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The View Outside: What Kind of Expression For Adolescents Outside the United States?

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INTRODUCTION

How to treat adolescents with respect to free discussion is an important question for the young, a system of free expression, and society. This issue is important for adolescents because it goes to an essence of who they are: their identity, their personality, their development, and their place in society. Should children be treated as a protected class–shielded as it were–from what no doubt can be a raucous, crude, wide-ranging discussion of ideas and views? Or, should children be treated as young adults–young, developing people who are in the process of becoming adults–and as such, should be exposed to free speech for what it is?

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* Professor of Law, Roger Williams University. All translations are mine unless otherwise noted. I wish to thank Kevin Saunders for the opportunity to participate in this symposium; Richard Kay for his valuable comments on this article; and Christopher Davidson for his valuable research assistance and comments in connection with this article.

These questions are important for a theory of rights as well. Should rights apply in reduced form to some members of society–in this case, children–because of, for example, their youth, which may be a solid justification for a reduced scope to rights? Or should rights apply equally, across the board, regardless of status? The implications for either approach are significant for a theory of rights. We have seen good justifications for both approaches in this symposium.

The questions facing a society are no less significant. How a society treats its more vulnerable members, such as children, is quite revealing about the society's core values. Should society protect children or empower them? Who should decide: communities or the children themselves? What value or values should animate the decision: protectionism or autonomy, to name a few?

The answer to these questions, in some important way, comes down to children: Should they be nurtured, and shielded if necessary, on account of their youth, being sensitive to their psyche and mental development? Or should children be thrown into the mix, the free-for-all of free speech, exposed to speech for what it is–in all of its vibrancy, enlightenment, rudeness, or crudeness–so that their capacity and talents can develop in a way appropriate, if not necessary, for constitutional democracy?

There are, of course, no real answers to these questions. The balance between the status of being an adolescent and free speech can be struck in a variety ways. And we have seen, firsthand, in the United States, alternative approaches at work. The world of the Warren Court, for example, in *Tinker v. Des Moines Independent Community School District*,[1] posits a model of free speech more inclined toward a robust, youth self-determined system of free expression. We might identify this model as one where students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] By contrast, the development of an expressive model appropriate to youth under the Rehnquist Court tends more to a restrained system of free speech, as decisions over expression gravitate more to school authorities, and away from student self-determination.[3]

Perhaps we can gain greater insight into this debate by looking outside the borders of the United States to see how other constitutional orders deal with

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1. 393 U.S. 503 (1969).

2. *Id.* at 506.

3. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding school discipline of student for giving nomination for school office speech that was sexually suggestive); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding a high school principal's exclusion of two stories, on student pregnancy and divorce from school newspapers, on ground that school authorities can control school-sponsored activities).

this question. This brings me to my particular task in this symposium: to show what type of model of free speech exists outside the United States. In examining this question, I have evaluated the laws of Canada, the European Court of Human Rights (ECHR), and Germany. The results of my investigation can easily be summarized: Canada and the ECHR have barely addressed this question, at least in their supreme constitutional courts, and have done so primarily with respect to possession of child pornography (Canada) or sex-specific expression (ECHR). Other authority in Canada suggests a more paternalistic model, upholding a ban on most advertising directed at children under the age of thirteen and allowing certain control of youth expression by school authorities, along the lines of the model set forth by the Rehnquist Court.

First, I will address these approaches of Canada and the ECHR. Second, I will turn to examination of the German Constitutional Court, the supreme interpreter of the German Basic Law (the charter document), which has carefully considered this question and has developed an extensive jurisprudence of what we might call youth free expression law. Third, I will contrast the Canadian and European models of youth free expression with the German model, which posits a robust, vibrant system of free expression–treating adolescents more as auditors of their own speech, self-determining their self-expression–in contrast to the more restrained American model advocated by the Rehnquist Court. Accordingly, the bulk of my paper will be devoted to the German model of youth free expression law, which can serve as an alternative model to the American one.

I. CANADA

I uncovered two cases of the Canadian Supreme Court on the topic of youth free expression law, which may not be so surprising given that Canada has had a Charter of Rights only since 1982.[4] In *R. v. Sharpe*[5] the Court

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4. Under the Canadian Charter of Rights and Freedoms, freedom of expression is guaranteed as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. . . .
> 2. Everyone has the following fundamental freedoms:
> . . .
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> . . . .
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

upheld the constitutionality, in most respects, of a Parliamentary law prohibiting the possession of child pornography. The child pornography at issue constituted explicit depictions of youth engaged in sex acts. In *Irwin Toy Ltd. v. Quebec (A.G.)*,[6] the Court upheld a ban on most advertising directed at children under the age of thirteen. These two cases illustrate the Court's willingness to shield children from influences that may prove harmful to them at a critical stage in their development.

Both these topics of child pornography and commercial speech stand somewhat at the margins of a system of free expression and thus are not at the center of the question of what level of free expression is appropriate for adolescents. We would expect most constitutional orders to prohibit or regulate extensively child pornography, as in Canada and the United States,[7] for the obvious reasons articulated by these two Courts: Child pornography is harmful because the act of children[8] engaging in sex acts for display will ordinarily involve child abuse (adults presumably coercing children to perform sex acts), and that a permanent record of sexual activities can exist to haunt and retard the healthy development of those children's psyches. These reasons seem persuasive to me as a justification for regulating speech because we can identify tangible harm–child abuse and psychological terror–that exist independent of the speech. In other words, extrinsic harm can be identified separate from the speech, and that harm can justify regulation.

Likewise, commercial speech is by no means an essence of a system of free expression. Advertising is only tangentially related to core justifications of speech, like autonomy, pursuit of truth or politics. Instead, it is, at best, an intermediately protected category of expression, along the lines worked out by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia*

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), *available at* http://laws.justice.gc.ca/en/charter/index.html.

5. [2001] 1 S.C.R. 45 (Can.).

6. [1989] 1 S.C.R. 927 (Can.).

7. New York v. Ferber, 458 U.S. 747 (1982).

8. Canada's definition of child pornography defines "children" as being under eighteen years of age, like the United States. *Sharpe*, 1 S.C.R at 54.

Citizens Consumer Council, Inc.,[9] where the Court first extended First Amendment protection to commercial speech.

Considering child pornography further, both *Sharpe* and *Ferber* acknowledge that society has a significant interest in protecting children–in this case, from child abuse and psychological terror. As stated by the Canadian Supreme Court:

> This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children.[10]

In this respect, we can see a tentative outline of what we might call a youth-protective model of free speech. Society is justified to act on behalf of children when they are endangered; here the danger involves exploitation of children. A more complete model of free expression would need to enumerate the points of harm, and their justifications, for excision from free discourse.

Yet, of course, life and law are never so simple, and it is worth examining the Canadian decision somewhat more. Any regulation of speech calls for an explication of the values of expression at issue and the justifications for its restriction under a sound system of free expression. For the Canadian Court, child pornography was expression too, although expression somewhat at the margins, because it implicated free speech values, such as self-fulfillment, autonomy and the like.[11] Under Canadian law, speech can only be regulated upon showing (1) a "pressing and substantial" goal, that is (2) proportional to the goal of the regulation, (3) is tailored and not excessive, and (4) "productive of benefits that outweigh the detriment to freedom of

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9. 425 U.S. 748, 771 n.24 (1976) ("[A] different degree of protection is necessary [for commercial speech] to ensure that the flow of truthful and legitimate commercial information is unimpaired."). The Supreme Court then introduces the concept of intermediate scrutiny as the standard of review appropriate to commercial speech, calling for a judgment that restrictions on commercial speech are substantially related to further substantial interests. *See id.* at 771-73. As its name implies, intermediate scrutiny falls between deferential rational basis review and searching strict scrutiny. *See id.* at 771.

10. *Sharpe*, 1 S.C.R. at 73. The Court was willing to presume that possession of child pornography causes the harm of "promot[ing] cognitive distortions," acknowledging that the scientific evidence for this proposition was weak. *Id.* at 49. Nevertheless, the Court stated there was a dispute in the scientific data, and was willing to defer to Parliament based on a rational connection between the law and reducing harm to children. *See id.*

11. *See id.* at 77-78.

expression."[12] There was no doubt, in the Court's mind, that the regulation satisfied this test.[13]

While free speech values were viewed by the Court as less weighty in normal cases of child pornography, and outweighed by the stronger interest in protecting children,[14] this was not the case in two instances of child pornography. Specifically excepted out of regulation by the Court because the free speech interests were determined to outweigh the risk to adolescents were (1) instances of youth self-created child pornography held for personal use (like "personal journals, writings, and drawings") and (2) "explicit recordings [made by a person] of him–or herself alone, . . . held solely for personal use."[15] In such instances, the Court determined that important values of self-expression, self-realization, and personal growth were at issue, outweighing the minimal risk of harm presented.[16]

In *Irwin Toy*, the Canadian Supreme Court, in a close three-two decision, upheld the province of Quebec's ban on most commercial advertising directed at children under the age of thirteen.[17] The Court reasoned that commercial advertising was protected expression under the Canadian Charter of Rights, but that it could be banned substantially when directed at these children because the restriction on expression was justified under the pressing and substantial need "for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising," the standard methodology of Canadian law.[18] The concern motivating legislation

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12. *Id.* at 94 (citing R. v. Oakes, [1986] 1 S.C.R. 103 (Can.)) (citations omitted). *Oakes* is the leading case establishing the degree of tailoring necessary to circumscribe a right. It has been reworked a number of times by the Canadian Court. On the transformations of the *Oakes* test, see MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS 153-56 (2d ed. 2000).

13. *See Sharpe*, 1 S.C.R. at 49, 106.

14. *See id.* at 49 ("This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography.").

15. *Id.* at 106.

16. *See id.* at 107.

17. *See* Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 (Can.).

18. *Id.* at 987. Under Canadian law, it must first be determined whether the activity "convey[s] meaning" in order to fall within the scope of freedom of expression. *Id.* at 968. If it does, as here, then the next question is whether a restriction on expression is justified. *See id.* at 986. To determine whether a restriction is appropriately justified, the Court then evaluates whether the measure satisfies the *Oakes* test, calling for assessment of tailoring pursuant to demonstration of pressing and substantial need, that is proportional and not excessive. *See id.* (citing R. v. Oakes, [1986] 1 S.C.R. 103 (Can.)). The majority and dissent agreed commercial advertising, even to children, was expression, but disagreed whether a ban was justified. *See id.* at 986-87.

was "the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority."[19] So we can now identify another point of reference in the developing Canadian model of youth free expression: Commercial advertising directed at children can be extensively restricted because of the need to protect children, who are viewed as a vulnerable group. It is worth pointing out that the Canadian approach accords with solutions in Belgium, Denmark, Norway, Sweden, and Italy; evidence the Court relied upon in reaching its conclusions.[20]

We might also consider the Canadian Supreme Court case of *R. v. Keegstra*,[21] which dealt with the free speech rights of a teacher to propagate a message of racial hatred, commonly referred to as hate speech. The teacher, Keegstra, taught that Jews were evil, describing them as "'treacherous,' 'subversive,' 'sadistic,' 'money-loving,' 'power hungry,' and 'child killers.'"[22] According to Keegstra, Jews "created the Holocaust to gain sympathy."[23] Keegstra expected his students to reproduce his teachings in class and on exams.[24] The Canadian Supreme Court found that Keegstra's speech could be limited because of the substantial harm hate propaganda caused racial, ethnic, and religious groups in multicultural Canadian society.[25] This objective overrode the speech interests at issue.[26]

While *Keegstra* obviously involved the teacher's expression rights, it has important implications for the classroom as well. Hate speech is an inappropriate lesson to impart in the classroom. The Canadian constitutional order is concerned with excising hate speech from its system of free expression, and this categorical limitation of speech applies to the classroom as well. We might say hate speech is viewed as a severe danger to the body

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19. *Id.* at 987.

20. *See id.* at 998. Italy's restriction is more limited, not allowing children's commercials on public television, as is done throughout Canada. *See id.*

21. [1990] 3 S.C.R. 697 (Can.).

22. *Id.* at 714. *See* Eric M. Roher, *Problems.Com: The Internet and Schools*, 12 EDUC. & L.J. 53, 69-70 (2003) (discussing applicability of *Keegstra* to the use of Internet in schools within the context of comparing Canada's and the United States's approaches to freedom of expression).

23. *Keegstra*, 3 S.C.R. at 714.

24. *See id.*

25. *See id.*

26. *See id.* at 787. *But see* Ross v. New Brunswick Sch. Dist. No. 15, [1996]1 S.C.R. 825 (Can.) (holding that a teacher expressing anti-Semitic views could be fired from teaching position, but could not be gagged in speaking his mind outside classroom).

politic (for adults as well as children), a result that Canada shares with Germany[27] and most countries of the world, but not the United States.[28]

Further, there is Canadian Supreme Court authority that students have a reduced expectation of privacy in a school setting because "teachers and school authorities are responsible for providing a safe school environment and maintaining order and discipline in the school."[29] This conclusion has important implications for students' free speech rights as well, as there is authority supporting school authorities' ability to limit expression available to students, along the lines of the Rehnquist Court approach.[30] For example, in Ontario, a school board can limit students' access to information through limitation of advertisements and announcements on school property.[31] Principals may also rely on their duty to maintain order and discipline in reviewing expressive materials appropriate to students.[32] In making these determinations, authorities must follow the methodology of Canadian free expression,[33] a methodology that demands the value of expression be assessed and any limitation of speech be justified as appropriate. On the other hand, the Saskatchewan Court of Queen's Bench ruled that a student's free speech rights were violated when school authorities punished a student for singing a banned song during lunch hour.[34]

From this limited survey of Canadian legal authority, we can observe that, generally speaking, Canada is protective of children in a manner not unlike the significant amount of deference placed in school authorities in the United States. We might say community authority substantially determines what type of expression is appropriate for children, and not the children themselves.

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27. *See, e.g., Holocaust Denial Case,* Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (F.R.G.).

28. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

29. R. v. M., [1998] 3 S.C.R. 393, 395 (Can.).

30. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

31. *See* Roher, *supra* note 22, at 70.

32. *See* Nora M. Findlay, *Students' Rights, Freedom of Expression and Prior Restraint: The* Hazelwood *Decision,* 11 EDUC. & L.J. 343, 359 (2002) (describing school principal's censorship of high school student's article reporting on school activities, written for local newspaper).

33. *See id.* at 357-58.

34. *See id.* at 357.

II. EUROPEAN COURT OF HUMAN RIGHTS

The idea of youth speech developed by the ECHR is essentially in accord with the idea of youth speech developed by Canada. Simply stated, I uncovered only one case that deals with youth speech and that case, *Handyside v. United Kingdom*,[35] also deals with the question of whether sexual speech is appropriate for minors. The famous book at issue in *Handyside* was *The Little Red Schoolbook*, which was not a work of child pornography but instead a reference book for children (starting at age 12) on a range of topics relating to growing up, including a section on sex and sex education designed to teach youth the mysterious and wondrous world of sex.[36] The section on sex discussed masturbation, orgasm, intercourse, child molesters, and the like.[37] English authorities seized the book on the ground that it was obscene.[38]

The conclusion of the ECHR was, in the main, like that of the Canadian Supreme Court: Sexually explicit expression can be restricted and held out of the view of adolescents because it might endanger them. Thus, as a matter of outcome and, to an extent reasoning, the ECHR case has much in common with the Canadian case of *R. v. Sharpe*.

Yet, because the ECHR is, as its name suggests, a supranational European court, and not a national court, the ECHR is far more hesitant to intrude into the national constitutional orders of member states. Instead, the ECHR accords substantial deference to national legal orders as to the norms, customs, conditions, and values of each country, over the meaning and interpretation

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35. 1 Eur. H.R. Rep. 737 (1976). The Court quotes article 10 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the freedom of expression as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. at 752.

36. *See id.* at 743.

37. *See id.* at 742-43. Later versions of the book, edited to take out the most sexually offensive passages, were not regulated. *See id.* at 743.

38. *See id.* at 741.

of a right like free expression or countervailing interests such as protection of youth, under the doctrine of a margin of appreciation, which the *Handyside* case is famous for helping further. The margin of appreciation doctrine acknowledges that there is no uniform concept of morality in Europe and, therefore, it is appropriate to recognize different moral customs.[39] While the doctrine of margin of appreciation does not entail blind deference to member states' determinations, it does entail quite substantial deference.

Employing the doctrine of margin of appreciation, the ECHR essentially determined that it would leave to the United Kingdom the decision as to the meaning of free expression and the nature of restrictions that can be placed on *The Little Red Schoolbook*.[40] Under European rights law, speech can be restricted "as . . . prescribed by law" upon justification.[41] The ECHR paid particular heed to the fact the book was intended for a young audience, of twelve to eighteen year olds, viewing this as endangering youth at "a highly critical stage of their development."[42] Because the United Kingdom had restricted dissemination of *The Little Red Schoolbook* on moral grounds, the ECHR's decision had the effect of sustaining the United Kingdom's regulation.

III. UNITED NATIONS

It is also worthwhile to point out that the United Nations has adopted and opened for signature a Convention of the Rights of the Child, entered into force on September 2, 1990, that addresses the development and rights of children, who are defined as people less than eighteen years of age, the conventional definition.[43] At least 192 countries are parties to the Convention and 140 countries have signed it; the United States has signed, but not ratified it.[44] Thus, we might characterize the Convention as establishing an

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39. *See id.* at 753-54.

40. *See id.*

41. European Convention for the Protection of Human Rights and Federal Freedoms, Nov. 4, 1950, E.T.S. 005, art. 10, Part II.

42. *Handyside*, 1 Eur. H.R. Rep. at 746; *accord*, Müller v. Switzerland, 13 Eur. H.R. Rep. 212 (1988) (deferring to Swiss authorities under margin of appreciation that father could protect daughter from shock of seeing sexually explicit, obscene paintings displayed in art gallery and that artist could be prosecuted).

43. *See* United Nations Convention on the Rights of the Child, G. A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 1, U.N. Doc. A/44/736 (Nov. 20, 1989) [hereinafter UN Convention on Child Rights].

44. *See id.*; Office of the United Nations High Commissioner for Human Rights, Status of Ratification of Principal International Human Rights Treaties (June 9, 2004), http://www.unchr.ch/pdf/report.pdf.

international norm, but one not ascribed to by the lone global power. The Convention recognizes that "childhood is entitled to special care and assistance."[45] As a source of law, the Convention is more aspirational than mandatory. Yet, the Convention offers the perspective of international norms for children's rights, including freedom of expression, which it addresses in a number of its articles.

In keeping with the model of rights more characteristic of Europe, the Convention enumerates a variety of expression rights, but couples them with express textual limitations. The concept of enumerating rights with duties initiated, in the modern world, in France in its famous 1789 Declaration of the Rights of Man and of the Citizen, and now is a staple of European constitutional orders, such as those in place in Canada and Europe, as we have seen. Specifically singled out for protection are expression rights over freedom of expression generally;[46] freedoms of thought, conscience, and religion;[47] freedoms of association and peaceful assembly;[48] access to the mass

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45. UN Convention on Child Rights, *supra* note 43, at preamble.

46.

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id. at art. 13.

47.

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Id. at art. 14.

48.

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Id. at art. 15.

media;[49] and protection from sexual exploitation,[50] a frequent topic arising in case law. It is less certain what meaning these articles have in a constitutional order, as national courts sometimes cite the Convention as authority, but courts generally do not interpret them in a definitive, binding manner. Thus, for our purposes, it is important to recognize the Convention as a source of international norms that might influence national, and perhaps worldwide, standards, but for now, not the United States.

In summary, we might observe that the data we have on which to base conclusions as to the treatment of youth speech in the Canadian and European rights regimes is, based on the authorities reviewed, extremely limited. The decisions of both highest constitutional Courts deal with exposure of youth to sexually explicit materials. Both decisions evidence solicitude in favor of youth, protecting and shielding them from what the Courts determine to be speech that could, in some way, endanger youth. And both Courts are willing to defer, on the whole, to authorities' determinations in that regard. Essentially, this is recognition of the appropriateness of morals legislation. Yet, in fairness, exposure of youth to sexually explicit expression stands

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49.

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Id. at art. 17.

50.

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Id. at art. 34.

somewhat at the extreme of freedom of expression. We would expect most jurisdictions to come out similarly.

Consideration of commercial speech in Canada leads to the same conclusion: Censorship of advertising directed at children is permissible out of concern for the welfare of children. A further look at Canadian authority of lesser rank than the Supreme Court discloses a somewhat circumscribed model of free expression. United Nations' standards evidence solicitude to youth as well, coupled with extensive expressive protections that are subject to significant textual limitations. In conclusion, it is hard to obtain far reaching conclusions as to the nature of a model of youth free speech, and how this might compare to an American model. We can tentatively conclude, however, that the authority reviewed tends toward a restrained model of youth expression.

IV. GERMANY

Turning now to Germany, we have a situation opposite that of Canada and the ECHR. The German Basic Law, or constitution, explicitly (textually) limits expression on behalf of youth and, further, the German Constitutional Court, the supreme interpreter of the Basic Law, has developed a comprehensive and sophisticated body of youth free expression law. Article 5(2) of the Basic Law provides that expression rights "are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor."[51] Of this triad of textual limitations on freedom of expression, we are, of course, concerned here with the restriction in favor of youth. Based on the text, we can see that the German Constitutional Court is textually authorized to monitor the type of expression appropriate to youth in a way not textually demonstrable in the American, Canadian, and European rights orders. Further, based on the text, the German parliament has enacted statutory regimes that enumerate in detail

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51. The full text of the Basic Law for the Federal Republic of Germany, Article 5, provides as follows:

> (1) Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There may be no censorship.
>
> (2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor.
>
> (3) Art and science, research and teaching are free. The freedom of teaching does not release from allegiance to the constitution.

Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, as amended, art. 5 (F.R.G.).

the nature of regulation that can occur in respect of youth and the process by which that regulation can occur. In essence, the statute provides for a censorship board, composed of a broadly representative group from the community and subject to constitutional standards, that makes these decisions as to youth regulation.[52] In this respect, we can say that Germany, as a matter of clear constitutional prioritization, has made youth a major focus of its polity. Simply stated, protection of youth is a constitutional priority of Germany in a textually self-evident way not characteristic of Canadian, European, and United States rights regimes.

Still, we need to examine the nature of the German model of youth free expression in order to gauge the nature of youth expression in Germany. As we do, we may be surprised: The German model of youth expression posits a vibrant, robust system of freedom of expression appropriate to adolescents, coalescing around the central idea that the young possess free and self-determining personalities. The role of the constitutional polity is to facilitate the unfolding of human capacity and personality in a free and responsible manner. These central concerns are typical of German constitutional law, which centers around the free development of human personality within a social community.

Facilitation of this state of affairs is aided by the methodology of German constitutional law. Even though the Basic Law expressly limits the nature of free expression in favor of youth, as we have seen, this does not give authorities free reign. The Constitutional Court interprets any restriction on speech as subject to the requirements of the constitution. Under the constitutional doctrine of *Wechselwirkung* (Reciprocal Effect Theory) developed by the Constitutional Court, a textual limitation, such as that in favor of youth, is not interpreted as a one-sided restriction on communication freedoms. Rather communication freedoms and textual limitations have a mutual effect on one another. It is as much, if not more, the case that communication freedoms influence the range of textual limitation as the other way.[53] Under the theory of objective constitutionalism, youth restrictions, like general law limitations, "must be interpreted in light of the value-establishing significance of the basic right in a free democratic state, and so any limiting effect on the basic right must itself be restricted."[54]

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52. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, as amended by Gesetz, July 12, 1985, BGBl. I at 1502 (F.R.G.) (law concerning the distribution of materials that threaten youth).

53. *See* Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 815-16 (1997) (discussing *Lüth*, 7 BVerfGE 198, 209 (1958) (F.R.G.)).

54. *Lüth*, 7 BVerfGE at 209.

For purposes of free speech, this means that exposure of the young to expression is presumptively to be favored, and restrictions on speech are strictly disfavored, as free expression is viewed as a training ground, as it were, for personality development–developing the habits of mind and character needed for participation in democracy–and for eventual participation as full adult, free and equal members in public discourse. Thus, the German Constitutional Court tends to be quite protective of speech, even with regard to raucous, sexually explicit, and controversial speech, on the idea that more speech, not less speech, is appropriate, healthy, and necessary for the development of adolescents as productive citizens.

The main areas where free expression can be regulated generally mirror the main areas where the Constitutional Court allows circumscription of expression for adults: violence, hate incitement, glorification of war, and offensive presentation of sex and crime. Consider the Constitutional Court's description:

> The constitutionally important interest in the wholesome development of young people . . . justifies regulations designed to protect children against moral harm. All printed matter, films, or pictures that glorify violence or crime, provoke racial hatred, glorify war, or depict sexual acts in a crude, offensive, and shameful manner constitute such harm and thus may lead to serious or even irreversible injury. The legislature may thus adopt measures designed to prevent children from gaining access to such materials.[55]

Within these categories, the Constitutional Court probes judgments on expression quite carefully pursuant to an independent, intensive standard of review, referred to as hard-look review.[56] Intensive, hard-look review requires that regulation of speech occur only where the interest at issue (here youth) is determined to be weightier than the high regard given expression. On the whole, hard-look review means that most attempted regulation of speech will not be upheld, as the Constitutional Court's approach tends to result in a speech protective regime, even with respect to youth.

In the *Nudist Magazine Case*,[57] the Constitutional Court upheld the constitutionality of a parliamentary statute regulating the type of speech appropriate to youth, pursuant to the Article 5(2) textual limitation of the

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55. *Nudist Magazine Case*, 30 BVerfGE 336, 347 (1971) (F.R.G.), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 423-24 (1989).

56. For careful consideration of hard-look review, see Eberle, *supra* note 53, at 854-56.

57. 30 BVerfGE at 336. The constitutionality of terms of the federal youth expression law has been a frequent subject of the Constitutional Court's attention. *See, e.g.*, *Horror Film Case*, 87 BVerfGE 209 (1992) (F.R.G.); *Josefine Mutzenbacher*, 83 BVerfGE 130 (1990) (F.R.G.).

Basic Law. Under the law, a censor board is set up for the purpose of deciding whether expressive material should be restricted in access to the young, and under what circumstances.[58] Prohibited expressive works are placed on a black list, which bans their distribution to youth.[59] Regulation may also be less severe, such as restriction on the advertising and types of dissemination of expressive materials.[60] The composition of the censor board is carefully regulated to assure diverse representation of the interests and make-up of the population.[61] The Constitutional Court has been active in assuring that the board meets constitutional standards.[62]

The purpose of the youth law is to facilitate the free and undisturbed development of youth, focusing on their talents and personalities, in a manner free from negative influences which, as mentioned before, center around war, crime, racial hatred, violence, and offensive sexuality in the German constitutional order. The legislature can take measures to advance these objectives. However, the legislature must adhere to constitutional safeguards, which the Constitutional Court actively polices to assure a vibrant system of public discourse. The Constitutional Court is more concerned with protecting children, including facilitation of their abilities, than punishing purveyors of expression.[63]

How the balance between constitutional norms of free communication and protection of youth is to be struck is illuminated in the sophisticated jurisprudence developed by the Constitutional Court. *Nudist Magazine* is illustrative. Here the magazine, *Sonnenfreunde*, had been blacklisted because it contained nude pictures and advocated a nudist way of life.[64] The question for the Constitutional Court was whether such nudity was a threat to youth.[65] The Constitutional Court assessed the magazine, concluding that nude pictures are part of expression as well, and could not be regulated out of hand.[66] Whether the nudity could be regulated depended on a careful assessment of the expression, under hard-look review, to determine whether, in fact, it was dangerous to youth. It was not constitutionally sufficient to presume harm existed. Demonstration of harm is required, which was not adequately done in the case. Accordingly, the Constitutional Court determined that the

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58. *See Nudist Magazine Case*, 30 BVerfGE at 337.

59. *See id.* at 337-38.

60. *See id.*

61. *Josefine Mutzenbacher*, 83 BVerfGE at 132-33.

62. *See, e.g.*, *Denial of Responsibility for World War II*, 90 BVerfGE 1 (1994) (F.R.G.); *Horror Film Case*, 87 BVerfGE at 209; *Josefine Mutzenbacher*, 83 BVerfGE at 130.

63. *See Nudist Magazine Case*, 30 BVerfGE at 350.

64. *See id.* at 339-40.

65. *See id.* at 352-53.

66. *See id.* at 352.

magazine could not be blacklisted, at least not without a careful explanation that legitimate harm was present that outweighed the value of expression present in the magazine.[67]

A further look at German law reveals a similar dynamic with respect to consideration of other expression accessible to youth. While expression accessible to youth can be restricted, it can be done so only upon considered determination that it presents danger to youth, and that that danger outweighs the value of the expression at issue. On the whole, the Constitutional Court structures youth expression according to the metaphor of a training ground for the development of the traits and character dispositions necessary for full, adult participation in a vibrant public discourse central to constitutional democracy.

Because public discourse in a democracy will tend toward being raucous and controversial, at least on occasion, the Constitutional Court will tend to promote free discussion of ideas to youth, even hardy or sharp ideas, as compared to shielding youth from controversial speech. The Constitutional Court seems most concerned with development of young people's talents, capacities, and personalities so that they can function effectively as adults in democracy. A look at German case law illustrates this more vibrant model of youth expression. Let us examine German law according to the categories presenting some of the greatest threats to young people: violence, war and hate speech, horror and gruesomeness, and sexuality. Evaluation of these categories of speech will provide a broad measure of the German Constitutional Court's model of expression appropriate to youth.

A. Discussion of Violence–*Student Article Case*

A leading case on the German conception of youth speech is the *Student Article Case*,[68] in which amidst the frenzy and upheaval of debate on use of nuclear energy in the 1980s, a young man advocated, in an article published in a student newspaper, all possible resistance to operation of nuclear power plants. The student was up-front as to his mind set, stating, essentially, that all kind of resistance was justified to oppose nuclear power plants, to counter the force of the state and society.[69]

The student had completed his school training and had arranged to assume a position with an employer.[70] However, based on the article, the employer terminated the employment offer because the employer interpreted the

67. *See id.* at 354-55.
68. 86 BVerfGE 122 (1992) (F.R.G.).
69. *See id.* at 123.
70. *See id.*

student's article to call for incitement to violence, and wanted no part of a violent militant.[71] The labor courts agreed with the employer's assessment.[72] This became the question of the case: whether the employer's termination of the job was proper or whether it unjustifiably violated the student's expression rights.[73]

The Constitutional Court cut right to the chase. Evaluating the student's article, the Court determined that it did not necessarily follow that the student's published statements could be interpreted as advocating violence.[74] No doubt, if the student did advocate violence, the speech could be restricted. But here the student's article could be taken to be an expression of frustration or protest or a comment on the nature of the militant anti-nuclear protestor movement. It was not clear that the statement communicated an intent to commit violence.

Under the methodology of German communication law, the Court subjects authorities' interpretation of expression to intensive, hard-look review, which calls on interpreters of expression to perform a careful evaluation of the speech in question, judging the possible meanings the statement can have, its context and its nature, and then offering an explanation as to why it settled on a particular meaning and dismissing alternative possible meanings. Only upon such a thorough evaluation of the speech at issue, settling on a convincing rationale as to why the communication is proscribable, will a restriction be upheld.[75] The labor courts failed to provide such a reasoned explanation for their restraint on speech. Accordingly, the Constitutional Court held that the student's speech rights had been violated.[76] To allow regulation of speech under these circumstances would chill young people's exercise of their expression rights.[77]

The Constitutional Court went out of its way to consider the nature and value of expression from the perspective of adolescents. Students, and more broadly the young, are in the process of learning, on their way to becoming

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71. *See id.*

72. *See id.* at 123-25. Under German principles of constitutionalism, private law disputes, such as that between the student and the employer, are also subject to constitutional norms under the theory of Third Party Effect, by which the norms of the constitution also regulate private law norms. The theory was developed in the famous case of *Lüth*, 7 BVerfGE 198 (1958). For further discussion of the doctrine of Third Party Effect, see EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS OF GERMANY AND THE UNITED STATES 27-31 (2002); Eberle, *supra* note 53, at 811-17.

73. *See Student Article Case*, 86 BVerfGE at 123-25.

74. *See id.* at 131-32.

75. For elaboration of hard-look review, see Eberle, *supra* note 53, at 854-57.

76. *See Student Article Case*, 86 BVerfGE at 130-31.

77. *See id.* at 131.

adults.[78] Their personalities have not yet formed, but are in the process of formation, unfolding progressively toward full maturation.[79] On account of their youth, a certain deference and solicitude must be accorded adolescents.[80] We cannot expect the young to always act maturely and responsibly, as we expect of adults.[81] Rash and emotional, radical and extreme opinions are commonplace among the young and should be viewed for what they are: part of the experimentation associated with growing up.[82] Radical views and opinions do not necessarily represent the true character of youth, nor as the young will develop into adults.[83] Young people should not be judged by the same standards of behavior applicable to adults, and this holds for engagement in speech rights as well.[84]

The Constitutional Court went on to elaborate its attitude toward the young:

> Also to be considered is that this case deals with an article published in a student magazine, a medium geared to young people. These constitute a practice field for [youth's] participation in the formation of public opinion. The articulation of opinions and exposure with contrasting ideas must also be learned. Student newspapers have a valuable role to play in this process. But this can only be accomplished when students can feel secure and without fear that participation [in student newspapers] will not later affect their career opportunities.[85]

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78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.*
85. *Id.* at 131-32 (quoted in Eberle, *supra* note 53, at 891). The Constitutional Court expressed similar sentiments in *Islamic Teacher's Head Scarf*, 108 BVerfGE 282 (2003) (F.R.G.), a controversial case where the Court determined that a German Land (state) could not bar an Islamic woman from assuming a teaching position on account of her desire to wear a head scarf in class, at least without a state law that provided a justifiable legal basis for excluding her. In the opinion, the Court discussed extensively the need for students to be exposed to the increasing diversity of German society. "Schools are no refuge, in which eyes are to be closed from the reality of a pluralistic society. Rather, schools have the mission to prepare youth for what they will encounter in society." *Islamic Teacher's Head Scarf*, 108 BVerfGE at 290.

Instead of insulating school children, schools are precisely the place for exposure to a marketplace of ideas and beliefs. *See id.* Learning to appreciate different, alternative beliefs, and achieve toleration, are important objectives and character traits in a constitutional democracy intent on achieving integration of diverse people. *See id.* at 298-301. We might think of respect and acknowledgment of freedoms of thought and conscience and toleration as the necessary ingredients of constitutional democracy, allowing the democracy to grow and progress and not lock in the values or mores of any one group in the society.

The *Student Article Case* captures the sense of the German model of youth expression well. The young are to be nurtured, but nurturing of the German kind means exposure and participation to the give-and-take of public discourse, as only by more full engagement in expression can young people learn the qualities of critical reasoning, toleration, and exposure to the give-and-take of free exchange necessary for full participation in public discourse. The preferred remedy in Germany, in other words, is "more speech, not enforced silence"[86] or less speech. German expression jurisprudence follows this essentially speech-protective model of expression, even in exposure to the young, as is evidenced in other cases of the Constitutional Court.

B. Glorification of War: *Denial of Responsibility for World War II*

Let us consider the case of *Denial of Responsibility for World War II*,[87] which concerned a book that denied German responsibility for World War II, instead positing that Germany was a victim of allied aggression and conspiracy, creating, startlingly enough, the conditions by which the Holocaust occurred.[88] The book essentially exonerated the Nazis from their worst deeds, presenting them as an acceptable political alternative.[89] Because of the book's favorable presentation of the Nazis, it was determined to be dangerous to youth and, therefore, restricted, including a ban on advertising and certain limitations on distribution.[90] Certainly any expressive work communicating racial hatred, including Nazi racial hatred, could be banned.[91] The Constitutional Court upheld the lower court's determination that the book was to be treated under Article 5(1) expression rights, and not the textually more protective Article 5(3) academic rights, because the book could not realistically be treated as a "serious search for truth," but was instead a one-sided, propagandistic treatment of the subject.[92]

Yet, applying heightened review, the Constitutional Court overturned the lower court's ruling that the book could be regulated and, instead, found those decisions to violate the author's expression rights.[93] The Constitutional Court found that the book represented the author's opinion as to the history of

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86. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

87. 90 BVerfGE 1, 3 (1994) (F.R.G.).

88. *See id.*

89. *See id.* at 1-3. The case is extensively discussed at Eberle, *supra* note 53, at 889-91.

90. *See Denial of Responsibility*, 90 BVerfGE at 18-19.

91. *See id.* at 18.

92. *See id.* at 13-14.

93. *See id.* at 18-20.

Naziism and World War II.[94] The mistake of the lower court, the Federal Administrative Court, was to assume that the book could be restricted merely on account of its historically false portrait of the Nazi ideology–which, of course, is filled with visions of racial hatred, glorification of war, and contempt for democracy.[95] To the mind of the Court, it was as much the case that the book dealt with a central question of German history, albeit in a controversial way.[96] As such, "the democratic state fundamentally has faith that the public dialogue between different opinions will produce a multifaceted picture, out of which generally controversial views premised on false facts will not be accepted. The free discussion is the real foundation of a free and democratic society."[97]

As in the *Student Article Case*, the Constitutional Court addressed the place of youth in democracy, necessitating a consideration of whether the book was helpful or hurtful to adolescents.[98] The Court confirmed its belief that the young must learn how to become participants in the free exchange of dialogue.[99] "The fostering of abilities of discretion and critical judgment are essential to young people's education and development as citizens. Thus, inculcation of democratic values and civic virtues is essential."[100] "The ascertainment [by youth] of historical events and their critical engagement with dissenting opinions can prepare and protect youth much more effectively for encounters with distorted historical presentations than can any classification of such opinions as presenting an improper lesson."[101] Developing and fostering youth according to these ideals is a constitutional priority.

The place of nuclear power in society and the legacy of Naziism and its meaning for present generations are, of course, forefront issues for contemporary Germany, issues that arise frequently as topics of public discourse. It is important for members of society to vent their opinions on issues like these as a way for the society to come to terms with central issues and form a consensus, if that is possible. We have seen that the Constitutional Court has quite actively policed this medium of public discourse to assure broad and vibrant participation in the public forum, allowing broad access for members of society. The Court has accorded essentially these same privileges

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94. *See id.* at 20-24.
95. *See id.* at 20-21.
96. *See id.*
97. *Id.*
98. *See id.*
99. *See id.*
100. *See* Eberle, *supra* note 53, at 891.
101. *Denial of Responsibility*, 90 BVerfGE at 21.

to the young, where possible. Let us now turn to consideration of issues of free speech that are more personal in nature: portrayal of violence and sex, themes relevant for public discourse as well.

C. Violence, Horror, Gruesomeness: *Horror Film Case*

The *Horror Film Case*[102] offers a sharp contrast between American and German society, and the free speech regimes that help constitute those societies. At issue was an American film, *The Evil Dead*, which depicted fairly standard American fare of the horror film genre: brutality, graphic, gruesome violence, cruelty, and bodily dismemberment.[103] In American culture, horror films of this type seem a rite of passage for youth, attended as frequently as the latest *Star Wars* offering. The idea of horror is an acceptable, if not thriving, element of American culture.

Not so for the Germans, for whom portrayal of violence is an anathema, a direct confrontation with the architectonic value of the German constitutional order: dignity. The German Basic Law centers around the human person and the person's free unfolding of personality in a manner designed so that people can realize their human capacities. Depiction of people in degrading or inhumane ways, as commonly in a horror film, is not consistent with the respect human beings are owed as a matter of equal claims to dignity. For this reason, the censor board banned the film, reasoning that it endangered youth, a decision which the lower courts upheld.[104]

The Constitutional Court agreed that there could be reasonable time, place, and manner restrictions of violence, gruesomeness, or cruelty that is presented in expression accessible to youth.[105] However, applying intensive review, "there must be a close fit between the end desired and the means used to effectuate that end."[106] Authorities' seizure of the film did not satisfy this more demanding standard and was, therefore, unconstitutional.[107] Accordingly, the Court found authorities' seizure of the film to be "an impermissible prior restraint because the film was confiscated before its classification under the rating system[108] could be determined."[109]

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102. 87 BVerfGE 209 (1992) (F.R.G.). The case is discussed in Eberle, *supra* note 53, at 870-71.

103. *See Horror Film Case*, 87 BVerfGE 209, 214-17 (1992) (F.R.G.).

104. *See id.* at 214-15.

105. *See id.* at 217, 228.

106. Eberle, *supra* note 53, at 870-71.

107. *See Horror Film Case*, 87 BVerfGE at 229-33.

108. Germany has a complicated rating system in place to classify films, which can

The crux of the problem for the Constitutional Court was that the decision of what to do with the film–to show only to adults, to edit the film and show to adolescents with restrictions, or to edit substantially the film and make it available to younger age groups–was one that should lie with the film's distributors, not authorities. The purveyor of the film should determine whether and how to distribute the film. The supplanting of this decision by authorities thus constituted the essence of censorship, and a cardinal violation of a system of free expression.[110] Left unresolved was whether the film could be shown to adolescents, and in what form.

D. Sex: *Josefine Mutzenbacher*

A final topic covered in German youth expression also contrasts well with American law: sexually explicit materials. Obscenity is one of the few areas of American free speech law that can be categorically regulated, although this is controversial because such regulation can occur without any extrinsic proof that exposure to obscenity is dangerous, the normal methodology of American free speech law.[111] Interestingly, we have observed that neither Canada nor Germany (as we shall see) has determined that scientific data shows a link between exposure to obscenity and harm as well. Germany, in contrast to the United States, follows the standard European and Canadian[112] approach: Sexually explicit materials, even what we might call obscenity, can generally be disseminated (although subject to time, place, and manner restrictions) if the obscenity (as I shall refer to it) does not demean women or depict violence or, of course, endanger youth.

Endangerment of youth was the question in *Josefine Mutzenbacher*,[113] a case involving a novel telling the life of a Viennese prostitute of that name. Authorities confiscated the book, and placed advertising and distribution restrictions on it, because it depicted graphic sex acts, child prostitution, incest, and promiscuity and, therefore, in the judgment of authorities, endangered the morals of the young.[114] However, as we have seen, authorities' determination of what threatens the young is not automatically

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classify films according to approximately five classifications, from "admission without age limitations" to "no admission to those under 18 years of age." *Id.* at 212 (discussing statute).

109. Eberle, *supra* note 53, at 871.

110. *See Horror Film Case*, 87 BVerfGE at 233-33.

111. *See generally* Miller v. California, 413 U.S. 15 (1973).

112. *See generally* R. v. Butler, [1992] 1 S.C.R. 452 (Can.).

113. 83 BVerfGE 130 (1990) (F.R.G.).

114. *See id.* at 131-33.

deferred to under the probing form of intensive review applied by the Constitutional Court. *Josefine Mutzenbacher* was no exception.

The Constitutional Court considered the book as a novel–because it was artistic, stylistic, and a product of the creative process–and, therefore, treated it as a work of art.[115] Classification as art has significant consequences for the German system of free expression because art, unlike the general Article 5(1) freedom of opinion protections (under which the historical work at issue in *Denial of Responsibility for World War II* was treated),[116] is not subject to express textual limitation, such as that which pertains to youth. Instead, textually unbounded artistic freedoms are more absolutist in orientation, like the famous argument of Justice Black with respect to the United States First Amendment speech protections.[117] Still, since protection of youth is recognized as a constitutional priority, it, like other constitutional values, can yet be read to place limitations on the more absolute protection accorded art, according to German constitutional theory. Thus, works of art can be regulated if it is determined that they endanger youth.

Indeed, sex or obscenity can threaten youth. The young also have the right to free development of personality, as we know, and it may therefore be necessary, at times, to protect them from exposure to graphic sex materials like obscenity.[118] The Constitutional Court acknowledged that scientific evidence does not show that exposure to obscenity is dangerous, although there is much opinion that this is so.[119] To the Court, these are decisions to be left essentially to the legislature, although legislative decisions too must be justified on a constitutional basis.

Applying hard-look review to authorities' judgment in *Josefine Mutzenbacher*, the Constitutional Court reasoned that sex is a common topic of art.[120] Much great art, if not little art, deals with sexual themes, even explicitly, including Henry Miller's work.[121] When art interweaves with sex, it is not so clear what is sex *per se* and what is art. In such cases, the artist must be given relatively free reign to pursue his or her art.[122]

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115. *See id.* at 138.

116. *See supra* notes 87-102 and accompanying text.

117. *See* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law abridging' to mean *no law abridging*.") (quoting U.S. CONST. amend. I); Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960).

118. *See Josefine Mutzenbacher*, 83 BVerfGE at 140-41.

119. *See id.* at 141.

120. *See id.* at 136.

121. *See id.* at 136, 139. The Court specifically mentioned Henry Miller's *Opus Pistorium*. *Id.* at 139.

122. *See id.* at 138-39.

Assessing the book as a novel, the Constitutional Court observed, that the book depicted vulgar, free-spirited, turn to the twentieth century Vienna.[123] It is not so clear how to estimate the work. True, it could be seen as pornographic. But it could also be seen as an exercise in male fantasy or a reaction against a more restrictive upbringing. Or it could be seen as a parody of the milieu presented.[124] Art and pornography are not mutually exclusive.[125]

The problem with the authorities' decision, according to the Constitutional Court, is that they had regulated the book because it depicted sex in explicit ways, but they had not examined the book carefully enough to determine if the artistic merit of the book was weightier than the risk it presented to the young.[126] Constitutionally, a careful assessment must be made as to whether artistic merit or harm was weightier.[127] Since the authorities' decision failed this careful analysis demanded by hard-look review, it could not stand constitutionally.[128]

There were also constitutional deficiencies in the youth statute on grounds of vagueness (lacking clear criterion on which judgments were made), subjectivity (as authorities were value-based, not value-neutral),[129] and problems in the make up of the censor board.[130] These constituted violations of the *Rechtsstaat*, the German idea of a state bound by the rule of law, which, among other things, requires clarity of legal norms.

V. COMPARATIVE OBSERVATIONS

As we look outside the United States to see how other constitutional orders design expressive freedoms for adolescents, we notice both similarities and differences with the model of speech employed in the United States, factors which are worth assessing as we search for an appropriate and perhaps more satisfactory model of free speech for the young. Evaluating the nature of these points of similarity and contrast is useful to interpreters and students of American law because it sheds perspective on the development and nature of American law, forcing to the fore inquiry into the justifications of

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123. *See id.* at 138.
124. *See id.* at 138-39.
125. *See id.* at 139.
126. *See id.* at 142-47.
127. *See id.*
128. *See id.* at 143-46.
129. *See id.* at 136, 145-46.
130. *See id.* at 149, 154. Under standard German constitutional principles, the Constitutional Court provided the legislature with a certain time to remedy these deficiencies, and was willing to allow the statute to remain in effect, subject to the Court's policing of its implementation, until a new statute could be devised.

American law. Does American law exist as it does because of unique forces, such as the Constitution, history, or tradition to name a few? Or are the issues faced in American law similar to those faced in other jurisdictions? If so, can we learn from these other constitutional systems? Are there ways to make American law an even more satisfying system?

A. Similarities

First, looking to similarities, we can observe that all of the jurisdictions examined here recognize protection of children as an important objective. Of the jurisdictions examined, we can observe further that Germany would seem to place the highest priority on protection of children, given that the German Basic Law, unlike any of the other charters, explicitly acknowledges that limitation of communication freedoms may be necessary to safeguard children. Explicit textual recognition of the necessity to shield children is *prima facie* evidence of a constitutional priority. A separate question, of course, is the nature of speech regulation on behalf of children that is permissible–a question we will examine later.

Second, another clear common trait shared by the jurisdictions is that possession and/or distribution of child pornography is a legitimately proscribable form of expression because it presents, in the judgment of the respective constitutional courts, a legitimate danger to children.[131] Of these Courts, the German Constitutional Court is most careful about requiring a considered assessment that the expressive work is, indeed, dangerous to the young.[132]

Third, a further similarity among the jurisdictions is that each allows, explicitly or implicitly, some regulation of obscenity (or sexually explicit material) accessible to youth without concrete proof that it causes harm. In the United States, of course, this state of affairs is no surprise, as *Miller v. California*[133] and its companion, *Paris Adult Theatre I v. Slaton*,[134] allow

131. *See, e.g.*, R. v. Sharpe, [2001] 1 S.C.R. 45 (Can.); *Josefine Mutzenbacher*, 83 BVfGE 130 (1990) (F.R.G.) (implicitly so finding); New York v. Ferber, 458 U.S. 747 (1982); Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737 (1976).

132. *See Josefine Mutzenbacher*, 83 BVerfGE at 130.

133. 413 U.S. 15 (1973).

134. 413 U.S. 49, 60 (1973) (noting that "'scientifically certain criteria of legislation'" for obscenity regulation is not required) (quoting Noble Bank v. Haskell, 219 U.S. 104, 110 (1911). Instead, legislatures can act on various unprovable assumptions, as states can act on such assumptions to protect the social interest in order and morality. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 62-63 (1973). It is an open question whether the Supreme Court's recent case in *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated morals legislation against homosexual private sex, calls into question legislation of obscenity morals regulation. *See, e.g.*,

regulation of obscenity on this very proposition, for adults as well as children. As a matter of First Amendment theory, regulation of any category of speech without proof of harm separate from the speech (as in obscenity regulation) is controversial and not persuasive as a matter of logic. In this respect, obscenity is the most notable exception to the normal rules of American free speech law. However, based on this new data of other countries' approaches, the American view seems more justified, at least in relation to children. There would appear to be a rough consensus on authorizing regulation of youth speech based on morals. In this respect, the issue may speak to a certain deference to authorities' supervision in these constitutional democracies over the reach of youth rights. Canadian censorship of advertising directed at children further illustrates what might be labeled an area of youth moral regulation.[135]

It is also worth observing, however, that the United States extends this type of morals regulation of obscenity to adults as well.[136] By contrast, the typical approach in jurisdictions like Canada and Europe is to allow free dissemination of obscenity, except when it demeans women or depicts violence.[137] Thus, United States law stands out, on the whole, as exceptionally restrictive on obscenity.

As we examine the experience of other countries with youth expression, balancing freedom versus order, we can see that other jurisdictions do follow the American approach in many respects. The approach of Canada is most like that of the United States. This is most evident in the close similarity between *R. v. Sharpe* and *Ferber*, both of which allow regulation of child pornography; and in the close similarity between *Sharpe* (children) and *Miller/Paris Adult Theatre I* (adults), both of which allow regulation of explicitly sexual materials upon a presumed connection that it can cause harm (although of course there is a world of difference in respect of regulation for children as compared to adults).[138] Lower courts and other authorities in

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Eric Lichtblau, *Justice Dept. Fights Ruling On Obscenity*, N.Y. TIMES, Feb. 17, 2005, at A17 (Justice Department to appeal federal district court ruling that invalidated obscenity conviction of seller of adult material on ground of *Lawrence*, which means "public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality.").

135. *See* Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 (Can.). Regulation of commercial advertising can also be justified because of the particular susceptibility of children to manipulation by the media. *See id.* at 987.

136. *See generally* Miller v. California, 413 U.S. 15 (1973).

137. *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.), is typical of this approach.

138. *Compare Sharpe*, 1 S.C.R. at 112 (noting the presumed "rational connection between the law and the reduction of harm to children through child pornography"), *with Paris Adult Theater*, 413 U.S. at 60, 62, 63.

Canada, moreover, seem in alignment with the Rehnquist Court's paternalistic approach in *Fraser* and *Kuhlmeier*.[139] *Handyside* likewise illustrates a similar dynamic, as the ECHR was willing to defer to English authorities on whether a sexually explicit book was dangerous to youth.[140]

There is a certain deference to authorities' judgments in respect of sexually explicit material present also in German law, as the Constitutional Court acknowledges that while scientific evidence does not show that exposure to obscenity is dangerous, the Constitutional Court is nevertheless willing to defer substantially to legislative judgment over these matters.[141]

B. Differences

As we look to differences among the jurisdictions, we can observe that the German model of youth expression provides the clearest contrast to the American model, and this difference proceeds from fundamentally different root assumptions about the constitutional order. The root assumption of Germany, of course, is that human dignity and the free unfolding of personality is the highest priority of the constitutional order. The dignitarian orientation of German law encompasses youth expression law as well, which has significant consequences.

Most significantly, a dignitarian focus means a concern for human well-being and welfare, as compared to a focus on liberty *qua* liberty, more the focus of the normal American constitutional system, as applicable to most adults. In this respect, Germany posits an alternative conception of freedom; not freedom for freedom's sake, but freedom for the sake of human capacity and wholeness. In this German view, freedom is not the value *per se*, but rather a means to achieve self-determination and development and control of human capacity. A focus on human personality calls for recognition that a person may have responsibilities to others and the community as a whole. Such constraints may limit more absolute approaches to liberty. But such constraints may also empower personal approaches to liberty.

Concretely, in German law this means that the focus is both on protecting youth from negative influences that can retard personal growth and development (such as hate speech, violence or demeaning sexual material), but also on equipping the young with the experience and opportunity to grow

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139. *See* note 3 and accompanying text; *see also* text accompanying notes 108-11.

140. *See* Handyside v. United Kingdom, 1 Eur. H.R. Rep. 737, 756 (1976) ("[T]he competent English judges were entititled, in the exercise of their discretion, to think at the relevant time that the *Schoolbook* would have pernicious effects on the morals of many of the children and adolescents who would read it.").

141. *See* Josefine Mutzenbacher, 83 BVerfGE 130, 140-41 (1990) (F.R.G.).

in maturity and skill, acquiring the habits of mind and temperament to function in a vibrant system of free expression appropriate to a Western constitutional democracy. In this last respect, Germany alone, of the jurisdictions examined, posits a robust, vibrant model of youth expression law, one more like that in place for adults. In Germany, an approach of more speech, not less speech, is practiced.

Thus, the direction of German youth expression law is toward facilitation and harnessing of the capacity, talents, and character of its young people. This is done by encouraging the young to participate vigorously in the free, give-and-take of expression. Concretely, this means that the young should participate as much as possible in the process of speaking and listening to the wide range of ideas, emotions, aims, or attitudes circulated in public discourse. The Constitutional Court is quite active in policing the structure of public discourse to assure an unimpeded field, free from intimidation, chilling, and censorship, an approach at odds with that in place in the authorities reviewed in Canada and the United States.[142] We might say that the German model of youth expression law represents a youth self-determined, autonomy model of speech, as the Constitutional Court is most concerned about facilitating young people's autonomy, responsibility, and capacity, and less concerned about any discomfort or discord the speech may cause. By contrast, the cases of the Rehnquist Court and of Canada endorse more a model of authorities' control of young people's speech and, therefore, we might call it a paternalistic approach, calling for, when authorities decide, censorship. In this respect, the American model differs from the German and differs also from the conventional American model of speech appropriate for adults, which, of course, is based on autonomy.

There is somewhat of an irony in this difference in approach between the German and American models, at least at first glance. The American model of youth expression tends to diverge from the American architectonic principle of liberty. Reasons apart from text or structure of the Constitution would appear to account for this. For example, we might point to tradition, precedent or community concern for the healthy development of youth as an explanation.

By contrast, the German model of youth expression seems more distinctly libertarian in result and, thus, we are left with the question as to how this form of libertarianism accords with the German architectonic principle of dignity. There is certainly a liberty-restrictive strand of German expression law,

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142. *Compare Denial of Responsibility for World War II*, 90 BVerfGE 1 (1994) (F.R.G.), *and Student Article Case*, 86 BVerfGE 122 (1992) (F.R.G.), *with Fraser and Kuhlmeier and* Canadian authorities discussed *supra* text accompanying notes 27-32.

attributable to dignitarian concerns such as honor or protection from insult.[143] Yet, another prominent strand of German expression law empowers individuals to assert their personal views and thoughts and, thereby, develop their personalities, as in the cases of youth expression we have reviewed. In the German view, the impetus for this is respect for the person *qua* person, a root idea of which is the ability of each person to assert dimensions of personality through exercise of liberty. Expressive rights, like all rights, are emanations of personal dignity. As the glue of the Basic Law, dignity is both empowering and constraining of individuality. We might think of this concept of dignity as facilitating exercise of rights within the constraints of a social community. Stated a different way, rights are freely exercisable until they offend another's claim to rights or important interests of the community.

In this regard, moreover, the German model of youth expression approximates, if possible, the adult expression model. More speech is preferred to less speech; facilitating vigorous exchange of ideas is preferable to circumscription. Content-based regulation of expression tends to apply across the board: Contents signaled out for excision apply generally to adults as well as children, such as in the cases of hate speech, violence, or threats to the social order subsumed within the German doctrine of militant democracy.[144]

By contrast, observable in Canada and the United States is a greater tendency to diverge from the standard model of expression applicable to adults in favor of reduced rights protection for children. The American model, of course, has been well covered.[145] In Canada, we can observe bifurcation of speech in commercial speech[146] and in general topics of social interest.[147]

Uniform versus differentiated application of rights has important implications for a theory of rights. What is a right? What justifies the special claim a right bestows against social power? How can applications of rights on different planes be justified? What is the place and role of children in exercise of their rights? What is the place and role of parents, or more

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143. For example, consider *Strauss Political Satire Case*, 75 BVerfGE 369 (1987) (F.R.G.) (holding that a cartoon depiction of a politician as a pig, copulating with other pigs, dressed in robes to symbolize justice, violated politician's claim to honor and dignity).

144. Under militant democracy, the state and citizens are authorized to defend society against threats to the basic democratic order. For further explanation of militant democracy, see Eberle, *supra* note 53, at 825-26.

145. *See generally* KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT (2003).

146. *Compare* Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 (Can.) (permissible ban of commercial advertising to children), *with* RJR-McDonald, [1995] 3 S.C.R. 199 (Can.) (impermissible ban of advertising of tobacco products to adults).

147. *See* authorities discussed *supra* text accompanying notes 27-32.

broadly, society, in regard to the exercise of children's rights? These are difficult and perplexing questions in need of an answer but, unfortunately, beyond the scope of this article.

As auditors of expression, the young in Germany are also to be exposed to, and to interact robustly in, the free speech experiment, including controversial political,[148] sexual,[149] and societal themes.[150] In these respects, the Constitutional Court's approach to auditors mirrors its approach to speakers.

We might also observe, however, that there is a protective strain to German law, attempting to shield the young from negative influences as well, like in the United States. In Germany, restriction of expression is done in order to safeguard human welfare, in keeping with the commitment to human dignity. The clearest example of this is the *Horror Film Case*,[151] where the Constitutional Court expressed concern about exposure of the young to violent, gruesome films, even while ruling in favor of the film's distributor's right to determine how to circulate the film. Other categories of speech are also restricted in access to youth, but these tend to be the same categorical priorities applicable to adults: hate speech, war, and violence. In this respect, we might say that Germany and the United States evidence different priorities in protecting the young; Germany is concerned with violence, horror, hate speech, and war glorification, while the United States is concerned with sex and certain politically and socially controversial topics.[152]

CONCLUSION

Which of the German or American approach, in effect, has dramatic consequences for the young? Should free speech be geared to developing the capacities, skills, talents, and character dispositions of young citizens of a democracy? Does it make sense to treat their youth as a training field for eventual full participation in public discourse? If so, the German model is preferable. Or should the young be protected by adults from the inevitable rudeness, crudeness if not vileness of public discourse out of concern these

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148. *See generally Denial of Responsibility for World War II*, 90 BVerfGE 1 (1994) (F.R.G.).

149. *See generally Josefine Mutzenbacher*, 83 BVerfGE 130 (1990) (F.R.G.).

150. *See generally Student Article Case*, 86 BVerfGE 122 (1992) (F.R.G.).

151. 87 BVerfGE 209 (1992) (F.R.G.).

152. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding school discipline of student for giving nomination for school office speech that was sexually suggestive); Hazelwood Sch. Dist v. Kuhlmeier, 484 U.S. 260 (1988) (upholding high school principal's exclusion of two stories, on student pregnancy and divorce, from school newspapers, on ground school authorities can control school-sponsored activities).

influences will retard or damage their development? If so, Canada and the United States offer insight. The choice, in short, is between whether autonomy or paternalism is the approach to youth expression in Western democracy, and in what degree.