 26, 1940), <https://www.universiteitleiden.nl/binaries/content/assets/algemeen/oraties/cleveringa-oratie/teksten/protest-speech-rudolph-cleveringa.pdf>.

14. PAUL CLITEUR & BASTIAAN RIJPKEMA, *The Foundations of Militant Democracy, in THE STATE OF EXCEPTION AND MILITANT DEMOCRACY IN A TIME OF TERROR* 235 (Afshin Ellian & Gelijn Molier eds., 2012).

equipped to combat internal challenges to democracy. Consequently, when an anti-democratic challenge arises, it is likely to succeed, as the bystander democracy is ill-equipped—whether deliberately or not—to combat internal anti-democratic forces resulting in a failure to challenge these forces. This is distinct from a nascent democracy, such as Egypt during the “Arab Spring,”¹⁵ that has not had to previously encounter such a challenge.¹⁶ Bystander democracy reflects either an unfortunate political consideration or a failure to learn from history’s lessons, thereby allowing anti-democratic forces to succeed through democratic means.

Conversely, a militant democracy takes an opposite approach. The ultimate implementation of successful militant democratic principles, when applied in accordance with democratic principles, is to prevent the dissolution of democracy through democratic means.

True internal threats to democracy, like fascism of the twentieth century, ultimately seek to gain and hold power, “for the sake of power alone.”¹⁷ While they may operate under the guise of a particular ideology, the ultimate goal is usurpation of the power that a democratic government wields by and for the people. For example, fascism in Italy and Germany marketed itself as a nationalist antidote to the increasingly popular socialist movements of the time. But the primary goal of fascism was the usurpation of power by its leaders. In such circumstances, Loewenstein explained that, “[i]f democracy is convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant.”¹⁸

Importantly, in protecting themselves from anti-democratic threats, successful militant democracies must tailor their responses to the nature of that threat. At its core, “[d]emocracy ‘stands for fundamental rights, for fair play for all opinions, for free speech, assembly,

15. Ahmed Aboulenein et al., *Major Events in Egypt Since Arab Spring Uprising*, REUTERS (Mar. 26, 2018), <https://www.reuters.com/article/us-egypt-election-timeline/major-events-in-egypt-since-arab-spring-uprisings-idUSKBN1H217Y>; *Egypt: Timeline of the Arab Spring Since Hosni Mubarak’s Ouster*, TELEGRAPH (June 24, 2012), <https://www.telegraph.co.uk/news/worldnews/africaandindianocan/egypt/9343198/Egypt-timeline-of-the-Arab-Spring-since-Hosni-Mubaraks-ouster.html>.

16. Certain circumstances make a democracy more vulnerable to authoritarian and autocratic threats from within. The age and economic state of a democracy are two such circumstances.

17. See Loewenstein, *supra* note 1, at 422.

18. *Id.* at 423.

press.”¹⁹ Militant democracies cannot, and should not, throw the baby out with the bath water. There is just as much danger, if not more, in placing too many limitations on democratic freedoms in an attempt to meet anti-democratic threats. The tools of militant democracy must be carefully utilized and critically chosen.

The militant response must be only enough, but not more than enough, to address the threat. Accordingly, a sliding scale of militant response is appropriate. We have provided an example of such a scale in the table below. While there is certainly no one-size-fits-all response to anti-democratic threats, the danger of misusing militant democracy cannot be overstated. As we provide concrete examples of militant democracy, it is important to consider and recognize how its tools might be abused.

Nature of the Threat	Nature of the Response	Risks/Consequences of Response
Party advocates for violence/religious or racial extremism	Banning of the party or refusal of registration	If the party has enough support, banning can only alienate and incite the party's base
Individual politician publicly promotes extremist views	Political sanctions	If one politician is silenced, another steps in
Individual politician promotes extremist views outside of the political process	Subject to incitement and hate speech laws	Sanctioning speech invokes more support for the views espoused in the speech

Table 1

The tools with which militant democracies address anti-democratic threats include, but are not limited to, the banning of political parties and limitations on speech, in accordance with either national laws and/or a national constitution.²⁰

19. *Id.* at 430–31.

20. Israel does not, for historical-political reasons, have a constitution, but rather a series of basic laws. See Amnon Rubinstein, *Israel's Partial Constitution: The Basic Laws*, JEWISH VIRTUAL LIBR. PUBLICATIONS (Apr. 2009), <http://www.jewishvirtuallibrary.org/jsource/isdf/text/Rubinstein.pdf>; GIDEON SAPIR ET. AL., *Introduction: Israeli Constitutional Law at the Crossroads*, in DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, 1 LS17, 1-5, <http://www.tau.ac.il/law/barakerez/articals/E%2051%20Sapir%20Ch1.pdf> (last visited Oct. 19, 2018).

As stated earlier, we will focus primarily on the banning of political parties, understanding it has implications for free speech. In doing so, we cannot, and should not, ignore the severity and impact of such tools. But this alone should not deter their use. There are circumstances that demand a dramatic response that a democracy must have in its arsenal as a means to address internal threats. The question is one of application. That is, whether protecting democracy stays within the contours of balancing and respecting individual rights while, similarly, protecting society.

In order to address these threats, many modern democracies have embraced militant-democratic principles to varying degrees of success and effectiveness. The United States, for example, has passed legislation that criminalizes individuals and actors who wish to overthrow the government and have denied rights to Communist parties.²¹ Other democracies employ the tools of militant democracy less specifically. Rather than directing legislation at one political ideology or type of democratic threat, countries like Germany and Israel have adopted provisions that seek to protect against internal threats to democracy generally.

In Germany, both statutes and constitutional law provide a basis for militant-democratic principles. The Federal Constitutional Court has defined the “free democratic basic order,” which supplies protection for the individual freedoms of the German people as well as a separation of government powers and the security of a democratic form of government.²² However, the Basic Law provides that those freedoms are forfeited when they are abused for the purpose of combatting “the free democratic basic order.”²³

Germany, like the United States, also recognizes the importance of political freedoms of speech and assembly. But, Article 21 Section 2 of the Basic Laws also allows for the banning of political parties, provided that sufficiently substantial justifications are present.²⁴ In addition, Article 20 Section 4 allows individual German people to invoke the protection of the law and “resist any person seeking to abolish th[e]

21. Angela K. Bourne, *The Proscription of Political Parties and “Militant Democracy,”* 7 J. COMP. L. 196, 200 (2012).

22. THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES 116–17 (Markus Thiel ed., 2009).

23. *Id.*

24. *Id.* at 123.

constitutional order.”²⁵ Germany has exercised the principles to outlaw a party twice. In both instances, the government banned extremist parties shortly after the end of World War II. The neo-Nazi Socialist Reich Party was outlawed in 1952 and the German Communist Party was outlawed in 1956. Since then, Germany has unsuccessfully attempted to ban the National Democratic Party on multiple occasions, including as recently as 2016.²⁶ Ultimately, Germany’s laws and constitution recognize that the banning of political parties is a dramatic action, and reserves such an action for when there is a true and imminent threat.²⁷

While Germany’s constitutional approach to militant principles is perhaps unique, its party banning provisions are not. Israel, a democracy that is not bound by or built upon a constitution, also provides for the banning of political parties. Without a constitution, Israel relies on the Knesset (Parliament) and the Supreme Court sitting as the High Court of Justice (known by its acronym BAGATZ) to define and create boundaries for individual and political rights.

The Knesset passed the Prevention of Terrorism Ordinance in 1948. Clauses 4(a) and 4(b) of the Ordinance punish oral or written dissemination or even publicity of “words of praise, sympathy, or encouragement[ment]” for violent acts.²⁸ The Ministry of the Interior has the authority to decline to recognize certain political groups on the basis that they deny the “legitimacy of the existence of the state of Israel.”²⁹ The Ministry of the Interior’s decision is then subject to review by the BAGATZ.³⁰ It is the prerogative of the BAGATZ to determine, even on the basis of “supra-constitutional principles,” whether a political party or organization is entitled to rights under Israeli law.³¹

The Israeli Central Elections Commission has similar authority in regard to registering political parties and historically has exercised its

25. GRUNDGESETZ [GG] [BASIC LAW] Art. 20(4), *translation at* <https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510>.

26. Melissa Eddy, *German Court Rejects Effort to Ban Neo-Nazi Party*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/world/europe/german-court-far-right.html>.

27. *Id.*

28. THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES, *supra* note 22, at 188–89.

29. *Id.* at 189.

30. MARGIT COHN ET. AL., *Religion and the High Court of Justice: Part 1*, 39 IMAGE AND REALITY (2003), <https://en.idi.org.il/publications/7854>; *The High Court of Justice*, KNESSET.GOV.IL, https://knesset.gov.il/lexicon/eng/bagatz_eng.htm (last visited Oct. 19, 2018).

31. THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES, *supra* note 22, at 189–90.

authority to ban certain parties it deems a threat to democracy. Under Section 5 of the Parties Law, the Commission may deny registration to any party whose purpose negates “the existence of Israel as a Jewish Democratic State,” incites racism, or may reasonably be deduced to be a cover for illegal actions.³² In addition to the Parties Law, the Basic Law also prohibits an individual candidate whose deeds or purposes denies the State of Israel as a Jewish Democratic State, incites racism, and supports the “armed struggle of an enemy state or a terrorist organization”³³

In addition, the Israeli Penal Law provides a criminal penalty for incitement to racism as well as incitement to rebellion. Section 144A defines racism, defines the instrumentalities of incitement, and provides for a penalty and religious exception to the law’s application.³⁴ Section 136 of the Penal Law defines incitement to rebellion, which includes the following: “disloyalty to the state or its institutions,” stimulation of “bad will and discontent,” and the creation of “hostility and enmity” among the population.³⁵ Israel has applied the principles of militant democracy, legislatively and judicially, against both far-right Jewish extremists and Israeli-Arab extremists.³⁶

Consider the differences and similarities in the German and Israeli approaches to militant democracy. Many of these differences are due to the dramatic disparities in culture, history, and demographics. Despite these differences, however, Germany and Israel have reached the conclusion that concrete militant democratic principles are worthy of codification.

A. Examples of Bystander-Democratic Principles in Contemporary Law

In contrast to the militant-democratic principles that Israel and Germany have adopted into their laws and constitution, the Dutch approach to anti-democratic extremism fits into a separate category. Like the United States, the Netherlands has adopted tolerance as the model

32. Parties Law, 5718-1958, § 5 (as amended) (Isr.).

33. THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES *supra* note 22, at 193.

34. Penal Laws, 5737-1977, § 144 (as amended) (Isr.).

35. THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES *supra* note 22, at 194-95.

36. *Id.* at 202.

for its militant-democratic principles. Following the tolerance model, the approach of both countries is to place as few limitations on personal and political freedom as possible without clearly compromising the safety of the country.

According to the militant-democratic model, maximum liberty is the ultimate defense mechanism for democracy. The marketplace of ideas is self-regulating, and allowing anti-democratic ideologies into that marketplace does not pose a real threat to democracy.³⁷ In a tolerant democracy, the balance is struck in favor of personal liberty and the consequences of striking such a balance are considered minimal and necessary.

But there can be a cost to unlimited and nearly unlimited liberties. Germany in the 1930s suffered the consequences of such democratic freedom. When the Weimar Republic fell into economic crisis, its laws and constitution left open the door for the extremist party that eventually assumed power.³⁸ Of course, the circumstances that led to the rise of the National Socialist Party were neither singular nor simple.³⁹ But without the current constitutional framework acting as a last resort safety measure, the Nazis successfully used Germany's nascent democratic process to rise to power and assume control of Germany. The results, of course, were devastating.⁴⁰

While the Netherlands today does not suffer the same economic, cultural, political, and historical challenges that Germany faced then, without legal safeguards in place, the Netherlands may nevertheless struggle with extremist parties. Current Dutch law provides similar means of regulating political speech and extremist parties as other tolerant democracies. Dutch criminal law disallows incitement to violence and hate speech.⁴¹

The Netherlands Supreme Court has determined that political speech is included in hate speech.⁴² This characterization, played out

37. *Id.* at 391–92.

38. Angela K. Bourne & Fernando Casal Bértoa, *Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)*, 13 EUR. CONST. L. REV. 1, 7 (2017).

39. *Id.*

40. *Id.*

41. *Id.* at 8.

42. Max Bearak, *'Prosecuted for What Millions Think:' Netherlands Hate Speech Trial Restarts for Geert Wilders*, WASH. POST (Oct. 14, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/10/14/prosecuted-for-what-millions-think-geert-wilders-hate-speech-trial-gets-green-light/?utm_term=.a2acb5a35196.

in the trial of Dutch Member of Parliament Geert Wilders—who was publicly for “fewer Moroccans”⁴³—which is discussed at length in the following section. The application of Dutch law in Wilder’s case raises the following question: is the call for fewer members of a specific race of individuals an anti-democratic principle? And if so, do incitement and hate crime laws sufficiently address the anti-democratic nature of the speech?

While Dutch law may address some speech of an individual politician, it does not allow the proscription of a political platform in its entirety. Unlike Germany and Israel, there is no filtering mechanism for anti-democratic parties. Whatever the preferred characterization of Geert Wilders and his views on immigration, neither his party nor platform are subject to regulation.

In instances where there is a clearer threat, as the Nazis were in the 1930s, a lack of means to address such a threat can make even the most democratic of governments complicit in that threat. If the political party is officially recognized by the system, it is legitimized in the eyes of the people. In such an instance, the system of government, and more specifically the political system, becomes a bystander to threat.

Perhaps one of the most important and difficult questions to answer in this context is where and how to exercise militant-democratic principles.⁴⁴ There are certain types of threats that may warrant certain responses. And, importantly, an overreaction to a minor threat in and of itself can threaten democracy. Placing a limitation on a democratic freedom should be the last response.

Imagine a world where every time a political party proposed something that the majority in the government did not like, the members of that party were censored. Such a response would be counterintuitive. An overreaction minimizes the legitimacy of the system. The people and structures in power must remember that, because fairness and liberty are at the heart of modern democracy, their actions cannot place undue burdens on minority beliefs, regardless of their personal feelings.

Of course, this raises another question: what constitutes an unfair burden? The history and demography of a particular democracy have to be the foremost consideration in this inquiry. The solution for one democracy could very well be ineffective and ultimately damaging to

43. *Id.*

44. *See* Table 1.

another. In other words, what is good for Germany is not applicable to the Netherlands.

IV. THREE CONTEMPORARY CASE STUDIES: ISRAEL, GERMANY, AND THE NETHERLANDS

Within a conceptual understanding of militant- and bystander-democratic principles in mind, we turn to contemporary examples of these principles in action. Beginning with Israel, and moving to Germany and then the Netherlands, our discussion focuses on how the unique laws and history of each country has impacted how their governments have defended, or struggled to defend, its democratic institutions against threats from within.

A. Israel

Extremism in Israel, as relevant to this discussion, refers to the combustible combination of religious extremism, nationalism, and racism. Our focus is on internal Israeli politics, not the Israeli-Palestinian conflict or Palestinian terrorism. That is not to deny the obvious—there are significant national security threats confronting Israeli decision makers including Iran, Palestinian terrorism, Hezbollah, and continued instability in Syria. These security threats cannot be denied.

As legitimate as these actual, national security threats are, they do not justify tolerating other threats, internal in nature, posed by the Israeli political right. That threat reflects a combustible combination of nationalism, religious extremism, and racism. As noted in the introduction, we seek to explore two mechanisms of militant democracy: the limits of free speech and banning of political parties.

Political parties have previously been banned in Israel. We will explore why and how this has occurred in an effort to suggest a balanced approach between militant and bystander democracy. The phrase *my brown shirts, your brown shirts*—when applied to Israel—suggests an extreme right-wing, fascist in orientation, recalling the dark days of European fascism.⁴⁵ After all, the brown shirts worn by Hitler's Storm

45. See generally Roger Hudson, *Hitler Youth and Italian Fascists: Dressing the Part*, 62 HIST. TODAY (Jan. 1, 2012), <http://www.historytoday.com/roger-hudson/hitler-youth-and-italian-fascists-dressing-part>.

Troopers were patterned after the black shirts worn by Mussolini's fascists.⁴⁶ The anti-Arab racism, extremism, and violence of the Israeli far right tragically resembles an earlier period.

The threat posed by the dark forces of hate are emboldened by the *wink and nod* policy of the present government. That reflects tolerating intolerance that endangers both members of a particular ethnic group and larger society. The former because of physical and verbal abuse directed at them; the latter because the tenuous threads of society are threatened when violence is predicated on racial, ethnic, and religious lines. That threat highlights the tension between militant and bystander democracy.

This tension was highlighted by the Israeli commentator Chemi Shalev in his powerful article "*Berlin, 1933 and Jerusalem, 2014: When Racist Thugs Are on the Prowl*,"⁴⁷ which he wrote in the aftermath of the horrific murder of 16-year-old Muhammed Abu Khdeir, burned to death by three Israelis.⁴⁸ The act did not occur in a vacuum; it came on the heels of the kidnapping and murder of three Israeli yeshiva students by two Palestinians.⁴⁹ That, however, is not intended to justify or excuse the horrific act. It is intended to highlight the danger that arises when criminals take the law into their own hands, seeking retribution against a convenient, innocent individual whose ethnicity alone makes him a legitimate target.

The response to the murder of the three Israeli students was both a dramatic increase in anti-Arab sentiment amongst the Israeli political right and the government's decision to forcefully engage Hamas, the Islamic extremist terror group that controls the Gaza Strip. Shalev's article primarily focused on the violent racism of Jewish fascists following at that time.⁵⁰

There is a direct link between Shalev's article and our article: in examining the tension between militant and bystander democracy, we are exploring whether—and how—the state responds to those who

46. SA: *Nazi Organization*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/SA-Nazi-organization> (last visited Oct. 19, 2018).

47. Chemi Shalev, *Berlin, 1933 and Jerusalem, 2014: When Racist Thugs Are on the Prowl*, HAARETZ (July 2, 2014), <https://www.haaretz.com/blogs/west-of-eden/.premium-1.602697>.

48. AFP & TOI Staff, *Israeli Man Handed Life in Prison for Grisly Murder of East Jerusalem Teen*, TIMES OF ISR. (May 3, 2016), <https://www.timesofisrael.com/jewish-killer-of-east-jerusalem-teen-handed-life-in-prison/>.

49. Shalev, *supra* note 47.

50. *Id.*

seek to harm society in general and individuals in particular. As we have repeatedly come to see, it is not a given that the state fully responds to threats from within. That is the case even when the threat is neither vague nor amorphous, but real and visceral. Innocent individuals have been threatened, injured, and murdered by violent extremists. The extremists are motivated by religion and nationalism. How to effectively counter this threat is an issue that is essential to the militant-bystander democracy discussion.

No responsible Israeli politician can ignore these threats; to do so is at his peril, for the forces of extremism and hatred know no bounds and are not deterred by mere rhetoric. More than that, extremists understand doublespeak well and read between the lines when politicians speak with a nod and a wink. This creates, or at least enables, a culture of tolerance fostering intolerance. We ignore the threat of extremism at our own peril. Turning a blind eye, sticking our head in the sand, and dismissing threats is, as history repeatedly demonstrates, a calculated risk. It results in harm that could have been otherwise prevented.

In characterizing these dangers Shalev wrote:

Both my parents lost their families during World War II, and I need no convincing that the Holocaust is a crime so unique in its evil totality that it stands by itself even in the annals of other premeditated genocides.

But I am a Jew, and there are scenes of the Holocaust that are indelibly etched in my mind, even though I was not alive at the time. And when I saw the videos and pictures of gangs of right-wing Jewish racists running through the streets of Jerusalem, chanting “Death to the Arabs,” hunting for random Arabs, picking them out by their appearance or by their accents, chasing them in broad daylight, “drooling like hysterical beasts” and then beating them up before the police could arrive - the historical association was automatic. It was the first thing that jumped into my mind. It should have been, I think, the first thing that jumped into any Jew’s mind.

Israel in 2014, it goes without saying, is not “The Garden of Beasts” that Erik Larson wrote about in his book on 1933 Germany. The Israeli government does not condone vigilantism or thuggery, as the Nazis did for a while, before Germans started complaining about the disorder on their streets and the damage to Berlin’s international reputation. I have no doubt that the police will also do their utmost to apprehend the murderers of the Palestinian boy

whose burnt body was found in a Jerusalem forest. I am even praying that they find that the killing wasn't a hate crime at all.

But make no mistake: the gangs of Jewish ruffians man-hunting for Arabs are no aberration. Theirs was not a one-time outpouring of uncontrollable rage following the discovery of the bodies of the three kidnapped students. Their inflamed hatred does not exist in a vacuum: it is an ongoing presence, growing by the day, encompassing ever larger segments of Israeli society, nurtured in a public environment of resentment, insularity and victimhood, fostered and fed by politicians and pundits - some cynical, some sincere - who have grown weary of democracy and its foibles and who long for an Israel, not to put too fine a point on it, of one state, one nation and, somewhere down the line, one leader.⁵¹

Shalev is not prone to hyperbole. That is not his manner or approach. His assessment reflects careful analysis of a deeply troubling reality. The reality is two-fold: a clear danger that is palpable and visceral and a commensurate failure to clearly recognize, much less articulate, the danger. One hopes the threat is recognized by the national security and intelligence community, but deliberately minimized by the political level. That, however, may represent a false hope; as tragically demonstrated in the past, the much-vaunted domestic intelligence community has failed to recognize concrete threats. The consequences were disastrous. On November 4, 1995, Yigal Amir, a right-wing religious nationalist motivated by extremist rabbis, assassinated Prime Minister Rabin.⁵² We will return to this in the pages ahead.

The danger to society posed by right-wing extremists who merge nationalism and religion is real. Minimization is dangerous and futile. But minimizing the external threat is also fool's gold. One threat does not come at the expense of the other; this is not a zero-sum game whereby it is one or the other. To suggest that is to simplify the threats and minimize the complexity of the situation. It is correct to debate the severity of distinct threats. Decision makers need to both prioritize the intensity and immediacy of each threat and the operational measures required to respond, much less mitigate, potential danger. It is impossible to view each threat equally and to prepare for each with equal resources.

51. *Id.*

52. Mordechai Kremnitzer, *The Meaning and Significance of the Rabin Assassination*, ISR. DEMOCRACY INST. (Nov. 4, 2015), <https://en.idi.org.il/articles/3917>.

Prioritization and resource allocation are critical to effective national security decision making. Both require effective intelligence gathering and analysis predicated on acknowledging the viability of threats, regardless of their origin. This can pose a dilemma for decision makers who, for political interests, might instinctually minimize the severity of a particular threat resulting from electoral discomfort. From a strictly political perspective, such a dilemma is understandable. That is particularly the case for a right-wing government concerned about its political base. The question of political expediency, calculated as it may be, bumps up against concerns regarding public order and individual safety. Tolerance of intolerance and extremism can pose significant dangers to society at large and individuals in particular.⁵³

Examples are plentiful of political leaders who tolerate intolerance for naked political interests. Angering one's base is politically expedient; it is, also, the height of irresponsibility. Deliberately minimizing an internal threat in a country like Israel is fraught with danger. Israel is a tinderbox of competing cultures, norms, and religions. The complexity—much less multiplicity—of threats is Israel's reality. So is the politicizing of and using of the threats. External threats are, as Bismarck wisely suggested, convenient distractions when internal threats pose significant problems. Israeli Prime Minister Netanyahu is a master practitioner of this principle.⁵⁴

Directing focus toward outside threats is politically understandable, and perhaps wise. However, it comes with a price: emboldening extremist actors. That is not to suggest the intention is to encourage or facilitate violence, but it is to highlight the danger of failing to unequivocally condemn extremism and violence.⁵⁵ This is a fine line in the militant-bystander democracy discussion: tolerating free speech is the essence of democracy, but tolerating intolerant speech that advocates hatred and violence is an extraordinary risk. There is a price

53. See AMOS N. GUIORA, *TOLERATING INTOLERANCE: THE PRICE OF EXTREMISM* (Oxford Univ. Press, 2014).

54. As these lines are written, Netanyahu is under criminal investigation on a number of suspected offenses including bribery, corruption, and violating the public trust. The police—in accordance with Israeli law—will make their recommendations to the State Attorney in the months ahead regarding filing of indictments against the Prime Minister. Israeli law does not require Netanyahu to resign were the State Attorney to file indictments.

55. Ruth Margalit, *Israel's Jewish-Terrorist Problem*, *NEW YORKER* (Aug. 4, 2015), <https://www.newyorker.com/news/news-desk/israels-jewish-terrorist-problem>; Shmuel Rosner, *Fighting Jewish Terrorism is the Burden of Israel's Right*, *JEWISH J.* (Aug. 3, 2015), http://jewishjournal.com/current_edition/176362/fighting-jewish-terrorism-is-the-burden-of-israels-right/.

for tolerating speech calling for “Death to Arabs”,⁵⁶ the tolerance reflects bystander democracy whereas banning it suggests militant democracy.

With respect to national leaders, are those who advocate tolerance of such speech practicing bystander democracy? Is their leadership a mix and match of militant and bystander democracy: militant with some threats, bystander with others?

Re-articulated: is tolerance of racist speech in the name of political convenience to be perceived as bystander democracy? And, when the same politician is quick to condemn speech by Palestinian terrorists (or their supporters) calling for the murder of Jews, is this reflective of militant democracy? Or, is tolerating the first and condemning the second to be understood as practicing militant and bystander democracy simultaneously?

The question is whether the threats posed by extremists impose the obligation on politicians to implement militant democracy on *their* base rather than engage in bystander democracy. Implementing militant democracy regarding Palestinian terrorism is, in many circumstances, legitimate and warranted. That is not to suggest all measures are necessary, but is to highlight the necessity of engaging in legitimate self-defense devoid of a political-diplomatic resolution of the Israeli-Palestinian conflict. Those who oppose application of militant democracy measures in response to Palestinian terrorism are from the political left and deeply opposed to Netanyahu.

However, the validity of the political response to Palestinian extremism is not the question we are addressing. Rather, we are examining the consequences of bystander democracy applied to Jewish extremists whose supporters are the Prime Minister’s natural allies. That enables—perhaps justifies is a more apt word—terminology that can be interpreted as tolerating political violence initiated from their supporters. We can but learn from history. To that end, we offer the following to set the scene. We do so for the purpose of enabling the con-

56. Nir Hasson, *Right-Wing Protestors March in Jerusalem, Chant ‘Death to Arabs,’* HAARETZ (Oct. 8, 2015), <https://www.haaretz.com/.premium-right-wing-protesters-in-j-lem-chant-death-to-arabs-1.5406971>; Stuart Winer & Jacob Magid, *‘Death to Arabs’ Graffitied on Cars in Palestinian Village*, TIMES OF ISR. (Feb. 13, 2018) <https://www.timesofisrael.com/death-to-arabs-graffitied-on-cars-in-palestinian-village/>; *Israel Settlers Call for ‘Death to Arabs’ on Violent Spree*, MIDDLE EASTERN MONITOR (Apr. 20, 2018), <https://www.middleeastmonitor.com/20180420-israel-settlers-call-for-death-to-arabs-on-violent-spree/>.

versation that awaits us: when should political free speech be limited and when should political parties be banned?

1. *The 1980's Jewish Underground*

In the early 1980s, 28 members of the Jewish Underground – a terror group that targeted Palestinians in the West Bank and Jerusalem – were arrested and given lengthy prison sentences. Yet within seven years of being jailed, they had all been released, returning to the limelight as either respected journalists, political activists and settler leaders, or slipping under the radar to lead private lives.⁵⁷

The Jewish Underground—a term that is a matter of some controversy—refers to a group of religious-nationalist Jews who committed a series of attacks on Palestinian residents of the West Bank.⁵⁸ When arrested, and in their subsequent interrogations, members confessed to deliberately targeting senior Palestinian leaders who they considered posed a danger to Israel. In addition, members attacked an Islamic Hebrew school. Victims were randomly chosen, though the perpetrators agreed to refrain from attacking girls. The actions came in the aftermath of the murders of Israelis in the West Bank. The group believed their actions were justified as self-defense. A number of people were killed; in one instance an Israeli sapper was critically injured.⁵⁹

One member, Yehuda Etzion, planned on destroying the Dome of the Rock, a holy Moslem place of prayer located on Temple Mount in Jerusalem. Etzion believed the Dome of the Rock⁶⁰ was an abomination that must be destroyed in order to ensure Jewish sovereignty.

While Etzion and others gathered explosives, their actions did not go beyond that. But the members, who were caught by the General Security Services,⁶¹ claimed they had rabbinical permission to commit

57. Aimee Amiga, *Israel Was Soft on Jewish Terrorists in the 1980s - Will History Repeat Itself?*, HAARETZ (Feb. 11, 2016), <https://www.haaretz.com/israel-news/.premium-1.702702>.

58. Donald Neff, *Jewish Terrorists Try to Assassinate Three Palestinian Mayors*, WASH. REP. ON MIDDLE EASTERN AFFS. (June, 1999), <https://www.wrmea.org/1999-june/jewish-terrorists-try-to-assassinate-three-palestinian-mayors.html>; *3 Israeli Terrorists are Released in 4th Reduction of Their Terms*, N.Y. TIMES (Dec. 27, 1990), <http://www.nytimes.com/1990/12/27/world/3-israeli-terrorists-are-released-in-4th-reduction-of-their-terms.html>.

59. Neff, *supra* note 58; *3 Israeli Terrorists are Released in 4th Reduction of Their Terms*, *supra* note 58.

60. *Dome of the Rock*, BIBLEPLACES, <https://www.bibleplaces.com/domeofrock/> (last visited Sept. 26, 2018).

61. The General Security Services is known in Hebrew as SHABAK (Sherut bitachon leumi)—today the correct English translation is Israel Security Agency.

their acts. The harm the group caused, regardless whether the term is semantically and terminologically correct, was significant. And if the group had succeeded with carrying out their plan, the results would have been disastrous.

Important for our purposes are two facets: (1) the deliberate minimizing by political leadership of the groups' actions and (2) the failure of the intelligence community to sufficiently understand the threat posed by Jewish extremists. The former reflects, in the context of militant-bystander democracy, bystander democracy for it suggests a conscious decision to understate a clear internal threat. The intelligence failure to recognize an internal threat would repeat itself on November 4, 1995, when the Prime Minister was assassinated.

The consequences of bystander democracy, as exemplified in the case of the Jewish Underground, are more than significant. The primary obligation of the nation-state is to protect innocent civilians and uphold the rule of law. While impossible to have a police officer at every corner, it is incumbent upon elected officials to unequivocally condemn acts of violence, regardless of their motivation and justification. More than that, the obligation is to make a concerted effort to nip such actions in the bud. This is the difference between reaction and proactive action. Condemnation perceived as lip service is as harmful as failing to proactively prevent such action.

In the aftermath of the murders and attacks undertaken by the Jewish Underground, half-hearted condemnation, intentionally or unintentionally, establishes a dangerous precedent whereby political-religious violence will be tolerated for purposes of political expediency. That is a form of bystander democracy. It fails to sufficiently protect vulnerable members of society and/or to aggressively respond to efforts to undermine democratic institutions. The consequences are tragic, reflecting a profound failure of government agencies and illuminating the ramifications of creating a tolerating intolerance paradigm. That is, bystander democracy allows the pushing of limits and endangers society from within. It is the antithesis of militant democracy as articulated by Loewenstein.

Planning such attacks is immeasurably easier when the actors assess that government leaders will tolerate their intolerance either because of political expediency or ideological alliance. That is bystander democracy, for it enables or tolerates speech that results in actions that threaten the fabric of society. Speech is an important component of ideological predicated action. The Jewish Underground, much like

Rabin's assassin, received guidance from rabbis whose teachings and interpretation of scripture were essential to the actions of the Jewish terrorists.

The casualness with which the political leadership responded set a dangerous precedent of tolerating racism and violence. The victims are both Palestinians, deliberately and randomly targeted, and the government, whose authority is undermined in the name of religious nationalism. In a country like Israel, where tensions, conflicts, and violence are an inherent part of the narrative, militant democracy is justified in the face of a direct challenge. The Jewish Underground posed such a challenge. To say it was responded to in full force would be an exaggeration.

2. *Kach: The racist, banned political party*

On June 19, 1984, the Israel Central Elections Committee voted 18-10 to ban Kach, a racist political party led by Rabbi Meir Kahane, from participating in the July Knesset elections.⁶² The Chairman of the Elections Commission, Justice Gavriel Bach, maintained that Kach undermined democracy. This was the first time in Israeli history that a Jewish political party would be banned from participating in an election. In 1965, an Arab-Socialist political party had been banned, but the Supreme Court, nevertheless, overturned the Election Commission decision.⁶³

In 1988, the Knesset revised the Knesset Election Law banning political parties that incite racism. In its aftermath, Kach was banned from participating in the 1988 election. A petition was filed before the Israel Supreme Court which upheld the ban.⁶⁴

In *Kach v. Central Election Committee for the 12th Knesset*,⁶⁵ President Meir Shamgar, writing for the Court, wrote the following:

The Appellant [Kach, ANG-KJI] wishes to deprive a portion of the citizens of the State, which it distinguishes by its national origin and ethnicity, of their right to vote, to be elected and to be appointed

62. Gil Sedan, *Kahane Group Barred from July 23 Knesset Ballot; Ban First for Jewish List*, JEWISH TELEGRAPHIC AGENCY (June 19, 1984), http://pdfs.jta.org/1984/1984-06-19_115.pdf?_ga=2.189702891.1588708135.1538021256-1626397147.1538021255.

63. *Id.*

64. *Id.*

65. EA 1/88 Kach v. Cent. Election Comm. for the 12th Knesset 7 Cheshvan 5749 (1988) (Isr.).

to government positions. Stripping such rights is a clear and unequivocal infringement upon the very soul of democracy, which is based on equal political rights among all citizens, irrespective of race, religion, nationality or gender. . . .

The Appellant's objectives and conduct are also clearly racist: systematically fanning the flames of ethnic and national hate, which causes divisiveness and animosity; calling for the forceful deprivation of rights; systematic and intentional degradation directed towards a specific part of the population selected because of their national origin and ethnicity; [calling] for their humiliation in ways very similar to the terrible experiences of the Jewish nation. All these reasons suffice, in light of the evidence presented, to come to this conclusion regarding incitement to racism. The extent of the actions taken by the Appellant in all its forms; the extremism through which it presents the action accompanying it; and the terrible distortion of the nature of the State and its regime that flow from it point to the severity of its objectives and conduct that requires that we affirm the decision of the Central Election Committee.⁶⁶

The decision to ban Kahane's party is the manifestation of militant democracy. The party was openly racist, espousing hatred of Israeli Arabs. There was to be no mistake regarding their agenda; supporters and opponents alike had no illusion regarding the party's platform.⁶⁷ Kahane, an American-born rabbi, played to the extreme right-wing of the Israeli electorate. Racism was the cornerstone of his appeal and platform. There was no hiding the ball. The party had a very clear vision of what Israel should look like and what ethnic group must be excluded.

To suggest Kahane was irrational is to under-estimate his capabilities and vision. Whether he believed in his ability to force Israeli Arab's to leave their homes is an open question. What is undeniable is that he tapped into the dark side of Israeli society. His supporters, largely lower-middle class, Sephardic Jews, felt marginalized by mainstream society (meaning Ashkenazi Jews, ANG-KJI) who were considered soft in the face of threats posed by Arabs. The politics and rhetoric were crude and base. Violence, whether verbal or physical, was very

66. *Id.*

67. Carla Hall, *The Message of Meir Kahane*, WASH. POST (Sept. 11, 1984), https://www.washingtonpost.com/archive/lifestyle/1984/09/11/the-message-of-meir-kahane/95a30f81-2e2e-431f-b9fb-33c0ad43ca39/?utm_term=.2de9f4d69392.

much in the air. Kahane was a demagogue, a hate-monger, who enjoyed momentary success. That cannot be denied.

The decision to ban his party reflected deep concern regarding both his political philosophy and the threat that his philosophy posed to society. The former is understandable; the latter less so. The caveat, of course, is that hindsight is nothing more than 20/20 vision and what one sees in 2018 is not what one saw in the moment. That is an important component in the militant-bystander discussion. Protecting society in general and individuals in particular is the primary obligation of government. Nevertheless, care must be taken not to trammel rights of those who challenge, even if uncomfortably, traditional institutions and mores. A healthy, strong, and vibrant democracy can tolerate challenging voices. The question is when to draw the line and determine that a threat is viable.

There is no doubt Kahane and his party were virulent racists. After all, their stated goal was to strive for an Arab-free Israel. This was the epitome of racism. The Supreme Court, in upholding their ban, noted their “objectives and conduct are also clearly racist: systematically fanning the flames of ethnic and national hate, which causes divisiveness and animosity.”⁶⁸

However, while there are no grounds for disagreeing with President (Chief Justice) Shamgar’s analysis of Kahane’s objectives, the militant-bystander democracy debate requires balancing competing tensions and interests. Mere repugnancy of a particular idea is not sufficient grounds for denying those who subscribe to a particular ideology the right to participate in the democratic process. It is a decision that must be made carefully, considering a significant number of considerations.

Kahane clearly espoused anti-democratic beliefs—“calling for the forceful deprivation of rights”⁶⁹ of a particular group. The question is whether Kahane’s platform was justifiably sufficient for the Supreme Court to uphold the Election Commission decision to ban him. While the Court ruled affirmatively, considering the consequences and impact on the Kach supporter is no less important than the principles of tolerance and democratic values that were at the heart of the Court’s decision.

68. Neiman, 7 Cheshvan 5749.

69. *Id.*

3. *Assassination of Prime Minister Rabin*

On November 4, 1995, Prime Minister Rabin was assassinated by a Jewish religious nationalist. The authorities said with certainty that the assassin, Yigal Amir, was incited by extremist rabbis.⁷⁰ Nevertheless, the then Attorney General Michael Ben-Yair failed to prosecute the rabbis who incited Ben-Yair.⁷¹ The Attorney General's decision was inexplicable then and it continues to defy reason two decades later. It represents, without a doubt, the Israeli government's failure to protect the individual who was threatened on a regular basis. More than that, assassination of a Prime Minister because of deep opposition to his efforts to resolve the Israeli-Palestinian conflict undermines democratic principles.

The state organs failed, chiefly the intelligence community prior to the assassination, and the Ministry of Justice in its aftermath. The intelligence community because they failed to assess and recognize clear warning signs; the Ministry of Justice because of a deliberate unwillingness to directly confront inciting, extremist rabbis. The intelligence community's failure led to Rabin's assassination; the Ministry of Justice's failure undermined democracy.

The writing was on the wall—something was going to happen. The verbal violence against the Prime Minister was palpable and undeniable.⁷² Ben-Yair and those in the Ministry of Justice who failed to forcibly investigate, interrogate, and prosecute those responsible for Rabin's assassination are guilty of bystander democracy. There were two critical decisions that reflect application of the bystander-democracy model. First, the government failed to recognize the unmitigated, violent, and threatening speech consistently and loudly directed at Rabin before the assassination, which included demonstrations in which participants labelled the Prime Minister traitor and held placards of Rabin in a SS uniform. And then, after the assassination, the government declined to prosecute the inciting rabbi's after the assassination. Both decisions reflect an extraordinary tolerance of free

70. Kremnitzer, *supra* note 52.

71. See AMOS GUIORA, *FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY* (Oxford Univ. Press, 2d ed. 2014).

72. Walter Rodgers, *Anti-Rabin Sentiment Had Turned Ugly: Confessed Assassin Had Been Seen Before*, CNN (Nov. 5, 1995), http://www.cnn.com/WORLD/9511/rabin/why_now/index.html.

speech; they suggest that overwhelming priority and preference is given to the speaker and the speech at the expense of a specific target.

This is to be distinguished from the decision to ban Kach. Without a doubt, the party espoused racist elements directed at a particular ethnic group—Israeli Arabs—but did not focus on a specific individual. The violence, verbal and ultimately physical, directed at Rabin harkens back to the Jewish Underground in that both were motivated by inciting rabbis.

The similarities are essential to our understanding of the application of bystander democracy: the tolerance of incitement and the unwillingness to directly confront those responsible for creating a hate-filled atmosphere, imbued with violence and clear, unmistakable calls to harm. Yet decision makers chose to turn a blind eye in accordance with the principles of what we define as bystander democracy. That is in direct contrast to how the Elections Commission in 1984 and 1988 and the Supreme Court in 1988 viewed the question of Kach's participation in elections to the Knesset.

While the Supreme Court in 1984 ruled in favor of Kach's participation, that is more a reflection of the Court's interpretation of relevant legislation than an affirmation or tolerance of the party's explicit racist views. President (Chief Justice) Shamgar's opinion in 1988 makes very clear how the Court viewed Kach; in the context of militant-bystander democracy, the Court (1988) and Election Commission (1984 and 1988) clearly sided with militant democracy as articulated by Professor Loewenstein.

4. Final word

Adoption of bystander democracy, in direct contrast to militant democracy, created an environment whereby incitement was enabled and horrific violence resulted. This is the consequence of failing to directly curtail extremism. It should serve as a sobering lesson when considering the consequences of failing to protect both democratic institutions and vulnerable members of society. This goes to the heart of the limits of free speech and banning political party discussion, and requires resolving how to protect democracy and the consequences of failing to protect its values.

B. Germany

To understand Germany requires examining its history. It is, needless to say, marked by extraordinary achievements and accomplishments alongside responsibility for the Holocaust. The dissonance between the two—some of the greatest artists, thinkers, writers, and philosophers side by side with Hitler, Himmler, Heydrich and Eichmann—has been widely discussed and analyzed. The continued relevance of this issue was brought into sharp focus when Alexander Gauland, a leader of the right-wing Alternative for Germany party said: “Hitler and the Nazis are just birdshit in more than 1,000 years of successful German history.”⁷³ A response was quick in coming from Annegret Kramp-Karrenbaue, the Secretary General of Chancellor Angela Merkel’s party, the Christian Democratic Party: “Fifty million victims of war, the Holocaust and all-out war are for the AfD and Gauland just ‘bird shit.’ This is what the party looks like behind its civic mask.”⁷⁴

While we have no intention to engage in a broad discussion about the Holocaust, addressing militant-bystander democracy in Germany today requires an understanding of the events of 1933-1945. Otherwise, it is impossible to understand contemporary Germany. In the context of the militant-bystander democracy paradigm, how Germany resolves contemporary tensions and challenges is directly impacted by how it failed to protect its democratic institutions when challenged from within.

The dark days of National Socialism did not happen in a vacuum; the Nazi’s did not fall upon Germany out of nowhere. Quite the opposite. Defeat in World War I, reparations imposed by the Treaty of Versailles, collapse of the Weimar Republic, and economic distress were in retrospect, harbingers of Hitler’s rise to power through democratic means and the unimaginable consequences it wrought.

Emphasizing that Hitler came to power democratically is relevant to the militant-bystander democracy discussion. Recall that Professor Loewenstein’s words, discussed at length above, were written during

73. Simone Rothe, *Far-Right Party Leader’s Nazi Comments Blasted by German Politicians*, DPA-INT’L (June 2, 2018), <http://www.dpa-international.com/topic/far-right-party-leader-nazi-comments-blasted-german-180602-99-558244>.

74. Daniel Politi, *Far-Right German Leader Dismisses Nazi Era as “Speck of Bird Poop” in Country’s History*, SLATE (June 2, 2018), <https://slate.com/news-and-politics/2018/06/far-right-german-leader-dismisses-nazi-era-as-speck-of-bird-poop-in-countrys-history.html>.

that dark era. They remind us of the reality—and consequences—of democracy failing to protect itself. The rise to power of National Socialism is the result of a failure of the German democracy to protect itself—a profound mistake and miscalculation. In many ways, it is *the* example, the standard by which all other nefarious uses, or more accurately misuses, of the weakness of democracy is measured.

Commenting on the Nazi rise to power Joseph Goebbels boasted:

We enter parliament in order to supply ourselves, in the arsenal of democracy, with its own weapons. . . If democracy is so stupid as to give us free tickets and salaries for this bear's work, that is its affair. . . We do not come as friends, nor even as neutrals. We come as enemies. As the wolf bursts into the flock, so we come.⁷⁵

Goebbels statement rings unfortunately true: pre-World War II German democracy was, indeed, unable to protect itself and became an unwitting weapon in the hands of the Nazis. The question is whether democratic institutions protect themselves when under attack from within or, quoting Goebbels, whether democracy is “so stupid as to give us free tickets.”⁷⁶ The discussion, however, is more nuanced than that. It is not enough to protect—that is too easy and insufficiently narrow. The more difficult question is against whom to protect and the limits of that protection.

While it is tempting to suggest one primary cause for tumultuous events, history suggests a more nuanced and sophisticated approach is appropriate. The temptation to ascribe the rise to one event minimizes the complexity of how democracy protects—or fails to protect—itsself in the face of innumerable challenges, failures, dilemmas, and crises.

That Germany was in crisis after World War I is unquestionable. That German leadership failed to protect German democracy—no matter how unstable, troubled, and vulnerable—is similarly not in doubt. If there was ever a time for militant democracy to be practiced, this was the time. The inability to do so, and the failure to recognize an internal threat, had devastating consequences. Professor Loewenstein's words were, in retrospect, remarkably prophetic.

75. Joseph Goebbels, *German Nazi Propagandist in 1928*, in THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS 107 (Robert Andrews ed., 1989).

76. *Id.*

Daniel Goldhagen argues in his book, *Hitler's Willing Executioners*,⁷⁷ that the Holocaust is a reflection of historic German anti-Semitism, suggesting an inevitability to the Holocaust. Goldhagen's theory has been praised by some and criticized by others. What is clear, regardless of whether one agrees or disagrees with Goldhagen, is that Germany has a virulent anti-Semitism pock-marked history. That, however, does not suggest the destruction of European Jewry was the preordained result of historic anti-Semitism. After all, much of European history is characterized by anti-Semitism, whether emanating from the Catholic Church or from national leaders. What is clear, in retrospect, is the vulnerability of Europe's Jews, their presumed assimilation notwithstanding.

Amos Elon's prize-winning book, *The Pity of It All*,⁷⁸ makes very clear that while German Jews considered themselves Germans, Germans considered German Jews to be Jewish, not German. The difference is crucial in understanding the relationship between Germany and its Jews. The difference is neither semantic nor terminological. It is profound for it reflects a deep misunderstanding of the relationship between a particular ethnic group and larger society. As Elon makes clear, German Jews had literally convinced themselves they were full members of society.

Pre-National Socialism instances of anti-Semitism were explained away or minimized. It was a defense mechanism. While perhaps understandable, its consequences were horrific. The refusal to recognize the painful reality that society did not fully accept you, but rather that you were an outsider—best efforts notwithstanding—is important in the militant democracy discussion.

1. Neo-Nazism and Jihadism in Germany today

As to Germany today: in the summer of 2017, one of the authors⁷⁹ spent a week meeting with senior security and government officials, scholars, and members of civil society. The officials represented both federal and state agencies and institutions.

77. See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1st Vintage Books, 1996).

78. AMOS ELON, *THE PITY OF IT ALL: A HISTORY OF JEWS IN GERMANY, 1743–1933* (2002).

79. Professor Guiora travelled to Germany and the Netherlands during the summer of 2017 to conduct interviews for this article and other academic projects.

The meetings, focusing on issues relevant to this writing project, were conducted in a variety of locations. All interlocutors shared concerns regarding significant challenges confronting contemporary German society. There was an understandable lack of uniformity regarding both concerns and solutions. Some conversations were particularly sobering especially regarding the rise in anti-Semitism in Germany today. This was a theme that repeated itself, whether the discussion focused on the extreme right-wing or on immigrant communities and the government's failure or unwillingness to directly address this troubling development. There was a two-fold concern: one, the rise of anti-Semitism and two, government inaction.

While there was not a sense of a country in crisis, there was a troubling disquiet that marked the discussions. No interlocutor offered a particularly rosy assessment of the state of the nation. However, it would be an exaggeration to suggest fear was expressed, explicitly or implicitly. Perhaps the best term is anxiety, bordering on deep anxiety. The conversations were candid, thoughtful, and revealing. They suggested a society facing two distinct, yet simultaneous, internal threats: Neo-Nazism and Jihadism. Clearly conveyed was the sense that German political leaders, civil society, courts, and the public are facing a very busy national agenda.

Germany's troubled history underlined each conversation. It is to state the obvious that the Holocaust and its causes and lessons were a constant. There was a sense that discussing the challenges facing Germany today must be viewed through the lens of history. It was a consistent sub-text, a pervasive constant that could not be ignored. Whether that reflected the topic at hand—threats German democracy faces and how to respond—or is, seventy-five years later, still an issue that invariably weaves itself into such conversations was unclear. Regardless of the impetus, in discussing both threats, the Holocaust had a prominent seat at the table.

The discussions were held before the September 2017 election which resulted in the electoral success of the Alternative for Germany Party in the Bundestag, making it the third largest party. Conversations suggested this electoral success was to be expected and were it to come to fruition, which it did, it would be disingenuous to claim surprise. That was the source of some consternation, reflective of a sentiment best described as "didn't we learn anything from history."

The cause for this prediction, which was accurate in retrospect, was attributed to two issues: the rise of immigration to Germany and

an increase in anti-Semitism. The immigration, primarily, albeit not exclusively, from Syria, Iraq, and Afghanistan, was believed to undermine German society, both economically and socially.⁸⁰ The former, because of the belief that immigrants take jobs from traditional Germans, and the latter, because of the belief that immigrants undermine traditional society and call into question the stability that has marked Germany in previous decades.

Concern regarding immigration focused on the inability of immigrants to adapt to German society. The example repeatedly mentioned was the verbal and sometimes physical harassment that white German women were subjected to by immigrant men.⁸¹ A number of examples were repeatedly emphasized—most of which had been covered broadly by the media. These instances, doubtlessly humiliating and greatly unpleasant for the affected women, were offered as proof of the immigrants' inability to understand the norms and mores of western culture.

The argument proposed was that immigrants threatened German society. In other words, the outsider had failed to understand his new home. This was a theme the political right used to its electoral advantage. It is, as discussed above, not the first time German society has looked disparagingly at the outsider. There is a critical difference: Jews had lived in Germany for hundreds of years, whereas Muslim immigrants were relative newcomers.

Nevertheless, the extreme right has lumped the two groups into one basket in spite of their obvious differences. The situation, however, is more complex than that. As a number of interlocutors suggested, there is a link and arguably an alliance between the extreme right and Muslims. Perhaps this is in accordance with the adage *the enemy of my enemy is my friend*. Otherwise, one is hard-pressed to understand this seemingly strange union of what would otherwise be perceived as unnatural bedfellows.

An accounting of the severity of each threat—neo-Nazi's and immigration—depends on who you ask. There was, perhaps not surprisingly, a lack of unanimity regarding which threat posed a greater danger to society. Arguably, the differences in perspective depends on one's particular perch. Security officials were focused on the extreme

80. Guiora, *Germany Must Confront Its New Wave of Anti-Semitism*, *supra* note 7; Guiora, *Wannsee Villa*, *supra* note 7; Liphshiz, *supra* note 7.

81. Anna Sauerbrey, *The German Feminists' Dilemma*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/opinion/the-german-feminists-dilemma.html>.

right, particularly on the trial of Beate Zschäepe. Zschäepe, whose trial concluded in July 2018, was convicted of murdering eight Turks, a Greek citizen, and a policewoman in a racially-motivated series of murders.⁸² As a member of the National Socialist Underground (NSU), Zschäepe, along with Uwe Mundlos and Uwe Böhnhardt, was convicted of carrying out a bombing attack and multiple robberies between 2000 and 2007 that resulted in the deaths of the ten victims.⁸³

While Zschäepe's accomplices, who died in an apparent murder suicide, were never brought to justice, the murders did expose "serious shortcomings in the German state's monitoring of neo-Nazis, and led to a public inquiry into how police failed to discover the murder plot."⁸⁴ The group had evaded law enforcement for eleven years before Zschäepe turned herself in to German authorities.⁸⁵ Although Zschäepe's attorneys made a statement denying her physical presence during the underlying bombing and robberies, Zschäepe will face a life sentence for her involvement in the NSU. Zschäepe was sentenced along with others involved with NSU and when a co-defendant was given a "lower sentence than expected," far-right attendees clapped in the courtroom.⁸⁶

2. *Final word*

The rise of the far right in recent German history is indeed disturbing. The fact that there remains support for neo-Nazis reflects the seriousness of the circumstances. And, while law enforcement has taken steps to address this threat,⁸⁷ largely in response to the public outcry following the NSU murder investigation, there is justifiable concern that the problem will persist.

82. *Beate Zschäepe Given Life in German Neo-Nazi Murder Trial*, BBC NEWS (July 11, 2018), <https://www.bbc.com/news/world-europe-44764827>.

83. *Id.*

84. *Id.*

85. *German Court Sentences Woman to Life for Neo-Nazi Murders*, CBS NEWS (July 11, 2018), <https://www.cbsnews.com/news/german-neo-nazi-beate-zschaepe-guilty-life-sentence-murder-of-migrants/>.

86. *Id.*

87. *Id.*

C. The Netherlands

Like Israel and Germany, Dutch political extremism is unique to its history and culture. Most recently, the tension between the larger Netherlands population and the population of immigrants from Morocco has manifested in extremism from both groups. Relevant to our discussion, the far-right has reacted with extreme rhetoric against the minority population. Justifying their actions and statements as a reaction to Islamic extremism among portions of the Moroccan population, the far-right has stirred serious support. The threat is not simply the dangerous racism at the core of this extremism, but rather the support for it in political leadership.

1. Prosecuting Geert Wilders

At the center of far-right extremism in the Netherlands is MP Geert Wilders. Wilders acts as a voice for the right and the far-right and his statements have received international attention. Wilders's rhetoric also serves as an example of not only the dangers of far-right extremism, but also the exercise of militant democratic principles.⁸⁸

The decision to prosecute Member of Parliament Geert Wilders under Dutch Penal Code 137 raises classic free speech questions and dilemmas, particularly regarding the limits of tolerance. Resolution of this dilemma requires balancing equally legitimate, viable, and valid considerations, principles, and interests.⁸⁹ At its core, the prosecutorial decision goes to the essence of what is free speech and what limits can be imposed on that right. The decision to prosecute Wilders also raises important questions relevant to the tolerance/intolerance debate that can be divided into two distinct questions: (1) how much intolerance should be tolerated; and (2) who is tolerant/intolerant?

The question is whether Wilders's comments on March 12 and 19, 2014 were deliberately offensive, deliberately incited to hate, and/or deliberately intended to discriminate against Moroccans. In assessing the comments, it is essential to focus and resolve if the words were deliberately offensive, discriminatory, or inciting to hatred. While

88. In the name of full disclosure, one of the authors (Guiora) was invited by Wilder's defense to be an expert witness regarding the limits of free speech. In accordance with Dutch Criminal Law, the Court has the discretion whether to accede to such a request. The Court declined the request.

89. Art.137, SR (NETH.). An English translation can be found at http://www.ejtn.eu/Pages/Files/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf.

there is no doubt Wilders said what he meant regarding Moroccans, that does not *automatically* equate meeting the *deliberate* standard in accordance with Section 137c and Section 137d.⁹⁰

Wilders engaged in an interactive “give and take/question and answer” dialogue with his audience. It is clear from repeated viewing of the speech that speaker and audience alike knew the questions/answers. The interaction is predicated on asking questions whose answers were known to both audience and speaker. However, that does not *prima facie* mean Wilders deliberately intended to offend, incite, and discriminate.

The context and content are of equal importance in assessing whether the *deliberate* standard has been met. Both must be taken into consideration. As noted below, Wilders was speaking at a political forum to *his* audience articulating a worldview with which he is universally identified.

2. Wilders's speeches

In pursuing charges against Wilders, the prosecutor focused on Wilders's public statements in which he asks his audience whether they want more or fewer Moroccans in the Netherlands.⁹¹ The comments accurately reflect Wilders's long-standing political position, as articulated in the Party for Freedom (PVV)⁹² platform and in innumerable public speeches, in the Netherlands and elsewhere. Careful review and thorough research of mainstream media, blogs, and other relevant information sources highlight the consistency of Wilders's public positions.⁹³

90. See *Id.*

91. The question whether the audience wanted more or fewer Moroccans in the Netherlands, is the third of three questions Wilders posed to his audience. The first two questions are unrelated to Moroccans and Islam. Dutch Muslims filed six-thousand public complaints with the public prosecutor in response to the comments.

92. Reiss Smith, *Dutch Election 2017: What Parties Are Running Against Geert Wilders? VVD, PVV and More*, EXPRESS (Mar. 16, 2017, 2:25 PM), <https://www.express.co.uk/news/world/779524/Dutch-election-2017-Parties-candidates-Geert-Wilders-VVD-PVV-Mark-Rutte-CDA-PvdA>.

93. Flavia Dzodan, *Be Afraid: Geert Wilders Released His Platform for Next Year's Election*, MEDIUM (Aug. 26, 2016), <https://medium.com/@flaviadzodan/be-afraid-geert-wilders-released-his-platform-for-next-years-election-a1ac453a0fff>; Stefanie Marsh, *This Is Exactly What He Wants: How Geert Wilders Won by Losing*, ATLANTIC (Mar. 16, 2017), <https://www.theatlantic.com/international/archive/2017/03/geert-wilders-won-by-losing-netherlands-vote/519834/>; Sarah Wildman, *Geert Wilders, The Islamophobe Some Call the Dutch Donald Drumpf, Explained*, VOX (Mar. 15, 2017), <https://www.vox.com/world/2017/3/14/14921614/geert-wilders->

Wilders's two speeches do not reflect or espouse new positions, perspectives, or platforms. There was, then, nothing new, different, or original in his comments. A cursory Internet search unequivocally confirms that. In addition to the questions regarding Moroccans, Wilders posed the same *more-fewer* question. Those questions, however, are not the subject of criminal prosecution. Wilders has not retracted his comments; his defense reflects a classic articulation of free speech, in spirit and practice alike. The context of the engagement with the audience causes discomfort; the setting of a beer hall has been negatively noted both by defenders and critics alike. Critics focus on content and context reflecting a broader interpretation of speech extending beyond merely the spoken. While political talks occur in a wide range of settings, it is important to note that the setting was, in our opinion, unfortunate, particularly from a historical perspective.

There is, as noted by some of Wilders's supporters, a discomfort factor with respect to content and context of his speech. Some have expressed regret for the exact circumstances of the statements, but no one is surprised that they were made. Regret is likely the result of the publicity and prosecution. The lack of surprise that Wilders made these comments can be attributed to the fact that Wilders's comments accurately reflect his very public and recognized positions regarding immigration, emigration, and Moroccans.⁹⁴

There is an obvious similarity between Wilders's focus on Moroccans and the specific identification of European Jewry as the enemy by Nazi Germany. The argument has been proposed that National Socialist anti-Semitism is akin to Wilders's stated position regarding harm Moroccans pose to the Netherlands.⁹⁵ Similarly, the response of Wilders's supporters would recall, for some, the anti-Arab incitement of the late Meir Kahane whose political party Kach was banned from participating in elections by the Israel Supreme Court.⁹⁶

islamophobia-islam-netherlands-populism-europe.

94. Christopher Caldwell, *More or Less?*, WKLY. STANDARD (Apr. 21, 2014), <https://www.weeklystandard.com/christopher-caldwell/more-or-less>; Uri Friedman, *Should Calling for 'Fewer Moroccans' Be Considered Hate Speech?*, ATLANTIC (Nov. 2, 2016), <https://www.theatlantic.com/international/archive/2016/11/geert-wilders-free-hate-speech/506018/>; Janene Pieters, *Wilders Hate Speech Appeal: 'Fewer Moroccans' a Call for Policy Change*, SAYS LAWYER, NL TIMES (Oct. 24, 2017), <https://nltimes.nl/2017/10/24/wilders-hate-speech-appeal-fewer-moroccans-call-policy-change-says-lawyer>.

95. See *Dutch Far-Right Firebrand Geert Wilders Fails to Draw Large Crowd at Pegida Rally*, GUARDIAN (Apr. 13, 2015), <https://www.theguardian.com/world/2015/apr/13/geert-wilders-pegida-germany-dutch-far-right>.

96. See *supra* sec. IV.A.2.

In addition, the singling out of a specific group, while particularly prominent in the Netherlands because of Wilders's speeches and political platform, occurs elsewhere in Europe and the United States. To that end, it is a familiar refrain albeit with different chords, styles, symbols, and mannerisms.

In the context of identifying a particular group, whether ethnic, religious, or national, Wilders's comments are problematic. The question is whether they violate the Dutch Penal Code. Problematic speech that makes an audience uncomfortable is not a crime. Society is strengthened when challenged. Pushing the boundaries is an accepted component of vibrant, thriving democracies that value the exercise of freedoms and rights.

Needless to say, those rights are not limitless. Protection of society and individuals alike is integral to public order and communal welfare. However, an unwarranted limit on free speech is equally dangerous; alternative voices are the essence of democracy. This is the essence of the balancing dilemma, if not the burden. Different countries have distinct approaches to the limits of the freedom of speech; line drawing is challenging, complex, and inherently controversial.

3. Balancing and tolerance-intolerance

Prosecutors and courts are hard-pressed to consistently, much less coherently, articulate boundaries and criteria. Social media significantly exacerbates the tension and difficulty; the range and immediacy of dissemination dramatically highlight the power of speech. That power is heightened when particular speech addresses an issue front and center in the public debate, taut with emotion and controversy, potentially volatile if not violent.

Determining whether the speech was deliberately offensive, deliberately incited to hate, and/or deliberately intended to discriminate against Moroccans requires balancing the speaker's right to exercise the right to free speech, the impact of the words, and resolving the tolerance-intolerance dilemma. While Wilders—undeniably—spoke the words, it is not clear they were intended to deliberately offend, incite, or discriminate.

The words, while problematic and controversial, reflect the political platform of a democratically elected Member of the Dutch Parliament. Though the words were spoken outside of Parliament and therefore do not enjoy parliamentary immunity, they are an accurate

reflection of a long-standing and frequently articulated political position. There is nothing new in either their content or message. Wilders's words are not significantly distinct from those spoken throughout Europe today. Whether that is a negative or a positive is irrelevant. What is relevant is that this is the reality.

As to the intended audience, the give and take was with PVV supporters at a political rally in the context of a campaign. Those supporters were the direct, intended audience, while the indirect audience included those watching on TV, following on the Internet, and reading the newspaper.

Without a doubt, the indirect audience included one of the targets of Wilders's speech: Dutch Moroccans. From an analysis of the setting/context and content, it would be an exaggeration to posit that Dutch Moroccans were the sole-exclusive intended audience. However, it is reasonable to surmise they understood the words were *also* directed at them. To assume they were the only audience would be incorrect.

The tolerance-intolerance debate is essential to this analysis. In many ways, it is the core of the broader discussion in Europe today. Arguably, the issues Wilders raised dominate the public sphere from the UK to Germany, from Sweden to Spain, and from Norway to Italy. The news is dominated by reports of European "jihadists" travelling to Syria and Iraq to join forces with ISIS; there are regular media reports regarding honor killings amongst Muslim communities in Europe; and rejection of traditional, enlightened European values is encouraged by imams in Europe who are public employees.

These three examples are but the "tip of the iceberg" regarding intolerance, as articulated by certain segments of Europe's Muslim population. In the main, those comments and actions go unpunished by European authorities. The reasons are varied, but the failure to aggressively prosecute illegal conduct is suggestive of a willful decision to tolerate intolerance. Elected officials do not specifically articulate that tolerating intolerance is a policy; nevertheless, that approach largely defines Western European governments today.

Repeated engagements with decision-makers in the Netherlands and the UK regarding this question have been more frustrating than satisfying, and more confounding than enlightening. The failure to prosecute intolerance reflects an understanding of the cost intolerance exacts on vulnerable members of society. This failure to prosecute intolerance has directly result in harm to vulnerable members of society,

such as those who live in closed communities and those deemed to have offended particular tenets of a faith. Attacks on cartoonists, writers, artists, social commentators, and women manifest the tragic human price of tolerating intolerance.

The failure to aggressively prosecute religious leaders who incite is troubling. The decision to prosecute Wilders on the charge of inciting to hatred is suggestive of a double standard. While prosecutorial discretion is an accepted principle, the decision to impact Wilders's right to free speech raises legitimate questions, if not concerns, regarding a rigorous and consistent application of the balancing requirement inherent to free speech analysis.

Similarly, the failure to equitably address, much less resolve, the tolerance-intolerance paradigm suggests four important observations: (1) unjustified tolerance of violence; (2) possible over-reach regarding limits on speech whose content was known and oft-repeated; (3) protection of violence (in the name of tolerating intolerance); and (4) prosecution of speech that has not resulted in physical harm to the group believed to have been deliberately offended.

4. Application of the charge

The question is, in applying a continuum model, what aspect of Section 137c and 137d⁹⁷ do Wilders's words violate. We must ask if the words: (1) deliberately offended; and/or (2) deliberately incited to hatred; and/or (3) deliberately discriminated? The analysis focuses on both content and context.

Targeting a specific group can be understood as offensive to that group. However, given that Wilders was *not* in a position of power—PVV is not in the ruling coalition and Wilders holds no governmental post—it is less clear whether the speech deliberately incited. With respect to deliberately discriminate, it is difficult to understand how that charge can be argued given that Wilders is not in a position to, for instance, determine hiring/firing practices in the Netherlands.

Of the three charges, incitement to hate seems the most problematic and murkiest. It is a stretch to suggest that Wilders's comments were intended to incite to hatred against Moroccans. While the audience and Wilders are engaged in a give and take, the context—a political rally at a beer hall—is reflective of a campaign environment and

97. Art.137, *supra* note 89.

not more than that. It is hard to believe that individuals—upon leaving the campaign rally—intended to cause harm to Moroccans based on the interactive engagement with Wilders. There is nothing to suggest that incitement was his intent nor that someone could argue that his words propelled them to action.

Whether the speech was offensive requires analyzing who was present and who was the intended audience. Those present at the rally were Wilders's supporters; they, it is safe to assume, were not offended. As to Moroccans who either heard of the rally or saw clips on the news or social media, a legitimate argument can be made that the give and take would be, clearly, unpleasant to the ear. There is, however, a difference between offensive speech and unpleasant speech. The former offends an individual or group whereas the latter is distasteful to the ear.

While Wilders's words were, perhaps, best not said and particularly not in a beer hall, they were arguably neither inciting nor offensive. They pushed the boundaries of civility regarding free speech but did not cross the line.

5. Final word

Much like Israel and Germany, the Netherlands faces an ongoing and serious threat from the far right. As the prosecution and trial of Geert Wilders reflects, the Netherlands is also struggling to find the appropriate means of addressing far-right extremism while balancing its response to real concerns about jihadists.

V. RESOLVING THE TENSION BETWEEN MILITANT AND BYSTANDER DEMOCRACY

It is apparent that every democracy bears both militant and bystander principles. Some democracies, like Israel and Germany, structure their legal and political system such that they err on the side of militancy. Others, like the Netherlands, err on the side of political liberty. Regardless of which side of the fence a democracy sits, there are costs. The determination that every democracy must make is whether the cost of failing to prevent extremism is tolerable or whether tolerating extremism is less a burden than directly addressing it through the legal and political system. This determination requires, in part, a cost-benefit analysis addressing the cost of tolerating intolerance that has the potential to destroy democracy from within. An analysis of that

cost requires understanding the possible consequences of turning a blind eye to the very danger of undermining democracy from within.

The rise of the Nazi Party through legitimate means illustrates the immeasurable dangers of a bystander democracy. Extremist parties are not dangerous simply because they are successful. Their threat is legitimate because of their potential for immense destruction of both the democratic system of government and the people it governs.

An extraordinary, thoughtful, and measured but also alarming speech, given by the President (Chief Justice, Retired) of the Israel Supreme Court, Dorit Beinisch, compellingly highlights dangers a democracy can face from within. Beinisch's words must be understood in their contemporary context. Her speech, given in December 2017, comes at a particularly tumultuous time for Israeli democracy.

Prime Minister Netanyahu, under intensive and consistent police investigations for alleged bribery and corruption charges, instructed his political supporters and operatives to weaken the powers of the Israel Police.⁹⁸ In the same spirit, Netanyahu and his ruling coalition members—amongst them the Minister of Justice, Ayelet Shaked—have consistently sought to cast aspersions at the Israeli judiciary, particularly the Supreme Court.⁹⁹

Beinisch's speech must be understood to be a warning that baseless undermining of democratic institutions undermine democracy itself. In other words, we live in uncertain times when, in the name of political survival, politicians are willing to sacrifice, or at least minimize, the rule of law. In the context of militant-bystander democracy, it is essential to recall that the primary threat to democracy and democratic institutions comes from within.

What Beinisch's speech highlights is that threats can not only come from internal groups, whether right wing extremists or religious extremists, but from the executive branch that seeks, deliberately, to minimize the judiciary. She said:

98. Moran Azulay & Shahar Hay, *Herzog: Netanyahu's Attacks on Judiciary a 'Clear and Present Danger to Democracy'*, YNETNEWS (May 1, 2018), <https://www.ynetnews.com/articles/0,7340,L-5247664,00.html>.

99. See Revital Hovel, *Israel's Chief Justice Warns Government in Landmark Speech: Judicial Branch 'Under Unprecedented Attack'*, HAARETZ (July 5, 2018), <https://www.haaretz.com/israel-news/israel-s-chief-justice-judicial-branch-under-attack-1.6062718>; Mordechai Kremnitzer, *Israel's War on Democracy Is Here—and the Justice Minister Is Leading the Charge*, HAARETZ (Aug. 7, 2018), <https://www.haaretz.com/israel-news/.premium-israel-s-war-on-the-high-court-is-here-justice-minister-at-its-helm-1.6344247>.

I would like to share with you the great concern I feel these days for the continued existence of the basic values of Israeli democracy, for the status of law and the rule of law, and for the structure of the regime established here.

The institutional division of government authorities, the role of the courts and the role of the Supreme Court are experiencing a continuous process aimed at undermining their status, inspired by government policy.

The value of *mamlachtiyut* (loyalty and respect for the state institutions), which David Ben-Gurion attributed so much importance to, and the efforts invested in the abolition of partisanship and divisions in the army, in education and the internalizing of subordination to the rule of law - are all at risk. A magnificent legal system was established here, on the foundation of respect for state institutions and on the foundations of a value-based philosophy, one that is independent, Jewish and liberal. All this happened in the difficult conditions of the early days of the state, and when society in Israel was divided and not yet formed into one people. We have since come a long way in many fields and can boast many achievements. It seems that we are currently in the midst of a process that might erode these achievements, because it is intended to weaken the institutions of the law. . . . The significance of this trend is an attack on the envelope whose function is to protect the democratic system of government and human rights, and to allow the executive branch - the government - to wield power without judicial review and legal guidance, under the auspices of the legislative branch - the Knesset.

Under the misguided slogan of governability, which is replacing the *mamlachtiyut* approach, we are witnessing the strengthening of the tendency to intentionally shrink the powers and functions that are distinctly the functions of the judicial system. In order to achieve this objective, misleading information is disseminated regarding the Court, the judges, and the judicial proceedings.

New bills, some of which are designed to solve personal and concrete problems, instead of taking into account the public interest in a broad sense, might jeopardize, in the long run, the war on corruption and the obligation of all agencies to act only within the framework of the law.¹⁰⁰

100. Dorit Beinisch, retired President of the Israeli Supreme Court, Without the Rule of Law, Israel's Existence Is in Danger, (Nov. 30, 2017) (original Hebrew transcript available at <https://www.yediot.co.il/articles/0,7340,L-5050287,00.html> (last accessed Sept. 13, 2018)) (translated above by Ori Nir).

While politicians often shift the blame when they come under attack, a deliberate minimization and delegitimization of a democracy's judiciary is a more dangerous tactic. The more a judiciary's legitimacy is questioned; the more tenuous democracy becomes. A fair and impartial judiciary, beholden to no power greater than its own authority and the nation's laws,¹⁰¹ is the bedrock of democracy.

The judiciary insures protection of rights, freedoms, and privileges. Similarly, it guarantees that those who violate the laws, regardless of status and station, will be dealt with accordingly and if necessary, suffer the consequences of their actions. To minimize this for the sake of actively seeking a two-tiered system, whereby any person is above the law and free from ramifications, is extremely dangerous.

Minimizing the judiciary is bad enough. Delegitimizing the judiciary is, for lack of a better phrase, playing with fire. Democracy is inherently tenuous or fragile. The undermining of the very institution entrusted with justice for all and ensuring equal protection before the law demands a strong response. To ignore this deliberate attack is to be a bystander, exactly what a democracy under attack cannot tolerate.

Militant democracy demands a strong response to an attack on the judiciary, whether the attack comes from the executive branch, the legislature, the media, or the public. Criticism is one thing; delegitimization is something very different. Criticism is important and essential. Delegitimization, however, should not be tolerated. That is what President Beinish's clarion call highlights.

Furthermore, when politicians attack democratic institutions, they legitimize anti-democratic extremism. Certainly, criticism of government activity is necessary for a thriving democracy, but attacking democratic institutions on the basis of their very existence and authority is something else entirely. When members of the government contend that government institutions, like the judiciary, lack legitimacy as a matter of political strategy, they incite extremists to do the same. They legitimize extreme, antidemocratic values, whether intentionally or not.

101. Israel, like Great Britain, does not have a constitution.

VI. CONCLUSION

In Germany, Israel, and the Netherlands today, there exist serious internal threats to democracy. In Germany, it is the ever-present white nationalist movement. White nationalist extremists are alive, well, and politically active in Germany today. In Israel, the greatest threat to democracy is again, the far-right. It is the far-right that the Israeli government has historically exercised its tools of militant democracy against and the threat remains today. Finally, in the Netherlands, it is the far-right that openly oppose and call out of the Moroccan population on the basis of nothing more than biology and geography. But the Netherlands also faces a legitimate threat from Islamists as well.

Like any true threat to democracy, the threats these three countries face are internal. Their collective feet are already in the door because the laws and processes allow them to be. Do the democracies of Germany, Israel, and the Netherlands run the risk then of being bystanders to their individual extremist threats? While there is no clear answer to this question, history tells us that there are certain threats that are particularly insidious. In all three countries, the extremist threat has legitimate representation in political parties and the platforms of those parties. The Alternative for Germany party in Germany,¹⁰² the Jewish Home party in Israel,¹⁰³ and the Party for Freedom in the Netherlands¹⁰⁴ each represent some far-right ideals.

While none of these three parties market themselves as extremist in view, they provide mainstream representation for extremist viewpoints. Even though their party platforms, in the case of the Netherlands and Germany, are not explicitly anti-democratic in nature, militant democratic principles should still provide protection for democracy and society. This is especially important because many of the ideals of all three parties threaten minorities.

102. Jefferson Chase, *AFD: What You Need to Know About Germany's Far-Right Party*, DW (Sept. 24, 2017), <https://www.dw.com/en/afd-what-you-need-to-know-about-germanys-far-right-party/a-37208199>.

103. See, e.g., Stuart Winer, *Anger at Jewish Home Campaign Warning of Ultra-Orthodox Takeover in Jerusalem*, TIMES OF ISR. (Aug. 6, 2018), <https://www.timesofisrael.com/jewish-home-campaign-warning-of-ultra-orthodox-takeover-in-jerusalem-raises-ire/>.

104. Ashley Kirk & Patrick Scott, *Dutch Election: How the Far Right Could Win but Not Rule in a Country Known for Its Liberal Values*, TELEGRAPH (Mar. 17, 2017), <https://www.telegraph.co.uk/news/0/dutch-election-far-right-could-win-not-rule-country-known-liberal/>.

Democracy, though by definition a majoritarian system, delegitimizes itself when it fails to protect minorities. In light of this, it is understandable that some democracies can and should find themselves considering more militant responses to internal threats that seek to oppress minorities. Ultimately, the heart of the tension between militant and bystander democracy is the balance between majority and minority interests.

Militant democracy invokes long standing principles. Hate speech and hate crime laws, party banning provisions, and constitutional limitations on speech and political representation can be and are indefinite, subject only to legislative changes. They cannot be reversed at the order of the executive.

It is important to understand what sets militant democratic principles apart in order to understand their gravity. They should not be adopted or undertaken lightly. But the risks of undertaking these measures must be weighed against the cost of doing nothing.

These balancing exercises are precisely what the government of Israel, Germany, and the Netherlands should be engaging in now. In each of these three countries the rise of the far-right, however it may differ among the three, poses a substantial threat to their democracies. Adopting the militant democracy principles articulated by Loewenstein, particularly regarding free speech and banning political parties, would significantly minimize the palpable danger to democratic value that is the essence of intolerance. Reflexively rejecting such an approach, opting for what we have defined as bystander democracy, opens the door to the harms highlighted throughout this article. The decision whether to apply militant democracy principles, in the name of preserving democracy requires recognition of internal threats and the harms imbued in them. This imposes on politicians the requirement to understand the dangers of hate, racism, and extremism. As history repeatedly demonstrates, a significant number of political leaders have either ignored this reality or made a calculation that intolerance can be tolerated.

The list of victims of bystander democracy is unfathomably long. Tragically, it is an ever-growing list for the simple reason that the lessons of history are, far too often, relegated to the back shelves. It is seemingly easier to ignore threats than to address them, for that requires both sensitivity to consequences and a willingness to confront the forces of darkness.

History illustrates the consequences of failing to respond to racism, extremism, and violence. The two measures analyzed in the pages above—limiting free speech and banning political parties—when applied judiciously, with respect for the rule of law, subject to separation of powers, checks and balances, and judicial review are the most effective way to preserve democracy while respecting democratic values.