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A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany

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A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany

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Since Brandenburg v. Ohio, *the United States Supreme Court has protected racist speech under the Free Speech Clause of the First Amendment. Critics of this approach routinely invoke the existence of hate speech regulations in other democracies as compelling evidence that such rules can comfortably coexist with a meaningful commitment to the freedom of speech. Germany, in particular, often receives favorable mention as an example of a nation that has successfully integrated hate speech regulations and a strong commitment to the freedom of speech. Promoting equality and encouraging the participation of racial and ethnic minorities in the project of democratic self-government certainly constitute important social goals. Accordingly, legal reforms designed to achieve these objectives deserve careful consideration.*

Even granting the importance of the equality project, however, Germany provides a poor model for the United States to follow. Germany's Federal Constitutional Court subordinates the freedom of expression to a remarkable degree to advance other constitutional values; dignity and personal honor routinely take precedence over free speech claims in German constitutional decisions. To some extent, the Constitutional Court's approach simply reflects the Basic Law itself: the Basic Law places human dignity, free development of one's personality, and the protection of personal honor above free speech in an overt hierarchy of values. Moreover, the Basic Law sets forth concrete limits on the freedom of speech, including limits designed to protect personal honor and safeguard the democratic social order. The Basic Law, however, provides only a partial explanation. Broader cultural traditions in Germany also help to explain why dignity and personal honor hold a preferred place within contemporary German constitutional law.

A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany *argues that the German example does not really support the argument that hate speech regulations can easily coexist with a strong commitment to protect the freedom of speech. The degree to which German law subordinates free speech claims would be difficult, if not impossible, to reconcile with both legal and cultural norms favoring speech rights in the United States. Moreover, the*

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importance of cultural values in explaining the German approach also suggests that importing Germany's regime for regulating hate speech might be a difficult, if not impossible, undertaking.

Critics of the United States Supreme Court's protection of racist speech point to the experience of other constitutional democracies in support of their position that proscriptions against hate speech are not necessarily inconsistent with a meaningful commitment to the freedom of speech. For example, Professor Richard Delgado has argued that "Western democracies that have enacted hate speech laws, such as Canada, Denmark, France, Germany, and the Netherlands, have scarcely suffered a diminution of respect for free speech."[1] Based on

1. Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 874 (1998); *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2346-48 (1989) (arguing that hate speech regulations have worked in several industrial democracies).

the adoption and enforcement of hate speech laws in Western Europe and elsewhere, he suggests that "it is evidently possible to regulate the more vicious forms of race-hate speech, while remaining committed to free expression."[2]

Other proponents of hate speech regulation also tend to characterize such regimes in foreign nations as largely successful. Professor Kathleen Mahoney observes that "[i]f one looks to the international community, there is a recognition that racist hate propaganda is integral to the perpetuation of racism, that it is illegitimate speech and is properly subject to control under law."[3] In a similar vein, Professor Michel Rosenfeld reports that "[i]n the Western European democracies, the speech of racists, Communists, Fascists, and Nazis has been successfully outlawed."[4]

Essentially, proponents of hate speech regulations claim that a limited proscription against certain targeted racial insults can exist in a regime that is otherwise quite tolerant of free speech. "Indeed, the experiences of Canada, Denmark, France, Germany, and the Netherlands—countries whose commitment to freedom of inquiry arguably is comparable to that of the United States—imply that limited regulation of hate speech does not invariably cause deterioration of the respect accorded free speech."[5] Rather than a gross abridgement of a fundamental right, "[c]itizens seem to regard anti-hate-speech laws as limited exceptions comparable to libel or official-secret rules necessary to preserve a decent society."[6]

Perhaps it might be possible to operationalize a regime of hate speech laws in a fashion that does not trample core speech rights. But, before endorsing any particular regulatory scheme, one should take some care to examine how it operates and the larger legal context of which it is a part. At least in the case of Germany, it is very difficult to claim plausibly that "limited regulation of hate speech does not invariably cause deterioration of the respect accorded free speech."[7]

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2. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 371 (1991).

3. Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 803.

4. Michel Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, 100 HARV. L. REV. 1457, 1457 (1987) (reviewing LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986)).

5. Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 742 (1993).

6. *Id.*

7. *Id.*

This Article examines some of the principal free speech decisions of the Federal Constitutional Court, the highest constitutional court in Germany. Free speech represents the Rodney Dangerfield of fundamental rights in Germany: it does not get much respect. Importantly, proscriptions against hate speech are only a small part of the overall picture. The legal and cultural milieu that gave rise to Germany's laws against hate speech also have given rise to a variety of laws, policies, and doctrines that subordinate the freedom of expression in favor of other values, notably including human dignity, reputation, and honor.

Part I examines the history of the Basic Law, Germany's constitution, and its protection of the freedom of speech. Part II considers the importance of human dignity, which enjoys an absolute primacy in the Basic Law's "objective order of values." Part III explores the content and viewpoint based laws that Germany has enacted to preserve its "militant democracy." Finally, Part IV considers whether hate speech laws and proscriptions on antidemocratic values represent an effective means of securing the rights of racial and ethnic minorities. At least arguably, access to citizenship—and, by implication, voting rights—would better advance equality values in Germany. The Article concludes that, although consideration of Germany's approach to hate speech is a fascinating subject for comparative law study, Germany's approach breaks far too radically with important free speech values to provide a plausible model for speech regulation in the United States.

Advocates of the adoption of hate speech regulations in the United States might well be correct in suggesting that such laws need only infringe free speech rights at the margins. The German example, however, suggests that such regimes can reflect a radically different hierarchy of values. In Germany, free speech is a (very) poor cousin of human dignity. Any effort to use Germany as a template for the regulation of racist speech in the United States must address this important fact.

I. AN INTRODUCTION TO THE BASIC LAW AND GERMAN CONSTITUTIONALISM

Following the end of World War II, the portion of Germany under the control of the Western Alliance worked to establish a functioning constitutional democracy. One of the primary bulwarks of this new

democratic order was the adoption of the Basic Law.[8] On May 8, 1949, precisely four years to the day after the collapse of the Third Reich, the postwar German government enacted the Basic Law.[9] The drafters intended for it to serve merely as a temporary measure for the Western Sector until a formal constitution could be written and enacted for a unified Germany.[10] The Basic Law took effect on May 23, 1949, and has remained Germany's foundational legal document ever since.[11]

Notwithstanding hopes for a quick reunification process, Germany remained divided for some forty years. Accordingly, the permanent "Constitution" that the Basic Law's framers envisioned never came into being. In fact, the Basic Law, over time, itself took on the character and function of a constitution. Following the reunification of Germany in 1990, the Basic Law became the basis for a new, democratic government for a united Germany. The Basic Law, drafted and enacted as a temporary measure, finally enjoyed an official status that reflected what for many years had been its de facto status: constitutional blueprint for democratic self-government in Germany.

Although the Basic Law protects the freedom of speech, it does so to a much more limited degree than does the Free Speech Clause of the First Amendment.[12] The reasons for this are many and varied. Perhaps most importantly, free speech simply is not the most important constitutional value in the German legal order; instead, pursuant to the first clause of the Basic Law, human dignity holds this position.[13] Article 1 of the Basic Law "is both 'the supreme constitutional principle' and a fundamental right."[14] Accordingly, when cases present

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8. GRUNDGESETZ [GG] (CONSTITUTION] (F.R.G.). For a brief history of the Basic Law, including its creation and adoption, see DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 8-24 (1994), and DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 7-10, 30-49 (2d ed. 1997). All citations and quotations to the Basic Law are taken from the English translation in the appendix to the Currie text, unless otherwise noted.

9. *See* Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443, 445-46 (2000). As one commentator noted at the time of the vote, "I am not sure how to grasp the symbolic meaning of this date. This 8th of May, in essence, is the most tragic and questionable paradox in our history. Why? Because we have, at the same time, been redeemed and destroyed." *Id.* at 445 (internal quotations omitted) (quoting PARLAMENTARISCHER RAT, Sten. Ber. (10 Sitzung S. 139), at 136).

10. *See id.*

11. *See id.*

12. *Compare* GG art. 5, *with* U.S. CONST. amend. I.

13. *See* GG art. 1(1) ("Human dignity is inviolable. To respect and protect it is the duty of all state authority.").

14. *See* Benda, *supra* note 9, at 444.

facts in which human dignity and free speech collide, free speech usually must give way.

A second reason for the weaker version of free speech in Germany relates to Germany's status as a "militant democracy."[15] Free speech, including core political speech, has definite limits in Germany: speech which has as its aim the destruction of democratic self-government enjoys absolutely no constitutional protection under the Basic Law.[16] Obviously, the history of National Socialist dictatorship under Adolf Hitler colors the German judiciary's view of the relative importance of free speech. Indeed, the Basic Law itself prohibits political parties who wish to disestablish democratic self-government in Germany.[17] Accordingly, an entire category of core political speech activity enjoys no protection whatsoever in the German constitutional system.

Finally, the Basic Law limits the right to free speech directly, by inviting balancing of other social interests against free expression claims.[18] The First Amendment, by way of contrast, makes no provision for rights balancing; on its face, the right to free speech is absolute. As one might predict, the weighing exercise mandated by the text of the Basic Law does not always redound in favor of free speech claimants.

In Germany, then, one finds a nation that is committed to the freedom of speech, but only within carefully circumscribed limits, and only to the extent that the commitment to free speech does not conflict with other constitutional values (including human dignity and the preservation of the democratic order). One would be mistaken, however, to dismiss Germany's approach to freedom of expression as self-evidently misguided or insufficiently sensitive to the value of free speech in a democratic society. Germany has simply weighed the various social costs and benefits very differently than has the United States. Whether Germany has struck an appropriate balance remains to be seen, but a careful student of the field should not automatically

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15. *See generally* KOMMERS, *supra* note 8, at 37-38 (discussing the impact of Germany's classification as a "militant democracy").

16. *See* GG art. 21(2).

17. *See id.* ("Parties that, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.").

18. *See id.* art. 5(2) ("These rights find their limits in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor.").

assume that labeling the German system "different" is simply a polite way of labeling it "wrong."

A. *The Basic Law and Freedom of Expression*

The Basic Law contains several provisions that protect speech activity. Although Article 5 is probably the most important of these provisions, it is worth noting that the Basic Law expressly protects speech activity in a variety of forms and contexts. For example, academic freedom enjoys textual protection[19] and, accordingly, the Federal Constitutional Court does not have to infer its existence within a more generic free speech guarantee.[20]

Another major difference between the Basic Law and the First Amendment is the Basic Law's textual inclusion of express limits on the scope of free speech rights. The United States Supreme Court has found that the First Amendment's free speech guarantee is not, in any meaningful sense of the word, absolute.[21] It has, accordingly, examined the government's claim for a need to regulate speech on a case-by-case basis and weighed the government's asserted interests against the values advanced by the free speech guarantee. This balancing exercise has taken place despite the seemingly unqualified language of the First Amendment itself. In Germany, by way of contrast, the Federal Constitutional Court has a textual mandate to balance some interests against the free speech guarantee.[22]

Finally, all constitutional rights are not equal in Germany. The Basic Law establishes an "objective ordering of values" that the Federal Constitutional Court declares and enforces.[23] As Professor

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19. *See id.* art. 5(3).

20. *Cf.* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) (finding that academic freedom enjoys constitutional protection as a penumbral right associated with the Free Speech Clause of the First Amendment).

21. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) (noting that free speech rights are fundamental, but not absolute).

22. *See* GG art. 5(2).

23. *See* Lüth, BVerfGE 7, 198 (1958), *translated in* 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC (1958) OF GERMANY (pt. 1), at 1 (1998) [hereinafter 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT]; *see also* Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 252-89 (1989) (discussing the *Lüth* case). As Professor Quint has stated the matter, the German Constitutional Court has

> emphasized that the Basic Law establishes an "objective ordering of values," and indicated that the introduction of this concept in constitutional doctrine represents a fundamental strengthening of the effectiveness of the basic rights and a certain extension of those rights beyond their traditional realm.

Quint, *supra*, at 261 (quoting *Lüth* internally).

Edward Eberle has observed, "the Basic Law is a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality, that are designed to restore the centrality of humanity to the social order, and thereby secure a stable democratic society on this basis."[24] Thus, even if one successfully invokes one provision of the Basic Law, this may prove to be an insufficient condition to avoid liability for speech activity when another constitutional value is also in play. In particular, free speech claims under Article 5 do not seem to do particularly well when balanced against human dignity claims premised on Article 1.

The Basic Law attempts to enshrine permanently the balance struck favoring dignity over freedom of speech, and favoring the preservation of democracy over the exercise of free speech. In relevant part, Article 79(3) provides that "Amendments of this Basic Law affecting . . . the basic principles laid down in Articles 1 and 20 shall be inadmissible."[25] Article 1 establishes the primacy of human dignity as a constitutional value,[26] and Article 20, which declares Germany to be a "democratic and social federal state,"[27] charges all citizens to resist efforts to "abolish that constitutional order."[28] Just as Article V of the United States Constitution attempts to preclude certain constitutional changes,[29] Article 79(3) reflects an effort by the Framers of the Basic Law to maintain in perpetuity the existing constitutional order.[30]

B. Article 5's Protection of Speech Activity

Article 5(1) of the Basic Law expressly protects the freedom of expression. It provides that "[e]veryone has the right freely to express and disseminate his opinion in speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship."[31]

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24. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 967.

25. GG art. 79(3); *see also* CURRIE, *supra* note 8, at 10-11.

26. *See* GG art. 1(1).

27. *See id.* art. 20(1).

28. *Id.* art. 20(4).

29. *See* U.S. CONST. art. V (permitting amendments to the Constitution, except that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

30. *See* GG art. 79(3).

31. *Id.* art. 5(1).

Article 5 also protects academic freedom, stating that "[a]rt and science, research, and teaching shall be free."[32] Thus, the Basic Law enshrines the freedom of speech as a constitutionally protected right in the Federal Republic of Germany.

Article 5's guarantees are, however, subject to some significant textual constraints. Perhaps most importantly, Article 5 limits the scope of freedom of speech by inviting judicial balancing of the right against other governmental objectives: "These rights find their limits in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor."[33] Moreover, the right to academic freedom does not extend to advocacy of violent overthrow of the government: "Freedom of teaching shall not release anyone from his allegiance to the constitution."[34]

Separate provisions of the Basic Law protect the freedom of assembly and the freedom of association. Article 8 states that "[a]ll Germans have the right to assemble peaceably and unarmed without prior notification or permission."[35] The right to assembly in open air meetings "may be restricted by or pursuant to statute."[36] Article 9 provides that "[a]ll Germans shall have the right to form associations and corporations."[37] As with Articles 5 and 8, however, this protection does not extend to groups that seek the overthrow of the democratic constitutional order: "Associations whose purposes or activities conflict with criminal statutes or that are directed against the constitutional order or the concept of international understanding are prohibited."[38] Finally, Article 17 provides that "[e]veryone has the right individually or jointly with others to address written requests or complaints to the competent agencies and to parliaments."[39]

With respect to the creation and operation of political parties, the Basic Law declares that "[t]he political parties shall participate in the formation of the political will of the people" and "may be freely established."[40] However, German political parties must maintain organizational structures that "conform to democratic principles."[41]

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32. *Id.* art. 5(3).
33. *Id.* art. 5(2).
34. *Id.* art. 5(3).
35. *Id.* art. 8(1).
36. *Id.* art. 8(2).
37. *Id.* art. 9(1).
38. *Id.* art. 9(2).
39. *Id.* art. 17.
40. *Id.* art. 21(1).
41. *Id.*

Finally, "[p]arties that, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional."[42] When questions arise regarding the consistency of a party's platform with these requirements, "[t]he Federal Constitutional Court shall decide on the question of unconstitutionality."[43]

The Basic Law contains redundancies that emphasize the importance of protecting the "democratic basic order." Even though the articles conferring specific speech rights on the citizenry expressly exclude speech aimed at overthrowing the government, several independent clauses repeat the rule that the exercise of rights enshrined in the Basic Law does not extend to efforts to abolish democratic self-government in Germany.

Article 18, for example, provides for forfeiture of basic rights, including the rights set forth in Articles 5, 8, and 9, if a citizen exercises those rights "in order to combat the free democratic basic order."[44] "Such forfeiture and the extent thereof shall be determined by the Federal Constitutional Court."[45] Similarly, Article 20 provides that "[t]he Federal Republic of Germany is a democratic and social federal state"[46] and invites citizens to "resist any person or persons seeking to abolish this constitutional order, should no other remedy be possible."[47]

Thus, one need not even turn to the case law of the Federal Constitutional Court to see the overtly limited scope of free speech in Germany. Certain kinds of political speech are simply outside the pale—even "core" political speech. A person or group advocating the violent overthrow of the government does not enjoy any right to advocate such action without facing both criminal and civil penalties.[48] This represents a marked break with the tradition in the United States, as represented by such cases as *Brandenburg v. Ohio*[49] and *NAACP v. Claiborne Hardware Co.*[50]

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42. *Id.* art. 21(2).
43. *Id.*
44. *Id.* art. 18.
45. *Id.*
46. *Id.* art. 20(1).
47. *Id.* art. 20(4).
48. *See* Communist Party Ban, BVerfGE 5, 85 (1956); *see also* KOMMERS, *supra* note 8, at 37-38, 222-24 (discussing the application of the Article 21 ban on antidemocratic political parties).
49. 395 U.S. 444 (1969).
50. 458 U.S. 886 (1982).

But Article 5's textual limitations are not restricted just to speech critical of the existing democratic constitutional order—Article 5 itself invites regulations that protect the youth, protect personal honor, or find expression in the general statutes.[51] Depending on the exact meaning of these express restrictions on the freedom of speech, the scope of permissible comment could shrink even more. We come to this point without engaging in the balancing exercise that applies when rights enshrined in the Basic Law collide—as often happens, for example, when a free speech exercise arguably offends the protection of dignity set forth in Article 1.

Thus, without even getting beyond the text of the Basic Law, it becomes very clear that the German conception of free speech is at great variance with the conception that prevails in the United States. Again, this is not necessarily a bad thing. Perhaps the United States fails to value adequately the dangers that speech advocating violent overthrow of the government represents. Perhaps the United States Supreme Court also has failed to recognize sufficiently the relative importance of personal honor or protection of youth. It is far too early in the analysis to draw any firm conclusions. That said, a very preliminary consideration of the issue establishes quickly that the German conception of free speech radically departs from baseline notions in the United States.

Another important distinction between the United States and Germany involves the potential scope of constitutional rights. In the United States, the Bill of Rights and the Fourteenth Amendment secure rights only against the government.[52] No matter how egregious, a private party's actions do not constitute a constitutional violation in the absence of some nexus with the government. Accordingly, one would not normally expect the Free Speech Clause to be invoked in an antitrust case between two private corporations or in an employment dispute involving a private employer's decision to discharge an employee because of the employee's speech activities.[53]

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51. *See* GG art. 5(2).

52. *See* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 303-21 (1995).

53. For example, suppose that a high school operated by the Roman Catholic Church fires a religion teacher after learning that the religion teacher belongs to NARAL (the National Abortion Rights Action League). The decision to fire would not raise any serious free speech issues, precisely because the high school, a private actor, is not obliged to respect the First Amendment. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 837-38 (1982). A county sheriff, on the other hand, could not engage in the same behavior; the First

Some legal academics in the United States have argued that rather than engage in state action analysis, the federal courts should simply engage in overt rights balancing when conflicting constitutional claims appear at bar.[54] For example, if a group of nuns complained that the local bishop denied them equal protection of the law on the basis of gender, by refusing to employ them as priests, the district court judge hearing the case would be required to weigh the nuns' interest in being free of gender discrimination against the bishop's interest in enforcing the doctrines of the Roman Catholic Church regarding the sacrament of Holy Orders. Under this approach, the fact that the bishop is not a "state actor" would not preclude consideration of the nuns' equal protection claim on the merits.

Professor Chemerinsky describes the state action doctrine as "incoherent" and suggests that the federal courts apply the state action doctrine strategically, by peeking at the merits, deciding whether they wish to recognize the plaintiffs' claims, and rule accordingly on the question of state action.[55] In his view, it would be more intellectually honest to balance the competing claims (assuming that the defendant can assert some sort of constitutional privilege to engage in the behavior that serves as the basis of the plaintiff's complaint).[56] In the hypothetical, the bishop could probably assert a free exercise and free association claim that trumps the nuns' claim to be free of gender discrimination. The state actor status of the bishop would be entirely irrelevant to the proper analysis of the merits.

In Germany, by way of contrast, there is no state action requirement. The Basic Law permeates all social relations, and the state actor status of a defendant does not prefigure the outcome of cases.[57] In the specific context of freedom of expression, Professor Eberle notes that the lack of a state action requirement probably "reflects the belief that the real threats to expression in German society come from private actors and social forces, and not from the state."[58]

Thus, in the *Lüth* case (discussed below), the German Constitutional Court balanced a film producer's Article 5 right to free

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Amendment would protect an employee who spoke out regarding a matter of public concern. *See* Rankin v. McPherson, 483 U.S. 378, 388-92 (1987).

54. Professor Erwin Chemerinsky has advocated such an approach. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503-11, 536-42 (1985).

55. *Id.* at 503-07, 524-27, 535-57.

56. *See id.* at 537-39.

57. *See* NIGEL G. FOSTER, GERMAN LEGAL SYSTEM & LAWS 155-56 (2d ed. 1996).

58. Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 813 (1997).

expression against the free speech claims of the organizer of a boycott against the film.[59] The state had made no effort to suppress the film in question—the case presented a free speech claim raised as a defense to an antiboycott claim (which also invoked the free speech principle).[60]

In deciding to apply the Basic Law's provisions to a dispute between two private parties, the German Constitutional Court articulated a doctrine of secondary effects: the Basic Law not only works to disallow civil law provisions that transgress its guarantees, but it also informs the substantive meaning of the civil code itself. This is especially true with respect to the so-called "general provisions" of the German civil code, which are intended to advance sound public policies. As Professor Peter Quint has observed, "[b]ecause the basic rights establish 'objective' values, then, those rights must apply not only against the state exercising its authority under public law; according to the Constitutional Court, basic rights must also have an effect on the rules of private law which regulate legal relations among individuals."[61]

It is certainly reasonable to suppose that the content of a given law should be measured against the provisions of the Basic Law. The United States Supreme Court, in *New York Times Co. v. Sullivan*, did exactly this.[62] Justice Brennan explained that,

> [a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[63]

Thus, because the validity of a state law was directly at issue, state action was present. Alabama exercised its authority by establishing a common law rule that permitted a state officer to recover for libel on a showing of less than actual malice.[64] The fact that the Alabama Supreme Court fashioned this common law rule—rather than the state legislature via statute—did not affect the rule's status as the product of state action.[65]

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59. *See generally* KOMMERS, *supra* note 8, at 361-68 (translating the *Lüth* case).
60. *See id.*
61. Quint, *supra* note 23, at 262.
62. 376 U.S. 254 (1964).
63. *Id.* at 265 (citation omitted).
64. *See id.* at 262-64.
65. *See id.* at 265.

The *New York Times Co.* Court did not purport to do anything more than ascertain whether the Alabama common law of libel satisfied the requirements of the Free Speech Clause; it did not purport to apply general free speech principles to the merits of the litigation itself. Had the law itself been consistent with the Free Speech Clause (it was not), Alabama would have been free to apply it without any further consideration of the First Amendment. The analysis in Germany would be quite different.

Under the doctrine of secondary effect, the defendant in an action for libel would remain free to argue that an award of damages would violate the Basic Law, even if the statute that gives rise to the action is itself unquestionably constitutional. The secondary effects doctrine treats the application of civil law between private parties as state action triggering the Basic Law. Accordingly, the Basic Law enjoys a far more expansive scope of application than does the Bill of Rights or Fourteenth Amendment. As Professor Eberle helpfully observes, "from the standpoint of law in the 1990s, there is effectively no difference in the standard of review applied by the Constitutional Court to purely private or public law disputes."[66]

Moreover, challenges to the application of private law provisions premised on the Basic Law are not limited to any particular provisions. For example, a defendant in a libel action could invoke Article 1's dignity clause rather than Article 5's free speech clause if an argument premised on the dignity guarantee would be plausible. This would be a sound strategic move because the dignity clause guarantee generally takes precedence over other constitutional rights.

In sum, "the German and American doctrines appear to reflect fundamentally differing views about the nature of the distinction between the public and the private realms."[67] The Federal Constitutional Court has, to a very large degree, collapsed the public/private distinction when enforcing the provisions of the Basic Law.

C. Article 1 and the Countervailing Value of Human Dignity

The Federal Constitutional Court has declared that the Basic Law establishes "an objective ordering of values" with some rights being more important than others.[68] In this objective order of values, freedom of speech, press, assembly, and association are decidedly

66. Eberle, *supra* note 58, at 813.
67. Quint, *supra* note 23, at 339.
68. *See* Eberle, *supra* note 58, at 811.

inferior to the government's interest in securing and protecting human dignity.[69]

The primacy of dignity leads the German Constitutional Court to reach results that appear odd to a student of the First Amendment. "In part, this reflects the value-ordering function basic rights perform in Germany, including communication rights."[70] For example, the German Constitutional Court has found that preserving the dignity of a dead man outweighed the free expression rights of a living novelist (who died before the final resolution of the case in the Federal Constitutional Court);[71] it has prohibited the publication of a fictional interview involving the wife of the Shah of Iran;[72] it has also enjoined distribution of a docudrama about a gay robber[73] and refused to protect political satire that presented a politician as a rutting pig.[74] These cases are discussed in greater detail below; together they demonstrate the German Constitutional Court's firm decision to weigh dignity, which encompasses the interest in personal reputation, above the freedom of speech.

At the outset, one should note the full implications of these holdings: speech routinely protected in the United States might well be unprotected in Germany. For example, it is uncertain that the faux Campari advertisement at issue in *Hustler Magazine, Inc. v. Falwell*[75] would enjoy constitutional protection under Article 5. The differences go even deeper. Orson Welles's masterpiece, *Citizen Kane*, constitutes

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69. Eberle, *supra* note 24, at 971 (noting that "[h]uman dignity is the central value of the Basic Law"); *see also id.* at 972 (noting that "dignity is the highest legal value in Germany"). For a definition of the concept of "dignity" in German constitutional law jurisprudence, see *id.* at 975-76.

70. Eberle, *supra* note 58, at 805.

71. Mephisto, BVerfGE 30, 173 (1971), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 147, 180.

72. Princess Soraya, BVerfGE 34, 269 (1973).

73. Lebach, BVerfGE 35, 202 (1973), *translated in* KOMMERS, *supra* note 8, at 416.

74. Strauß Caricature, BVerfGE 75, 369 (1987), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 420.

75. 485 U.S. 46, 46-48 (1988). For a discussion and thoughtful critique of the *Falwell* case, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 119-51 (1995). Post argues that "[t]he individualist methodology of first amendment doctrine ultimately means that individuals must be free within public discourse from the enforcement of all civility rules, so as to be able to advocate and to exemplify the creation of new forms of communal life in their speech." Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 647 (1990). The German approach generally enforces civility norms against iconoclasts, precisely because maintaining a common culture that safeguards personal honor constitutes a more pressing social objective for the German legal system than facilitating transgressive self-expression. *See infra* notes 191-198 and accompanying text.

a thinly veiled commentary on William Randolph Hearst. Mr. Hearst was very much alive at the time of its theatrical release (he worked strenuously to block the film's distribution) and, given the *Mephisto*[76] decision, his status among the living at the time the film premiered probably would not matter anyway.

As Professor David Currie has aptly noted, "[e]xamination of the German law of free expression reminds one once again how easily two well-intentioned societies, starting from substantially identical premises, can arrive at significantly different results."[77] But Professor Currie, at least to some extent, understates the glaring differences that exist in the respective treatment of free speech:

> Expression is a cardinal value both in Germany and in the United States, both as an end in itself and as an indispensable tool of democracy. In both countries it must yield on occasion to competing values, and there is room for honest disagreement as to where to draw the line.[78]

In the United States, the freedom of speech is a "preferred" freedom that generally outweighs other constitutional values, such as community or equality. The federal courts disfavor government regulation of speech based on content; the federal courts virtually disallow any regulation of speech based on its viewpoint. Even in areas of "unprotected" expression, such as hate speech conveying a threat, the government may not adopt viewpoint-based regulations.[79] None of these propositions holds true in Germany.[80]

With respect to the freedom of speech, the German approach represents a fundamental and radical break with the marketplace of ideas metaphor. Indeed, the ability of the government to suppress speech far outstrips not only the Holmesian ideal of a "marketplace of ideas,"[81] but goes far beyond even Alexander Meiklejohn's town hall

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76. BVerfGE 30, 173 (1971), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 147.

77. CURRIE, *supra* note 8, at 237.

78. *Id.*

79. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992).

80. *See, e.g.*, Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 340-47 (1998) (discussing German laws protecting reputation and prohibiting hate speech).

81. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out"); *see also* Gitlow v.

metaphor.[82] In Germany, "[s]peech is valued according to its utility in promoting desirable [social] ends."[83] This approach is largely, if not completely, foreign to the post-*Brandenburg* free speech tradition in the United States.

Although Meiklejohn endorsed government regulations that would promote a meaningful debate about the means and ends of democratic self-government, he never suggested that the government's power should extend to banning ideas or points of view that the government thought to be socially harmful.[84] Professor Stanley Fish is undoubtedly correct to posit that speech is never free,[85] but in Germany the realm of "free speech" is significantly narrower than in the contemporary United States. That said, whether this represents a better adjustment of competing constitutional values is a question over which reasonable minds may differ.[86]

New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting) (invoking market metaphor). Although Justice Holmes invoked the metaphor of a market for ideas, it was actually Justice Brennan who coined the phrase "marketplace of ideas." *See* Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965); *see also* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 160 n.25 (1996) (crediting Justice Brennan with originating the phrase "marketplace of ideas").

82. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26-27 (1960) (invoking town hall metaphor and suggesting goal of free speech should not be that everyone be permitted to speak at will, but rather "that everything worth saying shall be said") [hereinafter MEIKLEJOHN, CONSTITUTIONAL POWERS]; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 19-24 (1948) (setting forth a theory of free speech that includes government regulation to improve the quality and depth of speech and suggesting that the primary function and purpose of free speech is its ability to facilitate the process of democratic self-government) [hereinafter MEIKLEJOHN, FREE SPEECH].

83. Eberle, *supra* note 58, at 805.

84. *See* MEIKLEJOHN, FREE SPEECH, *supra* note 82, at 19-24.

85. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 102-19 (1994).

86. *See* CURRIE, *supra* note 8, at 242-43. As Currie notes:

> In all this there is much food for thought as to the proper role of a constitutional court as well as the proper scope of free expression and of those cognate rights that help to make it a reality. And that, in addition to the more modest but equally worthy goal of better understanding, is what comparative law is all about.

Id.; *see also* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (arguing that an independent tort action for racial insults is both permissible and necessary); Matsuda, *supra note* 1, at 2321 (calling for legal sanctions for racist speech); *cf.* Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 194-96 (1996) (arguing that efforts to limit speech rights to advance other values constitutes impermissible government censorship).

II. BALANCING DIGNITY AND FREE SPEECH

In a series of landmark opinions, the German Constitutional Court has firmly embraced dignity as a preferred constitutional value over the freedom of speech. Strangely enough, dignity claims even survive the grave—a dead actor's dignity has greater constitutional importance than a living author's interest in publishing his book.

A. Mephisto*: Bringing out the Dead*

In the famous *Mephisto*[87] case, the German Constitutional Court considered whether an author's interest in free speech justified burdening the dignity interests of a dead actor. The author, Klaus Mann, published *Mephisto*, a novel about an actor who collaborates with the Nazi government during the 1930s and 1940s.[88] The fictional actor, Hendrik Höfgen, was loosely based on Mann's brother-in-law, the German actor Gustaf Gründgens. "The novel describes the rise of the highly gifted actor Hendrik Höfgen, who disowns his political conviction and strips off all human and ethical ties in order to make an artistic career in a pact with the masters of Nationalist Socialist Germany."[89] In another work, *The Turning Point*, Klaus Mann publicly identified Gründgens as the model for the fictional actor Hendrik Höfgen.[90]

Gründgens's adopted son initiated a lawsuit in state court to block the distribution of the novel because it dishonored his dead father's memory.[91] The trial court dismissed the action, but the Regional Appellate Court reversed.[92] It found that "[t]he novel injured Gründgens in his honour, his reputation and his social position, and grossly defamed his memory."[93] Accordingly, the author "could not appeal to Article 5(3) GG" because his novel "constituted insult,

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87. BVerfGE 30, 173 (1971), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 147; *see also* KOMMERS, *supra* note 8, at 301-04.

88. Mephisto, BVerfGE 30, 173 (1971), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 147, 148.

89. *Id.*

90. KLAUS MANN, THE TURNING POINT 281-82 (1942). The Federal Constitutional Court cites this work and quotes Mann's identification of the fictional character with Gründgens. Mephisto, BVerfGE 30, 173 (1971), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 148-49.

91. Mephisto, BVerfGE 30, 173 (1971), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 149.

92. *See id.* at 149-50.

93. *Id.* at 150.

disparagement and defamation of Gründgens."[94] The Regional Appellate Court concluded that the deceased Gründgens's Article 1 dignity interest and Article 2 personality right, at least on the facts presented, outweighed Mann's Article 5(3) right to free expression and, accordingly, prohibited distribution of the book in Germany.[95] The Federal High Court of Justice affirmed this decision.[96] Thereafter, the publisher sought review of the decision in the Federal Constitutional Court, on the basis that the injunction violated Article 5(1) and 5(3) of the Basic Law.[97]

The Federal Constitutional Court began its analysis of the case by framing the dispute as involving a conflict of constitutional claims: Mann's publisher and estate claimed rights protected by Article 5(1) and 5(3), while Gründgens's son and estate asserted rights protected under Article 1 and 2.[98] The Justices found that Mann's novel constituted "art" for purposes of applying Article 5(3) and that the distribution of art enjoyed constitutional protection: "Article 5(3) . . . guarantees freedom of operation in the artistic sphere comprehensively. Accordingly, where, to create the relationships between artist and public, means of publication are needed, persons engaged in such mediatory activity are also protected by the guarantee of artistic freedom."[99]

Moreover, the Basic Law protects artistic freedom "without reservations."[100] This conclusion did not answer the ultimate question, however, because Article 5 claims are subordinate to claims arising under the dignity clause in Article 1. The court explained that "the dignity of man guaranteed in Article 1" may take precedence over an otherwise valid Article 5 claim because dignity is "the supreme value [that] dominates the whole value system of the fundamental rights."[101] Resolving the conflict required "weighing up all the circumstances of the individual case."[102]

After examining the facts found by the lower courts, notably including the fact that "Gründgens concerned a person of

94. *Id.*
95. *Id.*
96. *Id.* at 151.
97. *See id.*
98. *See id.* at 153. Ironically, Mann died prior to the Federal Constitutional Court's decision in the case. The *Mephisto* case therefore tested a dead author's interest in free expression against another dead man's reputational rights.
99. *Id.* at 155.
100. *Id.*
101. *Id.* at 156.
102. *Id.* at 158.

contemporary history and that public memory of him is still alive,"[103] the Federal Constitutional Court found that the balance favored vindication of Gründgens's Article 1 right over Mann's Article 5(3) interest in freedom of artistic expression.[104] In so holding, it rejected the proposition that "the publication ban was out of proportion to the expected curtailment of the right to respect of the late Gustaf Gründgens."[105] Accordingly, the Justices sustained the publication ban, noting that "[t]he considerations underlying this ban are not inappropriate to the case."[106] As Professor Quint has explained, "[i]t was this countervailing constitutional guarantee of personality, therefore, that could have the effect of limiting artistic expression."[107]

The result was far from unanimous. Three Justices dissented, arguing that the majority failed to examine adequately the balancing of interests undertaken by the lower courts.[108] Justice Stein argued:

> If in cases like the present one . . . the Federal Constitutional Court's reviewing power were to be confined to a narrowly limited check, namely whether the courts had at all seen the application of the fundamental rights, taken it into account and not contravened the general prohibition on arbitrariness then the Federal Constitutional Court would not be properly doing its job of being a guardian of the fundamental rights in all areas of law.[109]

The dissenters suggested that the lower courts had emphasized the interest in social reputation too much, and valued the social good of artistic expression too little, in finding for Gründgens.[110] "A free art must in principle be allowed to take off from personal information from reality and give it generalized significance through symbolic value."[111] This is especially true, the dissenters argued, when a public official or public figure serves as the artistic inspiration.[112] It necessarily follows that "[t]he guarantee of artistic freedom in

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103. *Id.*

104. *Id.* at 158-59.

105. *See id.* at 160.

106. *Id.* at 161. Because Article 5(3) provides a more specific textual home for Mann's claim, the Federal Constitutional Court declined to apply Article 5(1). *See id.* ("Artistic statements, even if they contain statements of opinion, mean something other than those statements.").

107. Quint, *supra* note 23, at 295.

108. *See* Mephisto, BVerfGE 30, 173 (1971), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 162-63 (Stein, J., dissenting).

109. *Id.* (Stein, J., dissenting) (citation omitted).

110. *See id.* at 163-64 (Stein, J., dissenting).

111. *Id.* at 166 (Stein, J., dissenting).

112. *See id.* (Stein, J., dissenting).

principle allows neither the restriction of the range of artistic topics nor the exclusion of means and methods of expression from the process of artistic transformation."[113]

The dissent also argued that the novel did not infringe Gustaf Gründgens's Article 1 dignity rights.[114] The subject was already deceased, his public reputation was largely committed to history rather than current events, and the book was plainly a work of fiction and featured a foreword stating this directly.[115] "For these reasons, no grave detriment to the personality sphere of the late Gustaf Gründgens can be found" and "[c]onsequently, there is no clear infringement of Article 1(1)[.]"[116]

A second dissent, by Justice Rupp-von Brünneck, emphasized that the Federal Constitutional Court had an obligation to engage in a de novo balancing of the relevant interests: "The dismissal of the constitutional complaint is based on a restrictive interpretation of the Federal Constitutional Court's competence for review, which marks a break with existing case law and can lead to very dubious consequences."[117] Absent stronger evidence of an intent by Mann to defame Gründgens, the Basic Law's protection of artistic freedom should prevail.[118] The dissent also invoked the case law of the United States Supreme Court, noting that the Court "in regard to persons and objects of contemporary affairs in principle always rates the general interest in free public debate above the personal interests that may be affected by false information or polemic description, as long as no 'actual malice' is present."[119] On the facts presented, Mann's novel plainly implicated a higher constitutional value than Gründgens's post-mortem dignity interest.[120]

B. Princess Soraya*: Telling Tales out of School*

Two years later, in *Princess Soraya*, the Federal Constitutional Court sustained an award of damages based on the publication of a fictional interview with the ex-wife of the then-Shah of Iran.[121] The periodical *Die Welt* published the story, which discussed "intimate

113. *Id.* at 167 (Stein, J., dissenting).
114. *See id.* at 171-72 (Stein, J., dissenting).
115. *See id.* at 171-73 (Stein, J., dissenting).
116. *Id.* at 173 (Stein, J., dissenting).
117. *Id.* at 175 (Rupp-von Brünneck, J., dissenting).
118. *See id.* at 179-80 (Rupp-von Brünneck, J., dissenting).
119. *Id.* at 179 (Rupp-von Brünneck, J., dissenting) (citation omitted).
120. *See id.* at 180 (Rupp-von Brünneck, J., dissenting).
121. *See* BVerfGE 34, 269 (1973).

details of her private life."[122] Soraya commenced a civil suit seeking money damages.[123] On review from the Federal High Court of Justice, the Federal Constitutional Court had to decide whether Article 5 provided a defense against the action for damages.[124]

The Federal Constitutional Court held in favor of Soraya and rejected *Die Welt*'s Article 5 defense, explaining that "[a]n *imaginary* interview adds nothing to the formation of real public opinion."[125] The Basic Law's protection of dignity, which encompasses personal reputation, required that "[t]he degree of care that must be expended to avoid dissemination of an *imaginary* interview . . . is never too much to expect."[126] Accordingly, in such circumstances, "[a]s against press utterances of this sort, the protection of privacy takes unconditional priority."[127]

In justifying this outcome, the Justices explained that "[t]he personality and dignity of an individual, to be freely enjoyed and developed within a societal and communal framework, stand at the very center of the value order reflected in the fundamental rights protected by the Constitution."[128] Thus, "all organs of the state" have a responsibility to protect "an individual's interest in his personality and dignity."[129] Whatever free speech value the faux interview possessed paled in comparison, at least in the Federal Constitutional Court's view, to Soraya's interest in avoiding the false presentation about her private life.[130]

C. Lebach*: Truth Is No Defense*

In the same year that it decided *Princess Soraya*, the Federal Constitutional Court also held that interests protected under the dignity clause outweighed any free speech value in a television movie presenting the true story of a gay robber.[131] Lebach, the gay robber,

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122. KOMMERS, *supra* note 8, at 124.

123. *See id.*

124. *See id.* at 128.

125. CURRIE, *supra* note 8, at 198 (translating *Princess Soraya*, BVerfGE 34, 283-84 (1973)).

126. *Id.* at 198 n.95 (internal quotations omitted) (translating *Princess Soraya*, BVerfGE 34, 286 (1973)).

127. *Id.* at 198 (translating *Princess Soraya*, BVerfGE 34, 283-84 (1973)).

128. KOMMERS, *supra* note 8, at 419-20 (translating *Princess Soraya*, BVerfGE 34, 269 (1973)).

129. *Id.* at 420 (translating *Princess Soraya*, BVerfGE 34, 269 (1973)).

130. *See id.*

131. Lebach, BVerfGE 35, 202 (1973), *translated in* KOMMERS, *supra* note 8, at 418-19.

had already completed his prison term at the time the movie was to be televised.[132] As Professor Currie notes, "the Court held the constitution *required* a remedy—this time to protect the right to free development of personality guaranteed by Art[icle] 2(1) in conjunction with the right to human dignity, which under Art[icle] 1(1) the state has an explicit affirmative obligation to protect."[133] As in the *Mephisto* case, the plaintiff sought and obtained injunctive relief against the distribution of the film—essentially, a very strong form of prior restraint.[134]

The Federal Constitutional Court explained that the case presented a conflict of values that required the court to "balance" or "adjust" the conflicting constitutional rights:

> In case of conflict [the court] must adjust both constitutional values, if possible; if this cannot be achieved, [the court] must determine which interest will defer to the other in the light of the nature of the case and [its] special circumstances. In so doing, [the court] must consider both constitutional values in their relation to human dignity as the nucleus of the Constitution's value system.[135]

The justices went on to conclude that the media have a justifiable interest in reporting crimes when they occur, as part of the natural news cycle, but that this interest in reporting on such matters declines rather quickly with time.[136] Thus, "[t]he radiating effect of the constitutional guarantee of the right of personality does not, however, permit the media, over and above reporting on contemporary events, to intrude indefinitely upon the person and private sphere of the criminal."[137]

In the case of a convicted defendant who has completed his prison sentence and been released, the news value does not outweigh the felon's interest in dignity and free development of his personality. "Once a criminal court has prosecuted and convicted a defendant for an act that has attracted public attention, and he has experienced the just reaction of the community, any further or repeated invasion of the criminal's personal sphere cannot normally be justified."[138] A television station may not re-broadcast a story about a past crime if

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132. *See id.* at 416.
133. CURRIE, *supra* note 8, at 199 n.96.
134. *See id.* at 199.
135. Lebach, BVerfGE 35, 202 (1973), *translated in* KOMMERS, *supra* note 8, at 417.
136. *See id.* at 418.
137. *Id.*
138. *Id.*

doing so "endangers the social rehabilitation of the criminal."[139] This is so because "[t]he criminal's vital interest in being reintegrated into society and the interest of the community in restoring him to his social position must generally have precedence over the public's interest in further discussion of the crime."[140] The Constitutional Court reversed the lower appellate court with instructions that the television network should be enjoined from broadcasting the program about Lebach.[141]

The result in *Lebach* provides virtually no protection to truthful speech about a matter of public concern in order to advance concerns rooted in the dignity and personality clauses. Thus, "the limiting effect of the constitutional right of personality on expression can be substantial."[142] Lebach, unlike Soraya, made no claim that the speech about him was factually false—he merely asserted that it violated his dignity and personality rights and would impede his reintegration into society.[143]

Professor Eberle describes these cases as creating a right to "informational self-determination" which "endows individuals with the right to control the portrayal of the facts and details of their lives."[144] This right encompasses the ability "to shield hurtful truths from public scrutiny in order to safeguard reputation or other personality interests," as well as "protection of personal honor as an outgrowth of personality."[145] The protection of these interests "can be extended to eclipse other basic rights," notably including "Article 5 expression guarantees."[146]

Thus, Article 1, as construed in *Lebach*, displaces truthful speech about an undoubted matter of public concern. This is a very substantial incursion on the freedom of speech (at least to an American constitutional lawyer's eyes) and demonstrates the decidedly inferior position that free speech occupies in the Federal Constitutional Court's objective order of constitutional values.[147]

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139. *Id.* at 419.
140. *Id.*
141. *See id.* at 418-19.
142. Quint, *supra* note 23, at 301.
143. *See* Lebach, BVerfGE 35, 202 (1973), *translated in* KOMMERS, *supra* note 8, at 416-19.
144. Eberle, *supra* note 24, at 1009.
145. *Id.*
146. *Id.*
147. *See* Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 691-93 (1980).

D. Böll*: Protecting Public Figures*

Some might argue that the Constitutional Court's decisions in the early 1970s reflect a concern for reputation that no longer holds true. Professor Currie posits that "[t]he overall trend... has been toward greater protection of speech, especially in matters of public concern."[148] He suggests that "[d]espite earlier decisions that appeared to embrace a more restrictive philosophy, it thus seems fair to say that, while the Constitutional Court continues to give the constitutionally protected interest in personal honor more weight than do analogous decisions of the Supreme Court, the gap has narrowed considerably."[149] This optimism toward greater protection for the freedom of speech seems somewhat overstated.

It may well be true that "[i]n most cases the German court seems inclined today to afford political and artistic expression a degree of protection comparable to that afforded by the [United States] Supreme Court."[150] But the Federal Constitutional Court has upheld free speech claims only when the personal insult was not targeted at any particular individual. In cases involving targeted insults, the Federal Constitutional Court has continued down the path outlined in *Mephisto*, *Princess Soraya*, and *Lebach*.

In 1980, for example, the German Constitutional Court rejected a free press claim in favor of protecting the dignity and reputation of a public figure.[151] In *Böll*, the Federal Constitutional Court had to decide whether the freedom of the press extended to false statements attributed to Heinrich Böll, a famous writer.[152] A local television station ran a commentary that attributed certain statements to Böll—specifically, the newscaster said that Böll had called the contemporary German state a "dungheap," featuring "residues of rotting power, defended with ratlike rage."[153] Finally, Böll was quoted as criticizing the government for pursuing the terrorists who killed the presiding judge of the Berlin Court of Appeal "in a merciless hunt."[154] The Federal High Court of Justice reversed a favorable lower court decision because "[t]he criticism ... both in content and form and in means

148. CURRIE, *supra* note 8, at 206.
149. *Id.*
150. *Id.*
151. *See* KOMMERS, *supra* note 8, at 420-21.
152. *See id.*
153. *See* Böll, BVerfGE 54, 208 (1980), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 190.
154. *Id.*

employed, [was] within the sphere of freedom guaranteed to expression of one's own opinion in a television commentary by Article 5(1) Basic Law."[155]

The German Constitutional Court reversed the Federal High Court of Justice, ruling that the commentary featured false quotes and that these quotes damaged Böll's dignity and personality rights, guaranteed by Articles 1 and 2 of the Basic Law. "The attacks directed against the complainant in the commentary were of such a nature as to infringe the complainant's constitutionally guaranteed general personality right."[156] The Constitutional Court flatly ruled that "[m]isquotations are not protected by Article 5(1)" and opined that "[i]t cannot be seen that the constitutionally guaranteed freedom of opinion requires such protection."[157] Not only had the lower court overstated the media's Article 5 rights, but it also had seriously undervalued the plaintiff's Article 1 and 2 rights to the protection of his dignity and personality.[158]

Professor Quint has noted that "the *Böll* case ... affirms a requirement of vigorous judicial review under some circumstances in order to vindicate the right of personality against the countervailing interests in speech."[159] In other words, appellate courts reviewing a decision in favor of the free speech claim have an obligation to scrutinize closely the facts to ensure that the defendant did not escape liability for causing harm to the dignity interests of the plaintiff. In the United States, by way of contrast, searching review of trial results also applies in defamation cases involving public figures, public officials, or matters of public concern—but this searching review applies only when the *plaintiff* prevails.[160] Thus, in the United States, the presumption runs in precisely the opposite direction: a verdict imposing liability on a press entity receives careful appellate review, including independent review of all matters of constitutional fact.

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155. *Id.* at 191.

156. *Id.* at 194-95.

157. *Id.* at 196.

158. *See id.* at 197-98.

159. Quint, *supra* note 23, at 337.

160. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984) (requiring independent appellate review of questions of constitutional fact resolved adversely to media defendant); *see also* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1236 (2000) ("Moreover, the Supreme Court has noted that the First Amendment entitles a speaker to an independent examination of a court or jury determination that the speech is subject to regulation.").

E. Strauß Caricature*: Protecting Politicians from Harsh Parody*

Other, even more recent, cases also seem to contradict Professor Currie's suggestion.[161] For example, in *Strauß Caricature*[162] the Constitutional Court had to decide whether a particularly harsh political cartoon merited protection under Article 5 of the Basic Law or, instead, whether the cartoon went "too far" and therefore constituted a violation of Article 1's guarantee of personal dignity.[163] A magazine called *Konkret* published a series of disparaging cartoons featuring Bavarian Prime Minister Franz Josef Strauβ as a pig.[164] The Constitutional Court explained:

> In the first of these drawings the pig is copulating with a pig dressed in judicial costume. A further caricature shows both figures of pigs—partly in pairs, partly separately—engaged in a variety of sexual activity. A third drawing shows four pigs, three of them mounting the pig in front. Here too, two of the figures of pigs bear the facial features of the Bavarian Minister-President and two are dressed in judicial robes and toque. The caption to the first drawing is: "'Satire may do anything': can Rainer Hachfeld too?" The second drawing has the caption: "Which drawing is the right one, finally, Mr. Prosecutor?" The third caricature was preceded by a cut version of a letter from the complainant to the editors of "konkret", complaining that he kept on having to draw more pictures of little pigs because the Bavarian Minister-President would not give him any rest.[165]

Needless to say, being portrayed as a rutting pig did not sit well with Prime Minister Strauß. He initiated an action for defamation against *Konkret*, seeking money damages.[166] The local trial court found for Strauß, but the Regional Court reversed.[167] At the next level of appeals, however, Strauß prevailed.[168] The Regional Appellate Court reinstated the local court's verdict, finding that the presentation of Strauß as a swine went beyond the limits of fair comment.[169]

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161. In fairness to Professor Currie, he acknowledges these cases, even as he asserts that the Constitutional Court has afforded "greater protection" to the freedom of speech. *See* CURRIE, *supra* note 8, at 206.

162. Strauß Caricature, BVerfGE 75, 369 (1987), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 420, 420-21.

163. *See id.* at 421-22.

164. *See id.* at 420.

165. *Id.* at 420-21.

166. *Id.*

167. *Id.* at 421.

168. *See id.*

169. *See id.*

The Federal Constitutional Court easily found that "[t]he caricatures at issue are the formed outcome of free creative action" and therefore "meet the requirements" for protection under Article 5(3).[170] The Court went on to find that the Regional Appellate Court had properly balanced the magazine's interest in artistic freedom (and political commentary) against Strauss's interest in personal honor and dignity.[171] It explained that "[t]he necessary balancing of conflicting constitutionally protected interests necessary because of the tension between artistic freedom and the general right to personality of third parties had inevitably in the present case to lead to the result it found."[172]

Although satire and parody enjoy protection under Articles 5(1) and 5(3), this protection must give way to the paramount importance of personal dignity.[173] On the facts presented, *Konkret* had gone beyond "usual portrayals" such as "characterizing or exaggerating particular traits or the physiognomy of a person by choosing the form of an animal."[174] Instead, "what was plainly intended was an attack on the personal dignity of the person caricatured."[175]

The Court took some pains to explain that

> [i]t [was] not his human features, his personal peculiarities, that are to be brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked "bestial" characteristics and behaves accordingly. Particularly the portrayal of sexual conduct, which in man still today forms part of the core of intimate life deserving of protection, is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being. The complainant is thereby condemning him in a way that a legal system that takes the dignity of man as the highest value must disapprove of.[176]

Utterly absent from the Constitutional Court's analysis is any discounting of the politician's interest in dignity as an essential accommodation to the democratic process.[177] Under the Basic Law, a

170. *Id.* at 423.
171. *See id.* at 424-25.
172. *Id.* at 425.
173. *See id.* at 425-26.
174. *Id.* at 425.
175. *Id.*
176. *Id.*
177. *See id.* at 420-27.

politician enjoys the same claim to personal honor and dignity as a private citizen.[178]

Of course, there is nothing fundamentally inconsistent with maintaining both a commitment to democratic self-governance and, at the same time, a strong commitment to protecting personal dignity. But history teaches that thin-skinned politicians are often willing to use the power of the state to suppress dissent. This is certainly true of Germany's history. What reason is there to think that politicians empowered with the credible threat of prosecution would not use this power to silence, or at least chill, dissent?

F. Dignity as the "Preferred" Freedom

At one time, it was commonplace in the United States to see the First Amendment, and particularly the Free Speech Clause, referred to as a "preferred freedom" or in a "preferred position."[179] Under the preferred position doctrine, First Amendment freedoms should be given priority over other guarantees in the Bill of Rights and the federal judiciary should exercise a special vigilance when government encroaches on the exercise of these rights.[180] In the mid-twentieth century, the Supreme Court explained the doctrine as follows:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority

178. *See id.*; *cf.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (noting the American prerogative to criticize public officials); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-82 (1964) (recognizing the special need for criticism of public officials).

179. *See, e.g.*, Saia v. New York, 334 U.S. 558, 562 (1948) ("Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."); Prince v. Massachusetts, 321 U.S. 158, 164 (1944) ("If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme."); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

180. *See* Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (arguing that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth").

> gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.[181]

By the late 1950s, the Supreme Court's invocation of the "preferred position" of the First Amendment had declined in favor of more open-ended balancing tests.[182] Even so, the Supreme Court's vindication of speech claims against important countervailing interests (such as reputation) continues to reflect the First Amendment's de facto "preferred position" in constitutional adjudication.

Although not every plaintiff with a free speech claim prevails, the federal courts are remarkably solicitous of such claims, even when the speech at issue does not implicate core concerns of the First Amendment.[183] Indeed, it would be no overstatement to say that free speech stands in more or less the same position in the United States constitutional scheme as does dignity under the German Basic Law.

What we find, then, is an inversion of values. The United States Supreme Court routinely subordinates values associated with personal dignity, honor, and reputation in favor of vindicating free speech claims. Cases like *Hustler Magazine, Inc. v. Falwell*[184] simply do not have any German counterparts. Nor is this an accident. Simply put, the German constitutional scheme elevates dignity as the "preferred freedom" and does so quite overtly at the expense of the freedom of speech.

If one views this state of affairs critically (as one well might), the question arises as to where the blame should lie. To be clear, one should hesitate before placing principal responsibility on the Federal

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181. Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (citations omitted); *see* Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.").

182. *See, e.g.*, Roth v. United States, 354 U.S. 476, 481-85 (1957) (rejecting a First Amendment defense to prosecution for obscenity, and holding that hardcore erotica does not implicate the Free Speech Clause at all). *But cf. id.* at 514 (Douglas, J., dissenting) (arguing that the materials should enjoy constitutional protection because "[t]he First Amendment puts free speech in the preferred position"); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring) ("The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling government interests of the highest order." (internal quotations and citations omitted)).

183. *See* Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1084-86, 1091-93 (2002).

184. 485 U.S. 46 (1988).

Constitutional Court. After all, the Basic Law *itself* strictly limits the protection of free speech by conditioning the scope of this freedom on other interests, notably including "the right to respect for personal honor."[185] Thus, the Basic Law itself elevates personal honor as a coequal interest with the freedom of speech—and does so entirely independently of the effect of Article 1.

When one then turns to Article 1, one finds that the very first right the Basic Law articulates is the protection of human dignity.[186] By way of contrast, the Bill of Rights makes the freedom of speech, press, and assembly (along with the religion clauses) its first concern.[187] The structural contrast could not be more striking. Article 79(3) further confirms this textual primacy by rendering Article 1 unamendable; it is a permanent and fixed part of the German constitutional order.[188] No comparable protection exists for Article 5. Finally, Article 2 lends further support to the primacy of dignity by protecting a citizen's interest in "the free development of his personality."[189] The Federal Constitutional Court has found that this provision has a synergistic effect with Article 1 that enhances the relative weight of dignity claims in certain contexts (such as those presented in *Lebach*).[190]

Thus, the Basic Law itself goes a very long way toward placing free speech in a decidedly inferior position to dignity interests in general, and reputational interests in particular. But it would be a mistake simply to rest the explanation on a simplistic textualist argument. Clever judges are quite capable of evading textual mandates that they do not like. It would grossly underestimate the Justices of the Constitutional Court to suggest that text alone explains their comparatively weak commitment to the freedom of speech.

As Professor Whitman has observed, "[t]here is, when you add all this up, a very great difference indeed between the American and Continental European legal traditions."[191] But more importantly, there are significant *cultural* differences at work too. A culture of honor, or respect, has been an important feature of German social life for quite a

185. GG art. 5(2) (F.R.G.).
186. *See id.* art. 1(1).
187. *See* U.S. CONST. amend. I.
188. GG art. 79(3).
189. *Id.* art. 2(1).
190. *See* Lebach, BVerfGE 35, 202 (1973), *translated in* KOMMERS, *supra* note 8, at 416-17.
191. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1381 (2000).

long time. Although the roots of this tradition are aristocratic, the expectation of respect has been effectively and thoroughly democratized.[192] Professor Whitman traces the broadest extension of personal insult law to the Nazi period.[193] He notes that "[t]his 'nationalization' of honor nicely paralleled a 'nationalization' of honor that took place during the French Revolution, and it had some of the same revolutionary implications: At least potentially, *every* German was a person of honor."[194]

Whitman suggests that, in the United States, "honor is truly absent from our legal thought-world."[195] But this absence in our legal thought-world is a product of our broader culture. In the United States, we really do not worry very much about securing to every person a "minimum of honor," something that Whitman characterizes as "deeply rooted in [German and French] cultural tradition."[196] Germany and the United States "have followed divergent paths of development in their march toward social egalitarianism as we see it today: Germany and France have *leveled up*, the United States has *leveled down*."[197] Whitman goes so far as to posit that "it is not wrong, in contrasting them with the United States, to describe Germany and France as modern honor cultures."[198]

Professor Whitman also has observed that the German laws protecting personal honor and dignity constitute "a body of law that shows, in many of its doctrines, a numbness to free-speech concerns that will startle any American."[199] This characterization seems spot on: German law's disregard of the chilling effects of the civil and criminal law's protection of personal honor is utterly antithetical to the free speech project embodied by the First Amendment. That politicians could enjoy not merely statutory, but, in fact, an absolute and unamendable constitutional privilege to be free from sharp or caustic criticism, represents a complete departure from baseline assumptions about the freedom of speech as it has been conceptualized in the United States.

Returning to Professor Currie's suggestion that "[t]he overall trend, nevertheless, has been toward greater protection of speech,

192. *See id.* at 1295-1300, 1313-30.
193. *See id.* at 1296.
194. *Id.* at 1328-29 (footnote omitted).
195. *Id.* at 1382.
196. *Id.* at 1384.
197. *Id.* at 1387.
198. *Id.* at 1391.
199. *Id.* at 1312.

especially in matters of public concern,"[200] one can make the case that the Federal Constitutional Court has protected speech when the countervailing dignity interest was diffuse. For example, the Constitutional Court has held that Article 5 protects art that allegedly casts contempt upon the German national flag[201] and a harsh parody of the German national anthem.[202] Thus, when the dignity of the state is itself at issue, the German Constitutional Court *has* vindicated free speech claims. The same result obtained in *Tucholsky*, which involved a legal challenge to the use of the phrase "soldiers are murderers."[203] Because the statement was not directed at any particular solider, no significant dignity interest existed.[204] Only in the context of anti-Semitic speech has the contemporary German Constitutional Court protected dignity at the expense of free speech in near absolute terms.

Thus, Professor Currie's assertion withstands scrutiny, at least when judged against the dignity of the German government itself or against abstract interests (although remarks of an anti-Semitic cast constitute a notable exception to this general approach). As the German Constitutional Court has explained, "the norm [the protection of personal honour] cannot be justified from the viewpoint of personal

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200. *See* CURRIE, *supra* note 8, at 206.

201. *See* Flag Desecration, BVerfGE 81, 278 (1990), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 437. One should note that the Constitutional Court invalidated criminal convictions for flag desecration only on an "as applied basis." The Court explained that although "complainants' actions fall in the area of artistic freedom protection" that this conclusion "does not, from the outset, actually stand in the way of punishment under § 90a . . . of the Criminal Code . . . for disparaging the federal flag." *Id.* at 443.

202. *See* German National Anthem, BVerfGE 81, 298 (1990), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 450. In this case, the magazine *Howler* published a parody of the German national anthem. *See id.* at 451 (providing the text of the parody). A local court convicted the publisher of an offense under section 90a(1) of the German Criminal Code and the appellate courts affirmed the conviction. *See id.* at 452. The Federal Constitutional Court reversed on Article 5(3) grounds, finding that the lower courts had failed properly to balance the publisher's interest in using the national anthem to parody social contradictions against the government's interest in preserving the dignity of the national anthem. *See id.* at 455-57. Here, the value of the satire outweighed, at least in context, the state interest in protecting the national anthem. As in the *Flag Desecration* case, the Constitutional Court invalidated the convictions only on an "as applied" basis.

203. *See* Tucholsky (Soldiers are Murderers), BVerfGE 93, 266 (1995), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 659. The Federal Constitutional Court held that Article 5(1) protected a citizen who published the words "Soldiers Are Murderers," provided that the statement is not directed at any particular soldier or group of soldiers. *See id.* at 676-77. "Instead, they expressed a judgement about soldiers and about the profession of soldier, which in some circumstances compels the killing of other people." *Id.* at 677.

204. *See id.* at 676-77.

honour, since State institutions neither have 'personal' honour nor are bearers of the general right of personality."[205] It is true that "[w]ithout a minimum of social acceptance, State institutions cannot carry out their functions" and "may therefore in principle be protected against verbal attacks that threaten to undermine these requirements."[206] But the protection of state agencies and institutions via the criminal law "may not however have the effect of protecting State institutions against public criticism, possibly even in sharp forms, something intended to be especially guaranteed by the fundamental right of freedom of opinion."[207]

When the dignity interest involves a specific individual, however, the Federal Constitutional Court usually finds that reputation (even of a dead person) trumps the Article 5 interest in freedom of expression. As the Court put the matter in the *Tucholsky*, "freedom of opinion must always take second place where the statement affects another's human dignity."[208] As late as 1995, the Court emphasized that "human dignity as the root of all fundamental rights cannot be weighed against any individual fundamental right"—including those rights protected under Article 5.[209] The Constitutional Court made very clear that, had the *Tucholsky* defendants plainly called specific soldiers "murderers," a different result would obtain.[210]

This analysis of the phrase, "soldiers are murderers" or "soldiers are potential murderers," drew a sharp dissent from Justice Haas, who believed that the lower courts had properly applied the civil code provision protecting personal honor.[211] She observed that "[r]efraining from personal defamation in the political opinion-forming process can only promote that process, by raising the culture of political conflict."[212] She further argued that the majority's failure to protect the honor of German soldiers as a class or group risked the Basic Law's popular legitimacy: "It is a simple matter of course that the constitution must not, if it is not to lose its credibility, leave unprotected those who follow its commands and are attacked (exclusively) for that very thing."[213]

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205. *Id.* at 678.
206. *Id.* (citation omitted).
207. *Id.* (citation omitted).
208. *Id.* at 680.
209. *Id.*
210. *See id.* at 682-88.
211. *See id.* at 694-98 (Haas, J., dissenting).
212. *Id.* at 698 (Haas, J., dissenting).
213. *Id.* (Haas, J., dissenting).

Thus, *Tucholsky* makes clear that the protection for free speech critical of the government runs to critiques of government institutions and offices, and not to the individuals who staff them.[214] The rule set forth in cases like *Lebach*, *Princess Soraya*, and *Strauß Caricature* remains in place. Free speech enjoys protection only to the extent that it does not displace the Basic Law's principal concern: the protection of personal dignity and honor.

III. BALANCING FREE SPEECH AND DEMOCRACY

In another important series of cases, the German Constitutional Court has vigorously enforced the Basic Law's mandate to safeguard democratic processes and institutions. Germany is a "militant democracy,"[215] and the freedom of speech does not extend to advocacy of the abolition of the existing constitutional order.[216]

The Federal Constitutional Court certainly acknowledges and embraces the relationship of free speech to democratic self-government:

> As the most immediate manifestation of the human personality in society, the basic right to free expression of opinion is one of the noblest of all human rights. . . . To a free democratic constitutional order it is absolutely basic for it alone makes possible the continuing intellectual controversy, the contest of opinions that forms the lifeblood of such an order. In a certain sense it is the basis of all freedom whatever, "the matrix, the indispensable condition of nearly every other form of freedom."[217]

Professor Currie notes that "[i]n light of this focus on the central role of free expression in the functioning of democracy, it is understandable that the German court, like its counterpart in the United States, has emphasized that political speech lies at the heart of the constitutional provisions."[218] Accordingly, no commercial speech doctrine exists in Germany; the Federal Constitutional Court has sustained both legislation limiting advertising by pharmacies and banning advertising

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214. *See id.* at 862-88.

215. *See* Eberle, *supra* note 58, at 825.

216. *See id.* at 825-26.

217. Lüth, BVerfGE 7, 198, 208 (1958) (author's translation) (quoting Justice Cardozo); *see also* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT, *supra* note 23, at 1, 7 (providing an alternate translation of the *Lüth* opinion).

218. CURRIE, *supra* note 8, at 175.

by physicians on the theory that commercial advertising does not implicate Article 5 values in a meaningful way.[219]

In practical terms, this means that even if speech does not offend the dignity clause (Article I), it may still not enjoy substantial protection from either government or private abridgement if the speech is of the wrong sort. And what, precisely, is speech of the wrong sort? Speech that has as its object the overthrow of the existing constitutional order is most definitely speech of the wrong sort.[220] So too is anti-Semitic speech.[221] As Professor Whitman has observed, "[i]t is indeed the case that Jews are extensively shielded from 'disrespectful' insults under current German law."[222] Moreover, "[t]he German commitment to protecting Jewish sensibilities is in this regard remarkably far-reaching."[223]

But to be clear: the proscription of speech by the German government is most assuredly one-sided and viewpoint based. Thus, one can inveigh at will against Nazis, Communists, or anti-Semites. Speech hostile to these positions is not only protected under Article 5, but also seems to be entirely consistent with the rather limited dignity interests of Nazis, Communists, and anti-Semites. Or, stated somewhat more directly, the Federal Constitutional Court appears to be generally more protective of speech that advances the favored government position on these issues than it is of other kinds of speech.

Moreover, the legal proscriptions against hate speech are, in practice, not universal in their application: "It is important to recognize, though, that the *broader* German commitment to respectful treatment is somewhat less far-reaching."[224] Thus, while the German government is committed to protecting Jewish citizens and visitors from the psychological harms associated with hate speech, it is not as vigilant with respect to other groups, such as persons of Turkish ancestry.[225] As the cases discussed below will demonstrate, even if the

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219. *See* Physician Advertising, BVerfGE 71, 162 (1985); Pharmacy Advertising, BVerfGE 53, 96 (1980). These results stand in stark contrast with cases like *Edenfield v. Fane*, 507 U.S. 761, 777 (1993), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), which protect the ability of accountants and pharmacies, respectively, to advertise their products and services.

220. *See, e.g.*, Communist Party Ban, BVerfGE 5, 85 (1956); Socialist Reich Party Ban, BVerfGE 2, 1 (1952), *translated in* KOMMERS, *supra* note 8, at 218.

221. *See, e.g.*, Auschwitz Lie (Holocaust Denial), BVerfGE 90, 241 (1994), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 621-30.

222. Whitman, *supra* note 191, at 1310.

223. *Id.*

224. *Id.*

225. *See id.* at 1310-12.

expression does not transgress an individual's or group's interest in dignity, the content and viewpoint of the speech most definitely matter in Germany.

A. Lüth: *Free Speech Triumphant?*

Lüth[226] is an important case for many reasons. Professor Kommers describes it as "a linchpin of German constitutional law," and rightly so.[227] The case establishes the general principle that the Basic Law applies to all legal disputes, either directly or indirectly.[228] It also "laid down for the first time the doctrine of an objective order of values."[229] Finally, the case serves as the foundation for German free speech doctrine more generally.[230]

Veit Harlan, a film director, worked closely with the Nazi propaganda machine.[231] In this capacity, he produced and directed a number of highly offensive films, most notably including the infamously anti-Semitic film *Jud Süss* (The Jew Seuss).[232] Notwithstanding his active collaboration with the Nazi government, the Allies never convicted Harlan of any war crimes for his contributions to the Nazis' genocidal programs.[233]

Following the end of World War II, he attempted to reemerge as a mainstream director.[234] In 1950, he wrote and directed the film *Immortal Beloved*, which was released to favorable critical notices both in Germany and abroad.[235]

Erich Lüth, Hamburg's director of information, was incensed at Harlan's reemergence into the world of cinema as a legitimate auteur.[236] Lüth, acting in his private capacity as a citizen, organized a nationwide boycott of Harlan's film.[237] Domnick-Film-Produktion GmbH, the film's producer, and Herzog-Film GmbH, the film's distributor in Germany, then sought an injunction against the boycott under a general

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226. Lüth, BVerfGE 7, 198 (1958), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 1-20; *see also* KOMMERS, *supra* note 8, at 361-69 (excerpting and translating the case).

227. *See* KOMMERS, *supra* note 8, at 361.

228. *See supra* notes 8-18 and accompanying text.

229. KOMMERS, *supra* note 8, at 361.

230. *See id.*

231. *See id.*

232. *See id.*

233. *See id.* at 361-62.

234. *See id.* at 362.

235. *See id.*

236. *See id.*

237. *See id.*

provision of the German Civil Code.[238] A local trial court in Hamburg found in favor of the producer and distributor and enjoined Lüth from pursuing the boycott.[239] The injunction prohibited Lüth from "calling on German cinema owners and film distributors not to include the film 'Immortal Beloved' in their programme" and from "calling on the German public not to go and see the film."[240]

After this adverse judgment, Lüth filed an appeal with the Regional Court, which he lost.[241] He then filed simultaneous appeals with the Regional Appeals Court and the Federal Constitutional Court, alleging a violation of his rights under Article 5 of the Basic Law.[242]

The German Constitutional Court began its analysis by noting that the Basic Law creates a system of rights that is not "neutral as to values" and that erects "an objective value system in its section on fundamental rights."[243] Dignity "must be regarded as the basic constitutional decision for all spheres of law," and this commitment to dignity "manifestly influences the civil law: no provision of civil law may be in contradiction with it; each one must be interpreted in its spirit."[244] This effect on private law is particularly appropriate in the context of the "general clauses" of the Civil Code which serve as the "points where the fundamental rights 'break in' to civil law."[245]

Although Article 5(2) limits the freedom of speech when required by the general laws, the general laws themselves must be interpreted consistently with the Basic Law. Thus, there is a kind of symbiotic relationship between the Basic Law and the Civil Code:

> [T]he general laws must themselves be interpreted as far as their effect of restricting the fundamental rights goes in the light of the importance of that fundamental right, . . . which in a free democracy must lead to a basic presumption in favour of freedom of speech in all areas but particularly in public life.[246]

The Federal Constitutional Court extols the value and importance of free speech, describing it "as the most direct expression of human

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238. *See id.* The provision, section 826, provides that "[w]hoever causes damages to another person intentionally and in a manner offensive to good morals is obligated to compensate the other person for the damage." *See id.* at 362 (internal quotations omitted).

239. *See* Lüth, BVerfGE 7, 198 (1958), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 3.

240. *Id.*

241. *See id.*

242. *Id.* at 3-4.

243. *Id.* at 5.

244. *Id.*

245. *Id.*

246. *Id.* at 7.

personality in society, one of the foremost human rights of all."[247] The Court explains that

> [f]or a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible.... It is in a certain sense the basis of every freedom whatever, "the matrix, the indispensable condition of nearly every other form of freedom."[248]

This language strongly foreshadowed the ultimate result in the case, which was favorable to Lüth.

The Constitutional Court found that the lower courts had failed to consider adequately Lüth's interest in self-expression when applying section 826 of the Civil Code.[249] The trial judge must "in each case ... weigh the importance of the fundamental right against the value of the legal good protected in the 'general law' for the person allegedly injured by the utterance."[250] The Court emphasized that "[t]he decision can be taken only on the basis of an overall view of the individual case, taking all essential circumstances into account."[251]

The Federal Constitutional Court went on to engage in a balancing of the plaintiffs' interests in being free from economic coercion and lost profits against Lüth's interest in freedom of expression.[252] The Court found that Lüth acted in good faith and on the basis of a sincere political conviction that Veit Harlan should not be permitted to simply resume his professional life, given the appearance this would create to the larger world, i.e., "that nothing had changed in German cultural life by comparison with the National Socialist period; with Harlan now again, as then, the representative German film director."[253]

The Court noted that the German government benefited from Lüth's speech: "There is therefore a decisive interest in having the world assured that the German people has turned away from this mental attitude and condemns it not merely for reasons of political opportunism but from insight into its contemptibility, gained from their own inner conversion."[254] In other words, Lüth's boycott represented a

247. *Id.*
248. *Id.* (quoting Justice Cardozo).
249. *See id.* at 20.
250. *Id.* at 9.
251. *Id.*
252. *See id.* at 9-20.
253. *Id.* at 11.
254. *Id.*

source of good publicity for both the West German government and the German people as a whole.

As for Harlan's interest in reintegration into society, pursuit of his career, and, moreover, his personal dignity and reputation? The Federal Constitutional Court posited counterspeech as an effective remedy for any harm to these interests that Lüth's activity caused: "Anyone who feels injured by a public statement of another can similarly reply before the public."[255] In fact, the Regional Court had applied Article 2, which protects the free development of individual personality, to sustain the trial court's judgment.[256] The Constitutional Court was far less interested in protecting Harlan's Article 2 (or Article 1) rights.[257] If the boycott ended Harlan's career as a film director, "he would still nevertheless have other possibilities of artistic activity . . . so that there could be no talk of a total annihilation of his artistic and human existence."[258]

Lüth's remarks against Harlan even contained arguable factual mistakes: "[T]he complainant had made the objectively untrue assertion that Harlan had been only formally acquitted by the Court of Assizes, while the grounds of judgment had been a moral condemnation."[259] Recall that false assertions of fact supposedly have no call, whatsoever, on Article 5. In the context of sham interviews, erroneous quotation marks, and quotes taken out of context, the Constitutional Court flatly denied any protection to the speaker.

Lüth's statements were at best inaccurate and at worst total mischaracterizations. The Federal Constitutional Court found that the war crimes court judgment

> goes on to explain in detail that at the time when Harlan was ordered to make the film there had scarcely been any further possibilities for him of avoiding cooperation, sabotaging the film or significantly moderating its anti-semitic content; it is explicitly attested that he had at least attempted the latter.[260]

Harlan's activities constituted a "crime against humanity," but were excused because he was simply following orders and would have faced

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255. *Id.* at 13.
256. *See id.*
257. *See id.*
258. *Id.* at 14.
259. *Id.* Later the Court described the findings of the Court of Assizes, which found Harlan had no choice but to make the Nazi films and that he attempted, to the extent possible, to sabotage his work product for the National Socialist government. *See id.* at 14-18.
260. *Id.* at 17.

personal danger "to life and limb" if he refused to work for the Nazi government.[261]

Lüth simplified a rather complicated verdict into the statement that "[h]is acquittal in Hamburg was purely a formal one" and "[t]he grounds of judgment were a moral condemnation."[262] This sort of spin fails to pass muster in later cases. Indeed, even an accurate quotation, taken out of context, gives rise to a private action for damages in *Böll*.[263] So why does the German Constitutional Court excuse Lüth from observing the standard of care it demands of others?

The reason is as simple as it is startling: Lüth's speech helped contribute to Germany's reemergence as a legitimate nation state and therefore deserved protection.[264] Indeed, the Federal Constitutional Court takes pains to note that his speech closely corresponded to a speech in the Bundestag condemning Harlan's reemergence as a film director.[265] The correspondence of views was a felicitous one: "In assessing the conduct of the complainant, the view of the representative body of the German people expressed here cannot be irrelevant."[266] Simply put, speech critical of Nazi collaborators or those who supported them is broadly protected, at least insofar as the government itself agrees with the speaker's characterization of the object of the accusation. The best way to win an Article 5 case before the German Constitutional Court is to attack a known Nazi. But, one should not draw any broad generalizations from the result in *Lüth*. Instead, it merely represents the viewpoint-based jurisprudence of Article 5.

Not only does German law protect those who trash the Nazis, it also generally prohibits political speech that endorses or supports Nationalist Socialist ideologies. The best way to lose a free speech claim is to embrace antidemocratic values or anti-Semitic ideologies. Simply put, certain ideas enjoy virtually no legal protection in German constitutional law. The cases that follow demonstrate the oddity of *Lüth* and the strength of the countervailing censorial tradition.

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261. *Id.* at 18.

262. *Id.* at 2.

263. *See* BVerfGE 54, 208 (1980), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 189-98.

264. *See* Lüth, BVerfGE 7, 198 (1958), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 1), *supra* note 23, at 19-20.

265. *See id.*

266. *Id.* at 20.

B. Socialist Reich Party *and* Communist Party Ban*: The "Militant Democracy" in Action*

As noted in the introduction, the Basic Law itself proscribes activities aimed at the overthrow of the democratic constitutional order. Although Article 9 generally protects the freedom of association, this protection does not extend to those associations "whose purposes or activities . . . are directed against the constitutional order."[267] Similarly, Article 18 declares free speech rights null and void for "abuse" if deployed "to combat the free democratic basic order."[268] Finally, Article 21 prohibits the existence of political parties "that, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."[269] These three provisions collectively establish that constitutional freedoms that otherwise enjoy protection under the Basic Law lose such protection if deployed in an effort to disestablish the "free democratic basic order." Article 5 does not itself contain this proviso, but Articles 9, 18, and 21 clearly establish that the freedom of speech does not extend to speech aimed at promoting the overthrow of the government.

In a pair of cases decided in the 1950s, the Federal Constitutional Court enforced bans against the Socialist Reich Party and the Communist Party. Although these decisions appear rather extreme when contrasted with the *Brandenburg* free speech orthodoxy that has prevailed in the United States since 1969, one cannot really fault the Constitutional Court for enforcing the express textual limitations that the Basic Law itself establishes.

In *Socialist Reich Party Ban (SRP)*, the government petitioned the Constitutional Court to ban the SRP under Article 21(2) of the Basic Law.[270] The Court recognized the inherent contradiction of positing full democracy with limitations on electoral speech.[271] It noted that "the principle of democracy" requires freedom for "any political orientation to manifest itself in political parties, including—to be consistent—anti-democratic orientations."[272] The nature of serving as a

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267. GG art. 9(2) (F.R.G.).

268. *Id.* art. 18.

269. *Id.* art. 21(2). For a very helpful discussion of political parties and their role in the constitutional order that the Basic Law establishes, see CURRIE, *supra* note 8, at 207-13.

270. *See* BVerfGE 2, 1 (1952), *translated in* KOMMERS, *supra* note 8, at 218.

271. *See id.* at 219.

272. *Id.* The Federal Constitutional Court has not offered translations of either the *Socialist Reich Party Ban* or *Communist Party Ban* cases. Accordingly, citations are to the Kommers translations.

democratic representative also implies the ability "to be a free representative of the entire people and at the same time be bound by a concrete party program."[273] "Both fundamental ideas lead to the basic conclusion that the establishment and activity of political parties must not be restrained."[274]

Banning antidemocratic political organizations violates both principles—something that the Constitutional Court found deeply problematic.[275] It noted that "[t]he Framers of the German Constitution had to decide whether they could fully implement this conclusion or whether, enlightened by recent experiences, they should instead draw certain limits in this area."[276] Article 21(2) and Article 9 resolve this question in favor of limiting the full freedom of association, whether by political parties or other groups, in order to safeguard the democratic constitutional order.[277] Consistent with Article 21(2), the Constitutional Court may ban a party "if, but only if, they seek to topple supreme fundamental values of the free democratic order which are embodied in the Basic Law."[278]

After examining the membership of the SRP, its objectives and platform, and its internal structure, the Constitutional Court concluded that it represented a de facto proxy for the Nazi Party and, therefore, fell within the ban Article 21(2) establishes.[279] Accordingly, it held that "[t]he SRP is thus unconstitutional within the meaning of Article 21(2) of the Basic Law" and "must be dissolved."[280]

Four years later, the Federal Constitutional Court issued a decree banning the Community Party (or KPD).[281] Professor Kommers reports that "[t]he court found, as a matter of ideology and fact, that the KPD directed all of its operations against the existing constitutional system."[282] It cautioned that the mere abstract advocacy of the overthrow of the government was not a sufficient condition for banning a political party.[283] Instead, the party must have "a fixed purpose constantly and resolutely to combat the free democratic basic

273. *Id.*
274. *Id.*
275. *See id.*
276. *Id.*
277. *See id.* at 220.
278. *Id.*
279. *See id.* at 220-22.
280. *Id.* at 222.
281. Communist Party Ban, BVerfGE 5, 85 (1956), *translated in* KOMMERS, *supra* note 8, at 222-23.
282. *Id.* at 223.
283. *See id.*

order" and must pursue this agenda "in political action according to a fixed plan."[284]

Although the Basic Law establishes a democratic constitutional order, its framers did not intend to tolerate any and all political agendas. The framers, "based on their concrete historical experience," concluded that "the state could no longer afford to maintain an attitude of neutrality toward political parties."[285] The Basic Law thus establishes a "militant democracy," which the Federal Constitutional Court has an obligation to defend and maintain.[286] In light of its finding that the KPD sought to overthrow the democratic basic order, the Constitutional Court ordered its dissolution and confiscation of its property.[287]

The Federal Constitutional Court has been less strict in its enforcement of Article 21(2) since the 1970s, but the government retains the power to abolish any party that it deems a sufficient threat to the existing constitutional order. Kommers notes that "the level of tolerance for extremist political speech and activity appears to have risen in the Federal Republic as Germans have gained confidence in their democratic institutions and processes."[288]

That said, one should not assume that the contemporary German government maintains a weakened commitment to "militant democracy." In many cases, a band of lunatics with little electoral support probably would benefit more from a government ban than suffer from it. The German government's behavior thus reflects much greater tolerance for extremist parties that show little sign of garnering significant electoral support. But, make no mistake, the toleration reflects pragmatism rather than an absolute commitment to entirely free and open democratic politics.[289] As Professor Currie notes, the government moved to invoke its powers to suppress organizations dedicated to overthrow of the democratic order in the immediate aftermath of German reunification because of "a rash of violent attacks on foreigners" that "reached alarming proportions."[290]

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284. *Id.* (internal quotations omitted).
285. *Id.*
286. *See id.* (internal quotations omitted).
287. *See id.*
288. *Id.* at 236.
289. *See id.* at 236-37.
290. *See* CURRIE, *supra* note 8, at 221.

C. Auschwitz Lie *(Holocaust Denial): The Exclusion of False Ideas from Article 5's Protection*

In the United States, "[u]nder the First Amendment there is no such thing as a false idea."[291] As Professor Martin Redish has noted, "the Supreme Court has adopted as its doctrinal baseline the principle that the government may not constitutionally regulate private expression because it disagrees with the viewpoints expressed."[292] Thus, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[293]

Under the Basic Law, Germany takes a somewhat more hands-on approach to demonstrably false speech. The *Auschwitz Lie* case incorporates and reflects the German view that some ideas are both demonstrably false and sufficiently evil to justify an immediate government response to suppress them.[294]

The facts of the case are relatively simple. The National Democratic Party (NDP) planned on staging a rally in Munich, at which David Irving, a self-styled "revisionist historian" and known Holocaust denier, would present the keynote address.[295] The local government threatened the NDP with criminal prosecution unless it promised to take "appropriate measures" to ensure that the fact of the Holocaust would not be denied.[296] The German administrative courts upheld the restrictions on the theory that a law prohibiting the denial of the Holocaust was presumptively constitutional and did not violate Article 5.[297] The NDP appealed these adverse decisions to the Federal Constitutional Court, alleging a breach of Article 5(1).[298]

The Federal Constitutional Court easily concluded that "[t]he contested decisions do not violate Art. 5(1)."[299] It explained that Article 5(1) protects the expression of opinions because "[o]pinions are marked by the individual's subjective relationship to his statement's

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291. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

292. Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 74-75 (2002).

293. *Gertz*, 418 U.S. at 339-40.

294. *See* Auschwitz Lie (Holocaust Denial), BVerfGE 90, 241 (1994), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 621.

295. *See id.*

296. *See id.*

297. *See id.* at 622-23.

298. *See id.* at 625.

299. *Id.* at 624.

content" and "[t]o this extent, demonstration of their truth or untruth is impossible."[300] On the other hand, "factual assertions are not, strictly speaking, expressions of opinion."[301] Factual assertions feature an "objective relationship between the utterance and reality" that permits an objective observer to ascertain "their truth or falsity."[302]

Factual assertions that "cannot contribute anything to the constitutionally presupposed formation of opinion" do not enjoy any Article 5(1) protection.[303] "Viewed from this angle, incorrect information is not an interest that merits protection."[304] This is particularly true when the false statements cause injury to reputation interests protected by Article 5(2) and dignitary interests safeguarded by Article 1. The Court explained that "where an expression of opinion must be viewed as a formal criminal insult or vilification, protection of personality routinely comes before freedom of expression."[305] It went on to find that the prohibited statements were both factually untrue and caused harm to the reputation and dignity of Holocaust survivors and their families.[306]

The contrast with *Lüth* is startling. Lüth, one should recall, misrepresented facts regarding Veit Harlan's acquittal by the Court of Assizes in his speeches calling for a boycott of *Immortal Beloved*. The Constitutional Court simply glossed over these inaccuracies in sustaining Lüth's Article 5(1) claim. David Irving and the NDP do not receive the same solicitous consideration. Why? Because the German government supported the views and attitudes espoused by Lüth and detests and opposes the views expressed by Mr. Irving and the NDP. It is a simple case of state-enforced viewpoint discrimination. Again, however, one should keep in mind that the Basic Law itself strikes this balance—to a large extent, the Federal Constitutional Court is simply

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300. *Id.* at 625.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*; *cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (holding that the government may not endeavor to declare truth and suppress falsehoods, but must instead rely on the marketplace of ideas to resolve any problems that false statements might cause if the speech involves a public figure or matter of public concern).

305. Auschwitz Lie (Holocaust Denial), BVerfGE 90, 241 (1994), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 626 (citation omitted).

306. *See id.* at 626-30. For a comprehensive review of Germany's laws prohibiting Holocaust denial and their history, see Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies"*, 85 MICH. L. REV. 277, 277-324 (1986).

enforcing limits that the text of the German Constitution itself establishes.

D. Nazi Symbols*: Viewpoint Based Protections for Political Speech*

To bring matters to a fitting close, one should note that the German government does not proscribe *all* uses or displays of Nazi symbols. It only prohibits the display of such symbols by those who appear to support or sympathize with the Third Reich and its anti-Semitic and racist policies. The *Nazi Symbols*[307] case makes clear that the attitude of the person using Nazi iconography will prefigure the protected or unprotected nature of the speech.

In the *Nazi Symbols* case, the complainants produced satirical t-shirts featuring "Adolph Hitler's body in a uniform jacket with a swastika armband" and "his body appear[ed] sideways in front of a map outline of Europe."[308] Hitler's name appeared over his image, with the dates "1939" and "1945" appearing to either side of the image; in gothic lettering under this picture the phrase "European Tour" appeared, with a series of dates and countries corresponding to the German conquest and occupation of various European nations during World War II.[309] The September 1940 entry for "England" and the August 1942 entry for "Russia" both featured a strike out over the country's name and the notation "Cancelled" in the margin.[310] The copyright lists "Third Reich Promotions" as the tour promoter.[311] A second t-shirt featured Hitler with a yo-yo and the caption, "European Yo-Yo Champion, 1939-1945."[312] The complainants sold 156 t-shirts: "153 with the first picture and 3 with the second picture."[313]

The trial court convicted the complainants of using the symbol of an unconstitutional organization, in violation of section 86 of the Criminal Code, and sentenced each of them to pay a fine. The t-shirt company's owners unsuccessfully appealed the conviction to the Regional Court and the Bavarian State Supreme Court.[314] Evidently, the concept of sarcasm was lost on the lower courts. The defendants

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307. BVerfGE 82, 1 (1990), *translated in* 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (pt. 2), *supra* note 23, at 458.

308. *Id.* at 459.

309. *Id.*

310. *Id.*

311. *Id.*

312. *See id.*

313. *Id.*

314. *See id.* at 459-60.

then filed an appeal with the Federal Constitutional Court, alleging infringement of their rights under Article 5(1) and (3).[315]

The Federal Constitutional Court found that the complainants' argument had merit on Article 5(3) grounds.[316] It noted that "[t]he Regional Court failed to appreciate the artistic content of the pictures":

> The assumption that an "informed observer" could not see any derision or ridicule of Hitler in the pictures and that in the first picture a "reasonable average citizen" could only recognize a chronological list of the campaigns, the failure of the attacks against England and Russia as well as Hitler's end, does not do justice to the content of the portrayals.[317]

The same conclusion applied with respect to the "yo-yo" Hitler t-shirt. "Contrary to the Regional Court's opinion both pictures are open to the interpretation that Hitler and his megalomania are intended to be ridiculed by using satire."[318] The t-shirts enjoyed protection, not as political speech or opinion, but as art.[319]

This decision is, at least superficially, free speech friendly. But on a deeper level, it is more disturbing than reassuring. The complainants win their case only because the Constitutional Court accepted their characterization of the t-shirts as disparaging of Hitler. Had the NDP produced t-shirts with heroic Hitler dressed in classical garb, convictions under Section 86 would undoubtedly have stood. Would the t-shirts have been any less "artistic"? Not really. But the t-shirts would have conveyed the wrong message about Hitler—they would have transmitted an officially proscribed viewpoint. As such, the Basic Law would not have stood as an impediment to civil or criminal punishments.

It is certainly true that "free speech" is not truly free anywhere. Every nation maintains some limits on the scope of lawful expression. For example, an attempt to "joke" with an airport security guard will lead to criminal punishment very quickly in the United States. But the scope of permissible speech in Germany seems remarkably limited. The government has arrogated to itself the power to ban bad ideas and organizations that attempt to disseminate bad ideas. The system reflects scant trust in the good sense of the German people to separate wheat from chaff in the marketplace of ideas.

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315. *See id.* at 460.
316. *See id.* at 461.
317. *Id.*
318. *Id.* at 462.
319. *See id.*

From an American perspective, speech is not really "free" at all in Germany. The government maintains strict editorial control over core political speech, and, for the most part, these restrictions are aggressively enforced. One cannot legally sell copies of *Mein Kampf* either in Germany or to Germans in Germany and Web sites featuring prohibited political ideas give rise to criminal prosecutions.[320] The German government's efforts to eradicate disfavored political viewpoints has not abated—its campaign against German language neo-Nazi Web sites continues into the present.[321] Although the German government may be somewhat less eager to ban parties formally, it has not abated its efforts to suppress publication of pro-Nazi sentiments.

In sum, these efforts are both content- and viewpoint-based censorship and reflect a radical break with the free speech tradition in the United States. Given the continuing problems the German government faces with extreme right wing parties and politicians, it should perhaps reexamine whether its program of official government censorship is doing more good than harm. Regardless of whether the censorial approach is consistent with democratic self-government, as a practical matter it does not seem to be very effective at suppressing racist and xenophobic viewpoints.[322] As Professor Currie delicately states the matter: "[t]hose who believe in constitutional liberties will continue to differ as to whether such measures [as prohibitions on extremist parties and their rhetoric] are appropriate means of protecting them."[323]

IV. AN IMPERFECT EQUALITY: SPEECH RESTRICTIONS AS A (POOR) SUBSTITUTE FOR EQUAL CITIZENSHIP

The German Federal Constitutional Court has broken important new ground in free speech theory. The Justices have squarely rejected the marketplace metaphor, not merely endorsing, but effectively

320. *See* Peter Finn, *Neo-Nazis Sheltering Web Sites in the U.S.*, WASH. POST, Dec. 12, 2000, at A1.

321. *See id.*; *see also* John F. McGuire, Note, *When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 768-71 (1999) (describing contemporary efforts by the German government to regulate internet content both domestically and with regard to Web sites located abroad but accessible by German citizens).

322. *See* David A. Jacobs, Recent Development, *The Ban of Neo-Nazi Music: Germany Takes on the Neo-Nazis*, 34 HARV. INT'L L.J. 563, 563-64, 567-68 (1993) (noting that "Germany has recently experienced an alarming rise in neo-Nazi and right-wing violence against foreigners and Jewish memorials," and reporting recent statistics involving hate crimes in Germany).

323. *See* CURRIE, *supra* note 8, at 221.

requiring government to police speech that transgresses the dignity guarantee and to proscribe and punish speech, speakers, and organizations that advocate the overthrow of the democratic social order. The German Constitutional Court's free speech jurisprudence utterly fails to embrace a marketplace of ideas—to the extent that a marketplace of ideas exists in Germany, all ideas are subject to government control not only for their content and viewpoint, but, by virtue of the dignity clause, for the manner in which a speaker chooses to express an idea or viewpoint.

If speech is a "preferred" freedom in the United States,[324] it represents a dispreferred freedom in Germany. Constitutional objectives associated with dignity and the survival of contemporary government institutions routinely supersede the Article 5 right to freedom of expression. German constitutional law intentionally subordinates the freedom of expression in order to promote values associated with dignity, community, and support for democratic self-government. As Professor Eberle has noted, "[t]he German vision, set out with reasonable clarity and reflecting the systemization of German legal science, centers around the human person and her dignity. . . ."[325]

Although the marketplace approach that generally prevails in the United States is certainly subject to serious criticisms,[326] the German approach seems to fail in several key respects. The Basic Law has criminalized speech advocating the overthrow of the existing constitutional order; nevertheless, citizens have continued to join organizations having this objective. Over fifty years of censorship have failed to get the job done. Reports of anti-Semitism and acts of violence against ethnic minorities in Germany continue to abound, particularly in the parts of Germany formerly comprising the German Democratic Republic.[327] The use of a speech ban as a means of

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324. *See generally* McGuire, *supra* note 321, at 753 & n.10 (collecting cases and noting that "[i]n both theory and practice, speech is considered the most fundamental of rights in the United States").

325. Eberle, *supra* note 24, at 1049.

326. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 1-4 (1996) (arguing that government regulations are necessary to ensure that monied interests do not use wealth to essentially buy up the marketplace of ideas); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241-52 (1993) (arguing that private market forces may not serve democratic self-government very well and that government might need to assume some responsibility for regulating, and hence shaping, the marketplace of ideas).

327. *See* David E. Weiss, Note, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899, 912-13 (1994) (describing the Rostock antiimmigrant riots of 1992 and the German government's response to the riots).

eradicating bad ideas has, as an empirical matter, simply failed to work. Moreover, the aggressive use of criminal law to ban parties and politicians espousing the wrong ideas serves only to lionize racist thugs and, by imbuing the ideology of hate with a strong musk of the taboo, to make such ideologies intrinsically more appealing to Germany's youth.

The failure of the speech ban is not really surprising. Banning speech as a primary effort to create an egalitarian society seems an odd approach. Consider, for example, Germany's restrictive citizenship laws. Since World War II, Germany has maintained a very liberal policy on immigration and asylum, while restricting citizenship on the basis of blood. As of 2002, some 7.3 million residents, representing fully nine percent of Germany's population, were legal foreign residents.[328] Of these noncitizen, permanent residents of Germany, 2,500,000 are Turks.[329] Until very recently, however, only the natural or adopted children of German citizens were entitled to claim German citizenship; birth on German soil did not (and still, standing alone, does not) automatically convey German citizenship.

The results of these two policies—relatively open immigration coupled with highly restrictive naturalization laws —are not difficult to predict: the establishment of a permanent underclass of noncitizen nationals, people born, educated, and employed in Germany who had no right to participate in civic affairs. Their presence served as an irritant to Germans enjoying citizenship—something that, in a democratic society, politicians are bound to notice. Meanwhile, the noncitizen nationals had no ability themselves to participate in the electoral process by supporting candidates sympathetic to their plight.

As one commentator has observed, "[o]ne possible means of ensuring the protection of foreigners would be to grant foreigners easier access to citizenship and thus to voting rights."[330] The German Constitutional Court, however, has held that it is unconstitutional to grant voting rights to noncitizens in federal, state, and local elections.[331]

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328. *See* Steven Erlanger, *Bill Easing Immigration Passes First Test in German Parliament*, N.Y. TIMES, Mar. 2, 2002, at A5.

329. *Id.*

330. Jacobs, *supra* note 322, at 576.

331. *Id.* at 576 n.85 (collecting and citing cases); *see also* Kay Hailbronner, *Fifty Years of the Basic Law—Migration, Citizenship, and Asylum*, 53 SMU L. REV. 519, 527 (2000) (noting that "[t]he Constitutional Court, in a landmark decision of October 31, 1990, . . . struck down the Hamburg law [extending voting rights to resident noncitizens] as unconstitutional," and observing that "[b]y reforming the citizenship law, the legislature can react to factual changes in the population of the Federal Republic of Germany").

Accordingly, the extension of voting rights would require liberalization of citizenship rules.

Until the enactment of major naturalization reforms in 1999, which took effect in 2000, German citizenship rested on *jus sanguinis*, or a child's bloodline: "for a child to be born a German citizen, one of his or her parents must be German."[332] Naturalization was highly disfavored and constituted "an exception based on full integration into German society and the public interest."[333] Thus, Germany maintained "a 'Völkisch' view of nationality based on blood rather than a liberal, republican view of citizenship."[334]

In practice, these restrictive rules could lead to absurd results:

> This law has two important consequences. First, the child of non-naturalized Turkish parents in their third generation in Germany is born a Turkish citizen. Second, the child of [a] Polish couple whose parents and grandparents have never seen Germany and speak no German but are of German descent has the automatic right to German citizenship. Germany, Austria, and Luxembourg are the only three countries in Europe that still determine citizenship by bloodline.... Although there may be a rational explanation for basing German citizenship on descent, the message is clear: the color of your blood is what being German is all about, and foreigners' blood is not the right color.[335]

Ironically, then, the German government maintained a citizenship policy that appeared to use troublesome racial stereotypes while at the same time it aggressively attempted to suppress potentially embarrassing displays of Nazi symbols. Thus, the German

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332. Jacobs, *supra* note 322, at 577; *see also* Ediberto Román, *Members and Outsiders: An Examination of the Models of United States Citizenship as Well as Questions Concerning European Union Citizenship*, 9 U. MIAMI INT'L & COMP. L. REV. 81, 112 (2000) ("Germany has a history of onerous and restrictive naturalization laws for foreigners.").

333. Jacobs, *supra* note 322, at 577; *see* Edmund L. Andrews, *German Immigration Bill Wins Disputed Vote*, N.Y. TIMES, Mar. 23, 2002, at A3. As Edmund Andrews of the *New York Times* reports:

> For decades, even when Germany recruited millions of 'guest workers' in the 1950's and 1960's, German leaders insisted that theirs was not 'an immigration country' and made it nearly impossible for foreigners to become citizens. Now, with more than seven million resident foreigners, or 9 percent of the total population, Germany is already a nation of immigrants.

Andrews, *supra*, at A3.

334. Roger Cohen, *The German 'Volk' Seem Set to Let Outsiders in*, N.Y. TIMES, Oct. 16, 1998, at A4.

335. Jacobs, *supra* note 322, at 577 (footnotes omitted); *see also* Cohen, *supra* note 334, at A4 ("Many people have a rooted image of Germany as a blood community." (quoting sociologist Hartmut Esser)).

government sent a highly mixed message by denying full civic participation to third-generation, permanent—resident noncitizens.

In a bold and somewhat politically risky move,[336] Chancellor Gerhard Schröder successfully advocated the overhaul of Germany's naturalization law, which dated back to 1913.[337] These reforms passed the federal Parliament on July 15, 1999, and took effect on January 1, 2000.[338] Under the reforms, "children born in Germany to foreign parents acquire German citizenship by birth, provided that one parent has been a permanent resident in Germany for at least eight years and has a permanent residence permit."[339] However, the child's German citizenship is only provisional; the child must make an election between German citizenship and her parent's citizenship between the ages of eighteen and twenty-three.[340] German nationality is lost automatically if a dual national reaches the age of twenty-three without having renounced any other citizenship or claim to citizenship.[341] In addition, the law reduced the naturalization waiting period for adult immigrants from fifteen years to eight years.[342]

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336. *See* David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L.J. 1, 3 (1999) (noting that the reform "bill triggered such heated opposition that it was generally blamed for the Social Democrats' defeat in a state election in Hesse in February 1999," and observing that this loss cost the party control of the Bundesrat, or upper house of the German federal parliament, which in turn required that the provisions of the naturalization reform bill be weakened in order to pass in the upper house).

337. *See* Daniel Boettcher, Current Development, *German Government Considers Changing Citizenship Laws, But Original Proposals Meet Fierce Opposition*, 13 GEO. IMMIGR. L.J. 339, 339-40 (1999).

338. Staatsangehörigkeitsgesetz (Citizenship Law), BÜRGERLICHES GESETZBUCH [BGB] art. 1618 (F.R.G.); *see* Kay Hailbronner, *Labor Transfer Schemes—In Whose National Interest? Globalization and the Transfer of Labor—The European Experience*, 16 GEO. IMMIGR. L.J. 773, 775 (2002); Hailbronner, *supra* note 331, at 529-31 (discussing reforms and possible effects on German political community and noting that "[t]he extension of German citizenship to children born on German territory to foreigners means a substantial conceptual change").

339. Hailbronner, *supra* note 331, at 530.

340. *See id.*

341. *Id.*; *see also* Martin, *supra* note 336, at 3 n.6 (describing substantive changes in German citizenship law, including forced election of nationality by age twenty-three for *jus soli* German citizens).

342. Professor Hailbronner explains that "[f]oreigners may now acquire German citizenship after eight years of lawful residence in Germany provided that they: 1) have a residence permit or a residence entitlement; 2) are not dependent on social welfare; 3) have no criminal record; and 4) have sufficient knowledge of the German language." Hailbronner, *supra* note 338, at 775; *see also* Hailbronner, *supra* note 331, at 530-31 ("Foreigners with a secure residence permit have a right to acquire German citizenship after eight years of residence instead of the fifteen-year wait period for those without secure resident permits. This right is dependent upon a sufficient knowledge of the German language and a formal commitment to respect the Basic Law.").

Both children born in Germany and foreign nationals seeking to become naturalized citizens must effectively and affirmatively renounce any other citizenship which they hold or to which they may be entitled. Thus, even after the reforms, "there is no automatic path, or 'tenure track,' that leads to German citizenship."[343]

Even though citizenship will now be possible for many of the permanent guest workers and their children, considerable unease remains among some current German citizens. "For adversaries [of the reforms], it is a fundamental change endangering the identity of the German nation."[344] For example, Professor Hailbronner expresses considerable reservations about the possible effects of the naturalization and citizenship reforms:

> The final test will be whether a reform of nationality law will contribute to the maintenance of the elements stabilizing the "identity" of the nation. The law would be a fundamental failure if it would lead to the establishment of national ethnic minorities with privileged political and social rights. The reform legislation makes clear that together with the requirement of sufficient German language knowledge and a commitment to the principles of the Basic Law, admission to the political community is dependent on the intention to integrate into German society.[345]

Thus, German citizenship, even after the reforms, has (or should have) as much to do with cultural identity as with simply paying one's taxes and voting.[346]

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343. Hailbronner, *supra* note 338, at 775.

344. Hailbronner, *supra* note 331, at 531.

345. *Id.* at 533-34.

346. *See* Román, *supra* note 332, at 112 ("Foreign individuals seeking German citizenship have historically had to demonstrate cultural integration, which included fluency in written and spoken German."); Karin Scherner-Kim, Note, *The Role of the Oath of Renunciation in Current U.S. Nationality Policy—To Enforce, to Omit, or Maybe to Change?*, 88 GEO. L.J. 329, 344-47 (2000) (observing the importance of the "need to foster national cohesion through adherence to common values," but also noting the importance of functional aspects of citizenship and the negative effect demands for cultural integration might have on voluntary naturalization). Given this historical demand for cultural integration as a condition of full citizenship, it is odd that "[f]or decades, German political leaders have avoided developing effective initiatives geared toward long-term integration of Turkish and Kurdish immigrants." Vera Eccarious-Kelly, *Radical Consequences of Benign Neglect: The Rise of the PKK in Germany*, 24 FLETCHER F. WORLD AFF. 161, 161 (2000). Eccarious-Kelly reports that "[t]his lack of official recognition has prompted descendants of Kurdish and Turkish immigrants to organize politically in order to increase their domestic influence." *Id.* Presumably, this sort of effort to create permanent ethnic voter blocs is exactly the sort of development that Professor Hailbronner most fears. *See supra* note 345 and accompanying text. At least arguably, however, the creation (or maintenance) of an ethnic identity simply

Such a requirement of full cultural assimilation undoubtedly raises the stakes of naturalization. As Professor Martin notes, "pangs of regret or wonder, emotional ties to the old country, and especially continuing relations with family still residing there make it impossible to accomplish a full and complete break."[347]

The liberalized rules governing citizenship should lead to greater political participation by ethnic minorities in Germany. This, in turn, should ensure the election of government officials more attuned to the needs, wants, and desires of these communities. This assumes, of course, that the immigration reforms will be implemented effectively. If a complete loss of ethnic identity is a de facto requirement for naturalization, many persons eligible for citizenship might deem the price too dear to pay.[348]

In many ways, the situation prior to the enactment of the immigration reforms was not entirely unlike that in the American South in the pre-Voting Rights Act era. Prior to 1965, African Americans could not vote. This was not a function of citizenship—any person born on United States soil is a citizen, by virtue of the citizenship clause of the Fourteenth Amendment.[349] But citizenship, by itself, does not establish the right to vote. One must register in order to enjoy suffrage. Thus, if local officials can systematically prevent a class of persons from registering to vote, the fact that they happen to be citizens is quite irrelevant.

State and local officials in the states of the former Confederacy deployed a variety of devices, including poll taxes, literacy tests, and physical violence, to prevent African-American citizens from voting. In consequence, politicians seeking office in states with thirty-five percent minority populations ran as open racists. The electorate was entirely white, so a politician seeking public office had no need to address the concerns of the minority community. Indeed, speaking to such issues virtually ensured electoral defeat.

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represents a rational response to the fact of racism and discrimination in contemporary German society.

347. Martin, *supra* note 336, at 9.

348. *See generally* Shlomo Avineri, *Comment: Remarks on Michelman and Breyer*, 21 CARDOZO L. REV. 1085, 1087 (2000) (arguing that "the current German debate over citizenship law and naturalization is equally characterized by the lack of solidarity with the ethnic Turkish population," and noting that "Turkish people, even if born in Germany, are to many Germans outside the pale of effective solidarity, and hence the debate is really not about rights, but about identity").

349. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

Whatever his faults (and they were legion), President Lyndon B. Johnson instinctively realized that the key to meaningful equality in the South involved reform of the political process. Through sheer willpower and brass-knuckle political tactics, President Johnson forced the Voting Rights Act of 1965 through the Congress. Following passage of the Voting Rights Act, literally millions of African-American citizens registered to vote and, in fact, voted. A sea of change swept the Deep South, as incumbent politicians fell over themselves trying to show support for the minority community. Avowed Dixiecrats, such as Senator John C. Stennis of Mississippi and Strom Thurmond of South Carolina, supported the renewal of the Voting Rights Act in 1982. The ultimate race baiter, Governor George C. Wallace of Alabama, had an epiphany and went to a historically black Baptist Church in Montgomery, Alabama to seek forgiveness for his past sins—before seeking an unprecedented fourth term as Alabama's governor in 1982.[350]

Thus, the political enfranchisement of minority citizens radically transformed the political scene. More than any judicial effort to enforce the Fourteenth Amendment, the Voting Rights Act of 1965 completed the process of national reconstruction that commenced with the Civil War in 1861.[351] The key to equality was not a speech code that banned the use of racial epithets or prohibited parties that advocated the maintenance of segregation. Instead, the enfranchisement of minority voters led to a transformation of the region's politics. The state and local governments in the states of the former Confederacy, once utterly indifferent to the needs and wants of minority citizens, suddenly exhibited a new solicitousness that continues to this day. As between a prohibition on hate speech and a

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350. *See* MARSHALL FRADY, WALLACE: THE CLASSIC PORTRAIT OF ALABAMA GOVERNOR GEORGE WALLACE, 289 (1996) (describing Wallace's 1979 visit to the Dexter Avenue Baptist Church in Montgomery, Alabama, to apologize for his past behavior and seek forgiveness from those he had wronged in the past); Art Harris, *George Wallace's Visions & Revisions: Wooing Alabama's Voters Away from His Own Past*, WASH. POST, Sept. 1, 1982, at B1 (describing Wallace's pilgrimage to an African American Baptist church seeking spiritual and political salvation); *see also* Caroline Rand Herron, Michael Wright & Carlyle C. Douglas, *George Wallace Leads the Pack in Alabama Vote*, N.Y. TIMES, Sept. 12, 1982, § 4, at 4 (noting Wallace's efforts to "court[] Alabama blacks, apologizing for his past race-baiting ways," and reporting that Wallace, seeking "an unprecedented fourth term as Governor," secured the electoral support of "nearly a third of the state's black voters" in the 1982 Democratic Party state primary election).

351. *See* Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1414-20, 1426-28 (1995) (describing genesis of Voting Rights Act of 1965 and its effects on minority participation in federal, state, and local government after enactment).

ballot, the leaders of the American Civil Rights Movement would undoubtedly have preferred the ballot.

Chancellor Gerhard Schröder's immigration reforms present the potential of seriously addressing the structural marginalization of ethnic minorities in Germany. Indeed, over time, the 1999 reforms may come to play the same role for remaking German society that the Voting Rights Act played in remaking the American South. The reforms are a significant and highly important step toward integrating Germany's multigenerational guest workers (or *Gastarbeiter*) into the political life of the nation.[352]

All that said, however, Germany's hate speech laws are a very poor proxy for enfranchisement of ethnic minorities. But there is good reason for this. The hate speech laws are neither designed nor enforced to empower ethnic minorities. The Basic Law's protection of dignity privileges members of the dominant cultural group much more than the average Turk. Moreover, this is not accidental.

As Professor James Q. Whitman has eloquently explained, German dignity concerns stem from a culture of respect that democratized aristocratic forms of politesse and protected these interests through the civil and criminal law.[353] "Standing behind both German and French attitudes toward the regulation of civility is something else: a commitment to the broad distribution of 'honor' or 'dignity' throughout society."[354] He emphasizes that "[t]hese Continental systems, in short, have human 'dignity' today largely because they had personal 'honor' in the past."[355]

The concept of honor, or dignity, goes to personal affront and not to core concerns with the equality of all persons. Accordingly, posting a sign in a local bar that states "no Turks allowed" does not necessarily give rise to a cause of action under the German Civil or Criminal Code provisions protecting personal honor. Why? Because the total rejection of another person based on his membership in a particular racial or ethnic group is not the same as a targeted personal insult.[356] Professor Whitman explains:

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352. Germany has experienced significant immigration from ostensibly "temporary" guest workers since the 1960s. *See* Boettcher, *supra* note 337, at 339-40. These workers "were expected to return home after several years' labor in Germany, so neither the Germans or the Turks made great efforts to integrate." *Id.* at 340.

353. *See* Whitman, *supra* note 191, at 1295-1312, 1327-32, 1381-90.

354. *Id.* at 1384.

355. *Id.* at 1385 (emphasis omitted).

356. *See id.* at 1303, 1310-11.

> It is important to recognize, though, that the *broader* German commitment to respectful treatment is somewhat less far-reaching. Members of other groups [besides Jews]—notably Turks, the focus of disproportionate hostility in the German public sphere today—are certainly protected against insults, like all Germans. But allegations of anti-Turkish insults, unlike allegations of anti-Jewish ones, are subjected to the usual juristic analysis, that is, to a factual inquiry as to whether they display an intentional "lack of respect or disrespect" on the part of the person delivering the insult. This is why bar-owners who post signs excluding Turks may not have committed an "insult" under German law: The operative question, under the law of insult, is again whether the individual bar-owner has indulged in an open and unambiguous display of "his *own* lack of respect for the victim."[357]

Thus, Germany's insult and hate speech laws are not really designed either to create or maintain comprehensive social equality.

For example, if a Turkish woman driving a car gives "the bird" to a fellow driver after being cut off, the woman, if caught and identified, could be prosecuted civilly for insult.[358] If the other driver, in response, called the woman a "Turkish whore," it is far from certain whether a claim would lie, under either the laws of personal insult or the antihate speech laws.[359] German law simply "does not aim to guarantee an atmosphere of dignity" or "establish structural ground rules for respectful interracial relations that will operate regardless of the (ever-elusive) subjective intent of the persons involved."[360]

This explanation helps to square the German legal system's historical failure to afford full civil rights, including suffrage, to noncitizen permanent residents. The apparent contradiction is more imagined than real: the objectives of the civility laws regulating speech are about protecting personal dignity from direct insult, not about the creation of an inclusive and egalitarian society. And even this commitment is somewhat shaky when one focuses on unpopular immigrant groups, like the Turks. Understood in this way, the failure (until 2000 in any event) to provide citizenship to literally thousands of permanent residents and their children becomes a great deal less puzzling.

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357. *Id.* at 1310-11.

358. *See id.* at 1296-97 ("In fact, every German knows that anybody who is the target of *any* such gesture—for example, 'the finger' or 'the fig'—has the right to call the cops." (footnote omitted)). For an amusing compendium of potentially actionable insults, see *id.* at 1305-06 n.70.

359. *See id.* at 1295-97, 1305 n.70, & 1312 n.88.

360. *Id.* at 1312.

Does Germany protect the freedom of speech? Undeniably, the answer is "yes."[361] But the Federal Constitutional Court has broadly and consistently declined to afford the freedom of speech the primacy that it enjoys in the United States. In part, this reflects a constitution that elevates dignity above free speech and specifically and strictly limits free speech itself. But, in a broader sense, Germany's treatment of free speech reflects a broader cultural fact: free speech is less important to Germans than personal honor. In the United States, there simply is no comparable legal protection for personal honor or reputation: "American law has, it must be emphasized, remarkably little to say about norms of hierarchical respect."[362] Thus, "American law is just different."[363]

I would not assert that American free speech law is inherently superior to German law. The legal systems, and, indeed, both the legal and broader cultures, achieve different results by design, and not by accident. It would make little sense to criticize the Constitutional Court for failing to advance values that the Justices of that Court self-consciously choose to subordinate to advance other values. One also would be hard pressed to make a serious case that Germany does not protect free speech. China does not respect free speech, but Germany certainly is not China. Although Germany protects less speech than the United States, a great deal of speech does enjoy formal constitutional protection.

The German approach deals a serious blow to efforts to establish a universal definition of "the freedom of speech." Indeed, as Professor Currie suggests, "[e]xamination of the German law of free expression reminds one once again how easily two well-intentioned societies, starting from substantially identical premises, can arrive at significantly different results."[364] German constitutional law defines free speech in a plausible way and reflects a sophisticated and highly nuanced jurisprudence. The Constitutional Court has endorsed neither a "marketplace of ideas" nor a paradigm that absolutely privileges speech annexed to the project of democratic self-governance.

Free speech, of course, has an important role in self-governance, but the German Constitutional Court has made clear that free speech

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361. *See* Kübler, *supra* note 80, at 375 (observing that understandings of free speech differ across national legal systems and suggesting "a shared understanding that a reasonable interpretation of free speech guarantees will allow the prohibition of the most threatening emanations of racial hatred and dehumanizing propaganda").

362. Whitman, *supra* note 191, at 1382.

363. *Id.*

364. CURRIE, *supra* note 8, at 237.

can accomplish this role without reaching hate speech, speech opposing the basic democratic order, or speech that impinges on personal dignity and honor. Although one can finds strains of Holmes and Meiklejohn in the opinions of the Federal Constitutional Court, the melody is radically different. Outside observers also should take care not to overstate the German Constitutional Court's equality project. The limitations on free speech only incidentally advance equality. Their principal purpose and effect is to advance an overarching civility project, and the protection of personal reputation represents one piece of this larger project.

V. CONCLUSION

Consideration of the German example suggests two important problems that proponents of greater regulation of hate speech in the United States must address. First, German hate speech regulations are part and parcel of a larger effort to protect human dignity and personal honor. Indeed, the subordinated position of free speech significantly predates adoption of the Basic Law and reflects cultural values largely absent in the contemporary United States.[365]

Second, hate speech laws are a very poor substitute for formal legal equality. Equal citizenship, now possible thanks to the German government's recent naturalization reforms, will do more to empower racial and ethnic minorities in Germany in the years to come than the hate speech laws have accomplished in several decades. In considering how to create an egalitarian society, rules requiring polite interaction should probably constitute a lesser priority than securing more basic civil rights, such as suffrage. Simply put, hate speech laws should not serve as a substitute for formal rights to participate in the project of democratic deliberation—happily, something that the German government has acknowledged and acted to remedy.

In sum, critics of the U.S. approach to hate speech regulation should reconsider carefully whether Germany provides an example worthy of emulation. One cannot fairly characterize Germany's speech restrictions as "limited," nor does the overall context of German speech regulation support the assertion that "limited regulation of hate speech does not invariably cause deterioration of the respect accorded free speech."[366] As a matter of causation, Germany's adoption and enforcement of hate speech laws probably reflect the subordinated

365. *See* Whitman, *supra* note 191, at 1395-98.
366. *See* Stefancic & Delgado, *supra* note 5, at 742.

position that free speech enjoys vis-à-vis other interests protected under the Basic Law, notably including human dignity, personality, and personal honor. German law elevated these interests above the freedom of speech before the adoption of the Basic Law and, to a significant degree, the Basic Law simply built upon a preexisting tradition.

To be sure, whether, and to what extent, Germany provides a viable model for the United States to follow is a debatable question. However, the radical rejection of free speech in the jurisprudence of the Federal Constitutional Court should give one serious pause about the suitability of Germany as a possible model for speech regulation in the United States. The German approach to hate speech is the product of a legal and cultural milieu that quite intentionally devalues the freedom of expression in order to advance other interests. One might well question whether legal regimes that accommodate German priorities would prove workable in the United States.

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