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Michael M. Pavlovich

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## A NAZI WAR CRIMINAL AS A STANDARD BEARER FOR GENDER EQUALITY? - THE STRANGE SAGA OF JOHANN BREYER

The modern judicial system's willingness to shield American women from any form of invidious gender-based discrimination and to demand the equal protection of the laws for all, is perhaps best evidenced by a recent courageous decision of the United States Court of Appeals for the Third Circuit, *Breyer v. Meissner*.<sup>1</sup> In this decision, the court *upheld* the claim of Johann Breyer, an admitted Nazi war criminal who had persecuted thousands in the hellish concentration camps of the Second World War, to American citizenship through his American-born mother.

The Third Circuit ruled that two Acts of Congress unconstitutionally discriminated against an American-born woman on the basis of her gender, with the effect of depriving her son of American citizenship at birth.<sup>2</sup> The first act, Section 1993 of the Revised Statutes of 1874,<sup>3</sup> allowed only American citizen fathers to pass their citizenship to their offspring born abroad, while preventing American citizen mothers from doing the same. The second act, Section 101(c)(2) of the Immigration and Nationality Technical Corrections Act ("INTCA") of 1994<sup>4</sup> made Section 1993 officially gender neutral, but specifically reserved the right to prevent American citizen mothers from passing on their citizenship to their foreign born offspring who would eventually participate in the crimes against humanity inflicted by the Nazis upon Europe in the Second World War.

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1. 214 F.3d 416 (3d Cir. 2000).

2. *Id.* at 429.

3. Rev. Stat. § 1993 (1874) (reenactment of Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604).

The text of the statute provides:

All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose *fathers* were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not to descend to children whose *fathers* never resided in the United States.

*Wauchope v. U.S. Dep't. of State*, 985 F.2d 1407, 1410 n.1 (9th Cir. 1993) (quoting Rev. Stat. §1993 (1874)) (emphasis added).

4. Pub. L. No. 103-416, sec 101(c), 108 Stat. 4306 (1994) (current version at 8 USC §1401(c)). Section 101(c)(1) eliminated the gender-based distinction inherent in Section 1993, *supra* (conferring citizenship at birth to all persons born to an American mother or father), but mandated that the imposition of gender neutrality "shall not confer citizenship on, or affect the validity of any denaturalization, deportation, or exclusion action against, any person who . . . was excluded from, or who would not have been eligible for admission to, the United States under the Displaced Persons Act of 1948 . . . ." *Id.*

The Third Circuit's declaration that both acts of Congress were unconstitutional violations of a mother's equal protection rights shows that even the most heinous of human beings deserve protection from invidious gender-based discrimination, even at the price of allowing a participant in the Holocaust to claim status as a United States citizen. Part I of this note examines the nature of Johann Breyer's wartime activities in the context of the Holocaust and the problem of Nazi war criminals immigrating to the United States in the chaotic aftermath of the Second World War. Part II of this note explores the ineffectual legislative attempts to exclude Nazis from the immigration process and will demonstrate how Johann Breyer's entry into the United States typifies the failings of the system. Part III examines the legal standards governing the later attempts by the United States government to denaturalize and remove those Nazi war criminals who had gained entry into the United States. Finally, Part IV of this note examines the litigation surrounding Johann Breyer's successful bid to obtain American citizenship through the assertion of his mother's equal protection rights, and the Third Circuit's courageous protection of her right to pass on that citizenship, even to a son who would become a participant in what one scholar has termed, "the ultimate evil."<sup>5</sup>

#### BACKGROUND AND WARTIME ACTIVITIES OF JOHANN BREYER

Johann Breyer was born on May 30, 1925, in the small farming village of Nova Lenza, in what was then Czechoslovakia.<sup>6</sup> His father was German, and his mother, Katharina, was born in Manayuk, Pennsylvania, just outside Philadelphia.<sup>7</sup> On February 10, 1943, Breyer became a member of the *Waffen Schutzstaffel* (SS)<sup>8</sup> branch

5. Stuart Eizenstat, *Keynote Address*, 25 FORDHAM INT'L L.J. 205, 208 (2001), *quoted in* Breyer v. Meissner, No. 97-6515, 2002 U.S. Dist. LEXIS 17869, at \*4 (E.D. Pa. Sept. 18, 2002), *aff'd by* Breyer v. Ashcroft, 350 F.3d 327 (3d Cir. 2003).

6. *See* Breyer, No. 97-6515, 2002 U.S. Dist. LEXIS 17869, at \*4.

7. Breyer v. Meissner, No. 97-6515, 2001 U.S. Dist. LEXIS 18705, at \*1 (E.D. Pa. Nov. 16, 2001); *see also* United States v. Breyer, 841 F. Supp. 679, 682-85 (E.D. Pa. 1993), *aff'd in part and vacated in part* (determining that secondary evidence establishes Katharina Breyer's birth in the United States on December 23, 1897, thus, confirming her status as an American citizen).

8. The *Waffen SS* comprised the armed (militarized) component of the *Schutzstaffel* (SS), the virtual empire within an empire upon which historians have laid much of the responsibility for the planning and systematic implementation of the Holocaust. *See generally*, HEINZ HÖHNE, THE ORDER OF THE DEATH'S HEAD: THE STORY OF HITLER'S S.S. (Richard Barry trans., 1970) (providing a broad-based history of the role and composition of the SS within the Third Reich).

of the German armed forces, at the age of 17, with subsequent assignment into the *SS Totenkopfsturmbann* ("Death's Head" Battalion), a subdivision of the *SS*, on February 10, 1943.<sup>9</sup> As part of the *SS Totenkopf* units, Breyer underwent four weeks of basic infantry training and swore an oath of allegiance to Adolf Hitler.<sup>10</sup>

The *SS Totenkopf's* responsibility during the war was the armed guarding of the genocidal factories known to history as the concentration and extermination camps run by the Nazi regime,<sup>11</sup> where "inmates were enslaved, tortured, and executed because of race, religion, national origin, or political beliefs."<sup>12</sup> *SS Totenkopf* members wore standard uniforms with the unique "Death's Head" insignia (skull and crossbones) on their collars,<sup>13</sup> and frequently engaged in the "inhuman and brutish treatment of prisoners."<sup>14</sup>

Breyer served as an armed guard at the Buchenwald concentration camp from February 1943 to May 1944, and at the infamous Auschwitz death camp from May to August, 1944.<sup>15</sup> His responsibilities at the two camps included orders to "[accompany] prisoners to and from work sites" and to stand "guard with a loaded rifle at the perimeter of the camp with orders to shoot any prisoner who tried to escape."<sup>16</sup> In the camps, the *Totenkopf* guards were encouraged to "maximize brutality" in their treatment of prisoners, including an unchecked ability to punish and execute prisoners for any reason, including mere personal entertainment.<sup>17</sup>

After leaving Auschwitz in August 1944,<sup>18</sup> Breyer joined the vast mass of refugees wandering across Central Europe.<sup>19</sup> In the immediate aftermath of the war in 1945, Breyer found work as a tool-and-die maker in postwar Germany.<sup>20</sup> Breyer applied to immigrate to America in 1952, as the United States was actively recruiting skilled metal workers to support the war effort in

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9. See *Breyer*, 2002 U.S. Dist. LEXIS 17869, at \*22.

10. *Breyer*, 2001 U.S. Dist LEXIS 18705, at \*2.

11. See HÖHNE, *supra* note 8, at 650. See generally DEBORAH DWORK & ROBERT JAN VAN PELT, *HOLOCAUST: A HISTORY* (2002) (offering an easily readable and updated history of Nazi genocidal activities during the Second World War).

12. *Breyer*, 214 F.3d at 419.

13. *United States v. Baumann*, 764 F. Supp. 1335, 1335 (E.D. Wis. 1991); K. Lesli Ligorner, *Nazi Concentration Camp Guard Service Equals "Good Moral Character"? United States v. Lindert*, 12 AM. U.J. INT'L L. & POL'Y 145, 158 (1991).

14. *Baumann*, 764 F. Supp. at 1335.

15. See *Breyer*, 214 F. 3d at 419.

16. *Id.*

17. See MICHAEL BURLEIGH, *THE THIRD REICH: A NEW HISTORY* 200-03 (2000).

18. *Breyer*, 214 F.3d at 419.

19. See *Breyer*, 2002 U.S. Dist. LEXIS 17869, at \*39.

20. See *id.*

Korea.<sup>21</sup> Breyer managed to successfully conceal his wartime activities while participating in the immigration process, which allowed him to receive eligibility for a visa as a 'displaced person,' under the Displaced Persons Act of 1948 ("DPA"),<sup>22</sup> on March 28, 1952.<sup>23</sup> Breyer subsequently entered the United States under an immigrant visa in May 1952 and became a naturalized United States citizen in August 1957,<sup>24</sup> leading a quiet life and working as a tool-and-die maker for the next forty years.<sup>25</sup>

The United States government filed a denaturalization action against Breyer in 1992 pursuant to 8 U.S.C. § 1451(a)<sup>26</sup> seeking to set aside Breyer's American citizenship and cancel his certificate of naturalization.<sup>27</sup> Breyer defended by claiming that in addition to gaining citizenship by virtue of the Displaced Persons Act, he was also entitled to American citizenship at birth through his American born mother.<sup>28</sup> Before specifically addressing Johann Breyer's situation, it will be useful to examine the problem of former Nazi war criminals gaining access to American citizenship in more detail.

21. *See id.*

22. Pub. L. No. 80-774, 62 Stat. 1009, *amended by* Pub. L. No. 81-555, 64 Stat. 219 (1950). The Displaced Persons Act's stated purpose is "to authorize for a limited period of time the admission into the United States of certain European displaced persons for permanent residence. . . ." 262 Stat. 555. The Act defined an "[e]ligible displaced person" as:

[a] displaced person . . . (1) who on or after September 1, 1939, and on or before December 22, 1945, entered Germany, Austria, or Italy or the American sector, the British Sector, or the French sector of either Berlin or Vienna or the American zone, the British zone, or the French zone of either Germany or Austria; or a person who, having resided in Germany or Austria, was a victim of persecution by the Nazi government and was detained in, or was obliged to flee from such persecution and was subsequently returned to, one of these countries as a result of enemy action, or of war circumstances, and on January 1, 1948, had not been firmly resettled therein, and (2) who is qualified for admission into the United states for permanent residence. . . .

647 Stat. 774 (1948)

The final amended version of the original Displaced Persons Act specifically excludes from admission into the United States:

[A]ny person . . . who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States, or to any person who advocated pr assisted in the persecution of any person because of race, religion, or national origin

262 Stat. 555 (1950).

23. *Breyer*, 214 F.3d at 419.

24. *Id.*

25. Maryclaire Dale, *U.S. Nazi Hunters Race 'Grim Reaper'*, TORONTO STAR, Sept. 24, 2002, at A19.

26. 8 U.S.C. § 1451(a)(mandating the revocation of naturalization in cases of illegally obtained citizenship).

27. *United States v. Breyer*, 829 F. Supp. 773, 774 (1993).

28. *See id.* at 779-80.

*The Problem Of Nazi War Criminals Entering The U.S.*

The ease with which Breyer and other Nazi war criminals entered the United States was a function of the chaotic aftermath of Germany's surrender. The unprecedented destruction wrought by the Second World War initiated a massive resettlement of Europe's populations in the war's aftermath.<sup>29</sup> Recent estimates reveal that the war displaced almost eight million people from their homes in war-torn Europe alone.<sup>30</sup> Approximately one million of these individuals either refused or were unable to return to their homes due to the presence of Soviet forces in Eastern Europe and the scale of destruction.<sup>31</sup> The majority of these individuals consisted of liberated concentration camp prisoners, prisoners of war, forced laborers, and civilian refugees fleeing the advance of the Red Army.<sup>32</sup>

However, many of the estimated 250,000 former Nazi war crimes participants<sup>33</sup> took full advantage of the chaotic situation, anonymously infiltrated the mass of legitimate refugees rendered homeless by the war, and escaped scrutiny for their crimes.<sup>34</sup> An estimated one thousand to ten thousand<sup>35</sup> of these barbaric individuals, including Johann Breyer, immigrated into the United States as 'legitimate' displaced persons and lived as ordinary immigrants, escaping accountability for their actions for decades.<sup>36</sup>

INEFFECTIVE CONGRESSIONAL ATTEMPTS TO CURTAIL NAZI  
IMMIGRATION TO THE U.S.

Under the Constitution, Congress holds the power to grant or to withhold citizenship and control immigration and naturalization.<sup>37</sup> In the aftermath of the Second World War, the U.S. Government made an inspired effort to allow hundreds of thousands of displaced

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29. Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems*, 29 CAL. W. INT'L. L.J. 1, 13 (1998).

30. Michael Creppy, *Nazi War Criminals in Immigration Law*, 12 GEO. IMMIGR. L.J. 443, 444 (1980).

31. Lippman, *supra* note 29, at 13.

32. Creppy, *supra* note 30, at 444.

33. Lippman, *supra* note 29, at 7.

34. *See id.* at 99.

35. *See id.* at 50.

36. *See generally* ALLAN A. RYAN JR., *QUIET NEIGHBORS* (1984) (discussing the ease with which Nazi war criminals were able to gain entry into the United States and the sheer scale and nature of former Nazis living in America).

37. Shari B. Gersten, Note, *United States v. Kungys: Clarifying the Materiality Standard in DeNaturalization Proceedings?*, 38 AM. U. L. REV. 429, 433 (1989)(citing U.S. CONST. art. I, §8, cl. 4).

persons, particularly the victims of Nazi oppression, to immigrate to the United States to rebuild their shattered lives.<sup>38</sup>

Although the United States attempted to prevent the influx of individuals who participated in war crimes into the nation in the aftermath of the Second World War, the means chosen by Congress to effectuate the dual goals of admission of victims and exclusion of oppressors proved ineffective at best.<sup>39</sup> It will be useful to examine the most important legislative acts that attempted to achieve Congress' dual goals of allowing legitimate refugees into the United States while keeping their persecutors out of the immigration process.

The first formal legislative attempt by the United States Government to prevent Nazi war criminals from entering the country came through its adoption of a provision of the Constitution of the International Refugee Organization ("IRO") in the Displaced Persons Act of 1948.<sup>40</sup> The impetus for this legislation stemmed from a mandate from President Truman to allow 200,000 persons to emigrate from war-torn Europe to the United States without regard to the standard immigration quotas.<sup>41</sup> At this time, the United States' immigration policy centered around a 'quota system' which placed a ceiling, restricting the number of potential immigrants based on the immigrant's geographical place of origin.<sup>42</sup>

To qualify for a visa under the DPA, an alien had the burden of proving that he or she was a legitimate displaced person as defined by the IRO Constitution.<sup>43</sup> Essentially, this meant that the potential immigrant had to prove that he or she was a victim of some form of

38. Creppy, *supra* note 30, at 444.

39. See RYAN, *supra* note 36, at 5.

40. The United Nations founded the IRO immediately after the Second World War to "deal with all aspects of the refugee problem in postwar Europe." *Fedorenko v. United States*, 449 U.S. 490, 496 n.5 (1981) (Service as a concentration camp guard during the Second World War rendered an individual ineligible for an immigrant visa). This organization created a "network of camps and resettlement centers where . . . refugees were registered, housed, fed, and provided with medical care." *See id.*

41. Ligorner, *supra* note 13, at 154; *see also supra* note 22.

42. Creppy, *supra* note 30, at 445.

43. *See id.*

wartime governmental oppression and had left his or her original country of residence because of such oppression.<sup>44</sup>

The initial provisions of the DPA concerning the possible admission of former war criminals specifically forbade the issuance of immigration visas to persons who had "assisted the enemy in persecuting civilians," or "voluntarily assisted the enemy forces."<sup>45</sup> These provisions also contained a clause that proscribed the issuance of visas to "former members of movements hostile to the United States."<sup>46</sup> Therefore, this provision of the DPA theoretically barred former Nazi war criminals from ever attaining eligible displaced person status.

Those seeking to enter the United States under the DPA also faced a series of procedures designed to screen applicants for eligibility.<sup>47</sup> The primary method of ascertaining whether an applicant was eligible for displaced person status was a series of interviews conducted by investigators.<sup>48</sup> Initially, representatives of the IRO interviewed each applicant to ascertain whether the person was a refugee or a displaced person.<sup>49</sup>

The applicant then had to undergo another interview with officials from the Displaced Persons Commission<sup>50</sup>, who made a determination regarding the applicant's eligibility for an immigrant visa.<sup>51</sup> State Department and Immigration and Naturalization Service officials subsequently reviewed this determination.<sup>52</sup> However, these interviews were ineffective as viable background

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44. Annex I of the IRO Constitution defined a "displaced person" as:

A person who, as a result of the actions of the authorities of the regimes has been deported from, or has been obliged to leave his country of nationality or former habitual residence, such as persons who were compelled to undertake forced labor or who were deported for racial, religious, or political reasons.

Constitution Int'l Refugee Org, 62 Stat. 3037, Annex I, art. II, para. 1 (entered into force Aug. 20, 1948) cited in Creppy, *supra* note 30, at 445. The United States ratified the IRO Constitution on December 16, 1947. See *Fedorenko*, 449 U.S. at 496 n.3.

45. Ligorner, *supra* note 13, at 154, (quoting *Fedorenko*, 449 U.S. at 495).

46. *Id.* Section 13 of the Displaced Persons Act (as originally enacted) provides "No visas shall be issued under the provisions of this Act to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States. . ." 62 Stat. 1014 (1948).

47. David Birnbaum, Note, *Denaturalization and Deportation of Nazi War Criminals in the United States: Upholding Constitutional Procedures in a Single Proceeding*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 201, 207 (1989).

48. *Id.*

49. *Fedorenko*, 449 U.S. at 495.

50. The Displaced Persons Commission consisted of three individuals appointed by the President and was established by the Displaced persons Act to "formulate and issue regulations . . . for the admission into the United States of . . . eligible displaced persons." Displaced Persons Act, 62 Stat. 1012, §8 (1948).

51. *Fedorenko*, 449 U.S. at 496.

52. *Id.*



checks as the "investigators relied solely on information supplied by the applicant to determine eligibility."<sup>53</sup> Therefore, it was relatively easy for former Nazis to misrepresent the nature of their wartime activities to investigators, and thus, to obtain eligibility for a Displaced Persons visa under the DPA of 1948.<sup>54</sup> This is evidenced by the fact that an estimated ten thousand Nazi collaborators and war criminals immigrated to the United States with visas that had been granted under the Displaced Persons Act.<sup>55</sup>

The next important component of Congressional immigration legislation relating to Nazi war criminals remains the backbone for much of current U.S. immigration law. Congress passed the Immigration and Nationality Act ("INA") of 1952<sup>56</sup> in an attempt to combine the multiple areas of immigration and naturalization into a single piece of legislation.<sup>57</sup> Section 1451(a) of the INA still provides a basis for revoking a suspected war criminal's citizenship.<sup>58</sup> Section 1451(a) provides that citizenship "illegally procured," or "procured by concealment of a material fact or by willful misrepresentation" shall be revoked.<sup>59</sup> Section 1451(a) would eventually become the primary statutory authority for revoking a suspected Nazi's citizenship in principle, although it would take decades before Section 1451(a) would become widely used in such a manner.<sup>60</sup>

Although the DPA officially expired in 1951, Congress decided to pass similar legislation to address the continuing problems posed by refugees in Europe and to provide a vehicle for refugees fleeing the shadow of the Iron Curtain.<sup>61</sup> This legislation, the Refugee Relief Act of 1953,<sup>62</sup> actually made it easier, at least statutorily, for Nazi war criminals to enter the United States than the DPA it replaced as it did not contain any explicit language identifying Nazi persecutors as a class ineligible for immigration visas, as the DPA had.<sup>63</sup> Conversely, the Refugee Relief Act used broader language in denying immigration visas to any person who "personally advocated

53. Birnbaum, *supra* note 47, at 208.

54. *See id.*

55. RYAN, *supra* note 36, at 26.

56. *Codified at* 8 U.S.C. §§ 1-1557 (2003).

57. Susan H. Lin, Comment, *Aliens Beware: Recent United States Legislative Efforts to Exclude and Remove Alien Human Rights Abusers*, 15 EMORY INT'L L. REV. 733, 737 n.22 (2001).

58. Birnbaum, *supra* note 47, at 209.

59. *Fedorenko* 449 U.S. 490 at 496 (citing 8 U.S.C. § 1451(a)).

60. *See generally* RYAN, *supra* note 36 (discussing the long delay in actual effective prosecution of Nazi war criminals).

61. Creppy, *supra* note 30, at 447.

62. Pub. L. No. 751, 67 Stat. 400, *amended by* Act of Aug. 31, 1954, 68 Stat. 1044 (1954).

63. Ligorner, *supra* note 13, at 155-56 n.61-62.

or assisted in the persecution of any person or group of persons because of race, religion, or national origin.”<sup>64</sup> The reason for this shift to broader statutory language in the RRA stemmed from the emergence of the Cold War and the view that a potential immigrant’s Communist leanings were more dangerous than the issue of whether an immigrant served as a Nazi during the Second World War.<sup>65</sup> Thus, even with the expiration of the relatively porous DPA, its replacement was calibrated toward battling the spread of Communism rather than keeping former Nazis from immigrating to America’s shores.

### *Breyer’s Entry into the United States*

An examination of Johann Breyer’s immigration to the United States and his eventual naturalization illustrates how the flaws in the postwar immigration policy allowed war criminals to legally enter the United States. Breyer applied to the U.S. Displaced Persons Commission in May of 1951 to be categorized as a displaced person under the DPA for the purpose of obtaining a visa to immigrate to the U.S.<sup>66</sup> Initially, the interviewer rejected Breyer’s application, because Breyer admitted that he had served in the *Waffen SS*.<sup>67</sup> However, the criteria changed months later, reflecting the passage of the more lenient RRA, and mere membership in the *Waffen SS* was no longer considered a bar to displaced person status.<sup>68</sup>

Breyer did not disclose his service in the *SS Totenkopf sturmbanne*, but admitted serving in the *Waffen SS* in a subsequent interview with the Displaced Persons Commission in which he was certified as a displaced person eligible for a visa.<sup>69</sup> Breyer then applied for and received permission to immigrate to the United States as an alien, entering the United States in May, 1952.<sup>70</sup> Five years after entering the United States, Breyer filed a petition for naturalization and the District Court for the Eastern District of

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64. *Id.* (quoting Section 14 of the RRA, *see supra* note 62).

65. *See* RYAN, *supra* note 36, at 327.

66. *United States v. Breyer*, 41 F.3d 884, 886 (3rd Cir. 1994).

67. *See id.* The *Waffen SS* constituted the militarized component of the *SS* and was organized into division-sized units which fought on all fronts of World War II in front-line actions and were regarded as elite infantry forces. The *Totenkopfsturmbanne* was a subsection of the *Waffen SS* that generally only guarded concentration camps. *See* HÖHNE, *supra* note 7, at 436-82.

68. *Breyer*, 41 F.3d at 886.

69. *See id.*

70. *See id.*

Pennsylvania issued Breyer a certificate of naturalization.<sup>71</sup> Therefore, even though Breyer was initially denied displaced persons status because of suspicions concerning his wartime service, the relaxation of the requirements brought on by the Cold War and the passage of the Refugee Relief Act allowed him to receive his immigrant visa and eventually become a United States citizen.

LATER ATTEMPTS BY THE UNITED STATES GOVERNMENT TO  
DENATURALIZE AND REMOVE NAZI WAR CRIMINALS WHO HAD  
GAINED ENTRY INTO THE UNITED STATES

*Congress Strikes Back - The Holtzman Amendment and the Formation of the OSI*

The porous nature of previous Congressional attempts to shield the United States from an influx of former Nazi persecutors persuaded Congresswoman Elizabeth Holtzman to introduce and sponsor the most important piece of legislation relating to Nazi war criminals living in the United States.<sup>72</sup> The Act of October 30, 1978, known as the Holtzman Amendment<sup>73</sup>, "modified the Immigration and Nationality Act specifically to exclude Nazi war criminals from eligibility to receive entry visas," and also made ex-Nazis deportable if found inside the United States.<sup>74</sup> The Holtzman Amendment "applies to any alien who, between March 23, 1933, and May 8, 1945, in conjunction with the Nazi government or an associated government, 'ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.'"<sup>75</sup>

It is important to note that the Holtzman Amendment reveals a conscious decision to rely on the two-step process of denaturalization and deportation rather than criminal prosecution to remove former Nazis from mainstream American society.<sup>76</sup> This reliance on deportation and denaturalization possesses the practical

71. *See id.*

72. Robert A. Cohen, Note, *United States Exclusion and Deportation of Nazi War Criminals: the Act of October 30, 1978*, 13 N.Y.U. J. INT'L L. & POL. 101, 112 (1980).

73. Pub. L. No. 95-549, 92 Stat. 2065 codified at 8 U.S.C. §1227(a)(4)(D)(2003)(General Classes of Deportable Aliens). See also 8 U.S.C. § 1182(a)(3)(E)(i), (ii) (Inadmissible Aliens.)

74. Lippman, *supra* note 29, at 51.

75. *Id.* (quoting Holtzman Amendment, Act of Oct. 30, 1978, codified at 8 U.S.C. § 1182(a)(3)(E)).

76. Lippman, *supra* note 29, at 52-53.

advantage of requiring that the government seeking to remove the accused war criminal satisfy a mere civil statutory standard of proof, rather than a more rigorous criminal burden of proof.<sup>77</sup>

The majority of former Nazi war criminals that the government wishes to prosecute have surreptitiously acquired United States citizenship, consequently, immigration laws no longer apply to them.<sup>78</sup> This is because United States citizens are not subject to immigration laws, regardless of how their citizenship was obtained.<sup>79</sup> Therefore, the government cannot simply deport ex-Nazis, but must denaturalize them first, stripping them of their citizenship and reverting them to 'alien' status, before initiating removal proceedings to force them out of the country.<sup>80</sup>

The right to acquire United States citizenship is "a precious one," and once an individual has acquired that citizenship, "its loss can have severe and unsettling consequences."<sup>81</sup> It is for these reasons that the Supreme Court has mandated that "[t]he Government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship."<sup>82</sup> The evidence presented in a revocation of citizenship action must be "clear, unequivocal, and convincing and not leave the issue in doubt."<sup>83</sup>

When the government brings a successful denaturalization proceeding against a former Nazi war criminal, the individual is stripped of his or her citizenship and essentially becomes an alien again.<sup>84</sup> The alien ex-Nazi appears before an Immigration Judge, and at the judge's discretion, may be physically removed from the

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77. See *id.* at 53.

78. Stacey Belisle, Note, *United States v. Balsys: The United States Supreme Court Takes A Stand to Maintain the Fifth Amendment's Integrity*, 77 U. DET. MERCY L. REV. 341, 351. This distinction is crucial as "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Matthews v. Diaz*, 427 U.S. 67, 79-80 (1976) (discussing distinctions between aliens and citizens and holding that aliens are not entitled to enjoy all of the benefits of citizenship).

79. Creppy, *supra* note 30, at 455.

80. See *id.*

81. *Fedorenko*, 449 U.S. at 505 (citing *Costello v. United States*, 365 U.S. 265, 269 (1961) (explaining that "in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside" *Id.*); *Baumgartner v. United States*, 322 U.S. 665, 676 (1944) ("... citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired. We ... require solid proof that citizenship was falsely and fraudulently procured." *Id.*); *Schneiderman v. United States*, 320 U.S. 118, 125 (1942) ("... rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted." *Id.*).

82. *Fedorenko*, 449 U.S. at 505 (quoting *Costello v. United States*, 365 U.S. at 269).

83. *Id.* (citing *Schneiderman*, 320 U.S. at 125).

84. See Belisle, *supra* note 78, at 353.

United States.<sup>85</sup> A Nazi war criminal cannot avoid removal from the United States by alleging that he or she would be persecuted if forced to return to his or her homeland.<sup>86</sup>

As a corollary to the Holtzman Amendment, and to assist in the Amendment's implementation and enforcement, the Attorney General of the United States created the Office of Special Investigations ("OSI") in 1979.<sup>87</sup> The OSI operates as part of the Criminal Division of the Department of Justice and is responsible for identifying and investigating suspected Nazis.<sup>88</sup> The OSI, using a staff comprised of historians and attorneys, also initiates and prosecutes the denaturalization and deportation legal actions against suspected Nazis.<sup>89</sup> The OSI usually initiates actions based on the immigrant's illegal procurement of citizenship, or willful and material misrepresentations during the naturalization process, and/or failure to possess the requisite good moral character.<sup>90</sup> To date, the OSI has closed well over one thousand cases and has many more under investigation.<sup>91</sup>

### *Legal Standards In Denaturalization Cases*

The first seminal denaturalization case established that an alien has neither a moral nor a constitutional right to retain the privileges associated with citizenship if naturalization would have been denied but for false statements made by the applicant at the time of admission.<sup>92</sup> However, the applicant's false statements must be material. In the subsequent case of *Chaunt v. United States*,<sup>93</sup> the Supreme Court mandated a two-part test to determine the materiality of an applicant's misrepresentations: either "the suppressed facts, if known, would have warranted a denial of citizenship, or that the disclosure of these facts might have been useful in an investigation possibly leading to the discovery of other

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85. *Id.*

86. See Creppy, *supra* note 30, at 462.

87. See Lin, *supra* note 57, at 739.

88. See *id.*

89. See Creppy, *supra* note 30, at 455.

90. See Ligorner, *supra* note 13, at 453.

91. See Creppy, *supra* note 30.

92. *Johanessen v. United States*, 225 U.S. 227, 241-43 (1912) cited in Gersten, *supra* note 37, at 438.

93. 364 U.S. 350 (1960).

facts warranting a denial of citizenship.”<sup>94</sup> The government must prove either part of the test with “clear, unequivocal, and convincing evidence.”<sup>95</sup>

The important case of *United States v. Fedorenko*<sup>96</sup> established the legal standards involving the denaturalization and removal of Nazi war criminals from the United States.<sup>97</sup> Fedorenko was a concentration camp guard at various Nazi camps during the war, who claimed that the Germans forced him to perform such duties and denied participation in any atrocities.<sup>98</sup> The Court ruled that disclosure of the facts concerning Fedorenko’s service as an armed concentration camp guard would have, as a matter of law, made him ineligible for a visa under the DPA.<sup>99</sup> Thus, *Fedorenko* confirmed that “an individual’s capacity in serving the Third Reich can, in and of itself, establish the individual’s involvement in Nazi-sponsored persecution.”<sup>100</sup> This is significant as it establishes no requirement to prove the individual’s *actual* participation in wartime atrocities, which is problematic as the events in question occurred well over a half-century ago; mere service in certain Nazi units is sufficient to allow denaturalization and deportation.<sup>101</sup> Therefore, in Johann Breyer’s case, the OSI would only have to prove that Breyer actually served in a *Waffen SS Totenskopf* unit during the war to successfully prove that Breyer would have been ineligible to receive an immigrant visa.

### *The Johann Breyer Saga- From Genocide to Upholding Gender Neutrality*

On April 21, 1992, the OSI filed a “five-count complaint under section 1451(a) of the Immigration and Nationality Act to revoke and set aside Johann Breyer’s naturalized United States citizenship on the grounds that it was illegally procured . . . or was procured by concealment or willful misrepresentation. . . .”<sup>102</sup> Breyer, in an unusual and landmark step, conceded that he never mentioned his service as a concentration camp guard in the Second World War but raised the affirmative defense that his citizenship derived from his

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94. See *id.* at 352 cited in Gersten, *supra* note 37, at 440.

95. *Chaunt*, 364 U.S. at 352-54 (1960) cited in Gersten, *supra* note 37, at 441.

96. 449 U.S. 490.

97. See *id.*

98. See *id.* at 494.

99. *Id.* at 513-14.

100. *Ligornier*, *supra* note 13, at 166 (discussing *Federenko*, 449 U.S. 490).

101. See *id.*

102. *Breyer*, 41 F.3d at 887.

mother, an alleged United States Citizen.<sup>103</sup> Thus, the battle lines were drawn in a protracted and contentious war over Breyer's denaturalization, but one that would have important symbolic effects on women's rights in America.

A person born in the United States is automatically deemed a United States citizen under the Fourteenth Amendment.<sup>104</sup> A person born outside of the United States may also have a statutory right to United States derivative citizenship through certain familial relationships.<sup>105</sup> Usually, this involves the passing of citizenship to the child, at birth, from its United States citizen parents.<sup>106</sup> Breyer claimed that the OSI could not denaturalize him, because when he entered the country in 1952, he did so lawfully, as a United States citizen.<sup>107</sup> Breyer asserted that he derived citizenship at birth through his mother, whom he claimed was born near Philadelphia, Pennsylvania.<sup>108</sup> Following a four-day bench trial on the issue of Katarina Susanna Breyer's birthplace, the District Court held that secondary evidence proved that Breyer's mother was indeed born in the United States on December 23, 1897.<sup>109</sup> The District Court accorded particular weight to baptismal records, a 1930 Czechoslovak census, and post war documents signed by Breyer's mother.<sup>110</sup>

When Johann Breyer was born on May 30, 1925, in Czechoslovakia, section 1993 of the Revised Statutes of 1874<sup>111</sup> awarded United States citizenship to foreign-born offspring of United States citizen *fathers*, but not to the offspring of United States citizen *mothers*.<sup>112</sup> A court noted that gender-based distinctions had existed in laws of this nature since 1790, allowing only a citizen father to pass his citizenship by right of blood.<sup>113</sup> Section 1993 was amended in 1934 to make it gender neutral so

103. *Id.*

104. *Id.* at 887 n.2.

105. *See Breyer*, 41 F.3d at 887.

106. *See id.*

107. *Breyer*, 214 F.3d at 420.

108. *Id.*

109. *Breyer*, 841 F. Supp. at 684.

110. *See id.*

111. Rev. Stat. § 1993 (1874) (reenacting Section 1 of Act of Feb. 10, 1855, ch. 71, 10 Stat. 604) All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

*Id. cited in* *Wauchope v. United States Dep't of State*, 985 F.2d 1407, 1410 n.1 (9th Cir. 1993).

112. *Breyer*, 829 F.Supp. at 780.

113. *United States v. Breyer*, 23 F.Supp.2d 521, 525 (E.D. Pa. 1998).

that any child born thereafter, outside of the United States to either a United States citizen father or mother would be considered a United States citizen so long as the child fulfilled certain residency requirements.<sup>114</sup> Because Congress specifically chose not to make the 1934 gender-neutral amendment to §1993 retroactive, the previous version containing the gender-based distinction continued to govern the citizenship status of persons born before 1934, including Johann Breyer.<sup>115</sup>

In 1994, Congress finally took action to make the 1934 amendment retroactive for those born before 1934 by passing Section 101(c)(1) of the Immigration and Nationality Technical Corrections Act ("INTCA").<sup>116</sup> Section 101(c)(1) amended the Immigration and Nationality Act to confer citizenship at birth to "a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States."<sup>117</sup> This amendment contained an important exception - Section 101(c)(2) stated that the retroactive application "shall not confer citizenship on, or affect the validity of any denaturalization, deportation, or exclusion action against, any person who would not have been eligible for admission to the United States under the Displaced Persons Act of 1948."<sup>118</sup> This effectively meant that the gender-based distinction present in the non-retroactive version of section 1993 would remain in place for children of American-born mothers who had participated in Nazi persecution during the Second World War. Breyer sought to challenge the constitutionality of both Section 1993 and INTCA § 101(c)(2) because they denied his American citizen mother her right to pass on her citizenship to her offspring, while the statutes would confer United States citizenship on a similarly situated child if the child's father had been American.<sup>119</sup>

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114. *Id.* (citing Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797) ("any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States" *Id.*).

115. *See Breyer*, 214 F.3d at 421-22.

116. 103d Congress Oct. 25, 1994 108 STAT. 4305 [H.R. 783] Pub. L. No. 103-416, 108 Stat. 4305, 4306 (1994); *see supra* note 3 and accompanying text.

117. Pub. L. No. 103-416 (1994) at 4306. INTCA. § 101(c)(2) 8 U.S.C. 1401(h)(2003) *cited in Breyer*, 214 F.3d at 422.

118. *Breyer*, 214 F.3d at 422 (quoting Pub. L. No. 103-416, 108 Stat. (1994) at 4306. INTCA § 101(c)(2)).

119. *Breyer*, 214 F.3d at 422.



JOHANN BREYER'S SUCCESSFUL BID TO OBTAIN  
AMERICAN CITIZENSHIP

*Third Circuit's Analysis of Breyer's Section 1993 Claim*

In examining the constitutionality of Section 1993, the Third Circuit first ruled that Breyer was entitled to assert his mother's equal protection rights pursuant to the doctrine of third-party standing.<sup>120</sup> The Supreme Court has ruled that one seeking to assert third party rights must demonstrate injury in fact, a close relationship to the third party, and a hindrance to the third party asserting its own rights.<sup>121</sup> The Third Circuit correctly concluded that Breyer met all of these prerequisites for asserting a violation of his mother's equal protection rights: his own alleged deprivation of citizenship constituted an injury in fact, the closeness of a son's relationship to his mother satisfied the close relationship test, and his mother's death certainly prevented her from asserting her own rights.<sup>122</sup> The Third Circuit's determination that Breyer had standing to assert his mother's rights is crucial to the outcome of the case, as it allowed Breyer to invoke heightened scrutiny in the examination of the gender-based classification.<sup>123</sup> If Breyer had not been able to assert his mother's rights in his claim for citizenship, his claim likely would have failed, as mere rational basis scrutiny would have been invoked.<sup>124</sup> The Third Circuit distinguished this case from previous cases that had considered the equal protection rights of naturalized persons themselves and found heightened scrutiny inapplicable.<sup>125</sup>

The Third Circuit also distinguished Breyer's assertion of his mother's rights from *Miller v. Albright*.<sup>126</sup> In *Miller*, the Supreme

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120. *See id.* at 423.

121. *See Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

122. *Breyer*, 214 F.3d at 423; *see, e.g., Wauchope*, 985 F.2d at 1410-11 (allowing foreign-born children of American mothers standing to challenge the constitutionality of Section 1993).

123. *Breyer*, 214 F.3d at 424. ("Because [Section 1993] created a gender classification with respect to Breyer's mother's ability to pass her citizenship to her foreign-born child at his birth, the section is subject to heightened scrutiny." *Id.*).

124. *See generally Romer v. Evans*, 517 U.S. 620, 631 (1996) (explaining a legislative classification that neither burdens a fundamental right nor targets suspect class will be upheld on rational basis review).

125. *See Breyer*, 214 F.3d at 424; *Linnas v. INS*, 790 F.2d 1024, 1032 (2d Cir. 1986), *cert. denied*, 479 U.S. 995 (1986) (refusing heightened scrutiny to Nazi war criminals after assertion of equal protection rights by the naturalized individuals).

126. 523 U.S. 420 (1998).

Court upheld a gender-based statutory distinction between the granting of citizenship automatically to illegitimate children born abroad to American mothers and requiring illegitimate offspring of American fathers born abroad to present formal proof of paternity.<sup>127</sup> Although the Supreme Court only applied rational basis scrutiny,<sup>128</sup> the Third Circuit properly distinguished the statute at issue in *Miller* from Section 1993 in that “the offspring seeking citizenship under § 1993 are not illegitimate” and do not require any further act of acknowledgment on the part of the parent other than the birth of the child itself.<sup>129</sup>

Section 1993’s use of a gender-based classification does not survive the mandated heightened level of scrutiny when applied to the mother of the foreign-born child. The heightened level of scrutiny requires parties who seek to defend gender-based government action to demonstrate an “exceedingly persuasive justification” for that action.<sup>130</sup> In addition, an exceedingly persuasive justification must be proffered even if the statute at issue is designed to remedy past gender-based discrimination.<sup>131</sup> The discrimination in question must serve important government objectives and the discriminatory means used to achieve those objectives must be substantially related to those objectives.<sup>132</sup>

The Third Circuit correctly surmised that the government did not provide any justification at all with regards to Section 1993 in support of the gender classification that prevented Breyer’s mother from conveying her citizenship at the birth of her son.<sup>133</sup> The government insisted that Breyer’s case was only about “the government’s right to deny entry and citizenship to Nazis and like individuals,” and argued that Breyer’s claim should be considered only under the INTCA (considered *infra*).<sup>134</sup> Because the government chose not to present a defense to Breyer’s Section 1993 claim, the Third Circuit refused to surmise one, concluding that “[t]here is no support in the case law for surmising a defense for the government in gender discrimination cases, where it has not offered one.”<sup>135</sup> In finding Section 1993 an unconstitutional violation of Katharina Breyer’s equal protection rights, the Third Circuit cited opinions

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127. *Id.* at 426-28, 441-45.

128. *Id.* at 441.

129. *Breyer*, 214 F.3d at 424.

130. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

131. *See id.* at 533, 536.

132. *Id.* at 533.

133. *Breyer*, 214 F.3d at 426.

134. *Id.*

135. *Id.*

from the Ninth Circuit and two United States District Courts<sup>136</sup> that found Section 1993 unconstitutional even under the more lenient rational basis test.<sup>137</sup> However, in determining that Section 1993 was unconstitutional, none of the other courts were faced with the unique dilemma of allowing a Nazi war criminal to gain American citizenship as a result of ruling the statute invalid. That the Third Circuit was willing to accept this dilemma marks an important symbolic place of primacy for the gender-neutral application of American laws in modern society.

*Third Circuit's Analysis of Section 101(c)(2) Claim*

Breyer also claimed that Section 101(c)(2) of the INTCA exacerbated the discriminatory impact of Section 1993 in that it deprived his mother of the right to pass on her citizenship to him due to wrongdoing on his part, where he could not know the consequences of his actions.<sup>138</sup> The government presented two justifications for Section 101(c)(2). First, it argued that Section 101(c)(2) remedied the gender distinction present in Section 1993 by "ensuring the equal treatment of all foreign born children who have committed expatriating acts," by denying United States citizenship.<sup>139</sup> The government's second justification for Section 101(c)(2) was its protection of national security.<sup>140</sup> They argued that Section 101(c)(2) ensures the integrity of American citizenship by preventing United States citizenship from passing to persons having committed genocide.<sup>141</sup>

The decision of the United States District Court for the Eastern District of Pennsylvania recognized that heightened scrutiny is generally the appropriate standard for equal protection challenges based on gender discrimination.<sup>142</sup> The court applies a lower level of scrutiny, however, demonstrating its great deference to Congress

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136. See *Wauchope*, 985 F.2d at 1416 (9th Cir. 1993) (finding no facially legitimate and bona fide reason for unequal treatment of citizen men and women); *Aguayo v. Christopher*, 865 F. Supp. 479, 490 (N.D. Ill. 1994) (using rational basis test, finding Section 1993 unconstitutional on gender lines); *Elias v. U.S. Dep't of State*, 721 F. Supp. 243, 249 (N.D. Cal. 1989) (finding §1993 unconstitutional because of differential treatment of men and women).

137. *Breyer*, 214 F.3d at 426.

138. See *id.*

139. See *id.*

140. *Id.*

141. *Id.*

142. See *supra* note 133 and accompanying text

in immigration and naturalization matters.<sup>143</sup> Citing the *Fiallo*<sup>144</sup> standard on the limited scope of judicial inquiry into immigration legislation, the lower court ruled that Congress need only show a “facially legitimate and bona fide reason” to enact a discriminatory rule regarding immigration or naturalization.<sup>145</sup> The lower court also cited *Miller v. Albright*<sup>146</sup> in ruling that when Congress determines by statute which foreign born persons acquire citizenship at birth, a narrow standard of review applies because of the traditional deference given to the legislative branch in matters of immigration and naturalization.<sup>147</sup>

The district court further elaborated its desire to review Section 101(c)(2) under a lenient standard by mandating that a statute conferring citizenship at birth is an exercise of the naturalization power of Congress and not within the automatic nature of citizenship acquired under the Constitution.<sup>148</sup> The district court emphasized that “[a]bsent valid naturalization, persons born outside the jurisdiction of the United States are assumed by the Constitution to be aliens,”<sup>149</sup> who may only obtain citizenship “as provided by Acts of Congress.”<sup>150</sup> Quoting the language of *Fiallo*, the lower court emphasized that “over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of

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143. Breyer, 2 F. Supp. at 531-32. The court specifically acknowledged Congress’ “plenary authority” in the areas of immigration and naturalization. *Id.* at 532.

144. *Fiallo v. Bell*, 430 U.S. 787 (1977).

145. Breyer, 23 F. Supp. 2d. at 531-32 (citing *Fiallo*, 430 U.S. at 792-94. The facially legitimate and bona fide reason test is equivalent to the rational basis test. *Id.* at 533 (citing *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Wauchope*, 985 F.2d at 1414 n.3; *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990)).

146. 523 U.S. 407 (1998).

147. Breyer, 23 F. Supp. 2d at 532 (citing *Miller*, 118 S. Ct., at 1437 n.11).

148. Breyer, 23 F. Supp. 2d at 532 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1898)).

A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty . . . or by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens. . .

*Id.*

149. *Id.* at 533 (citing U.S. CONST. amend. XIV.) (‘The constitution extends United States citizenship only to “persons born or naturalized in the United States”).

150. *Id.* (quoting *Wong Kim Ark*, 169 U.S., at 703).

aliens."<sup>151</sup> Hence, the lower court only "required a facially legitimate and *bona fide* reason for the gender classification at issue."<sup>152</sup>

In applying the rational basis test to Section 101(c)(2), the lower court examined whether the differential treatment of groups imposed by the statute was related to a legitimate objective of the government.<sup>153</sup> The first stated governmental objective of Section 101(c)(2) was to ensure equal treatment of all foreign-born children of United States citizen parents who have committed expatriating acts.<sup>154</sup> The lower court found this constituted a legitimate governmental objective and concluded that there was a rational relation between Section 101(c)(2) and the achievement of this objective.<sup>155</sup> The lower court focused on the effect of Section 101(c)(2) in equalizing the effects of expatriating conduct on children of American citizen mothers, and not the effects of the statute on the mothers themselves.<sup>156</sup> In fact, in a footnote contained in the district court's opinion, the court indicates that even if heightened scrutiny were applied to challenge Section 101(c)(2), the gender-based distinction would pass muster due to the nature of the governmental objectives dealing with keeping participants in Nazi genocide out of the country.<sup>157</sup>

In declaring Section 101(c)(2) unconstitutional on equal protection grounds, the United States Court of Appeals for the Third Circuit correctly pointed out that the lower court's imposition of rational basis review was primarily and erroneously predicated

151. *Breyer*, 23 F. Supp. 2d at 533 (quoting *Fiallo*, 430 U.S. at 792 (quoting *Oceanic Navigation Co. v. Stanhan*, 214 U.S. 320, 339 (1909))). The court also recognized that "[t]he Congressional power to exclude aliens has long been recognized by the [Supreme] Court 'as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Id.* at 533 (quoting *Shaugnessy v. United States, ex. rel. Mezei* 345 U.S. 206, 210 (1953).)

152. *Id.* (citing *Fiallo*, 430 U.S. at 794).

153. *Id.* at 533. Under the easily satisfied rational basis standard, legislation fails only when "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [one] can only conclude that the legislature's actions were irrational." *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

154. *Id.* at 534. To establish an expatriating act, the government must prove intent to relinquish citizenship. The voluntary participation in Nazi genocidal activities is recognized as satisfying an intent to relinquish citizenship. *See United States v. Schiffer*, 831 F. Supp. 1166, 1183 (E.D. Pa. 1993).

155. *Breyer*, 23 F. Supp. 2d at 535.

156. *See id.*

157. *Id.* at 537 n.11 stating:

the governmental objectives of national security, foreign policy, and the promotion of human rights are important ones, and there exists a substantial relationship between the differential treatment and the achievement of those objectives . . . I find the reasons cited to constitute an exceedingly persuasive justification for the discriminatory provision.

*Id.* at 537 n.11 (internal quotations, citations omitted).

on its view that Breyer was asserting his own rights in his equal protection claim, instead of those of his mother.<sup>158</sup> Because Breyer was asserting the equal protection rights of his mother, an American citizen, to pass on her citizenship her foreign-born offspring, the traditional judicial deference given to Congress in matters of immigration and naturalization could not apply.<sup>159</sup> A shift in the focus of the debate from an assertion of Breyer's rights to the ability of Breyer's mother to effectively transmit her citizenship to her foreign-born offspring completely eliminates any need for the judicial deference traditionally given towards Acts of Congress relating to immigration and naturalization. This is because Breyer's mother was an American citizen by virtue of her birth in Pennsylvania.<sup>160</sup> The Third Circuit points out that Section 101(c)(2) affects a particular subset of children born to American citizen mothers, those children who would become participants in Nazi genocide, who continued to be excluded from citizenship.<sup>161</sup> The Third Circuit tellingly points to the legislative history of Section 101(c)(2), that reveals Congress' specific intent to exclude some American women whose offspring had committed expatriating acts from the remedial "cure" of Section 101(c)(2).<sup>162</sup>

Instead of eliminating all gender-based discrimination under the old statute, Section 1993 of the Revised Statutes of 1874, INTCA Section 101(c)(2) reimposed that discrimination by requiring a different test for the foreign born children of American citizen mothers than it does for the foreign born children of American citizen fathers.<sup>163</sup> Under Section 101(c)(2), foreign-born children of American fathers would acquire citizenship at birth and could only

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158. *Breyer*, 214 F.3d at 426-27.

159. *See id.* at 427.

160. *See supra* text accompanying note 7.

161. *Breyer*, 214 F.3d at 426-27. "Thus, while §101(c)(1) cured the discriminatory effects of §1993, as written in 1925 and amended in 1934, §101(c)(2) took away that cure for a subset of American mothers whose foreign-born off-spring have committed certain acts." *Id.* at 427

162. *Id.* The comments of Rep. Schumer are particularly illustrative:

... [t]here are several Nazi expatriation cases pending in the United States that would be jeopardized if Nazi children of American mothers were to be naturalized. Nazis born to American fathers do not have this problem . . . Proper prosecution of these individuals depends on the ability to denaturalize and deport them to stand trial overseas for war crimes.

*Id.* at 427 (quoting statements of Rep. Schumer, Col. 140, No. 132 Cong. Rec. H9280 (daily ed. Sept. 20, 1994)). Therefore, it seems apparent that the members of Congress who sponsored Section 101(c)(2) were aware of its potential to maintain gender-based discriminatory treatment on a unique subset of American women, and in fact, welcomed such discriminatory treatment.

163. *Breyer*, 214 F.3d, at 428.

be forced to relinquish citizenship upon their commission of intentional expatriating acts.<sup>164</sup>

Conversely, the foreign-born children of American mothers who have committed similar acts with or without an intent to expatriate themselves would be precluded from obtaining American citizenship at all.<sup>165</sup> The Third Circuit correctly found this treatment difference in the ability of American fathers and mothers to transmit their citizenship to their offspring is an "additional burden . . . in fundamental tension with the principle of equal protection."<sup>166</sup> As such, the Third Circuit held that Section 101(c)(2) as applied to Breyer's citizen mother violated equal protection by "perpetuating the gender discrimination contained in [Section] 1993, which prevented [Breyer's] mother from transmitting citizenship to him at birth."<sup>167</sup> In ruling that the equal protection rights of Johann Breyer's American mother were violated, the Third Circuit found that Breyer was entitled to American citizenship at birth, and remanded Breyer's claim to the district court for a determination of whether Breyer's actions in the Second World War constituted voluntary expatriating acts.<sup>168</sup>

### CONCLUSION

The barbarous state-sponsored genocide unleashed upon Europe during the Second World War against millions of innocent human beings by the Nazi government of Germany "remains the embodiment of man's most profound capacity for evil."<sup>169</sup> Individuals like Johann Breyer who participated in the inhuman

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164. *Id.* The government must prove that a citizen has intended to relinquish citizenship to successfully demonstrate that a citizen has expatriated himself and is eligible for removal and loss of citizenship. *See id.* (citing *Vance v. Terrazas*, 444 U.S. 252, 270 (1980)).

165. *Breyer*, 214 F.3d at 428.

166. *Id.* ("We find no legitimate reason for such disparate treatment of American citizen mothers that is sufficient to override their guarantee to equal protection of the laws.") The Third Circuit also rejected the government's rationale regarding the protection of national security as one of the reasons to allow the gender-based distinction to survive. *Id.* at 429. "[T]he cases that the [lower court] cites to support its conclusion that the government's national security justification for § 101(c)(2) is rational refer only to alienage . . . [t]hese cases do not control the interests of American citizen mothers or their foreign-born children. . .").

167. *Id.* at 429.

168. *Id.* at 429-32. The United States District Court for the Eastern District of Pennsylvania found, on remand, that Breyer's wartime service in the *SS Totenkopf* did not constitute a voluntary expatriating act, primarily based on the fact that Breyer was 17 years old when he joined the *SS*. Breyer therefore retained his American citizenship. *See Breyer v. Meissner*, No. 97-6515, 2002 U.S. Dist LEXIS 17869 (E.D. Pa. Sept. 18, 2002); Shannon P. Duffy, *Immigration Federal Court Allows Ex-Guard at Auschwitz to Stay in U.S.*, PA. L. WEEKLY, Sept. 30, 2002, at 6.

169. RYAN, *supra* note 36, at 4.

treatment of Holocaust victims, are the perpetrators of profound evil and are among the most morally repugnant members of society because of their deeds. This is exactly why the Third Circuit's decision in the Johann Breyer case is so important as a benchmark of gender equality in modern America.

The invalidation of two Acts of Congress that blatantly conditioned the ability of American citizens to convey their "precious right"<sup>170</sup> of American citizenship to their foreign-born offspring on the basis of their gender sends a clear message that gender-based discrimination has no place in modern America. This anti-discriminatory policy is made even more evident when considering the Third Circuit's invalidation of INTCA Section 101(c)(2). Section 101(c)(2) was specifically targeted to prevent foreign-born children of American mothers who had matured into Nazi oppressors from gaining citizenship. The Third Circuit's invalidation of Section 101(c)(2) allowed former Nazi war criminals such as Johann Breyer the ability to legally claim American citizenship. Allowing Breyer the ability to claim American citizenship and thus, to receive the full protections and guarantees afforded to citizens under the law, may not be a desirable outcome considering his participation in the Holocaust.

However, the fact that Breyer's American citizen mother and other similarly situated women gained the right to pass American citizenship to their children at birth, when throughout history Congress had allowed similarly situated fathers the same right, is a laudable result given the goal of maintaining the gender-neutral application of our laws to all. The Third Circuit's decision is therefore one that should be celebrated as a convincing example that gender-based discrimination will not be tolerated by the United States judiciary, even at the price of allowing an admitted Nazi war criminal to claim status as an American citizen.

MICHAEL M. PAVLOVICH\*

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170. *United States v. Costello*, 365 U.S. 265, 269 (1961).

\* J.D. Candidate, 2004, Marshall-Wythe School of Law, College of William and Mary; B.A. History, Phi Kappa Phi, Phi Alpha Theta, 2000, University of Utah. The author would like to dedicate this note to the memory of my late father, Richard D. Pavlovich, and I would like to thank my family, especially Sandra J. Pavlovich, for all of their support over the years.