Human Dignity, Privacy, and Personality in German and American Constitutional Law

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I. INTRODUCTION

The quest for human dignity in modern society is a noble but elusive goal. Difficult to define,1 difficult to realize, personally or socially, dignity nevertheless remains a defining trait of human character, and a preeminent ideal of western society.

From the perspective of an individual, dignity might be thought of as the ability to pursue one's rights, claims, or interests in daily life so that one can fully realize talents, ambitions, or abilities as one would like. That is one path to satisfaction, social recognition, and stature—certainly attributes of dignity. This might be thought of as

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1In western thought, the most definitive elaboration of the concept of human dignity is in the work of Immanuel Kant, especially his seminal FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (L.W. Beck trans., 2d ed. 1959) ("Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."). Recently, there has been a renaissance in the influence of Kantian thought, as a counterweight to utilitarianism. This is most pronounced in the work of John Rawls. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971); John Rawls, Political Liberalism (1993).

There are other conceptions of dignity too. Consider, for example, the work of RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (developing theory of human rights as part of dignity) and LAW'S EMPIRE (1986) (examining how judges determine legal rights); or ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) (arguing from natural law tradition of John Locke).
self-realization, although that is not the only conception of dignity. What matters here is that each person should be free to develop his own personality to the fullest, subject only to restrictions arising from others' pursuit of the same.²

Of course, there must be some limit to individual freedom if society is to function in a reasonably orderly manner. Thus, from the standpoint of society, individual aspiration must be measured against the demand for order, peace, and social harmony. This balance between the aspiration of individual freedom and the demands of organized society has been a central quest of modern constitutional law.³

Today this balance is harder than ever to achieve. Social demands have escalated, placing elevated pressures on the integrity of human personhood. The rise of the administrative state, for example, has led to omnipresent government and its potential to suffocate personal freedom.⁴ Technology now develops so rapidly and pervasively that it risks overwhelming individuality. For example, computers can gather, store, and transmit information so capably that they can access, and even mimic, human functions.⁵ Gene technology, artificial insemination, and the ability to prolong and, indeed, end life pose troubling existential questions. How are we coping in this world, both in isolation and in comparison to others?

This Article takes up these themes by exploring the concept of human dignity as reflected in the legal order of two comparable modern western societies: Germany and America. Germany and America are good choices for this comparison because both share similar European intellectual and cultural influences; both are highly developed,

²It is fundamentally a Kantian thought that all moral agents should develop their talents to the maximum extent compatible with the freedom of others. Note, for example, Kant's influence in RAWLS, A THEORY OF JUSTICE, supra note 1, at 60: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." Anthony Sampson similarly voiced these thoughts: "'What matters... is that each man should be free to develop his own personality to the full; and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same.'" ANTHONY SAMPSON, THE CHANGING ANATOMY OF BRITAIN 160 (1982) (quoting Lord Tom Denning, Master of the Rolls). For Kant, the concepts of freedom, development of moral personality, reverence of the moral law, and treating people as the final end are interlinked.

³See, e.g., Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.").

⁴While the administrative state in America can be traced to 1887—with the institution of the Interstate Commerce Commission, the first significant administrative agency—the predominant rise of the administrative state occurred during the era of the New Deal and continues today. In Europe, the roots of the administrative state lie in the eighteenth and nineteenth centuries. In Germany, the modern administrative state arose from Frederick the Great, who thought of himself as "the first servant of the state." Edward I. Eberle, COMPARATIVE PUBLIC LAW: A TIME THAT HAS ARRIVED, in FESTSCHRIFT FOR BERNHARD CROSSFIELD 7, 7 n.13 (Weizner Ebke ed., forthcoming 1998). In France, Napoleon formed the administrative state through, among other things, a professional civil service. See id.

advanced industrial societies coping with change and technological revolution; and both value individual freedom in the context of a stable society.

Human dignity is, of course, an elusive concept. For our purposes, we will concentrate on the content given the term by the constitutional law of both countries. In particular, we will explore how persons are free to develop their own personalities. One might choose, for example, to be let alone as master of his realm. Or, one might engage vigorously in the affairs of the day. In Germany, these matters are covered in the right to the free unfolding of personality. In America, this falls under the rubric of privacy rights, including the zone of personal autonomy that emanates therefrom. It makes sense to focus on the constitutional law of these countries because recording in a constitution a culture's highest values is a defining attribute of western society. Certainly this is the case with America and Germany. In Germany, the Basic Law, as interpreted by the Constitutional Court, guides and organizes society. In America, the Supreme Court has long secured the role of declaring out of the fabric of the Constitution certain fundamental values for the social order.

By exploring this concept of human dignity in each constitutional order, insight can be derived as to the quality of the human condition, the reach of individual freedom, and the make up of the social order. The particular traits, activities, or essences valued by each country reveal something important about human personality as it relates to society. Likewise, the limitations on freedom articulated in German and American law are instructive of the social structure each country seeks to create. In short, the balance struck between individual freedom and the social order colors the legal culture.

It makes particular sense to focus on these concepts from a cross-cultural perspective. First, it is important to realize that there are other visions of humanity beyond our own visage that may be ennobling, enriching, or both. Second, it is worthwhile to explore the similarities and differences in constitutional vision and doctrine—both in themselves and as a basis for assessing the transplantation of legal norms. Third, this comparison may yield a set of higher principles of constitutional order or a sounder public law philosophy. Fourth, the foreign legal regime may serve as an alternative standard by which to measure the work of the native court. Fifth, in an increasingly interdependent world, realization of mutual cultural influences may prove beneficial. Sixth, through study of other cultures, we learn, by comparison, something important about ourselves.

To accomplish these goals, some grounding in German constitutional law—particularly its protection of human dignity—is first necessary so that we can see how German law contrasts with American. This is the subject of Part II. Part III provides an overview of human dignity as developed in German personality and American privacy rights. There are two components to German personality law. Freedom of

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6 These points are noted in Edward J. Eberle, Public Discourse in Contemporary Germany, 47 CASE W. RES. L. REV. 797, 804 (1997) [hereinafter Eberle, Public Discourse].

7 This may be the main mission of comparative law: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be." THOMAS MANN, JOSEPH IN EGYPT (1938), translated in Dedication, DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994).
action, elaborated on in Part IV, is outward in focus, including protection of activities like freedom to travel, or to pursue a sport or occupation. German law also guarantees a personal sphere that is inward in orientation. As discussed in Part V, this protection of the personal sphere entails a number of strands, such as privacy, informational self-determination, and control over one's portrayal in society. Parts IV and V are presented against the backdrop of American law in order to discover points of divergence and convergence in the two legal cultures. Part VI explores how both countries approach constitutional issues central to identity, self-determination, and autonomy. This area provides the greatest overlap between German and American law. German law has evolved to protect a search for biological parenthood, sexual identity, and rights to one's name, among other matters. In American law, self-determination has encompassed control over procreation, conception, marriage, and child rearing, to name a few. Part VII discusses the recent convergence in German and American abortion law in the context of these themes. All of this leads to a more comprehensive assessment in Part VIII of the countries' contrasting views of human dignity and the comparative strength of their constitutional visions.

II. THE GERMAN CONSTITUTIONAL ORDER AND ITS PROTECTION OF HUMAN DIGNITY AND PERSONALITY

A. The German Constitutional Order

The adoption of the Basic Law in 1949, following the debacle of World War II, signaled a new constitutional order in Germany. Seeking distance from the horrors of Nazism, the Basic Law made a sharp break from this immediate past, instead drawing deeply upon German tradition to found the legal order on moral and rational idealism, particularly that of Kant. Thus, 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. These values are not to be sacrificed for the exigencies of the day, as had been the case in Nazi Germany. The Rechtsstaat principle, for example, obligates society to adhere to a rule of law, requiring that legal measures have a legal basis and discernible content, provide fair notice, and be necessary and proportional to the ends they seek to accomplish (Proportionality Principle). The principle of the Social State (Sozialstaatsprinzip)
obligates the state to take necessary social welfare measures so that all citizens will have a dignified existence.\textsuperscript{11} The concept of a "militant democracy" (\textit{streitbare Demokratie}) obligates the state to resist any threats to the basic democratic order, thereby assuring that democracy flourishes.\textsuperscript{12}

Crucial also to the German social order is commitment to human rights. Many fundamental values are enumerated in the Basic Law's catalogue of rights, including protections of free conscience, faith and creed, free expression, equality, and occupational freedom. The Basic Law is far more specific and comprehensive in its listing of basic freedoms, enumerating at least twenty specific individual liberties, as compared to the relatively sparse enumeration of liberties in the American Constitution.\textsuperscript{13}

There are differences in the countries' conceptions of basic rights. Fundamental to the German constitutional scheme is the principle of objective and subjective rights, or positive and negative liberties. The objective or positive dimension of rights obligates the government to create the proper conditions so that rights might be realized.\textsuperscript{14} This bestows duties on the state, calling for state activism. For example, the concept of human dignity protected in Article 1 obligates the state to provide a basic minimal existence for citizens.\textsuperscript{15} This objective dimension to basic rights is tied to the value-ordered nature of the German constitutional scheme, obligating the government to realize in society the set of objective values embodied in the Basic Law. "This value-system, which centers upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private."\textsuperscript{16}

By interpreting basic rights as establishing an "objective" ordering of values, centered around human dignity, the Constitutional Court transformed those values into

\textit{Comparative Jurisprudence (I): What Was It Like to Try a Rat?}, 143 U. Pa. L. Rev. 1889, 2046–55 (1995). See also \textit{Kommers, Constitutional Jurisprudence}, supra note 8, at 42–43. Today the notion of the \textit{Rechtsstaat} is anchored in Article 20(3), which provides: "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice." Art. 20(3) Grundgesetz [hereinafter GG]; see also infra note 135 and accompanying text.

\textsuperscript{11} See Art. 20(1) GG. For elaboration of the concept of the Social State, see \textit{Constitutional Jurisprudence}, supra note 8, at 41–42. For the intellectual origins of the Social State, see Ewald, supra note 10, at 2055–61.

\textsuperscript{12} See, e.g., \textit{Klass Case}, 30 Entscheidungen des Bundesverfassungsgerichts [hereinafter BVerfGE] 1, 19–20 (1970), translated in \textit{Constitutional Jurisprudence}, supra note 8, at 230 ("Constitutional provisions must not be interpreted in isolation but rather in a manner consistent with the Basic Law's fundamental principles and its system of values . . . . In the context of this case it is especially significant that the Constitution . . . has decided in favor of [a] 'militant democracy' that does not submit to abuse of basic rights or an attack on the liberal order of the state. Enemies of the Constitution must not be allowed to endanger, impair, or destroy the existence of the state while claiming protection of rights granted by the Basic Law.").\textsuperscript{14}

\textsuperscript{13} These differences should be expected, as the German charter was drafted in 1949 and the American Bill of Rights was drafted in 1791.

\textsuperscript{14} The concept of an 'objective' ordering of values . . . [is] a central concept in German constitutional doctrine." Peter E. Quint, \textit{Free Speech and Private Law in German Constitutional Theory}, 48 Md. L. Rev. 247, 261 (1989).

\textsuperscript{15} This provides the foundation for the social welfare principle, anchored in Article 20(1), that distinguishes Germany.

\textsuperscript{16} \textit{Lath}, 7 BVerfGE 198, 205 (1958).
principles so important that they must exist "objectively"—as an independent force, separate from their specific manifestation in a concrete legal relationship. So conceived, objective rights form part of the legal order, the ordre public, thereby taking their place among the governing principles of German society. In this way, the Basic Law acts as a blueprint for society, setting forth the values to be realized, requiring a close fit between its text and society.

By contrast, there is no such objective aspect to the American Constitution. The American Constitution simply provides the outline for government, concentrating on limiting official power. Our Constitution lacks any positive element that requires affirmative government action to enforce our rights.

The second aspect of German basic rights is their subjective or negative dimension. This means that rights play a defensive role, delimiting a sphere of personal liberty beyond governmental control. In German law, this concept of rights is referred to as "subjective," denoting a set of rights individuals may exercise. The essential character of this subjective dimension corresponds to the American concept of fundamental constitutional rights.

In contrast to the American Constitution, the German Basic Law also sets forth certain duties citizens or government must perform. For example, Article 6(2) provides that "the care and upbringing of children shall be a natural right of and a duty primarily incumbent on the parents. The state shall watch over their endeavors in this respect." Moreover, the objective value-order, as worked out by the Court, calibrates the relationships between rights, and among rights and duties. Thus, German citizens have both claims to subjective rights, which they may exercise, and objective rights, which they can call on government to perform, but must also assume duties corollary to such rights.

We can thus see that the contrast between the text and nature of the two constitutions is striking. The German Basic Law is value-oriented and sets forth both rights and duties, whereas the United States Constitution attempts to be value-neutral pursuant to a scheme of negative liberties, specifically enumerating rights government may not infringe, but not stating comparable duties citizens must assume or values government must realize.

Constitutional interpretative techniques also differ in Germany and America. Under American canon, one must consult, in order of importance, constitutional text...
(including structure and purpose), precedent, Framers’ intent, and then, perhaps, social, economic, or philosophic perspectives prior to reaching a plausible result. By contrast, German law places a premium on the text of the Basic Law and its applicability to social and economic conditions. Beyond textual and structural exegesis, German interpreters also employ historical and teleological analysis, before integrating and harmonizing the whole (praktische Konkordanz). Both Courts thus employ a variety of reasoning techniques, including arguments based on text, structure, history and natural law. Functionally, German case law operates like American decisions, setting forth fundamental principles that bind other courts and people in society.

The most pronounced difference between the two modes of interpretation relates to the role of Framers’ intent. In Germany, the Constitutional Court treats Framers’ intent and history as auxiliary sources of interpretation. While the Court is free to consult them, they generally lend support to a result reached through other interpretative methods, such as the textual, structural, or teleological analysis noted above. Framers’ intent is not an independent source of authority. Instead, the Court mainly interprets constitutional text in relationship to the conditions of modern society. This

Under German canon, textual analysis consists of analyzing the meaning of words or sentences. This is usually combined with a structural or systematic analysis, where one attempts to clarify the meaning of a word or sentence by comparing it to related language in the legal text. The interpreter strives for a unity of the legal document interpreted. In historical analysis, the interpreter tries to divine the intent of the Framers of the legal text. In teleological analysis, the interpreter glosses over Framers’ intent and, instead, searches for the purpose or goal behind the language. Such purposes are generally viewed from a contemporary perspective. These four schools of interpretation constitute the classic catalogue of statutory interpretation in Germany, and the core of constitutional interpretation as well. With the exception of teleological interpretation, these classic methods of interpretation were established in Germany by Friedrich Carl von Savigny in his classic eight volume treatise on Roman law, SYSTEM DES HEUTIGEN ROMISCHEN RECHTS (SYSTEM OF MODERN ROMAN LAW) (Scientia Verlag 1981) (1840-1851). See Winfried Brugger, Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View, 42 AM. J. COMP. L. 395, 396-98 (1994); see also CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 48-49. One can thus see that there is some overlap between American and German methods of textual interpretation.

A difference between German statutory and constitutional interpretation is that, in constitutional interpretation, after employing a combination of the above four techniques, the constitutional interpreter then tries to bring some unity to the overall interpretation. If norms are in conflict with one another, the interpreter tries to reconcile them by interpreting their essences to the maximum extent possible, and then harmonizing the difference. This is the technique of concordance or harmonization (praktische Konkordanz). It is easier in theory than in practice. Consider, for example, the Constitutional Court’s use of the technique in the context of the clashes between expression and privacy interests, in the Lebach, 35 BVerfGE 202 (1973), and Soraya, 34 BVerfGE 269 (1973), cases, discussed infra notes 337–40, 373–80 and accompanying text, and abortion, discussed infra notes 504–07 and accompanying text. The interpreter also tries to integrate the interpretation to achieve interparty and social cohesion. See Brugger, supra, at 398–99.

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21See CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 48-49.

22In Germany, there is no formal stare decisis system as there is in America. This follows from the civil law premise that judicial decisions serve only as a gloss on the open development of the law, which is to be found in the rules and principles of the governing text. See id. at 48. However, in practice, German courts strive to adhere to precedent, as do American courts. Moreover, Constitutional Court decisions represent binding interpretations of the Basic Law.

23See Brugger, supra note 20, at 400; CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 49. Note, for example, these words of the Constitutional Court: “[T]he original history of a particular provision of the Basic Law has no decisive importance” in constitutional interpretation. Homosexuality Case, 6 BVerfGE 389, 431 (1957), translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 49.
is perhaps most pronounced in relation to the Article 1 concept of human dignity, where the Court has stated: "[A]ny decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claim to a conception of timeless validity." ²⁴

This is a far cry from American law, where text, structure, history, and Framers' intent are thought to lend predictability and stability to the law. Some even forcefully argue that these methods provide an additional guard against judicial activism. Certainly the conservative reaction to the Warren Court has sought limitation of judicial review through a search for originalism. ²⁵ Moreover, in the area of unenumerated rights, ²⁶ the Supreme Court has sought to anchor its decisions in timeless concepts, like justice or natural law, to avoid the appearance of judicial bias or result-orientation. ²⁷ These differences show, almost by definition, that the Constitutional Court tends to be a more activist body than the Supreme Court. They also point out, in a sense, that the Constitutional Court is forward-looking, whereas the Supreme Court is backward in focus. ²⁸

B. Human Dignity in Germany

Human dignity is the central value of the Basic Law. This determination reflects the conscious intention to elevate modern Germany beyond the inhumanity of Nazism, signaling a new constitutional order. Article 1(1) therefore states that "the dignity of man shall be inviolable." The second paragraph of Article 1 reinforces the centrality of human rights to the concept of human dignity: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." ²⁹

A core aspect of human dignity is the guarantee of human rights. Indeed, the specific enumeration of basic rights in the Basic Law are themselves tangible manifestations of human dignity. This catalogue of basic rights is systematically ordered, making up a central aspect of the objectively determined set of values that...
govern German society. In this way, dignity and basic rights have a mutually
nourishing effect on one another. But human dignity means more than the specific
catalogue of basic rights. Dignity is not merely a focus on individuality. As the central
value of the constitution, it infuses the whole constitutional order, obligating the state
both to protect and realize it. This includes a communitarian dimension: Requiring
respect for others’ claims to dignity better assures vindication of the human dignity of
all, and fosters a community of mutual cooperation and solidarity.

The first draft of the constitutional convention, the Herrenchiemsee conference,
stated, “The dignity of man is founded upon eternal rights with which every person is
endowed by nature.” Christian-Democrats (a Christian-inspired and generally
conservative party) sought to link the language “eternal rights” with “God-given
rights.” But this effort was resisted by the more secular and liberal Social Democrats
(a social welfare democratic party) and Free Democrats (a nineteenth-century liberal
party). The result was the more neutral language reflected in Article 1(1). There is
general consensus that this language means that the guarantee of human dignity is
inalienable, being both prior to and a constituent part of the social
contract.3 The American Declaration of Independence seems the closest reflection of this understand-
ing. Human dignity is thus a constituent part of humanity, and its guarantee is the
essence of the German social order. In this sense, dignity is the highest legal value in
Germany.

The concept of human dignity in the Basic Law reflects the influence of three
main schools of thought, although it was not intended to be strictly associated with any
one of them. The three influences are Christian natural law, Kantian moral philosophy,
and more secular theories of personal autonomy and self-determination. In the
dignitarian jurisprudence of the Constitutional Court, however, the Court has mainly
followed Kant’s theory of moral autonomy. This is evident, for example, in the leading
Life Imprisonment Case, where the Court attempted to capture the essence of human
dignity:

It is contrary to human dignity to make the individual the mere tool (blosses
Objekt) of the state. The principle that “each person must always be an end in
himself” applies unreservedly to all areas of the law; the intrinsic dignity of the
person consists in acknowledging him as an independent personality.36

See CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 305.
31Id. at 308.
32Id.
33For a brief description of this history, see CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 308.
34See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-
evident... that they are endowed by their Creator with certain unalienable Rights, that among these are Life,
Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men,
deriving their just Powers from the Consent of the Governed ...”).
35Under Christian natural law theories, dignity is a gift of God and, therefore, an inalienable aspect of
humanity. Under Kantian philosophy, dignity is an indispensable part of human nature. Under a more secular
theory of self-realization, the decisive aspect of human dignity is self-realization of one’s identity through
exercise of one’s talents and abilities. For elaboration of these theories, and their influence on human dignity,
see PIEROTH & SCHLINK, supra note 19, at 90–91.
36Life Imprisonment Case, 45 BVerfGE at 228, translated in CURRIE, supra note 7, at 314.
Still, human dignity is essentially an abstract, normative concept, albeit with a philosophical framework. The Framers sought, and the Court has striven, to keep the term an open one, preferring that it take on concrete meaning through case by case determination. Thus, the main definition of dignity is the meaning given it by the Court in its jurisprudence.

C. Human Personhood and the Polity

The dignitarian jurisprudence of the Constitutional Court is replete with references to the nature of humankind and society. The Court has frequently characterized man as a "spiritual-moral being," reflecting the Christian-natural law influence. The Life Imprisonment Case is again a good statement of this:

The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.

A strongly Kantian view likewise invests the concept of personhood with rationality and self-determination, but also emphasizes duties and moral bounds. These strands converge to form an integrated, whole person. As envisioned in German law, human beings are spiritual-moral beings who act freely, but their actions are bound by a sense of moral duty. Actions, in other words, are guided by a sense of social need, personal responsibility, and human solidarity.

By comparison, American law has never really sought to define human dignity, nor human personhood or personality. Certainly there have been sketches of these concepts in American law, particularly in procedural due process, substantive due process, and capital punishment cases. Moreover, in recent times, the Warren Court, and particularly Justices Brennan and Marshall, sought to give life to these concepts. More recently, human dignity turns up with some regularity in the Supreme Court's decisions.
Court’s discussions, particularly in the context of autonomy rights, and might even be considered a background theme of American law. Still, American law does not exhibit the same systematic attempt to come to basic definitional certitude as German law.

There is a strong link in German law between the concept of personhood and the social community. The seminal case on artistic freedom, Mephisto, captured this thought well: The human person is "an autonomous being developing freely within the social community." The human is not to be "an isolated and self-regarding individual," as she so often seems to be in the American social scheme. Rather, the human is to be "related to and bound by the community." The Investment Aid Case first advanced the concept of the human as a community-bound person:

The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person’s dependence on and commitment to the community, without infringing upon a person’s individual value.

Once again, these statements bear the clear imprint of Kantian moral philosophy. Thus, the community envisioned by the Basic Law is one where individuality and human dignity are to be guaranteed and nourished, but with a sense of social solidarity and responsibility. Rather than being a collection of atomistic individuals, people should be connected to one another. Thus, individual self-determination is offset by concepts of "participation, communication and civility." In short, at the root of the German social vision is the Kantian proposition that humans are to be treated always as ends in themselves, never as means, and that this is to be done within a moral social construct that both empowers and guides individuals.

The Life Imprisonment Case, again, gives voice to these ideas:

(1966) ("[T]he constitutional foundation underlying the privilege is the respect a government ... must accord to the dignity and integrity of its citizens."); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.").

"See Casey, 505 U.S. at 851 (plurality opinion); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) ("In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.").

There are several explanations for this. First, dignity is textually mandated in Article 1 of the Basic Law, whereas it is not mentioned in the American Constitution and, instead, must be implied from the promise of liberty in the Due Process Clause. Second, German law reflects the civil law orientation toward abstraction, systemization, and classification, whereas American law reflects the common law orientation toward pragmatism and concreteness.

"Mephisto, 30 BVerfGE 173, 193 (1971), translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 428.

"Life Imprisonment Case, 45 BVerfGE at 227, translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 316.

"Id.

"Investment Aid Case, 4 BVerfGE 7, 15–16 (1954), translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 313; accord, Klass Case, 30 BVerfGE at 20; Conscientious Objector Case I, 12 BVerfGE 45, 51 (1960).

"See CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 313.
This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather [that] of a person related to and bound by the community. In the light of this community-boundedness it cannot be "in principle unlimited." The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected. This means that [the state] must regard every individual within society with equal worth. It is contrary to human dignity to make persons the mere tools [blosses Objekten] of the state. The principle that "each person must shape his own life" applies unreservedly to all areas of law; the intrinsic dignity of each person depends on his status as an independent personality.51

The German social vision obviously contrasts starkly with the American one. In the United States, we do not have consensus on core values, like Kantian morality, around which to organize the social order. While we have fundamental agreement on principles like individual freedom and democracy, these principles operate without stabilizing concepts of morality or community. Instead, we as autonomous persons ourselves determine the norms and values that infuse the social order. And these norms and values are almost always in flux. No American principle demonstrates this more than our concept of free speech.52 Thus, individual freedom in America is somewhat unconnected to any one particular community, whereas in Germany it unfolds within a more shared sense of community. This has dramatic consequences for the two social orders, as we will see.

D. The Concrete Meaning of Human Dignity

Since human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of a factual setting. As the driving principle of Germany's legal order, however, and as a root of Kantian thought, it possesses a certain fixed content. At a minimum, for example, it means that the social order must reflect recognition of the equality of humankind. This concept is anchored in Article 3 of the Basic Law. Equality means at least that persons are entitled to "equal worth," and that, accordingly, there can be no slavery or serfdom, racial or ethnic discrimination.53 Second, dignity means respect of physical identity and integrity, which is textually specified in Article 2(2). This prohibits torture and corporal punishment, and forbids imposing punishment without fault or levying disproportionate penalties.54 Third, dignity means respect of intellectual and spiritual identity and integrity.55 This

51Life Imprisonment Case, 45 BVerfGE at 227-28, translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 316. For elaboration, see GRUNDGESETZ, KOMMENTAR 4, 6-8, 11-12 (Theodor Maunz et al. eds., 1993).
52See generally Edward J. Eberle, Hate Speech, Offensive Speech, and Public Discourse in America, 29 WAKE FOREST L. REV. 1135, 1135-1213 (1994) [hereinafter Eberle, Hate Speech] (arguing that through public discourse, we determine who we are as a people).
53See Life Imprisonment Case, 45 BVerfGE at 228.
54See PIEROTH & SCHLINC, supra note 19, at 93.
55See id.
56See id.
is manifested most dramatically in the protection of personality rights, specified in Article 2 and elaborated on in this Article. Fourth, dignity means limitation of official power. This is particularly evident in the guarantee of proportionality, which circumscribes governmental means to legitimate ends, and of procedural due process rights, which allow persons affected by official action to be heard and to be able to influence proceedings which concern them.\(^5\) Finally, dignity means guarantee of individual and social existence. Tangibly, this is manifested in the Article 2(2) right to life and in Germany's social welfare state, textually anchored in Article 20(1).\(^6\)

The main development of dignitarian jurisprudence has occurred in conjunction with the more concrete freedoms of Article 2, which guarantees three specific freedoms. The first of these is the right to free development of personality: "Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality."\(^7\) Article 2(1) thus grants personality rights most like the American concept of privacy rights grounded in the Due Process Clause. Personality rights include protection of informational privacy,\(^8\) a right to have one's paternity established,\(^9\) and a right to have official records reflect a sex change.\(^10\) Parts III-VI will elaborate on these personality rights.

The second of the important Article 2 freedoms is "the right to life and to physical integrity."\(^11\) The right to life clause is the source for the Constitutional Court's conclusion in the abortion cases\(^12\) that the state has a duty to protect life after conception. This conclusion resulted in strict limitations on abortion. The contrasting German and American treatment of abortion will be examined in Part VII. Apart from abortion, the Constitutional Court has not invoked the right to life clause to place wide-ranging duties to protect life on the state. While recognizing a duty to protect life, in other matters, the Court has deferred to government's implementation of it.

\(^{5}\)See id. at 94; see also Art. 19(4) GG ("Should any person's rights be violated by public authority, recourse to the court shall be open to him.").
\(^{6}\)See PIEROTH & SCHLINK, supra note 19, at 94.
\(^{7}\)Art. 2(1) GG. The notion of free development of personality is fundamentally a Kantian one. See supra note 2 and accompanying text. Von Savigny picked up on the idea in elaborating his theory of autonomy, which in turn influenced Otto von Gierke, and the framing of the German Civil Code. Von Gierke emphasized the personal nature of the right of personality. See OTTO VON GIERKE, I DEUTSCHES PRIVATRECHT 702 (1895). This history is recounted in Ewald, supra note 10, at 2000-01, 2034-36, 2045-50, 2053-60, 2063-65. See also Harry D. Krause, The Right to Privacy in Germany—Pointers for American Legislation?, 1965 DUKE L.J. 481, 485. Despite the theoretical acceptance of a general right of personality, the right did not find a place in the German Civil Code which was codified in 1896. By contrast, the right did find a place in the Swiss Civil Code of 1907, in Article 28. See Krause, supra, at 485 & n.13. In Germany, it took later developments by the civil law courts for general recognition of a right of personality. Interestingly, the main theoretical development of personality rights in Germany, by von Gierke in the 1890s, paralleled the original development of privacy rights in America. See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890).
\(^{8}\)See Census Act Case, 65 BVerfGE 1, 64 (1983), discussed infra notes 241-75 and accompanying text.
\(^{10}\)See Transsexual Case, 49 BVerfGE at 298, discussed infra notes 460-65 and accompanying text.
\(^{11}\)Art. 2(2) GG.
\(^{12}\)See Abortion II, 88 BVerfGE 203, 252 (1993); Abortion I, 39 BVerfGE 1, 36-37 (1975).
Accordingly, the Court refused to impose affirmative duties upon the state to prevent kidnaping or to rescue its victims, or to guard against threats to the environment from army bases or nuclear plants.

The "physical integrity" clause of Article 2(2) is mainly used as a source to guide criminal procedures, somewhat like American criminal due process jurisprudence. It has also been used to limit invasions of the body that would cause pain, harm, disfigurement, or injury. For example, in the *Spinal Tap Case*, the Court invalidated a court-ordered sampling of a defendant's spinal column to test his involvement in a crime on the ground that this violated his physical integrity. The Court has also invalidated use of polygraph tests to determine a defendant's veracity. Attaching a person to a machine to force the truth, the Court reasoned, is "an inadmissible invasion of a person's innermost self and a violation of human dignity." Man should not be "an object of experimentation," a manifestation by the Court of the Kantian directive to treat people as ends only. Efforts to apply the physical integrity clause outside the criminal context have not, as yet, been successful. Physical inviolability is mainly a concern of criminal law, and therefore will not be addressed in this Article.

The last of the Article 2 freedoms provides that "[t]he liberty of the individual shall be inviolable." This mainly operates in conjunction with the other Article 2(2) freedoms. It will not be extensively considered here.

Not surprisingly, human dignity, alone or in conjunction with the more specific freedoms of Article 2, is a rich source of constitutional litigation, and is widely debated on and off the court. Human dignity in Germany is thus most like the American concept of modern substantive due process, particularly rights of privacy. Both concepts are open-ended and controversial, posing difficult questions for the role of the court within a democracy and the nature of the constitutional order. The remaining part of this Article explores this topic as it relates to the development of human personality in Germany and America.

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7Chemical Weapons Case, 77 BVerfGE 170 (1987) (holding that right to life clause does not prevent state from approving storage of chemical weapons at army bases). In *Mülheim*, 53 BVerfGE 30, 57–69 (1979) and *Kalkar*, 49 BVerfGE 89, 140–44 (1978), the Constitutional Court recognized a state duty to protect life in connection with the threats of a nuclear power plant, but determined that the duty could be met in the manner the government determined.
9Id.
10Id.
11*CONSTITUTIONAL JURISPRUDENCE*, supra note 8, at 344.
12Art. 2 GG.
13Id.
14Mainly, this freedom protects free physical movement. It is somewhat akin to the concept of habeas corpus, protecting against arbitrary restraints on physical liberty. See *PIEROTH & SCHLинг*, supra note 19, at 110–11.
In comparison to the relatively specific framing of human dignity and its cognates in the Basic Law, it is striking how devoid of detail the American Constitution is. Since the Supreme Court’s determination in 1873 in *The Slaughter-House Cases* that the Fourteenth Amendment Privileges and Immunities Clause only protects a narrow category of national rights, the Privileges and Immunities Clause has effectively been rendered a dead letter for purposes of enumerating basic rights. That leaves only two textual pieces of support for this endeavor: the Due Process Clause and the Ninth Amendment. The Ninth Amendment was not invoked by the Court until 1965 in the famous case, *Griswold v. Connecticut,* and then only to lend support to the Court’s extension of a right of privacy beyond the constitutional text. Not surprisingly, therefore, the Court has mainly relied on the Due Process Clause, which provides that no “[s]tate [shall] . . . deprive any person of life, liberty, or property, without due process of law,” to found basic rights. Through Due Process, the Court has interpreted a range of privacy and autonomy rights which protect personal decision making in areas relating to marriage, procreation, contraception, family

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75See 83 U.S. (16 Wall.) 36, 79–80 (1873) (recognizing national rights such as peaceable assembly, petition, writ of habeas corpus, and use of navigable waters).


7381 U.S. 479 (1965).

77See id. at 484 (relying on Ninth Amendment and other amendments for penumbras emanating from specific guarantees); see also id. at 493 (Goldberg, J., concurring) (“[T]he Ninth Amendment . . . lends strong support to the view that the ‘liberty’ protected by the Fifth and Fourteenth Amendments . . . is not restricted to rights specifically mentioned in the first eight amendments.”).

78U.S. CONST. amend. XIV, § 1.

79See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty . . . , as we feel it is, or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”). Other cognates of privacy could be found in the prohibition against “quartering troops in any house,” U.S. CONST. amend. III, and the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures,” U.S. CONST. amend. IV.

80See *Griswold,* 381 U.S. at 485 (suggesting that marriage lies “within the zone of privacy created by several fundamental constitutional guarantees”).

81See *Skinner,* 316 U.S. at 541–43 (holding that statute requiring sterilization of habitual criminals violates Equal Protection Clause as applied to person convicted once of stealing chickens and twice of robbery).

relationships, child rearing, and education. The movement of both Courts thus seems very much in the same general direction, notwithstanding different textual, historical, philosophical, and cultural settings.

III. INTRODUCTION TO GERMAN PERSONALITY RIGHTS

The German Law on the "free unfolding of personality" is comprehensive and multifaceted. Grounded in human dignity and Kantian philosophy, the right is the only one read in conjunction with other rights. In contrast to human dignity, personality is not an objective value and therefore does not generally operate to impose affirmative obligations on the state.

Personality rights come into play, potentially, whenever an action is not protected by a more specific right. Theoretically, all claims or interests have the potential to be so protected. In this way, Article 1 human dignity and Article 2(1) rights interact to form comprehensive protection of human personality and personhood. The Constitutional Court captured the sense of these rights well in the *Eppler Case*:

They complement as "undefined" freedom the special ("defined") freedoms, like freedom of conscience or expression, equally constitutive elements of personality. Their function is, in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions, that are not encompassed by traditional concrete guarantees.

This "catch-all" function of personality rights is especially important in view of "modern developments and the associated threats they pose to the protection of human personality." Textually, comprehensive rights are not clearly derivable from enumeration of a "right to the free development of personality," although the German text is more supportive of the effort than the American one. Still, the fundamental thrust of the German Constitutional Court has been to enlarge the rights sought to be captured by the language, as compared to confining itself to strict application of the language of the text. German personality law is thus a creature of the Constitutional Court, as rights of privacy are of the Supreme Court.

There are two components to German personality law: freedom of action and guarantee of a personal sphere. Freedom of action is outward in focus. As conceived

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84See Moore v. East Cleveland, 431 U.S. 494, 505-06 (1977) (holding that city cannot limit occupancy of dwelling to members of same nuclear family).
85See Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that state cannot mandate public school attendance when parents desire to send children to private school); Meyer v. Nebraska, 262 U.S. 390, 400-03 (1923) (holding that state cannot mandate teaching of only English in schools).
86See Interview with Dr. Bodo Pieroth, Professor of Law, University of Münster, Münster, Germany (July 8, 1996).
89See Degenhart, supra note 74, at 362. In developing personality law, the Constitutional Court relied significantly on developments by the civil law court. Some of these developments are discussed *infra* note 93, and notes 327-37 and accompanying text.
in the seminal *Elfes Case*, freedom of action empowers one to do fundamentally what one desires insofar as it does not interfere with others or the constraints of the social order. Essentially, this aspect of personality allows one to define oneself in relation to society.

As freedom of action is outward in focus, the personal sphere is inward in orientation. The personal sphere delimits an essential sphere of privacy within which one can fundamentally determine who one is and how one should relate to the world, if at all. One may choose to engage actively in the world, and thus avail oneself of freedom of action. Or, one may choose to withdraw from the world, retreating into oneself and concentrating on inner development. The Constitutional Court has actively sought to create an inner, intimate sphere so that a core of personality might be developed and protected. The focus on interiority reflects the underlying vision of man as a "spiritual-moral" being.

The personal sphere is narrower in scope than the range of freedom of action. It protects only against incursions that aim to curtail the personal sphere. Just what this means is better elaborated by case law than definition, although the Court has had some difficulty in fixing the concept. Confidentiality is protected against certain incursions, such as the secret taping of conversations or the attempted use of divorce records in a work disciplinary proceeding. Similarly, inquiry into personal matters is limited, a right developed in the census cases. The Court, in fact, has sought to delineate a range of tangible rights that map out this private sphere in order to lend structure to personality rights. These include the novel concept of informational self-determination; rights to control presentation of oneself in society, including control over one's words, images, portrait, and reputation; and rights of self-determination and knowledge of one's heritage, as elaborated on more fully in Parts V and VI.

American law lacks this focus on the inner self. Our concern is much more with rights of autonomy and self-determination in relation to the world, such as those that relate to marriage, procreation, abortion, or child rearing. This may reflect the American preoccupation with public life, which itself may reflect the influence of the central role democracy (and its emphasis on public participation) plays in our society, historically and today. It may also reflect our Constitution's preoccupation with organizing and limiting government, leaving unspecified areas to individual choice, without elaboration, in contrast to the German enumeration of the parameters of that

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90 See *Elfes*, 6 BVerfGE 32, 36 (1957). For elaboration of the concept of free development of personality, see PIEROTH & SCHLINK, supra note 19, at 96–104; Degenhart, supra note 74, at 362.
91 See, e.g., *Elfes*, 6 BVerfGE at 36 (essence of man as spiritual-moral person). For establishment of interiority in German law, see infra notes 186–95 and accompanying text.
92 See *Criminal Diary Case*, 80 BVerfGE 367, 373–75 (1989); see also infra notes 218–40 and accompanying text.
95 See *Census Act Case*, 65 BVerfGE 1, 41–42 (1983); *Microcensus*, 27 BVerfGE 1, 6–8 (1969), discussed infra notes 193–95, 247–53 and accompanying text.
choice. Contrastingly, the German focus on the inner life may reflect the fact that freedom in public life was foreclosed for much of Germany’s modern history, leaving the inner realm as the stage for freedom. Certainly a German interior life has deep intellectual and cultural roots. Cultural and artistic manifestations of the human spirit have traditionally been prized in Germany. Before developing these thoughts, however, we must consider the jurisprudence of the Court so that we will have an empirical basis on which to base such observation. The next part of the Article explores the twin inner and outer dimensions of German personality law, with reference to American law, starting with the outer dimension as crystallized around the concept of freedom of action.

IV. FREEDOM OF ACTION: THE OUTER WORLD

A. Elfes and the General Right of Personality

German personality law began with the groundbreaking 1957 decision, Elfes.99 The setting seemed an odd one in which to announce a general personality right. Elfes was active in right-wing politics before and after World War II, enjoying some success, including election to Parliament as a member of the Christian Democratic Union.100 In his political activities, he was a severe critic of West German defense and reunification policies, participating in conferences and demonstrations at home and abroad.101 Seeking to continue spreading his message abroad, he requested extension of his visa to attend a foreign political conference, but was denied on the ground that his criticism constituted a threat to national security.

Elfes first argued that his activities were protected by Article 11, which guarantees Germans freedom of movement. However, the Court ruled that this

99 BVerfGE 32 (1957). An earlier Constitutional Court case, the Investment Aid Case, 4 BVerfGE 7 (1954), had first begun the process of attempting to fix the definition of freedom of action. See infra notes 105–09 and accompanying text. But the essential development of a right of personality occurred in connection with the interpretation of the German Civil Code (Bürgerliches Gesetzbuch, or BGB) by its supreme interpreter, the Federal Supreme Court (Bundesgerichtshof, or BGH). For example, in the famous Schacht Case, 13 Entscheidungen des Bundesgerichtshofes in Zivilsachen [hereinafter BGHZ] 334 (1954), the BGH derived a right of personality from Articles 1 and 2 of the Basic Law in protecting the contents of a letter sent as commentary to a magazine. See id. at 338. Decisions such as these found a favorable audience in the legal literature. See, e.g., Larenz, Das “allgemeine Persönlichkeitsrecht” im Recht der unerlaubten Handlungen, 8 NJW 521 (1955); von Gamin, Zur praktischen Anwendung des allgemeinen Persönlichkeitsrechts, 8 NJW 1826 (1955). These developments are traced in Degenhart, supra note 74, at 362; Krause, supra note 59, at 488–89. See also notes 328–36 and accompanying text.

Thus, Elfes represented the Constitutional Court’s approval of these developments of the BGH, thereby constitutionalizing the doctrine of a general right to personality. Interestingly, this period of the 1950s represented one of significant judicial creativity by the Constitutional Court, as the seminal case on freedom of expression, Lüth, 7 BVerfGE 198 (1958), was decided one year after Elfes. For elaboration of the importance of Lüth, see Eberle, Public Discourse, supra note 6, at 800–33.

100 See Elfes, 6 BVerfGE at 32–33. Elfes had been a member of the central committee of the party before 1933, police commissioner of Krefeld in 1927, and mayor of München-Gladbach, among other political activities. See id.

101 See id. at 33.
provision applied only to travel within Germany, not foreign travel. Thus, if Elfes was to succeed, another argument was necessary: the Article 2 guarantee of personality. The Court determined that, even if foreign travel was not covered by Article 11, it might yet be part of one’s personal freedom of action, protected under Article 2(1). This illustrates the catch-all function of Article 2 personality rights; they capture claims not protected by the more specific guarantees in the catalogue of basic rights.

By freedom of action, the Court meant the right to engage in activities necessary to the development and assertion of one’s person. Whether traveling abroad constituted freedom of action required resolution of a theoretical dispute regarding the limits to this freedom. This dispute was left open in the Investment Aid Case, where the Court laid out two definitions of freedom of action without choosing one over the other: Freedom of action could mean only a “minimal amount of this freedom of action without which an individual would not be able to develop herself as a spiritual-moral person,” or, freedom of action could be interpreted “in a broad, comprehensive sense.”

In Elfes, the Court decided that a broad interpretation better suited the text and purpose of the Basic Law. First, it seemed inconceivable that a definition limited to the “core area of personality” could ever result in violations of “the rights of others . . . the constitutional order . . . or morality,” the textual limitations of personality. It seemed hard to envision how these textual restrictions could then have meaning. A broader interpretation thus seemed more sensible. Second, Article 2 reflects the radiation of human dignity, the ultimate constitutional value, as do all constitutional principles. Thus, a broad interpretation seemed more compatible with a view of persons as morally autonomous beings operating responsibly within the community. Third, an expansive interpretation also seemed more consistent with the

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101 See id. at 34–35. The Court noted Germany’s long history of limiting, for security reasons, the right to travel abroad. See id.
102 See id. at 41–42.
103 See id. at 37 (“Insofar as specific life areas are not guaranteed through the specific protection of a basic right, an individual can call on Article 2(1) for protection against incursions into his liberty by officials.”). Note the Court’s later explanation of Article 2 freedoms in Eppler: They complement as “undefined” freedom the special (“defined”) freedoms, like freedom of conscience or expression, equally constitutive elements of personality. Their function is, in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions, that are not encompassed by traditional concrete guarantees.

104 See Elfes, 6 BVerfGE at 36 (“Seen from a legal perspective, [Article 2(1)] is an independent basic right, that guarantees general human freedom of action.”).
106 See id.
107 Elfes, 6 BVerfGE at 36. This is the so-called Core Theory (Kernbereich Theorie), which connotes protection of only a core of personality that involves the essence of individuals as spiritual-moral persons.

See id. at 37; Pieroth & Schlink, supra note 19, at 96.
108 Elfes, 6 BVerfGE at 36.
109 Id.
110 See id. (“Certainly the . . . formulation of Article 2(1) was an emanation of seeing it in the light of Article 1 and to derive therefrom its purpose to embody the vision of humankind.”).
Framers, who had originally used the phrase "everyone can do or not do what he or she likes," and had changed it for "linguistic," not legal, considerations.\textsuperscript{112}

A broad interpretation of freedom of action has important consequences for the German constitutional order. As intended by the Court, every form of activity related to personality, in principle, is covered by the concept. Restraints on personal freedom will only be imposed when necessary as a condition of the "constitutional order" or other textual limitation.\textsuperscript{113} This view thus endows individuals with significant personal freedom, transforming the Basic Law into a very rights-protective charter. One might argue it is consistent with the concept of human dignity that infuses the Basic Law, calling on the state, as it does, "to respect and protect it."\textsuperscript{114} In practice, the Court has limited the reach of this freedom to mainly economic and recreational areas, despite the expansive reach of the concept.\textsuperscript{115} Yet, the role of Article 2 as the last preserve of individual freedom is an important principle. It serves as a residual vessel of freedom in a way that our Ninth Amendment, as yet, does not.\textsuperscript{116} Thus, future developments, perhaps, may expand the scope of freedom of action.

Applying these principles, the Court determined that foreign travel was within freedom of action.\textsuperscript{117} This determination did not, of course, end the inquiry. Freedom of action is guaranteed only to the extent it is within the constitutional order, and does not violate third party rights or morality.\textsuperscript{118} This thus provided the Court with the occasion to interpret these textual limitations. At issue in \textit{Elfes} was the constitutional

\textsuperscript{112}Id. at 36–37.
\textsuperscript{113}See id. ("Restrains on the free development of personality come from the constitutional order."); see also supra note 105.
\textsuperscript{114}Art. 1(1) GG.
\textsuperscript{115}See \textit{CONSTITUTIONAL JURISPRUDENCE}, \textit{supra} note 8, at 323. The \textit{Falconry Licensing Case}, 55 BVerfGE 159 (1980), discussed infra notes 157–69 and accompanying text, is an example of how the Court has interpreted freedom of action to apply in recreational areas. See id.; accord \textit{Rider In Woods}, 80 BVerfGE 137, 164 (1989).
\textsuperscript{116}Our Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Despite its seeming authorization of rights beyond those textually enumerated, the Supreme Court did not invoke the Ninth Amendment until \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965). Even in \textit{Griswold}, the Court noted the status of the Ninth Amendment as the "forgotten amendment." \textit{Id.} at 490 (Goldberg, J., concurring) (citing \textit{Bennett B. Patterson, The Forgotten Ninth Amendment} (1955)). Since \textit{Griswold}, the Ninth Amendment has appeared only rarely in Court opinions. \textit{See}, e.g., \textit{Roe v. Wade}, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty, . . . . as we feel it is, or . . . . in the Ninth [Amendment] . . . . "). The Ninth Amendment has been a popular topic of scholarly commentary. \textit{Compare John H. Ely, Democracy and Distrust} 34–38 (1980) ("[T]he conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably to support"), with Raoul Berger, \textit{The Ninth Amendment}, 66 \textit{CORNELL L. REV.} 1, 14 (1980) ("In 'retaining' the unenumerated rights, the people reserved to themselves power to add to or subtract from the rights enumerated in the Constitution by the process of amendment. . . . [A]ccording to Madison the ninth amendment itself was 'inserted merely for greater caution.'").

It is interesting, as a matter of comparative law, that Americans have been rather stingy with the concept of liberty, \textit{see}, e.g., \textit{Bowers v. Hardwick}, 478 U.S. 186, 194–95 (1986) (theorizing end of substantive due process), whereas the Germans have been quite expansive.
\textsuperscript{117}See \textit{Elfes}, 6 BVerfGE at 41–42.
\textsuperscript{118}This is in the text of Article 2, and is consistent with court interpretation of the article. \textit{See Art. 2 GG; Elfes}, 6 BVerfGE at 36–37.
order limitation, since security measures are taken to protect society. This is the most important limitation.

Rights of others entail the rights and claims of third parties.119 Such claims might justifiably limit individual rights in Germany or in America. In German law, this restriction has been employed to ban arson and trespass, for example.120 In the context of religious rights, the dignitarian rights of others were used to limit an atheist’s attempt to coerce individuals to his view through use of cigarettes as bribery.121 However, third party rights are ordinarily evidenced in the legal and constitutional order and, thus, are unlikely to act as an independent restraint.122

Morality is no more self-defining in German law than American law, although German law relies on more explicitly Christian law notions. Interestingly, for comparative purposes, morality has been used in both Germany and America to ban sodomy and homosexual activities.123 However, notably, the major German case of 1957 has been held in disrepute for some time,124 whereas the more recent 1986 decision of Bowers v. Hardwick yet remains the law, having only recently been questioned, and then only sub silentio.125 Still, morality is mainly reflected in legal concepts, like “good morals” (guten Sitten) or “good faith” (Treu und Glauben),126 that make up the legal order. As such, and especially with its Kantian roots, morality becomes an important background principle for the legal system as a whole. As a practical matter, however, morality itself will not ordinarily restrain freedom of action.127 This brings us back to the “constitutional order” limitation, the construction of which would determine the contours of freedom of action.

According to the Court, the constitutional order means the general legal order as it conforms to the constitution.128 One interpretation of this would be that any law consistent with the constitution, at least procedurally, could limit the basic right. While textually plausible, this would effectively render the right meaningless.129 Since the
Federal Republic was founded as a social-democratic state committed to human dignity, this interpretation seemed inappropriate to the Efles court.

Rather, since the "Basic Law erected a value-oriented order... the independence, self-determination, responsibility and dignity of individuals must be guaranteed in a political community."\textsuperscript{130} Thus, for laws to be consistent with the constitution, they must conform to the value-order of the Basic Law. At the top of this value-order is, of course, human dignity, the ultimate constitutional value. In this context, dignity means, at a minimum, that the "intellectual, political and economic freedom of people may not be limited so that the essence of personhood is impaired."\textsuperscript{131} From this it follows "that each citizen is afforded a sphere of private development[,] ... an ultimate inviolable realm of personal freedom, insulated against encroachment by public authorities."\textsuperscript{132} Certainly no law impinging on the "inviolable realm" could be consistent with the Basic Law.

Laws must also conform substantively to "unwritten fundamental constitutional principles (of the free-democratic order), as well as the fundamental decisions of the Basic Law, especially the principles of the rule of law [Rechtsstaat] and the social welfare principle [Sozialstaatsprinzip]."\textsuperscript{133} Through this interpretive technique, the Court introduced significant background, and even immanent, if not extratextual, authority.\textsuperscript{134} Again, this underscores the Court's proactive interpretive stance and the rich context within which the Basic Law is to be interpreted. The Rechtsstaat principle is especially significant in this regard. Under this principle, laws must give fair warning and fair procedure; they must not be retroactive, and they must have a legal basis.\textsuperscript{135} Most importantly, the concept of Rechtsstaat embodies the Proportionality Principle, which means, in essence, that laws may pursue proper ends only through

\textsuperscript{130}Id. at 40.
\textsuperscript{131}Id. at 41.
\textsuperscript{132}Id.
\textsuperscript{133}Id.
\textsuperscript{134}This appears to be a deliberate choice by the Framers and interpreters of the Basic Law. Under the Nazi regime, gross injustice was perpetrated within a state committed to an extreme version of positivism. To avoid such injustice, the Framers sought to distance the legal order from such absolute sovereignty, providing in Article 20(3) that "the executive and the judiciary shall be bound by law and justice." Art. 20(3) GG. Article 20(3) "justice" operates as a free-standing concept, somewhat like natural law. The Soraya decision, 34 BVeriGE 269, 286–87 (1973), represents perhaps the farthest extension of this principle, suggesting, as it does, that the fundamental concept of justice, as interpreted by the Court, can trump parliamentary democracy. \textit{See infra} notes 340–58 and accompanying text.
\textsuperscript{135}See Curius, supra note 7, at 318–19. By Rechtsstaat, the Germans mean a state based on reason and the rule of law. Under this concept, state power must be exercised pursuant to previously established principles that are themselves rational. This is to guard against arbitrary power. \textit{See supra} note 10. The Rechtsstaat principle further restricts official power by requiring that any limitation on liberty must have a sufficient legal basis, such as a statute. \textit{See Curius, supra} note 7, at 318. For this reason, most basic rights provisions contain a reservation of authority to the Bundestag. The legislative preserve in Article 2(2) is typical: "Intrusion on these rights may only be made pursuant to a statute." Art. 2(2) GG. From the standpoint of a Rechtsstaat, this assures that restrictions on liberty be openly justified as matters of democratic deliberation. \textit{See also} Art. 19(1) GG ("Statutes [restricting rights] shall apply generally and not solely to an individual case ... [and shall] name the basic right.").

The concept of Rechtsstaat can also be said to embody the concept of meaningful judicial review of administrative action. \textit{See Curius, supra} note 7, at 19.
means that are suitable and "proportional" to the ends sought. The Proportionality Principle is akin to means-end testing in American rights analysis, such as that used in heightened scrutiny methodologies. Both methodologies guard against arbitrary government. Thus, as in America, the true impact of the Proportionality Principle is seen in case law, where it often decides the case, as will be amply shown.

It is thus apparent that the value-oriented nature of the Basic Law influences significantly the nature of the legal order. Laws must conform to this value-order to be part of the "constitutional order." "Constitutional order" is thereby rendered a two-sided limitation. While the "constitutional order" can limit personality rights, this can occur only when laws themselves conform to the German value-order. In essence, the Court implied a limitation from the structure of the Basic Law on the express textual limitation of Article 2(1), itself a notable, but plausible, act of judicial activism. Significantly, this had the effect of transforming plain constitutional language into an open-ended, general clause. Much will always depend on judicial interpretation of Article 2(1).

In Elfes, the Court found that Elfes' interests in foreign travel were part of his freedom of action, but that it was outweighed by the state security interests at issue. Certainly state security is a justifiable part of the "constitutional order" which might be used in limitation of basic rights. However, the particular state interests at issue in Elfes did not seem particularly well drawn or persuasive. Elfes was an elected official in Germany. His views were well known, at home and abroad. Thus, it seems unreasonable to find that another foreign trip would place the state in jeopardy. Perhaps the government desired to protect its image abroad. Perhaps it yet feared for the fragility of the new German experiment in democracy. Certainly Elfes seems to

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135 Proportionality is a stringent test, requiring that governmental actions be calculated to further a legitimate purpose, and impose no more than a reasonable burden on basic rights. The essence of a basic right must yet be preserved. See Art. 19(2) GG. Sometimes, a least restrictive alternative prong is added. Thus, at bottom, proportionality requires reasonableness. See CURRIB, supra note 7, at 122. When basic rights are at issue, proportionality translates into intensive review. It has its roots in the law of Frederick the Great, limiting the discretion of the administration. See id. at 20. Such proportionality has become standard fare in European law too. See, e.g., Case 178/84, Commission v. Federal Republic of Germany, 1983 E.C.R. 1227, [1987-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,417 (1987) (applying proportionality to restraints on trade).

136 See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). Under conventional American doctrine, violations of fundamental individual rights trigger strict scrutiny, an inquiry requiring government to justify its regulation as "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." Id.

137 See Elfes, 6 BVerfGE at 37-41.

138 The technique of the Constitutional Court is thus quite like the techniques of civil courts in interpreting civil codes. For example, German civil courts, operating pursuant to Article 242 (good faith) or Article 826 (good morals) of the BGB, frequently readjust contracts to enforce concepts of fairness to preserve the bargain. An example of this is standard form contracts, which courts invalidate as contrary to good faith if they contain one-sided, unbargained-for terms. See the cases collected and discussed in John P. Dawson, Unconscionable Coercion: The German Version, 89 HARV. L. REV. 1041, 1103-21 (1976). Thus, at bottom, the techniques of the Constitutional Court reflect the civil law orientation of the German legal order, as the jurisprudence of the Supreme Court reflects the common law orientation of our legal system.

139 See Elfes, 6 BVerfGE at 42-43.
reflect the skittishness of cold war times. In this way, *Elfes* is not unlike American cases of this genre.\(^{141}\)

It is notable that the Court in *Elfes* did not attempt to set out any comprehensive definition of freedom of action. In fact, there is no case where the Court has defined "the full range of personality rights."\(^{142}\) Instead, the Court has preferred to work out the specifics of what freedom of action means in concrete cases in view of current or developing social conditions.\(^{143}\) Thus, the exact reach of the zone in which individuals may shape their lives awaits case-by-case development, similar to the evolution of American privacy law.\(^{144}\)

However, *Elfes* did establish the methodology applied by the Court to judge the reasonableness of governmental action seeking to limit personal interests. As applied in *Elfes*, this methodology is an ad hoc balancing test designed to weigh the personal interest against the strength of the official interest. The Court did not engage in any comprehensive review of the lower court decision, but considered only whether the lower court decision had a basis in law.\(^{145}\) Certainly the Court was concerned that it not intrude too deeply into the domain of the ordinary courts.\(^{146}\) It would take later

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\(^{141}\) See, e.g., Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 105 (1961) (upholding, as consistent with First Amendment, registration requirements of Subversive Activities Control Act, requiring registration and disclosure of communist activities); Dennis v. United States, 341 U.S. 494, 516–17 (1951) (ruling that government may enforce Smith Act to prohibit teaching of Marxist-Leninist doctrine); American Communications Ass'n v. Douds, 339 U.S. 382, 415 (1950) (upholding law prohibiting labor representation rights of union whose officers failed to certify they were not communists).

\(^{142}\) CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 328; see also Census Act Case, 65 BVerfGE 1, 41 (1984).

\(^{143}\) See id.; PIEROTH & SCHUINNK, supra note 19, at 98–99.

\(^{144}\) Justice Harlan well explained this dynamic of liberty, which resonates in both German and American law:

"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."


\(^{145}\) See *Elfes*, 6 BVerfGE at 43–44 (holding that courts should not apply full-range review, but only determine whether specific constitutional provisions have been violated).

\(^{146}\) Germany, like other European countries rooted in the civil system, has a specialized court system with different tribunals for different areas, such as civil law, and administrative and tax courts. These specialized courts are, of course, expert in their areas. Thus, the Constitutional Court is generally hesitant to intrude into an area in which another court is expert. Moreover, the civil law, founded on Roman law, is the traditional field of German legal thought. Because of the traditional respect and prestige of the civil law, the Constitutional Court might be especially cautious to intervene in favor of the then relatively new constitutional law.

The Constitutional Court, too, is a specialized court, hearing only constitutional claims. In this capacity, the Constitutional Court is the supreme interpreter of the Basic Law. Other German courts refer constitutional questions to the Constitutional Court.
events before the Court would exercise a more intensive review of lower court cases to further fundamental rights.ELFES is significant in another regard. The techniques employed by the Court illustrate how it has been able to assume its role as guardian of the Constitution and censor of governmental action. The German Constitutional Court thus parallels the role of the Supreme Court over matters that we call substantive due process. In the modern era of human rights, the Supreme Court has judged the reasonableness of official action against the opaque language of "due process of law." Both the German and American Courts have set up legal regimes to anchor such operative terms in more solid ground. In Germany, we have seen how personality rights have become part of a general "freedom of action" limited only by third party rights, morality, or the constitutional order. In the United States, the due process inquiry involves a quest for those "basic values 'implicit in the concept of ordered liberty,'" which itself involves a reasoned judgment "of respect for the liberty of the individual . . . [against] the demands of organized society." In both countries, these decisions are ultimately acts of judicial judgment. We will be in a better position to gauge the quality, range, and validity of those judgments upon further comparison of German and American law.

As in the United States, most measures challenged for violating personal freedoms pass constitutional muster in Germany. As we have seen in ELFES, national security interests were held to justify limitations on foreign travel. Likewise, general freedoms of action have been limited by price regulations, and the freedom of action of a horse rider has been limited to assigned bridal paths out of deference to the rights of hikers and bikers to pursue their activities secure from horse traffic.

However, the Court has also invalidated measures for violating the Proportionality Principle. Thus, government cannot prevent persons from trying to arrange drivers for interested riders. Likewise, parents do not have unlimited power to bind their minor children by contract. One of the best examples of the Constitutional Court's

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147 The development of German standards of review for rights analysis has occurred mainly in connection with freedoms of expression, as in American law, which is itself notable from a comparative perspective. See Eberle, Public Discourse, supra note 6, at 807-08 (describing evolution of levels of scrutiny in German expression law). The standards developed in law regarding freedom of expression, then, carry over, in most particulars, to other freedoms, such as those of Article 2. The development of intensive, hard-look review occurred in the 1990s. See, e.g., Stern-Strauss Interview, 82 BVerfGE 272, 280 (1990). The development of German expression law in the 1990s is covered in depth in Eberle, Public Discourse, supra note 6, at 852-94. The intense form of scrutiny at work in a case like Stern-Strauss Interview seeped also into Article 2 right of personality cases in the 1990s, as most explicitly illustrated in Right to Heritage II, 90 BVerfGE 263, 271 (1994), discussed infra notes 422-52 and accompanying text.

148 Griswold, 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

149 Poe, 367 U.S. at 542 (Harlan, J., dissenting).

150 See CURRIE, supra note 7, at 319.

151 See ELFES, 6 BVerfGE at 42.

152 See 8 BVerfGE 274, 327-29 (1958).

153 See Rider in Woods, 80 BVerfGE at 159-60.

154 See 17 BVerfGE 306, 313-18 (1964), noted in CURRIE, supra note 7, at 319 (cataloguing cases along these lines).

technique in judging state actions is the *Falconry Licensing Case*, where the Court found governmental regulation unreasonable in requiring those engaging in the sport of falconry to demonstrate competence in the use of firearms.\textsuperscript{156}

\textbf{B. Falconry Licensing Case}

At issue in the *Falconry Licensing Case* was a federal hunting law which required prowess in knowledge and operation of weapons, including guns, as a requirement for obtaining a hunting license. The plaintiff engaged in the sport of falconry, which involves use of a falcon to hunt and retrieve prey. Since guns are not used in falconry, the plaintiff objected to being tested for weapon proficiency.\textsuperscript{157}

The case provides good insight into the Constitutional Court’s evaluation of governmental action circumscribing personality rights. “Article 2 guarantees everyone a general freedom of action insofar as one does not violate the rights of others, the moral order, or the constitutional order,” the Court asserted.\textsuperscript{158} The requirement of weapon proficiency “violates in an unconstitutional manner Article 2 freedom of action, because denial of the ability to hunt without weapon proficiency contradicts the concept of the rule of law [Rechtsstaat]; therefore, the regulation is inconsistent with the constitutional order.”\textsuperscript{159} Understanding why this is so requires closer examination of the Rechtsstaat principle:

The concept of Rechtsstaat demands, when viewed in conjunction with the presumptive zone of freedom Article 2 bestows, that citizens are protected against unnecessary curtailment of their freedoms by official actions. For legal measures to be indispensable, they must use means to establish a legal end that are suitable and that do not excessively burden an individual.\textsuperscript{160}

In this manner, the Court demonstrated again its methodology for Article 2 personality claims.

First, a person’s general freedom of action is to be broadly understood, consistent with the freedom-protective nature of the Basic Law. Second, such freedom may be limited only by the triad of textual limitations, which themselves are limited by the implied limitation of the “constitutional order.”\textsuperscript{161} Third, the constitutional order includes “unwritten elementary constitutional principles,” most notably the Rechtsstaat principle, which itself embodies foundational principles like the Proportionality Principle.\textsuperscript{162} Fourth, the Proportionality Principle requires careful scrutiny of freedom-restrictive actions to assure that they are proportional to the ends they seek, that is, that they are justifiable and not excessively onerous. According to the *Falconry Licensing*
Case, proportionality requires that "the means to establish a legal end . . . are suitable . . . and do not excessively burden an individual."163

Applying this test, the Court determined in the Falconry Licensing Case that "weapon proficiency is incongruous with the legislative goal . . . [of] protection of wildlife and prevention of abuse of hunting birds."164 These goals could be accomplished "through more precisely drawn measures."165 The problem here was that "the requirement of weapon proficiency has nothing to do with the maintenance [and preservation] of hunting. . . . It is a violation of proportionality when weapon proficiency is demanded . . . that has no relation to the planned activity."166 Indeed, discharge of weapons "could frighten the falcons . . . and they might not return to the falconer."167 Fortifying these conclusions was the Court's observation that few open areas remain where people can engage in falconry. Care must therefore be taken to preserve them.168 The Court thus carved out a sphere of protected liberty amidst the bustle of the modern world.

In sum, Elfes and the Falconry Licensing Case evidence the broad range of freedom of action accorded citizens under Article 2, and the care the Court takes to evaluate restriction of that freedom. The Falconry Licensing Case, in particular, demonstrates a considerable tightening of the scrutiny employed to incursion of freedom. In this manner, the Court shows again how it has set itself up as a comprehensive censor of the reasonableness of governmental action.

C. American Law

In the United States, by comparison, there is no comprehensive constitutional concept of a general freedom of action, entitling persons to do what they like within the constraints of the social order.169 This concept is more likely to be handled under general private law concepts like tort, contract, or property, or pursuant to the criminal law. As a whole, therefore, private American law maps out the zone for general freedom of action. Certainly there is a significant difference, in both Germany and America, between constitutionalizing an area, with its accompanying higher status, and treatment pursuant to ordinary law.170
Moreover, at the constitutional level, the American approach under modern substantive due process has been much more selective, focusing on identifying those personal freedoms thought to be "fundamental,"171 "implicit in the concept of ordered liberty,"172 or "deeply rooted in this Nation's history and tradition,"173 for example. Under these constructs, the Court has deemed "fundamental" those activities relating to control over one's life, such as marriage,174 procreation,175 contraception,176 or child rearing;177 or control over one's body, such as abortion178 or the ability to refuse medical treatment.179 As are the German freedom of action cases, the American cases seem directed outward, focusing on issues of personal autonomy and self-determination in relationship to the world. On the other hand, this aspect of American law differs from German freedom of action in that American "fundamental" rights also partake of an element of personal identity. Marriage, procreation, and contraception, for example, are more personal and more revealing of identity than foreign travel180 or riding in the woods.181 In this way, the American law has a certain resonance with the personal sphere of German law, discussed next in Part V.

A second focus of American substantive due process law has been the delineation of a zone of privacy, particularly in shielding disclosure of personal matters. This case is _Liih_, 7 BVerfGE at 205 (holding that Basic Law's "value system, which centers upon human dignity and free unfolding of the human personality within the social community, must be locked upon as a fundamental constitutional decision affecting all areas of law, public and private . . . . Thus, basic rights obviously influence civil law too."). For extensive treatment of this relationship, see Eberle, _Public Discourse_, _supra_ note 6, at 815–16; Quint, _supra_ note 14, at 254–58, 261–81.

In America too, the trend of the Supreme Court has been to constitutionalize private law areas, most notably defamation law, through the landmark case, _New York Times Co. v. Sullivan_, 376 U.S. 254, 283 (1964) ("The Constitution delimits a State's power to award damages for libel actions brought by public officials against critics of their official conduct."). Note, for example, Justice White's cry: "[U]sing [the First] Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States . . . ." _Gertz v. Robert Welch_, Inc, 418 U.S. 323, 370 (1974) (White, J., dissenting). "These are radical changes in the law and severe invasions of the prerogatives of the States." _Id._ at 376 (White, J., dissenting).
explains the privacy accorded the marriage bedroom\textsuperscript{182} and the home\textsuperscript{183} in certain contexts. However, as with American autonomy law, rather than establishing any general or comprehensive right, this law too has evolved narrowly, in response to discrete intrusions into individual privacy, usually amidst criminal prosecutions. At bottom, then, American law is episodic—a judicial response to "substantial arbitrary impositions,"\textsuperscript{184} whereas German law is more systematic. Undoubtedly, this reflects the American common law methodology, inherited from English law. German systematization, by contrast, reflects the influence of Roman law, especially as transformed in high German legal science (Rechtswissenschaft).\textsuperscript{185} In the broadest sense, the differing approaches of the law evidence a cultural distinction between common and civil law.

V. INNER FREEDOM IN GERMAN LAW: THE PERSONAL SPHERE

The flip side of freedom of action is a focus on the interior person. Here the Constitutional Court has posited a "private sphere or ultimate domain of inviolability in which a person is free to shape his life as he or she sees fit.\textsuperscript{186} This domain includes both the right to retreat from the world, as one likes, captured as the moral-spiritual essence of being, as well as the right to engage actively in the world, as covered by freedom of action. There is not, of course, a clear conceptual line between the inner and outer world. Rather, both are components of an integrated, whole person. Nevertheless, it is notable that German law has accented the interior component of human personality, a focus American law has not, as yet, developed.\textsuperscript{187}

\textsuperscript{182}See Griswold, 381 U.S. at 499 (holding that state law prohibiting use of contraceptives by married couples violates Fourteenth Amendment).

\textsuperscript{183}See Stanley v. Georgia, 394 U.S. 557, 559 (1969) ("[M]ere private possession of obscene matter cannot constitutionally be made a crime.").

\textsuperscript{184}Poe, 367 U.S. at 543 (Harlan, J., dissenting).

\textsuperscript{185}The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points picked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

\textsuperscript{186}Under German legal science, techniques of careful legal study and investigation were brought to bear on Roman law, attempting to uncover the essence of a system of law, and on German customary law, in order to discover the basis of law itself. This resulted in the drafting of the German Civil Code of 1896, a high achievement of German legal science. Friedrich von Savigny, one of the seminal German legal theoreticians of the Code, described the aims of German legal science: "[W]e want a national community whose scientific endeavors focus upon one and the same object[,] . . . an organically progressive legal science which may be common to the whole nation." Reinhard Zimmerman, An Introduction to German Legal Culture, in INTRODUCTION TO GERMAN LAW 1, 4-5 (Werner F. Ebke & Matthew W. Finkin eds., 1996). Savigny's legal historicism became "the fulcrum for the emergence of a national community of scholars." Id.

\textsuperscript{187}Constitutional Jurisprudence, supra note 8, at 328.

\textsuperscript{188}To a significant extent, German law picked up the suggestions by Warren and Brandeis, in their important article The Right to Privacy, that there exists a general right of personality based on the notion of "an inviolate personality," including a "more general right to be let alone," see Warren & Brandeis, supra
A. Establishment of Interiority in German Law

I. Microcensus

Focus on the interior component of human personality in German law began comprehensively with the important Microcensus case, which concerned the constitutionality of a federal questionnaire, or "microcensus," designed to elicit a portrait of the German population. The questionnaire sought information concerning personal habits, including vacation practices, occupation, standard of living, and whether mothers worked or remained home to rear children, among other topics. In this context, the Court carved out a private, personal sphere for citizens to inhabit free from incursion.

The fact that the statistical survey sought personal information necessitated inquiry into the domain of personal rights protected within Article 2. Here the Constitutional Court raised the barricade of human dignity, beyond which "the state could take no measure, or enact any law, which would violate... or otherwise infringe upon the essence of personal freedom as encompassed within the limits of Article 2." As should now be evident, there can be no greater thunder in the German constellation than invocation of human dignity. The significance of this became immediately clear: "The Basic Law thereby guarantees individual citizens an inviolable area of personal freedom in which one can freely form one's life, the effect of which is to remove all official power [from this realm]." This is the personal sphere in which one is free to determine and structure one's life.

note 59, at 205, and "to the immunity of the person—the right to one's personality." Id. at 207. Such personality rights would include "legal recognition" of "thoughts, emotions and sensations," id. at 195, and also "some retreat from the world" in recognition "that solitude and privacy have become more essential to the individual" given the "intensity and complexity of life attendant upon advancing civilization." Id. at 196.

In German law, this right of personality is based on Kant and, more recently, the work of Otto von Gierke, who suggested, during the time of the drafting of the Civil Code, that the law recognize a "general right of personality." Otto von Gierke, 1 DEUTSCHES PRIVATRECHT 702 (1895) cited in Krause, supra note 59, at 485.

It is interesting, as a matter of comparative law, that this call for a general right of personality, which occurred rather contemporaneously in Germany and America during the influential last decade of the nineteenth century, met with great success in Germany, but with only limited success in America. See infra note 386.

19See id. at 32.
20Id. at 6.
21Id.

22See id. For this proposition, the Court, significantly, cited Elfes, which had theorized both this inner realm of freedom as well as an outer zone. See Elfes, 6 BVerfGE 32, 41 (1957). This private, personal sphere of freedom has been developed as a separate strand of German law. See infra Part V; see also, e.g., Right to Heritage I, 79 BVerfGE 256, 268 (1989) ("The right to free development of personality and human dignity guarantees everyone an autonomous area of private life formation, in which one can develop and protect one's individuality.")
This intimate sphere is a critical part of the human vision that lies at the root of the Basic Law, bestowing self-worth, social value, and respect. This also shows how concepts of human dignity, humanity, and community are interlinked in German law. Through this interaction, dignity takes on a more concrete meaning: "It would be inconsistent with human dignity for the state to force people to register and catalogue their whole personalities, even if done anonymously through a statistical survey, thereby treating man as an object, which is accessible in every manner." Insistence on respect for human dignity is thus instrumental to preservation of human autonomy.

With this background, the Court went on to elaborate the Inner Sphere. "Such a [pervasive] penetration in the personal area through a comprehensive inspection of the personal relationships of a citizen is also denied the state because individuals must have an Inner Space [Innenraum] in which to develop freely and self-responsibly their personalities, an Inner Space which they themselves possess and in which they can retreat, banning all entrance to the outer world, in which one can enjoy tranquility and a right to solitude."

The presence of an ascertainable Inner Space in German personality law is a notable achievement, and a dramatic contrast with American law. It is wholly a creation of the Constitutional Court, in pursuit of its perception of the vision underlying the Basic Law. Textually, it is certainly not self-evident that "the dignity of man" or "the right to the free development of his personality" would yield this emphasis. Rather, it reflects the Court's desire to preserve and protect the integrity of human personality, especially in applying the concept of human dignity to meet changing social conditions, such as the development and use of computer technology in Microcensus. In this way, human autonomy and capacity are safeguarded and nourished against the challenges posed by modern social, economic, and technological change. The clear desire of the Constitutional Court to keep its constitution "in tune with the times" contrasts with the Supreme Court, which has always sought to anchor fundamental rights in timeless or constant principles such as natural law or inalienable rights, or from verifiable sources like tradition or history, partly as a way of deflecting the argument that the Court is overstepping its bounds.

Considering that law is a reflection of culture, it is interesting to decipher the cultural traits evidenced by this German accent on the interior life. For one thing, this focus is quite compatible with German history and culture, which has placed extraordinary emphasis on the world of the mind and of the artist. Emphasis on culture has predominated over public life through most of German history. This contrasts with American law and American life, which has often emphasized public life over cultural life, a natural outgrowth of the central role played here by our democracy. American substantive due process law reflects this too. The thrust of American cases has either been autonomy in the world or privacy from a prying world. But under American

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193 See Microcensus, 27 BVerfGE at 6 ("In the light of this image of man at root in the Basic Law, the human achieves social value and respect in society.").
194 Id. These sentiments evidence, unmistakably, the influence of Kant.
195 Id. The Court observed that even the presence of a neutrally devised state inspection scheme could violate the right to personality because it would induce psychological pressure. See id. at 6–7.
196 Id. at 6; see also Art. 2(1) GG.
privacy, the Court has not sought comprehensively to define or nourish an interior sphere so much as to shield the outside world from invasion of that private zone. The German emphasis on interiority also reflects, again, Kantian thought, and its emphasis on the autonomy of the individual and the unfolding of human capacity.

As a matter of doctrinal law, the Constitutional Court’s carving out of a private, intimate sphere has produced distinct strands of personality law. Perhaps most notable is the general control over personal information that has resulted in a right to informational self-determination, discussed in Section B. Related to informational self-determination is the right to control the portrayal of one’s person, including rights to one’s own image and spoken word, and rights, in some circumstances, not to have false interviews or statements attributed to one’s person, as discussed in Section C. But these are all matters meriting separate development. What is significant for our purposes is that the German strand of interior personality has led to a distinct evolution of personality law, one quite different from American law.

In reference to Microcensus, the question for the Court was whether this “microcensus” so deeply impinged upon this sphere of intimacy as to violate Article 2 personality rights. Certainly “not every statistical survey of personal data violates personal dignity . . . or disturbs self-determination over the innermost [private] areas of life.” Characteristic of the German regime of rights, everything is a question of balance and proportion. No one right is extended to the detriment of other rights as, for example, in the American preferencing of free speech. Thus, personality rights—even over intimate areas—are mediated in relationship to other values of the social order. One’s obligations as “community-connected and community-bound” citizens entail a certain cooperation with officials in matters that call for state-planning, like a census.

This inquiry necessitates a closer evaluation of the case. Survey questions principally threaten self-determination rights when they impinge upon the “personal intimate area of life, which by nature is confidential. [For] the modern industrial state, this is a barricade to prevent administrative-technical depersonalization.” However, statistical surveys inquiring only into human behavior will not generally violate the intimate realm. This is especially so when anonymity is used, as in the Microcensus survey, since this obscures personal connections, and hinders, if not prevents, the cataloging of human personality.

In Microcensus, the key issue turned on inquiry into vacation and recreational habits. While such inquiries implicate the private sphere, they do not “force disclosure of information arising from one’s intimate sphere, nor allow the state access to

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198See, e.g., id. at 485–86.
199See infra notes 241–60 and accompanying text.
200See infra notes 337–40, 387–93 and accompanying text.
201See infra notes 241–60 and accompanying text.
202See Microcensus, 27 BVerfGE at 7.
203See Eberle, Hate Speech, supra note 52, at 1213 (“[F]ree speech is the preferred right in our constitutional structure.”).
204Microcensus, 27 BVerfGE at 7.
205Id.
206See id. Moreover, as additional precautions, the statute prohibits publication of information gathered and binds census takers to confidentiality. See id.
relationships that are ordinarily beyond outside scrutiny or of a confidential nature. Thus, the inquiry did not constitute a constitutional violation. Likewise, resort to the Rechtsstaat principle did not yield relief, since the legal norms at issue were sufficiently definite and the measures taken satisfied the Proportionality Principle, being suitable means to accomplish legitimate ends. Microcensus therefore illustrates the same methodology used by the Court in the outer-directed freedom of action cases: evaluation of the intensity of the rights violation, followed by testing of the case against Rechtsstaat principles, especially that of proportionality.

2. Criminal Diary Case

Determining to construct a sphere of inviolable privacy is one thing. Defining it is another. The best recent attempt to come to grips with these existential questions is the Criminal Diary Case, where the Court grappled with the question whether the state could use diaries of a young man accused of murder as evidence in its case. The man was in therapy to help resolve a lifelong problem forming relationships with women. The therapist recommended that he write down his inner struggle in a diary. The diaries revealed his innermost feelings and insecurities over his inability to form relationships with women. During a search of his parents' home, where he lived, the police discovered the diary. The diary entries bore certain similarities to the murder the man later was accused of. Because of their relationship to the crime, the state sought to use the diaries as circumstantial evidence in its case.

The essence of the legal dispute was whether the diary entries were portals into the innermost feelings of the defendant, protected as part of the intimate realm of Article 2 personality. In fact, the Federal Supreme Court (Bundesgerichtshof or BGH) believed just this—that the intimate nature of the diaries made them part of the defendant's protected personality rights, but that their use in a criminal trial was justified by the important public interest in solving a serious crime. Criminal Diary thus provided the Constitutional Court with a good opportunity to bring some clarity to the personal sphere.

206 Id. at 8.
207 Id.
208 See id. at 8.
210 See id. at 368–69.
211 See id. In this respect, the BGH upheld the decision of the lower court. See id. at 368–69. On the other hand, one could conclude, as did the quartet of Justices who found a violation of personality rights, that the diary entries were made so many months (17 and 8) before the crime that they lacked any relevance to proof of the crime.

In developing a general right of privacy, the BGH had long held that this right protects against disclosure of confidential information relating to private activities, such as that contained in letters and diaries. The private nature of the information was the key to protection under the Civil Code. Professor Krause traces these developments. See Krause, supra note 59, at 500. In a case like Criminal Diary, the Constitutional Court relied, in essence, on these developments by the BGH. Other strands of this general right of personality were also constitutionalized by the Court, in reliance on the work of the civil courts. These matters are discussed infra notes 327–37 and accompanying text.
"The general personality rights anchored in Articles 1 and 2 guarantee . . . control over . . . personal details of one's life," the Court announced, referring to the fundamental right of informational self-determination established in Microcensus and secured in the Census Act Case. Yet the "protection is not absolute," but can be limited by "overriding public interest." This follows from individuals' obligations to the community and its members. Nevertheless, "even overriding public interest" might not justify intrusion into this most intimate sphere. On account of the human dignity anchor, the Court postulated a certain ultimate core of personality from which all official entry is barred. Here it was unnecessary to perform any proportional means-end testing. Certainly, only truly innermost matters would enjoy such protection.

To the extent a personal matter is not characterized as being of the innermost "inviolable area," it might be counted as part of the personal sphere into which the state might be allowed entry upon a showing of "significant public interest." Thus, much depended on how personal matters, like the diary entries, were to be characterized.

The topic of an innermost personal sphere, and how to define it, has been a focus of much controversy. Early on, the Court set forth the Sphere Theory (Sphären-theorie), under which human personality interests were calibrated according to the intensity of their intimacy. Different interests were assigned different levels of constitutional protection according to this scheme. For example, the most intimate sphere (Intimsphäre) was the "last, inviolable area of human freedom . . . from which all public power was disseized." Aspects of sexual determination, such as one's sex, sex education, or the marriage bedroom are examples of interests held to be within this most intimate sphere. Next in concentric order was a private or confidential sphere (Privat or Geheimsphäre) that was subject to the textual limitations of Article 2(1). In this sphere, personality rights could be curtailed only in the face of hard proof of their necessity under the Proportionality Principle.

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212 Criminal Diary Case, 80 BVerfGE at 373. The development of informational self-determination is explored infra notes 247-57 and accompanying text. See also Census Act Case, 65 BVerfGE 1, 41 (1983).
213 Criminal Diary Case, 80 BVerfGE at 373.
214 This reflects the German vision of individuals as socially connected and bound. "Limitation of freedom can occur when justified by overriding public interest, because individuals enter into communication with others in the social community, and their conduct affects others and can disturb the personal sphere of others or the interests of the community." Id.
215 See id. This follows from Article 19(2) GG, which protects the essence of a right.
216 See id. at 373 ("The Court has recognized a last inviolable area of private life formation from which all public power is disseized.").
217 Whether this is so or not would depend on means-end testing pursuant to the Proportionality Principle.
218 See PIEROTH & SCHLUNK, supra note 19, at 100; Degenhart, supra note 74, at 363–64.
219 Degenhart, supra note 74, at 363–64 (citing 38 BVerfGE 312, 320 (1975); Elfes, 6 BVerfGE at 41).
220 See Transsexual Case, 49 BVerfGE 286 (1978) (finding right to live according to chosen sex).
221 See Sex Education Case, 47 BVerfGE 46, 71 (1977) (noting that sex is among most intimate of human activities and, therefore, parents have right to be informed of sex education in schools).
223 See PIEROTH & SCHLUNK, supra note 19, at 100.
Vacation and recreational habits were examples of interests grouped in this sphere. The last sphere was an outer or social sphere (Sozialsphäre), comprised of interests connected closely to society which had little intimate character. Actions could be taken to curtail exercise of these interests under less exacting standards of proof, for example, to gain information leading to the solution of a crime or disease, such as an epidemic.

Not surprisingly, serious definitional problems arose as to the boundaries of these spheres, and the grouping of interests within them. The spheres could not be adequately distinguished, and people classified interests differently, leading to a certain relativism of the theory. Moreover, the main criterion used by the Constitutional Court—social connectedness—proved unworkable as a legal standard, since legal regulation always involved a considerable social element, whether in conduct, action, or communication.

For these reasons, the Court abandoned the Sphere Theory in the Census Act Case. Since that abandonment, however, no satisfactory replacement theory has been forthcoming. In fact, the Sphere Theory continues to provide a certain structure to this inquiry, even if as a background concept, as is evident in the Court’s discussion in Criminal Diary. This is especially pronounced in matters involving an aspect of retreat from the world, such as the act of writing diaries in Criminal Diary. The Court’s ventures may ultimately prove to be an example of the limits of Grand Theory, not unlike similar quests in service of the First Amendment.

This brings us back to the Criminal Diary Case, which marks the last great attempt of the Court to define an innermost sphere. "Whether a matter is to be characterized as within the core area... depends on whether it is of a highly personal nature and the degree and intensity with which it affects the interests of others or the community." If this works, fine. But this standard seems no more self-defining than the old Sphere Theory. Indeed, it seems to call for an ad hoc weighing of personality versus social interests, thus repeating the relativism of the former theory. Because of these difficulties, the Court has renounced Grand Theory, at least for now, preferring

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224 See Microcensus, 27 BVerfGE at 1.
225 See, e.g., Criminal Diary Case, 80 BVerfGE at 375–77; Lebach, 35 BVerfGE 202, 220 (1973) (noting strong state interest in solving crime); see also H. VON MANGOLD ET AL., DAS BONNER GRUNDEBETZ, Art. 2(1), § 64 (3d ed. 1985).
226 See PIEROTH & SCHLNIK, supra note 19, at 100; Degenhart, supra note 74, at 364.
227 See PIEROTH & SCHLNIK, supra note 19, at 100.
228 See Census Act Case, 65 BVerfGE at 45. The Court ruled that the significance of information can no longer depend on its type or nature. Equally decisive is the use and application of information gathered, including possibilities of dissemination. In this sense, there is no unimportant information.
229 See Letter from Dr. Bodo Pieroth, Professor of Law, University of Münster, Münster, Germany, to Edward J. Eberle (Nov. 13, 1996) (on file with author) [hereinafter Pieroth Letter].
230 See Pieroth Letter, supra note 229.
231 Criminal Diary Case, 80 BVerfGE at 374. This marks a renunciation of focusing solely on "social connectedness" as the distinguishing factor. "The ordering of matters within the inviolable area... or the area of private life... can no longer depend on the social significance or connection of the matter." Id.
to work out what is “personal” or “intimate” on a case-by-case basis. Thus, the extent of the inviolable sphere can only be determined by its delineation in case law. At bottom, then, the German approach is moving in the direction of the American one.

Applying these principles proved no more satisfactory than defining them. The Court split 4-4 on whether the diaries were part of an innermost personal sphere. The quartet of Justices believing the diary entries were not private enough focused on their social connection. Because the diaries helped explain a gruesome crime, the Justices reasoned, they bore a clear connection to societal interests and did not partake of any intimate thought. They were written, and thus discoverable, and the acts were already performed. Moreover, use of the diaries as proof in a serious crime provided a “significant public justification.”

The four dissenting Justices, by contrast, believed the diaries to be “highly personal,” reflective of the defendant’s “real personality structure...a dialogue with the real I.” Indeed, it is hard to imagine many acts more intimate than recording one’s innermost thoughts in a diary, especially when done in the context of a confidential relationship, such as that between doctor and patient. Thus, for these Justices, the diaries should have been protected as within the personal sphere. Moreover, they argued, the crime had happened seventeen and eight months, respectively, before the two diary entries most at issue. Thus, any connection to the real world was remote.

There is an unsatisfactory quality to the Court’s analysis. Reliance on the ad hoc balancing test may be too unprincipled, allowing each judge to see personality or community interests as he or she wishes. There would seem to be particular pressure to act on community interests, such as crime, to the detriment of individual interests. Certainly the haphazardness of this case-by-case approach is a danger to legal security. It will take some time before organizing principles are evident around which the law may be structured. In the interim, however, there will be great uncertainty. Because lower courts or other decision makers will not be sure which standards to apply, this carries a risk of curtailing freedoms.

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233See id. at 374 (“What type and how intense a matter is...cannot be described abstractly, but can be satisfactorily determined only upon a full consideration of all relevant factors in a particular case.”).

234See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (plurality opinion) (“The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.”).

235Under German law, a tie vote results in the lower court ruling remaining in effect. See Gesetz über das Bundesverfassungsgericht (BVerfGG) § 15(3).

236See Criminal Diary Case, 80 BVerfGE at 376–77. The Court did not find any general protection for diaries. Therefore, much depended on the content of the diaries, and how one valued it.

237Id. at 377–79.

238Id. at 381. Accordingly, these Justices believed that the diaries should be “absolutely protected as within the area of private life-formation.” Id.

239See id. at 381–82.
B. Informational Self-Determination

The most notable manifestation of the concern for preserving an intimate realm to life, expressed by the Court in Microcensus, is the concept of informational self-determination. This means, fundamentally, a right to control access to and dissemination of personal data, including protection against revelation of one's private affairs. It is rooted in a desire to preserve the integrity of human personality against the onslaught of the technological age and of prying eyes. Thus, the Court has sought to carve out an area of inviolable human interiority as a secure haven. In a sense, this represents adjustment of the Kantian ideal of moral autonomy to the conditions of the modern age.

1. Census Act Case

Building on Microcensus, the Census Act Case\(^{260}\) strove to preserve the inviolability of human personality amidst revolutionary changes in the computer age.\(^{241}\) The controversy concerned the Federal Census Act of 1983 (the "Act"), which required the collection of comprehensive data concerning the Federal Republic's demographic and social structure. The Act set the parameters for the country's population count and also required rudimentary personal information, such as name, address, gender, marital status, nature of household occupants, religious affiliation, job occupation, and work setting.\(^{242}\) The Act also required citizens to fill out detailed questions concerning their sources of income, educational background, mode of transportation to and from work, and use of dwelling, including method of heating and utilities.\(^{243}\) The Act further allowed information obtained to be transmitted to local government, which could then use the information for purposes of planning, environmental protection, and redistricting. Local government could even compare information to housing registers and, if necessary, correct them.\(^{244}\)

Over one hundred persons filed suit against the Act, complaining that the Act's intrusiveness threatened their privacy rights.\(^{245}\) The Court agreed, at least temporarily, and suspended the census until its constitutionality could be determined. The case is thus an example of the rare instance where individuals may directly pursue claims to the Constitutional Court without having to exhaust legal remedies because of an immediate threat to a fundamental right.\(^{246}\)

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\(^{260}\) 65 BVerfGE 1 (1983).
\(^{241}\) Census Act Case, 65 BVerfGE at 3.
\(^{242}\) See id. at 4–7, 12–13.
\(^{243}\) See id. at 5.
\(^{244}\) See id. at 7–8.
\(^{245}\) See CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 333.
\(^{246}\) Professor Schwartz records that although it was passed without controversy by the Bundestag, the law triggered a storm of protest. Hundreds of citizen initiative groups called for a boycott of the census. Günter Grass, the Nobel Prize winning author, called the law a "monster." Even a high census official admitted that the questionnaire "was written in an exceedingly authoritative style and frightfully unclear language." See Schwartz, supra note 5, at 688.

Professor Schwartz writes that the Census Act Case, and the 1983 Federal law that gave rise to it, did not occur in a legal vacuum. As early as 1970, state laws were enacted to provide for the transmission,
At the heart of *Microcensus* and the *Census Act Case* is the concern that intrusive and comprehensive surveys of the population will yield personality profiles which, with the aid of modern computing techniques, will facilitate the state’s ability to access such information at will and use it as it sees fit. From the Kantian perspective, this carries the danger of converting human beings into mere objects of statistical survey, depersonalizing the human element. From the standpoint of human autonomy, the Court feared that gathering, storing, and using personal information would threaten human liberty. The more that is known about a person, the easier the person is to control. As the Court noted, these concerns are especially heightened with the advance of modern computer technology and its capacity to access human habit and capabilities. The amount of personal information stored in and accessible by computers is staggering, including information over credit history, taxes, social security, and travel plans.

The background of German personality law provides the theoretical base for these concerns. Since the “focus of the constitutional order . . . is the value and dignity of the person, who operates in free self-determination as a member of a free society,” these values must be sustained “in view of modern developments and their accompanying threats to human personality.” Human dignity must be adapted amidst changing economic and social conditions if human personhood is to remain inviolate in modern society. In this way, the Constitutional Court acknowledged that changing social conditions require adaptation in the application of core concepts.

Just this motivation led the Constitutional Court to announce a general right of informational self-determination. Informational self-determination means processing, and protection of data. All states subsequently adopted legal regimes. Later laws were fashioned, at both the federal and state levels, that granted individuals certain rights to be informed of data banks, and to comment and correct false information contained in them. Thus, the 1983 Federal Law arose amidst a legal culture already well accustomed to data protection. Protests, accordingly, reacted against what were well-focused and understood dangers associated with processing of information. See id. at 688–89.

For example, the Court in the *Census Act Case* observed that modern computing techniques can gather and store practically limitless information about people that is accessible “in seconds.” This “information . . . can produce a . . . personality profile, which the person affected cannot control . . . and induces psychological pressure on behavior.”

Once information is available on computer, it could be put to a variety of uses. Thus, control over information could result in political or social power. See id. at 678. For example, “use of computerized criminal history records affects both the chances for employment of ex-convicts and the balance of power between defense attorney and prosecution.”

Since the 1969 decision *Microcensus*, the Court observed, the advance of computer technology and capability has changed radically. Before, information was entered manually by keypunch and stored in separate areas, accessible mainly by expert personnel, making it more difficult to fashion together and obtain a personality “portrait.” Today, information is entered and retrievable electronically by almost anyone, which facilitates instantaneous access to far-ranging information. See *Census Act Case*, 65 BVerfGE at 4. This “information . . . can produce a . . . personality profile, which the person affected cannot control . . . and induces psychological pressure on behavior.”

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Germany is the second largest user of computers. See id. at 677 n.10. Professor Schwartz cites authority that in America, “since the federal government’s entry into the taxation and social welfare spheres, increasing quantities of information have been elicited from citizens and recorded.”

Professor Schwartz cites authority that in America, “since the federal government’s entry into the taxation and social welfare spheres, increasing quantities of information have been elicited from citizens and recorded.”

See id. at 678 n.14 (citation omitted). Many hospitals' resources are “devoted to the task of recording information about patients.”

See id. (citation omitted).
the authority of the individual to decide fundamentally for herself, when and within what limits personal data may be disclosed.... [T]his decisional authority requires a special measure of protection under present and future conditions of automatic data processing. [For example,] the technological capability of storing [highly] personalized information concerning specific people is practically unlimited and retrievable in seconds... without concern for distance. ...[T]his information, when connected to other data sources, ... can produce a complete or partial personality profile, over which the affected individual has no control, and the truth of which he cannot confirm. ... The possibilities of acquiring information and exerting influence have increased to a degree never previously known.252

This rise in technological capability poses severe threats to human personality and human autonomy. "An individual's right to plan and make decisions freely may be severely curtailed, if she does not know or cannot predict adequately what personal data is known or may be disclosed."253 It is unhealthy for society "when citizens do not know who knows what about them, and when they know it."254 Not knowing others' knowledge of their affairs may lead citizens to curtail their activities or "refrain from exercising rights... like associational rights," or expression, religious, or occupational freedoms. Certainly, official possession of detailed personal information carries a serious threat of abuse, including coercion and manipulation of human autonomy.255 "This would damage an individual's personal development, and also the common good, because self-determination is an elementary condition of a free democratic society based on citizens' ability to act and to participate."256 Accordingly, data use that has the potential to influence people must be strictly controlled. "[A]n individual must be protected against unlimited collection, storage, use and transmission of personal data... as a consequence of the free development of personality under modern conditions of data processing."257 In essence, informational self-determination follows from human autonomy; in the modern information age, control of information is power. Thus, control over personal information is the power to control a measure of one's fate. This is indispensable to the free unfolding of personality.

The right to informational self-determination, like all basic rights, is not absolute in the carefully calibrated value-order of the Basic Law.258 Since persons "develop within the social community... personal information is also a reflection of social reality."259 Thus, there is a social dimension to personal data too, posing a tension between personal and social components to information. Government and other actors in society, such as banks or companies, need information about people to plan and

252Id. at 42. Such use could induce psychological pressure to conform, out of fear of how others might employ such personal information. See id.

As the Court noted, the concept of informational self-determination emanated from earlier cases too, such as Lebach, 35 BVerfGE at 220; Divorce Records, 27 BVerfGE 344, 350 (1970); and Microcensus, 27 BVerfGE at 36. See Census Act Case, 65 BVerfGE at 42.

253Census Act Case, 65 BVerfGE at 43.

254Id.

255See id.

256Id.

257Id.

258Id.

259See id.

260Id. at 44.
serve the public weal. Democracy itself depends on the free flow of information.\textsuperscript{260} "The Basic Law . . . has resolved the tension between individuality and society by constituting individuals as community-bound and community-related."\textsuperscript{261} Therefore, "individuals must . . . accept limitations on their right to informational self-determination for reasons of overriding public interest (überwiegenden Allgemeininteresse)."\textsuperscript{262}

Just what an "overriding public interest" is can only be determined by resort to standard German norms. First, the law must have a (constitutional) legal basis, which makes clear the conditions and reach of the limitations on freedom and thereby satisfies the Rechtsstaat command that norms be clearly stated.\textsuperscript{263} Second, the law must satisfy the Proportionality Principle, which, as we know, mandates that freedom be limited only to the degree necessary to satisfy public interests. Because "of the dangers of automatic data processing . . . the legislature must, more than ever, adopt organizational and procedural safeguards to diminish violations of individual personal rights."\textsuperscript{264} Only then can one test the strength of the public interest.

Testing the Act against these principles entailed a detailed and comprehensive analysis, filling seventy-one pages of the official reporter. First, the Court evaluated whether the information was actually necessary by testing legislative ends.\textsuperscript{265} The Court concluded that it was legitimate to perform a census for social and economic planning.\textsuperscript{266} However, collection and storage of data for other purposes would be constitutionally suspect. The Court "carefully scrutinized the nature of the information collected, the methods of its storage and transmission, and its particular uses" in order to assure that the stated uses properly fell within police powers and did not pose an undue threat to human liberty.\textsuperscript{267} Protection of information thus depended on a distinction "between personality-related information that is gathered and processed in an individually nonanonymous manner and data that is census-related."\textsuperscript{268} The Court emphasized that persons should not be treated as "mere information-objects," because depersonalizing people as information sources jeopardizes their essence as "spiritual-moral" persons.\textsuperscript{269} The Court directed that protective measures be used to assure that personality profiles of individuals could not be obtained. Cloaking information in anonymity was the key safeguard identified by the Court.

\textsuperscript{260}See id.
\textsuperscript{261}Id.
\textsuperscript{262}Id.
\textsuperscript{263}See id.
\textsuperscript{264}Id.
\textsuperscript{265}Id.
\textsuperscript{266}Id.
\textsuperscript{267}See id. at 44–46.
\textsuperscript{268}Id.
\textsuperscript{269}See id. at 47.

\textsuperscript{260}See CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 335. While it was necessary for state purposes to collect information, the Court stipulated that data may be collected only when "suitable as well as necessary." Census Act Case, 65 BVerfGE at 46. While recognizing that certain data for statistical purposes, including that necessary for operation of the social welfare state, necessitated a stockpiling of data for future use, limits must still be set concerning such information. Clear goals for use of such information must be identified. See id. at 47–48. To better assure confidentiality, surveys could be returned through the mail at government cost. Attributes identifying people were to be deleted as soon as possible and, until then, held confidentially on a need-to-see basis. See id. at 60.

\textsuperscript{261}See Census Act Case, 65 BVerfGE at 45.
\textsuperscript{262}Id. at 48.
Other protective measures suggested by the Court included confidentiality obligations and a prohibition against employing census takers in locales where they also lived. The Court ultimately sustained most of the Act, although it invalidated several provisions, including one that allowed local officials to “compare census data with local housing registries,” on the ground that combining these statistics might allow officials to identify particular persons, thereby violating the core of personality.

In the wake of the Census Act Case, it is worth observing what a remarkable act of judicial activism the case represents. First, the Court suspended the Act until its constitutionality could be determined, ultimately requiring the German Bundestag (parliament) to amend certain provisions before the census could be carried out. This delayed the census for four years at notable cost. Second, the Court established concretely a right of informational self-determination from the textual authority of Articles 1 and 2. That language, of course, does not self-evidently bestow citizens’ control over personal data. Rather, the Court extended the principle animating the provisions to carve out this radiation of autonomy. In this way, the Constitutional Court acted in a manner quite like the Supreme Court in Griswold v. Connecticut, in inferring a right of privacy from the Bill of Rights. At the root of the Constitutional Court’s decision was the vision that human dignity and autonomy must be preserved against the onslaught of the modern computer age. Thus, measures needed be taken to assure that the collection, storage, and use of personal data is justifiable pursuant to the Rechtsstaat, and that this power not be abused.

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270 See id. at 49–51, 60.
271 Id. at 64. Other deficiencies identified in the law were a lack of clarity in certain provisions, which therefore failed to place citizens on adequate notice of the law; failure to specify clearly projected uses of the information; and failure to obtain permission for transmission to authorities of certain information, such as religious affiliation. See id. at 64–66.
272 Professor Schwartz records that since the Census Act Case, government and courts have generally striven to meet the challenges of the case and conform the law to constitutional standards. The German judiciary has invalidated laws that do not adequately spell out projected uses of data or grant citizens satisfactory inspection rights. See Schwartz, supra note 5, at 698–99. State laws have generally provided for extensive inspection and informational rights, responding to the Constitutional Court’s “call for greater involvement of the citizen in his role as data subject.” Id. at 699. The Census Act Case, not surprisingly, also inspired an outpouring of scholarly commentary. See id. at 698 n.118 (citing authorities).

Yet, Professor Schwartz notes, there have been setbacks too. See id. at 700–01. Legal regulation of data use by police and antiterrorist agencies has been lax, probably on account of the majoritarian pressure to fight crime and terrorism. See id. at 700. German authorities responded harshly to protests of the next census, approved by the Constitutional Court after the Census Act Case. See id. at 700–01.

273 See CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 332. After the Census Act Case, the government decided to abandon the census. Instead, the Bundestag drafted a new census bill, which the Constitutional Court approved. See, e.g., 42 NJW 707 (1989); 40 NJW 2805 (1987).
274 See Griswold, 381 U.S. at 484 (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.” (citation omitted)).
275 Interestingly, when Germany reevaluated the Basic Law in 1993, the Constitutional Commissioners decided not to codify explicitly informational privacy, seemingly preferring court-created law. See CURRIE, supra note 7, at 321 n.324. In this way, the Constitutional Commissioners paralleled the course of the drafters of the Civil Code, who decided against codification of a general right of privacy. See Krause, supra note 59, at 485. Thus, like informational self-determination, a general right of privacy has been a court-created doctrine, in both Germany and America. Indeed, this brings into clear relief the role of German courts as
The American constitutional case which comes closest to addressing the German concept of informational self-determination is Whalen v. Roe,276 which involved a patient-identification requirement in a statute providing for a centralized computer file of all persons who obtained drugs, both legal and illegal, pursuant to a doctor's prescription. Although the Supreme Court, like the Constitutional Court, recognized that there was a "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files,"277 the Court nevertheless held that "neither the immediate nor the threatened impact of the patient-identification requirements . . . is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment."278 The American Court hesitated to declare any substantive right, preferring to wait and see whether case law would present an actual intrusion into privacy rights. In this manner, American law, reflecting common law orientation, represents a tentativeness not characteristic of German law.279

It is interesting to speculate why American law has not taken a turn similar to German law, even though the growth of data and data processing in the United States has paralleled and, indeed, eclipsed that in Germany. Thus, the threats that the information age pose to human autonomy in America are at least equal, if not greater, than in Germany. Textually, both the American and German Constitutions provide a basis for recognizing such a right. The First Amendment, for example, plausibly bestows certain rights to knowledge of how information, especially personal information, is to be gathered or used.280 The Fourth Amendment confers certain rights

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275Id. at 605. For example, the "collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed." Id.
276Id. at 603–04. Under German concepts, "the Court should have applied the right of informational self-determination by first asking if the State had decided what it planned to do with the data. Although New York had recorded one hundred thousand prescriptions each month during the twenty months that the law had been in effect, it had used this information in investigations of exactly two persons. . . . [P]rotection of human autonomy . . . require[s] judicial inquiry into the influence on the individual of having his personal information used in a specific system or indefinitely stored for future application." Schwartz, supra note 5, at 684.
277The position of Justice Brennan most approximates the German one. He observes that an individual has a privacy "interest in avoiding disclosure of personal matters," and that "[b]road dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights." Whalen, 429 U.S. at 606 (Brennan, J., concurring) (quoting the majority opinion). Justice Brennan states, moreover, that "[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." Id. at 607 (Brennan, J., concurring). However, Justice Stewart, responding to Justice Brennan, seems to have articulated the sense of the Court in dampening any recognition of "a general interest in freedom from disclosure of private information." Id. at 609 (Stewart, J., concurring).
278See, e.g., Roe v. Wade, 410 U.S. 113, 209 (1973) (Douglas, J., concurring) (stating that "'liberty' as used in the Fourteenth Amendment includes . . . autonomous control over the development and expression of one's intellect, interests, tastes, and personality"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting) (arguing that, because education affects ability of child to exercise First Amendment rights as receiver of information and ideas, there is intimate relationship between active participants in the creation of the law. This runs counter to the stereotype of civil courts as blindly applying pre-determined code-law.
of privacy against discovery of personal information, especially that in which one has a "reasonable expectation" of privacy. The Due Process Clause protects against arbitrary intrusion into matters of personal security and liberty. Human dignity also has been a theme of the American Bill of Rights, particularly its cognates of self-determination and autonomy. Together, these rights would seem to convey a certain zone of privacy which, it might be argued, covers informational privacy. In this way, a right to informational privacy and self-determination plausibly could exist to safeguard human liberty and self-government in the information age.

personal interest and exercise of rights justifying constitutional protection); Griswold, 381 U.S. at 482 ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . ").

See Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring) (explaining that Fourth Amendment protections are based on both subjective and socially reasonable expectations of privacy); Murphy v. Waterfront Comm'r, 378 U.S. 52, 55 (1964) (noting that Fifth Amendment privilege against self-incrimination reflects "respect for the inviolability of the human personality").

See, e.g., Casey, 505 U.S. at 851 (plurality opinion) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

See, e.g., id. at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); National Treas. Employees Union v. Von Raab, 489 U.S. 656, 661 (1989) (Scalia, J., dissenting) ("In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."); McClesky v. Kemp, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) ("Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess."); Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (stating that individual's right to protection of his own good name "reflects . . . our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty").
Yet, American law has not developed along these lines. There are a number of possible explanations for this. The Supreme Court may feel less compelled to address changing social and economic conditions, or more restrained in declaring rights to be fundamental in the absence of clear textual or historical support. The Court may be limited because Whalen, like all substantive due process cases, is anchored in privacy, not autonomy as the Census Act Case, and privacy confers less power or control than autonomy. Similarly, our Constitution lacks an underlying philosophic base corresponding to the influence of Kantian morality on the German Basic Law, which results in fewer substantive protections. On the other hand, the Supreme Court may simply believe that Congress or state courts or legislatures have sufficiently protected these rights, leaving little need for Court activism. Whatever the reason, as a matter of comparative law, the German Court is addressing this aspect of the computer age in a more rights-protective manner than the Supreme Court.

2. Confidentiality

The concept of informational privacy in German law extends beyond data processing. A frequent application of the doctrine has occurred in the context of confidentiality over personal matters. Good examples of this strand of application appear in cases concerning the confidentiality of medical files, general inquiries into

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24 Under American law, the privacy on which informational self-determination most logically could be based would be either a matter of constitutional law under the Due Process Clause or a matter of tort law. Under the Due Process analysis of enforcing privacy rights, Whalen, discussed supra notes 276–79 and accompanying text, is the main case.


Some scholars have picked up the charge. See, e.g., Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 1000–01 (1964) (arguing that privacy represents freedom from public scrutiny and includes “prohibiting the disclosure of confidential information obtained by government agencies”); Charles Fried, Privacy, 77 Yale L.J. 475, 483 (1968) (arguing that “[p]rivacy . . . is control over knowledge about oneself”). But see Richard A. Posner, The Right of Privacy, 12 Ga. L. Rev. 393, 408 (1978) (“[W]e have no right, by controlling the information that is known about us[,] to manipulate the opinions that other people hold of us.”).

Recently, an emerging tort of “breach of confidence” has been the focus of scholarly attention. See, e.g., Mintz, supra, at 465; Randall P. Bezanson, The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990, 80 Cal. L. Rev. 1133, 1135 (1992) (defining breach of confidence as “a concept of privacy based on the individual’s control of information rather than on generalized social controls on information, and . . . an enforceable obligation of confidentiality for those possessing private information rather than . . . a duty visited on publishers”).

The notion of sufficient legislative protection seems to be a basis on which Whalen was decided: The Court noted precautions taken by the New York State Department of Health to ensure confidentiality, such as a locked wire fence, alarm system, and storing the computer tapes in locked cabinets. 429 U.S. at 594. However, precautions are only as good as the people who implement them. See John Markoff, Used Computer Bears Old User’s Secrets, N.Y. Times, Apr. 4, 1997 (late edition), at A14 (noting that resold computer retained confidential pharmacology files of patients, disclosing sensitive information, such as treatment for AIDS or depression).

246 See Medical Records, 32 BVerfGE 373, 379 (1972).
mental and physical health, and divorce records. These cases are grounded in the theory of German personality law described above: People are spiritual-moral beings who possess an inviolable core of privacy. Entry into the private sphere is barred unless the measure is justified by overriding public need and is proportional to the end sought. In both types of cases, the Court considered the information sought—divorce records and patient files—to be within a person's private sphere, but not the inviolable sphere. Both sets of cases, therefore, required justification pursuant to the Rechtsstaat principle of proportionality, but neither of them attained it.

Divorce Records is the more interesting case. Here the Court protected against unauthorized disclosure of divorce records sought by officials for use in a disciplinary hearing against the former husband. Divorce records were, the Court concluded, a record of intimate details of a couple's life together, scrutiny of which ordinarily did not extend beyond participants in the divorce proceeding. In its analysis, the Court demonstrated the Proportionality Principle's bite. "Measures taken in service to a desired end must be necessary and suitable and not disproportionately intrusive in curtailing rights in relationship to the objective sought." The problem was that no adequate proof was offered as to why the documents were needed. At a minimum, officials must demonstrate why private matters are relevant to job performance. Even if the divorce records proved necessary, a less intrusive measure, such as redacted versions, would be more suitable to protection of privacy. Moreover, other avenues of proof should be pursued prior to using the records. Along similar lines, the Court has protected as confidential unauthorized recordings of private conversations. Conversation, like private matters, reflects human personality; therefore, it is not accessible unless consented to or justified on proportionality grounds.

The German focus on rights of privacy has general resonance in American law. Confidentiality rights have historically been the subject of common law privilege (e.g., attorney-client privilege)—or statutory law (e.g., patient-client privacy). However, the Supreme Court, in recent years, has announced certain confidentiality rules as a matter of federal evidence law in a variety of settings, most notably in attorney-client relations, spousal relations, and psychotherapist-patient relations. A difference between the laws is that American law is grounded mainly in privacy, whereas German law is part of human personality. This has significant consequences, since American

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288See Divorce Records, 27 BVerfGE at 351–52.
289See Medical Records, 32 BVerfGE at 379–80; Divorce Records, 27 BVerfGE at 351. For a discussion of Sphere Theory, see supra notes 218–30 and accompanying text.
290See Medical Records, 32 BVerfGE at 379–80; Divorce Records, 27 BVerfGE at 351.
291See Divorce Records, 27 BVerfGE at 351–52.
292See id. at 352.
293See id. at 353. Proof of the necessity of obtaining the documents would have required notice to and participation by the couple. See id.
294See id. at 354.
295See id.
privacy protects against official attempts at discovery, whereas personality more broadly protects the individual per se, so that he or she might flourish.\textsuperscript{300}

3. Reputational Interest

A more innovative aspect of informational self-determination is that it endows individuals with the right to control the portrayal of the facts and details of their lives, even if uncomfortable or embarrassing. This right empowers persons to shield hurtful truths from public scrutiny in order to safeguard reputation or other personality interests. The right also encompasses protection of personal honor as an outgrowth of personality.\textsuperscript{301} As such, these rights can be extended to eclipse other basic rights, including, most notably, Article 5 expression guarantees.

(a) Drunkard Case

A good example of personal control over truthful, but harmful, information is the Drunkard Case,\textsuperscript{302} where the Court prohibited the public announcement of persons legally determined to be incapacitated because of drunkenness, drug addiction, being a spendthrift, or other such disfavored status.\textsuperscript{303} The purpose of such public announcements was protection of the general public, who otherwise might unwittingly transact business with such persons. However, control of the gathering and use of such personal information, including “the act and status of being placed under legal guardianship,” is protected.\textsuperscript{304} “The right of informational self-determination protects much more . . . than data processing . . . . A public announcement . . . is a special form of official transmission of data.”\textsuperscript{305}

Applying Rechtsstaat principles to the state’s chosen method of communication, the Court invalidated the publication mechanism, notwithstanding its observation that “public access to [this] information is necessary to accomplish the statutory purpose” of informing the public of the restoration of full contracting capacity of individuals previously found legally incapacitated.\textsuperscript{306} “Because of the anonymity of [modern] life relations, the mobility of the population and the oversaturation of information [in today’s age],” it is doubtful that general announcements will reach the intended audience.\textsuperscript{307} The choice of communicative methods must be more tightly tailored to achieve desired objectives. Thus, the means chosen failed the Proportionality test. This

\textsuperscript{300}See Fletcher, supra note 9, at 179.
\textsuperscript{301}There is a long history, going back to the early twentieth century, of civil court protection, through interpretation of the Civil Code, of such privacy rights. Thus, as noted previously, the Constitutional Court has “constitutionalized” most of these developments of the civil court. See Krause, supra note 59, at 486–87.
\textsuperscript{302}BVerfGE 77 (1978).
\textsuperscript{303}See id. at 78.
\textsuperscript{304}Id. at 84.
\textsuperscript{305}Id. (analogizing release of information about one’s status to release and use of computerized personal data (citing Census Act Case, 65 BVerfGE at 41)).
\textsuperscript{306}Id. at 86.
\textsuperscript{307}Id.
line of analysis is familiar enough to readers knowledgeable of American heightened scrutiny methodologies.

A second aspect of the Drunkard Case distinguishes German law from American. "[P]ublic notice of being placed under guardianship on account of alcoholism or being a spendthrift is a severe violation of [informational self-determination.]"\(^{308}\) This "severely impacts the person in her entirety... It places a negative stamp [on reputation,] and complicates application of the Social State Principle [Socialstaatprinzip] oriented support measures [Hilfsmassnahmen] designed to assist recovery from addiction and facilitate social reentry."\(^{309}\) Indeed, such notification impacts the person "at an especially critical phase in his beginning reentry into society."\(^{310}\)

Reputation and its radiation to human personality are important reflections of the state of the human condition in modern society. Over these matters, Drunkard echoes the essential teaching of German law: Human personality and its nurturing are core concerns of the constitutional order. Because of the centrality of personality, adjustments must be made to the legal order to further its facilitation, as in guardianship law in Drunkard and expression law in Lebach and related cases, as discussed next in Section C.\(^{311}\) Moreover, the dignitarian radiation of the Basic Law necessitates a reaching out and nurturing of the weaker elements of society, such as rehabilitated criminals or troubled souls. Human dignity, as it were, calls for application of the golden rule: How would you want to be treated if you were in that state? Moreover, the quality of society is to be judged by how it treats its weaker members. Individuals are not just independent contractors; they are "community-bound" and "community-connected." Thus, the community, as a whole, has obligations to these persons, just as individuals are to be responsible as rights-holders. Dignity, in other words, acts as a "higher law" by which individuals and society are judged.

A brief look at American law underscores deep cultural differences over these points. At the constitutional level, the cases most like Drunkard are Wisconsin v. Constantineau\(^{312}\) and Paul v. Davis,\(^{313}\) both decided under procedural due process. It is noteworthy that public posting of a disfavored status (such as drunkenness in Drunkard and Wisconsin, or shoplifting in Paul) is treated in American law as raising only a procedural inquiry as to whether the person affected had adequate notice and participatory rights in determining whether the measure was justifiable. There is no

\(^{308}\)Id. at 87.

\(^{309}\)Id. In this way, Drunkard is similar to the solicitude rendered weaker members of society in Lebach, discussed infra notes 377–83 and accompanying text, where the Court was concerned about the reentry into society of a rehabilitated felon. The Social State Principle is part of the objective norms of the Basic Law, obligating the state to protect and promote the welfare of the people. See supra note 11 and accompanying text.

\(^{310}\)Drunkard Case, 78 BVerfGE at 87. Those who desire that the notification be rendered can so choose, consistent with the idea of control over personal information. See id.

\(^{311}\)See infra notes 377–83 and accompanying text.

\(^{312}\)400 U.S. 433, 437 (1971) (invalidating statute that allowed posting of sign, without notice or hearing, forbidding sale of liquor to person because such sign impaired person's good name without fair determination).

inquiry into personality rights, phrased in the American scheme as privacy rights, despite the obvious tarnishing of reputation that occurs. This would seem to reflect the lack of focus in American law on the centrality of personality. Certainly there is little solicitude for weaker social members, who might seek to regain some semblance of ordinary life. In this respect, American outcasts encounter a harsh world.\footnote{4}

(b) Mephisto

Protection of honor and reputation in Germany is itself a highly valued manifestation of human dignity.\footnote{5} No case represents this view better than the famous

\footnote{4}The difference in treatment between German and American law is attributable also to the difference between positive and negative approaches to the Constitution. See supra notes 14–28 and accompanying text. Because the American Constitution ordinarily lacks an objective dimension, there is no corresponding claim to governmental action. No case better illustrates this point than the infamous DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), where the Court refused to require state intervention despite the state social service department's knowledge that one of its minor clients was the subject of such severe child abuse at the hand of the father as to ultimately render the child incapacitated. Id. at 195–96. In DeShaney, the Court stated:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. .... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195–96. Even under the procedural due process analysis, the treatment of reputation is inconsistent, if not illogical. Despite the similarity of the facts and dates of Constantineau and Paul, see supra notes 312–13, the cases are incompatible. In Constantineau, the Court determined that the posting of a sign of Constantineau's excessive drinking injured his reputation, and was therefore unconstitutional because he was not rendered notice and hearing rights to determine the appropriateness of this measure:

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. .... Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

Constantineau, 400 U.S. at 437.

Paul flew in the face of this logic, which seems inexplicable, since Constantineau was decided only five years earlier. In Paul, the Court found no reputation interest implicated in the placement of Davis's name on a flyer sent to 800 merchants designating him an active shoplifter, even though the charges were dismissed. The Court concluded that reputation alone was not a constitutionally protected liberty interest. Paul, 424 U.S. at 701.

The illogic between Constantineau and Paul shows, at a minimum, the confusion of American law. By comparison, the secure anchoring in German law results in strong protection of personality.

\footnote{5}Protection of honor and reputational interests in Germany has a long pedigree. Montesquieu thought that honor was the basis for monarchy, because "it is the nature of honor to aspire to preferments and distinguishing titles .... and a Monarchical government supposest .... preeminences, ranks, and likewise a nobel descent." CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 121–22 (D. W. Carrithers ed., 1977). Thus, honor seems particularly well suited to an aristocratic society, like Germany was for much of its history.

Since the adoption of the German Civil Code, honor and reputation are protected as part of the general right of personality, which is anchored in section 823 of the Civil Code. See Krause, supra note 59, at 487, 499–500.

The Civil Code reflects Roman law roots, including compensation for mental suffering arising from
Mephisto case, a seminal case of artistic freedom, where the Court split 3-3 in upholding an injunction against publication of Klaus Mann's novel of the same name, on the ground that it defamed the memory of a famous deceased actor who had been quite active in the theater during the Nazi period.\textsuperscript{16}

All basic rights, including artistic rights, must be interpreted within the value order of the Basic Law, according to the Court. Since the Basic Law is founded on the view "of the human person as an autonomous being developing freely within the social community," artistic freedom must be measured against Article 1 human dignity, the supreme value.\textsuperscript{317} To the extent artistic or communication freedoms conflict with human dignity, they may have to yield, depending on the concrete balancing of the freedoms at issue. For example, in Mephisto, it might be argued that the tangible effect of Mann's novel was to tarnish the memory of the deceased actor. Disparagement of the dead could be thought to be inconsistent with human dignity.\textsuperscript{318} "[A]n artist's use of personal data about people in his environment can affect their social rights to violation of honor. See Warren & Brandeis, supra note 59, at 198. These roots have given rise to an extensive body of law, protecting reputation, one's name, and a right to reply in the press, as elaborated here. See id; see also infra notes 327-37 and accompanying text.

In America, the development was different. For a time the civic Republican emphasis on reputation and virtue animated a strong concept of honor. But eventually the revolutionary idea of equality among all peoples completely upturned any concept of nobility. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 39, 207, 233, 285 (1991). Honor still persists in America as a legal concept, primarily through state defamation laws, but only to the extent not eclipsed by the landmark case, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), which redefined the relationship between honor, furthered in state libel law and the First Amendment. See id. at 283.


\textsuperscript{30}See Mephisto, 30 BVerfGE 173, 174 (1971). The central character of the novel was an actor named Hendrik Höfgen, whom Klaus Mann, the son of the great German writer Thomas Mann, portrayed as having made his name by playing the devil in Goethe's Faust during the Nazi period. While other artists were persecuted, Höfgen "betrayed his own political convictions and cast off all ethical and humanitarian restraints to further his career by making a pact with . . . those in power in Nazi Germany." Id. at 174. The story was based on a real-life actor, Gustaf Gründgens, whose career paralleled the fictitious Höfgen in important respects. Mephisto is extensively analyzed by Quint, supra note 14, at 290-307, and by Eberle, Public Discourse, supra note 6, at 834-41.

The suit was brought by Gründgens' son to protect the honor and dignity of the dead, illustrating the extraordinary protection afforded honor in Germany.

\textsuperscript{31}See id. at 194. "It would be inconsistent with the constitutional guarantee of the inviolability of human dignity . . . if a person's general claim to respect . . . could be degraded or debased even after his death." Id. This point became important, because Gründgens died shortly after plans to publish the novel were announced. His son filed the action, proceeding under § 823(1) BGB, a general tort provision, which provides recovery for actions that "intentionally or negligently, and unlawfully, injures the life, body . . . liberty . . . or any other right of another person," seeking redress for harm to the memory of his father. Id. This interest was within the concept of dignity, according to the Court. The Court observed, however, that this protection diminishes as memory of the deceased recedes. See id.

respect and esteem." To that extent, communication freedoms may have to yield to the superior value of dignity, as manifested in this interest in honor and reputation. In this manner, the Court implied limits on the seemingly boundless guarantee of artistic freedom, as it previously had implied limits to the seemingly express limitation of personality rights in *Elfes.* In both cases, the Court acted on behalf of its vision of human dignity. In *Mephisto,* this vision acted to limit expression rights; in *Elfes,* it limited restriction of freedom of action. Human dignity thus becomes the glue between both rights-enhancing and rights-constricting interpretations. Certainly this illustrates the Constitutional Court's powers of creative interpretation, a skill the Supreme Court too has sometimes displayed.

This reasoning points to a fundamental contrast with American law. Anchoring reputational rights in the malleable concepts of human dignity, and accompanying personality, allowed the Constitutional Court, in essence, to imply a constitutional right to be free from defamation. This could be justified from the "objective" theory of constitutionalism, requiring the state, as it does, to realize the norms of the value order. By contrast, American law is founded on the concept that "public" persons are to be treated as "men of fortitude, able to live in a hardy climate." Accordingly, public men and women in America are expected to endure the insults and abuses common to public life. Based on such thinking, the Supreme Court has widely immunized speakers from defamation claims. Under American principles, Gründgens, the actor protected in *Mephisto,* would qualify as a public figure subject to these immunity rules. In this way, one notices that American individuals are left alone to confront criticism or disparagement, lacking any claim to official protection, whereas German individuals can call on communal support. Constituting community on a core of values makes a big difference.

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29 See *Mephisto,* 30 B VerfGE at 195. The Court reasoned that a work of art could harm human dignity by misusing facts of a person's life. Whether this is so or not depends on the nature of the portrait drawn, particularly its truth or falsity. Reputational interests must then be balanced against artistic values to see which is weightier in the circumstance. This test involves a "weighing of all circumstances of the case," equivalent to an ad hoc balancing test. *Id.* For evaluation of this general balancing test, see Eberle, *Public Discourse,* supra note 6, at 835-36, 841-42.
30 See supra notes 128-39 and accompanying text.
31 See, e.g., *Griswold,* 381 U.S. at 483 (deriving right of privacy from penumbras that emanate from specific rights).
32 See *Eberle,* *Public Discourse,* supra note 6, at 838.
34 See *Sullivan,* 376 U.S. at 283.
35 Gründgens would likely be "an individual . . . [who] achieve[d] such pervasive fame or notoriety that he [has] become [] a public figure for all purposes and in all contexts," meeting the essential test for public figures established in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351 (1974).
36 See *Eberle,* *Public Discourse,* supra note 6, at 838 ("German law has gone part way down the path of American law through the latitude it accords certain polemic communicated in matters of public significance pursuant to both the Counter-Attack Theory (*Gegenschlag*) [which provides that a harsh public attack merits a reply in kind to counter its impact on the formation of public opinion], and by its assumption that public figures must endure sharp scrutiny and critique.").
C. Right to Honor and Rightful Portrayal of Self

Cases like Drunkard are grounded in a more general right to control presentation of one's self in the world. This is, of course, an outgrowth of the same theory of informational self-determination discussed in Section B above. However, it is additionally based on a more fundamental right of self-determination over one's position and social standing, a right "fundamentally to decide how to present oneself to third parties or the public, whether and to what extent outsiders can have access to one's personality." In this way, both informational self-determination and this "image self-determination" are grounded in control over one's private, intimate core of personality.

In so interpreting Article 2 personality rights, the Constitutional Court relied upon lines of doctrine developed by the Federal Supreme Court (Bundesgerichtshof or BGH), the supreme interpreter of the German Civil Code (Bürgerliches Gesetzbuch or BGB). The BGH had developed a jurisprudence of personality rights in connection with interpretation of the BGB. First, the BGH found a general right of personality, derived from the influence of Articles 1 and 2, that carried over into civil law, so that everyone could enforce a certain privacy in their private legal relations. This development allowed people to enforce these personality rights against infringement—by individuals as well as the state—thereby providing comprehensive protection to personality. Over time, the BGH extended such rights to cover specific emanations of personality, including control over distribution of one's own writings, such as personal letters or diaries, or secrecy in relation to medical records, or rights to one's spoken word, developments later confirmed by the Constitutional Court.

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21The path-breaking case was Schacht-Letter, 13 BGHZ 334 (1952), where an attorney, on behalf of his client, Dr. Hjalmar Schacht, a former economics minister under Hitler, had written a letter to a newspaper demanding that it correct certain statements it had previously published concerning Schacht. The newspaper published this letter, along with other correspondence, without replying to it or correcting its earlier publication. The attorney successfully complained that the publication of the letter falsely depicted him to the public as making a personal stand, when he actually was acting for his client. Breaking with precedent, the BGH found that a person's letters were protected, even in the absence of copyright, on account of this new-found "general right of personality," rooted in § 823 BGB. See Krause, supra note 59, at 488. For an English translation of Schacht-Letter, see BASIL S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORT 191-95 (1986).

The revolutionary change marked by Schacht-Letter was attributable to the change in the German legal order marked by the value-ordered nature of the Basic Law, particularly Articles 1 and 2. Prior to the Basic Law, the civil courts had been careful to limit claims for harms based on intangible injury, such as presentation in a false light. See Soraya, 34 BVerfGE 269, 270-71 (1973). With Schacht-Letter, the influence of the Basic Law as an objective statement of values on the civil law and, indeed, all law has become prominent. Under this theory of Third Party Effect (Drittirkung), a certain content of the Basic Law affects all legal relationships, public or private. For extensive discussion, see Eberle, Public Discourse, supra note 6, at 813-18; Quint, supra note 14, at 262-64, 278-79. A contrast is found in American law, where, ordinarily, the Constitution does not affect private law. See Eberle, Public Discourse, supra note 6, at 814-15.

30See Schacht-Letter, 13 BGHZ at 338.
31See, e.g., Medical Records, 32 BVerfGE 373 (1972) (protecting confidentiality of medical records); Divorce Records, 27 BVerfGE 344 (1970) (granting protection for confidential information concerning marriage relationships); Boll, 54 BVerfGE 208 (1980) (establishing right not to be misquoted). The BGH
The next step of this development was even more revolutionary. In the famous *Herrenreiter Case* of 1958, the BGH interpreted Articles 1 and 2 to command not only a respect for human dignity and personality, but also to provide affirmative protection of personality against incursion. Applying by analogy the German Civil Code remedy provisions, which cover harms to tangible property and physical health, the Court created a damage remedy to redress harm for intangible interests, such as personality. This enabled one individual to seek redress against another individual for a violation of personality rights. The Court's creation of this damage remedy was somewhat startling, since the Civil Code expressly excludes damage liability for most injuries to intangible interests, except when authorized by statute; here, there was no enabling statute. Moreover, money damages are quite rare in Germany, unlike in America; standard German relief is specific performance, not damages.

Through these innovations, the BGH provided comprehensive protection for personality, in recognition of the core value of human dignity. Not surprisingly, these developments engendered significant controversy.

In reliance on this work, the Constitutional Court reversed the process, recasting the private law interests of reputation or privacy into the capacious language of human dignity and personality, thereby constitutionalizing the doctrine. This certainly made for a more secure anchoring of the concepts in the legal order, as the Court recognized. No cases demonstrated the power and reach of these new constitutional developments more than the famous *Soraya* and *Lebach* decisions.

widely developed these rights of personality even though codification of them through amendment of the BGB was rejected. See generally, Krause, supra note 59, at 489, 495, 499–500.

*See Herrenreiter* (Gentleman Rider), 26 BGHZ 349 (1958). In *Herrenreiter*, a picture was taken of an amateur horseman shown jumping in a competition, and the picture was used to advertise a product reputed to improve sexual potency. See id. In assessing money damages, the BGH reasoned that the conduct must be appropriately sanctioned to reflect the seriousness of the harm to personality. See id. at 356. *Herrenreiter* thus gave rise to the doctrine of compensation for "moral" harms. For an English translation of *Herrenreiter*, see MARKE'SINIS, supra note 328, at 195–201. These developments are also covered in *Soraya*, 34 BVerfGE at 270–73; Degenhart, supra note 74, at 362; Quint, supra note 14, at 279–80.

*See § 847 BGB.*

*See Herrenreiter*, 26 BGHZ at 349.

*See CURRIB, supra note 7, at 117. Indeed, the defendant had argued that the BGH had disobeyed a limitation of the BGB. Traditionally, relief for injuries to personality were limited to injunction or, where appropriate, a right to reply based on the thought that awarding money for damages to honor cheapened such intangible values. "[A]n individual who would sell his honor for money had no honor." Krause, supra note 59, at 511. These beliefs were codified in the BGB, and left unchanged despite attempts to the contrary. See id. at 510–12. Thus, *Herrenreiter* represents a very bold judicial step. Today, money damages for intangible harms are more widely accepted in Germany. See id. at 515.

A later case, *Fernsehansagerin*, 39 BGHZ 124 (1975), even concluded that, if human dignity was to be the supreme value of the legal system, judges could no longer be bound by the original views of the BGB drafters, since, in the ensuing 70 years, law and society had changed dramatically. See id. This illustrates the dynamic, creative interpretation employed by courts under German legal science, which the Constitutional Court too has picked up.

*See Soraya*, 34 BVerfGE at 275–76.

*See id. at 282.*
1. Soraya: Right to Control Against Attribution of False Statements

In the famous Soraya case, the Court upheld an award of damages for publication in a tabloid of a fictitious interview with the former wife of the Shah of Iran. The fictitious interview fabricated intimate details of her private life. The award was predicated on this newly created constitutional right of personality, derived from the influence of objective constitutional principles on the private law. Recast as constitutional values, privacy, personality, and dignity became obligations that the state must preserve and protect under objective constitutionalism. State organizations, like the Constitutional Court, thereby became obligated to create the proper conditions for their realization.

These values now moved to the very center of the legal order:

The 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. Thus an individual's interest in his personality and dignity must be respected, and must be protected by all organs of the state [see Articles 1 and 2 of the Constitution]. Such protection should be extended, above all, to a person's private sphere, i.e., the sphere in which he desires to be left alone, to make ... his own decisions, and to remain free from any outside interference. Within the area of private law such protection is provided ... by the legal rules relating to the general right of personality.

This constitutional right of personality entitles a person to be left fundamentally alone, free from unauthorized interference, whether from public or private actors, if so desired. Moreover, this right is enforceable as a private cause of action whereby one private individual could enforce a right to privacy against another private individual. In Soraya, these privacy interests operated to limit the publication of the interview by the Axel Springer publishing house, the publisher of the tabloid. “An imaginary interview adds nothing to the formation of real public opinion. As against press utterances of this sort, the protection of privacy takes unconditional priority.”

As novel as these results were, even more pathbreaking were the methods used to obtain them. In constitutionalizing the innovations of the BGH discussed above, the Constitutional Court seemed to call into question parliamentary supremacy. Naturally, this would follow from the BGH’s approach, since it created a damage remedy for

334See id. at 281.
335Id.
336Soraya, 34 BVerfGE at 283–284, translated in CURRIE, supra note 7, at 198. The reasoning of Soraya was later picked up in Böll, where the Court determined that false quotations are not protected by Article 5. See Böll, 54 BVerfGE at 221. For discussion of Böll, see infra notes 387-93 and accompanying text. “The degree of care that must be expended to avoid dissemination of an imaginary interview is never too much to expect.” Soraya, 34 BVerfGE at 286, translated in CURRIE, supra note 7, at 198 n.95. The German result contrasts dramatically with American law, illustrating the extraordinary protection American law accords speech. See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (holding that deliberate alteration of quotations did not rise to the level of actual malice falsity required by New York Times Co. v. Sullivan, and was therefore protected speech).
intangible interests despite the wording of the Civil Code, which forbade such practice in the absence of an authorizing statute. Responding to this, the Constitutional Court suggested that judges were not wholly bound by statutory law after all. The Basic Law, in Article 20(3), had altered the traditional civilian law limitation of the judge to statutory law, rejecting a “narrow positivism.” “Statutes [Gesetze] and laws [Recht]... are not necessarily always identical. Law is not synonymous with the totality of written statutes.” Law (Recht) can, under some circumstances, include additional norms or concepts, derived from “the constitutional order as a whole,” and “functioning as a corrective to the written law.” Thus, rather than being “bound by the strict letter of the law, the role of the judge is to realize in case law... the values immanent in the constitutional order, [even if] not written or clearly expressed in written law.” Judges should so fill statutory gaps based on “practical reason” and “well-founded general community concepts of justice.”

However, in the case at hand, there was no real statutory gap to fill, since the Bundestag had expressly rejected a law authorizing damages for intangible harms. Now the Court resorted to the tools of German legal science (Rechtswissenschaft) in authorizing this “creative jurisprudence” (schöpferischer Rechtsfindung). Social conditions must often take priority over statutory text. Rather than being static, norms reflect the context of social relations in their socio-political milieu; their content varies under these circumstances. This is especially so in the present age, which has witnessed dramatic social and legal change over the course of the twentieth century. In this context, a judge cannot simply consult written law and meet her obligation to declare the law. Instead, the judge “has a free hand” to interpret law in view of “substantive justice” and “changed social conditions.”

The Court’s interpretation comes close to authorizing judges to determine themselves the applicability of statutory norms. Norms perceived to be outdated or not relevant can seemingly be replaced with a judge’s own view of justice. Not surprisingly, this position engendered wide discussion in German legal circles.

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341 See CURRIE, supra note 7, at 117–18. The critique is noted in Soraya, 34 BVerfGE at 276, 278. See also supra notes 334–35 and accompanying text.
342 See Soraya, 34 BVerfGE at 286.
343 Id.
344 Id. at 286–87.
345 Id. at 287; see also CURRIE, supra note 7, at 117.
346 Soraya, 34 BVerfGE at 287.
347 Id.
348 The history is covered in Krause, supra note 59, at 488–96.
349 See Soraya, 34 BVerfGE at 287.
350 See id. Civil law is a good example of this. The BGB was adopted in 1900, but is made relevant to current times through the collaborative work of judges and scholars, applying the methods of German legal science. In Soraya, the Court noted these techniques, stating, “Interpretation of a statutory norm cannot always be tied to its original meaning.” Id. at 288. Judges’ “freedom to develop law creatively increases” as a codification such as the BGB grows older. Id. One must also consider what reasonable function the code language serves at the time of its application.
351 See id. at 288.
352 See id. at 289.
353 See CURRIE, supra note 7, at 118 nn.90–91. The seeds of the problem lie in Article 20(3), which binds the executive and judiciary to “law [Gesetz] and justice [Recht].” Art. 20(3) GG. Gesetz ordinarily means statutory law. Recht means justice or the totality of law. The Court interpreted Recht as written and
If courts are to be bound by "justice" as well as by enacted law, Article 20(3) would seem, by this interpretation, to constitutionalize natural law as a source for rendering decisions.\textsuperscript{4} If so, one might argue, judges should reject unjust law.\textsuperscript{5} Alternatively, one might say outmoded or misguided law should be corrected by judges striving for just results,\textsuperscript{3} as seemed the goal of the \textit{Soraya} Court. Certainly \textit{Soraya} injects a degree of free judicial creativity into constitutional law not seen so explicitly in the United States since, perhaps, \textit{Calder v. Bull}\textsuperscript{57} and its famous debate between Justices Chase and Iredell.

Nevertheless, natural law can be a perilous course, as well as an enriching one, as American battles over the theory attest.\textsuperscript{3} Recognizing this, the Constitutional Court has mainly sought to cabin the temptation to authorize judicial usurpation of parliamentary supremacy. The \textit{Soraya} Court, in authorizing judges to fill a gap left by the Civil Code, was "careful to couch its reasoning in terms of statutory interpretation, not of any right to defy the legislature."\textsuperscript{359} The Court has applied this technique, in reliance on \textit{Soraya}, to other cases as well.\textsuperscript{360} But the Court, in still other cases, has been clear in recognizing the obligation of judges to adhere to statutory law, thereby reigning judicial discretion.\textsuperscript{361}

Contrasting this creative interpretivism with American law, it is worth observing that American law does not resonate with the language of "creative jurisprudence," as in German law. Our constitutional strategy is couched in the language of interpretivism, even if activist results are thereby reached.\textsuperscript{362} Perhaps the German Court is simply more forthright about the judicial enterprise, although we have our moments

\textsuperscript{4}There is some basis for this, since Christian natural law was an important influence on the Basic Law. \textit{See supra} note 35 and accompanying text. However, the debates over the framing of the Basic Law do not reflect this. \textit{See Currie, supra} note 7, at 119.

\textsuperscript{5}\textit{See Currie, supra} note 7, at 119.

\textsuperscript{6}\textit{See id.}

\textsuperscript{7} U.S. (3 Dall.) 385 (1798). \textit{Compare id.} at 388 (setting forth Justice Chase's natural law foundation: "There are certain vital principles in our free republican governments."), \textit{with id.} at 399 (Iredell, J. dissenting) ("[It has been the policy of all the American states . . . and of the people of the United States . . . to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. . . . The ideas of natural justice are regulated by no fixed standards . . . .").

\textsuperscript{384}\textit{Compare Lochner v. New York,} 198 U.S. 45 (1905) (using notion of freedom of contract to invalidate statute regulating work hours), \textit{with Griswold,} 381 U.S. at 486 (finding "right of privacy older than the Bill of Rights").

\textsuperscript{385}\textit{CURRIE, supra note} 7, at 120; \textit{see also} \textit{Soraya,} 34 BVerfGE at 290 (judges could "thereby fill the gap in codified sanctions that was evident respecting this violation of personality law").

\textsuperscript{386}\textit{See, e.g., 82 BVerfGE} 6, 11–15 (1990) (applying principles of \textit{Soraya} to validate, by analogy, live-in partner's right to assume deceased partner's lease, even though law spoke only of spouses).

\textsuperscript{387}\textit{See, e.g., 49 BVerfGE 304, 320 (1978), translated in Currie, supra note} 7, at 120–21 ("It is not the business of a judge who is bound by the statute and laws to cut back claims for liability that the statutes afford . . . ."). Whether natural law, or its cognates, is a justifiable measure of constitutionality is heavily debated in the scholarly literature. \textit{See Pieroth Letter, supra} note 229.

\textsuperscript{388}Like the German Basic Law, our Constitution contains many vague words that lend themselves to open interpretation. \textit{See, e.g., U.S. Const. art. I, § 7, cl. 18 ("necessary and proper"); id. amend. V, XIV ("due process"); id. amend. XIV ("equal protection")}.
of candor too.\textsuperscript{363} Still, as a matter of comparative law, it is worth observing that German constitutionalism advocates a degree of judicial creativity more pronounced than the American variety.

2. Lebach: Right to Personal Honor and Control Over Presentation of One’s Self in Society

Later in the year, the Constitutional Court, in the \textit{Lebach} decision, concluded that the privacy interests recognized in \textit{Soraya} outweighed any public speech interest in publicizing an individual’s role in a crime for which he had already paid the penalty.\textsuperscript{364} In \textit{Lebach}, a convicted robber was able to halt a planned television broadcast of a documentary film depicting, accurately, his and others’ participation in a notorious armed robbery of an army munitions depot which resulted in the death of four soldiers.\textsuperscript{365} The Court grounded its decision in the felon’s personality right in being let alone, free from publicity, so that he could concentrate on his reentry into society.\textsuperscript{366} This concern took precedence over even highly ranked expression freedoms, just as personality interests had trumped expression in \textit{Soraya}.\textsuperscript{367}

At the heart of \textit{Lebach} was the need to preserve the integrity of human personality against the sometimes intrusive influence of the outside world. “The rights to the free development of one’s personality and human dignity secure for everyone an autonomous sphere in which to shape one’s private life by developing and

\textsuperscript{363} See \textit{Casey}, 505 U.S. 849 (plurality opinion) (“The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”).


\textsuperscript{365} See \textit{Lebach}, 35 BVerfGE at 204–05.

\textsuperscript{366} See \textit{id.} at 220, 233–36.

\textsuperscript{367} In the 1970s, the Constitutional Court tended to prefer [values of] human dignity and personality rights over communication. \textit{[It]} did so by relying on Article 5(2), which states that communication rights expressly find their limits in “the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect of personal honor.” Under the Reciprocal Effect theory \textit{[Wechselwirkung]}, the values of the general law influence interpretation of basic rights, as basic rights influence interpretation of the general law. The courts of the 1970s essentially heightened emphasis of Article 1 human dignity values and Article 2 personality interests to justify their preference of these values over expression rights. Eberle, \textit{Public Discourse}, supra note 6, at 833–34 (footnote omitted). \textit{Mephisto}, \textit{Soraya}, and \textit{Lebach} are emblematic of this approach. See \textit{id.} at 834–43; Quint, \textit{supra} note 14, at 290–318.

Today, the Court attaches far more significance to expression rights, even in relationship to concepts of honor. See Eberle, \textit{Public Discourse}, supra note 6, at 852–69 (discussing Court’s restoration of communication as preferred value). Free expression is itself now viewed as an intrinsic element of human dignity. \textit{See id.} at 817; \textit{see, e.g.}, Lith 7 BVerfGE 198, 208 (1958) (noting that free expression is “the most immediate manifestation of human personality in society”). Still, dignity places limitations on expression that would be out of place in America. \textit{Compare Cripple}, 86 BVerfGE 1 (1992) (holding that one cannot call disabled person a “cripple”), and \textit{Horror Film Case}, 87 BVerfGE 209, 217 (1992) (concluding that presentation of violence, gruesomeness, or cruelty can be violation of human dignity), \textit{with R.A.V. v. City of St. Paul}, 505 U.S. 377, 381 (1992) (holding that state may not proscribe “otherwise permitted speech solely on the basis of the subjects the speech addresses”). \textit{See also} Eberle, \textit{Public Discourse}, supra note 6, at 892–94.
These values are threatened by public reporting of the crime, which "publicizes [the criminal's] misdeeds and conveys a negative image of his person in the eyes of the public." The film depicted the felon's homosexuality, and the Court was concerned that this would resonate negatively with the public, complicating the felon's reentry into society. The need to anchor personality is so strong, it seemed to the Court, that others could be prevented from examining truthful, but personal, events. Personality rights "include[] the right to remain alone, to be oneself within this [autonomous] sphere, and to exclude the intrusion of or the inspection by others." From here, it is not much of a step to the general right of informational self-determination. Personality rights also encompass[] the right to one's own likeness and utterances, especially the right to decide what to do with pictures of oneself. In principle, everyone has the right to determine for himself whether and to what extent others may make a public account of either certain incidents from his life or his entire life story.

Of course, these rights ran directly counter to the broadcasters' expression rights, guaranteed in Article 5. Expression rights are highly valued in Germany, as in America, and are themselves reflections of human dignity. Thus, the Court was faced with resolving the conflict between the two fundamental values.

In such cases, the Court strives to achieve concordance (Konkordanz) between the values, attempting to interpret both in a manner such that the essence of each can be preserved and, hopefully, optimized. This requires a careful assessment and application of differing values, which seems to work better in theory than in practice. It is not always possible to achieve such harmony in the hard realities of a case. It was not possible in Lebach.

The Court chose personality rights over expression rights. Ordinarily, the public has a significant interest in learning of a crime. However, there is an important difference between a crime that is ongoing and one that is past. If the crime is ongoing or yet being prosecuted, the public has a real need to know of the danger it may be in, the need to solve the crime, and the need to bring perpetrators to justice. Such crimes constitute an "overriding" public interest, like medical epidemics or

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369 Id. at 226, translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 416.
370 Because of the effect of mass media and the illusion of reality that a documentary film conveys, the Court worried that the film would reinforce public hostility toward homosexuality. See id. at 228–31, 233–35.
371 Id. at 220, translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 415.
372 Id.
373 Freedom of reporting is expressly guaranteed in Article 5(1), which provides: "Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship." Art. 5(1) GG.
374 See supra note 20. Concordance also follows from the objective ordering of values in the Basic Law, which is calibrated to steer society.
376 See Medical Records, 32 BVerfGE at 380.
public unrest, that may justify incursions of rights. However, in Lebach the crime was past and the felon had paid his price. Thus, the only public interest was in publicizing an event that had already occurred.

From the felon's point of view, his "right to be let alone" increases as the public's interest in receiving current, vital information, decreases.\textsuperscript{377} This follows from the Proportionality Principle. "The invasion of the personal sphere is limited to the need to satisfy adequately the [public's] interest in receiving information, while the harm inflicted upon the accused must be proportional to the seriousness of the offense or to its importance otherwise for the public."\textsuperscript{378} Consequently, it is not always permissible to "disclose the name, release a picture, or use some other means of identifying the perpetrator."\textsuperscript{379} Moreover, crucial to the development of the felon's personality was his reintegration into society so that he might find himself and reach his potential.\textsuperscript{380} These factors combined to outweigh the broadcasting rights at issue.

Lebach thus illustrates how the assertion of dignitarian rights can operate to limit other fundamental rights, even especially highly valued ones like expression freedoms. This limiting influence that personality rights may have on other rights is mainly foreign to American law.\textsuperscript{381} Lebach further illustrates the communitarian bent of German law. The Court's concern for reintegrating the felon into society took precedence over individual and social interests in expression.\textsuperscript{382} It is hard to find a more dramatic contrast with American law; it is a contrast which illustrates the strength of dignity and personality in German law and society. Certainly one does not ordinarily find such solicitude for individual welfare in American law.\textsuperscript{383} On its face, Lebach is also a remarkable act of judicial activism: The Court inferred rights from the textual enumeration of personality rights to eclipse textually secure expression rights.

\textsuperscript{377}See Lebach, 35 BVerfGE at 233–34 (“[O]nce [a] criminal is convicted... [the] public ordinarily has no interest in repeated invasion of a criminal’s [private] sphere.”).

\textsuperscript{378}Id. at 232, translated in \textit{CONSTITUTIONAL JURISPRUDENCE}, supra note 8, at 416.

\textsuperscript{379}Id.

\textsuperscript{380}See id. at 235–36, translated in \textit{CONSTITUTIONAL JURISPRUDENCE}, supra note 8, at 417 (“The 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 a further discussion of the crime...”). This concern follows from the Social State Principle. See \textit{id}.

\textsuperscript{381}A notable exception under American law is trial publicity, a protected free speech activity, which may nevertheless impugn due process. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (holding that criminal defendant did not receive fair trial consistent with due process because trial judge failed to protect defendant from "massive, pervasive, and prejudicial publicity that attended his prosecution").

\textsuperscript{382}See Lebach, 35 BVerfGE at 235–36: Not only must the reformed felon be prepared to return to free, human society, but also society must be ready to accept him. Constitutionally this follows, self-evidently, from a society in which human dignity stands in the center of its value order and is obligated by the principles of the Social State. As a rights bearer of human dignity, the felon too must have a chance to reintegrate into society.

\textsuperscript{383}Id. See, e.g., DeShaney, 489 U.S. at 195 (holding that state has no duty to protect life, liberty, or property against invasion by private citizens). \textit{But cf.} Goldberg, 397 U.S. at 261 ("Suffice it to say that to cut off a welfare recipient in the face of... 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.” (quoting Kelly v. Wyman, 294 F. Supp. 893, 899–900 (1968))).
In assessing Lebach against the backdrop of American law, it is quite remarkable how this case empowers individuals to control dissemination of truthful information about their personal affairs. It is astounding from our perspective to think that accurate reporting of an event, especially one with public significance, could be considered an invasion of personality. This goes well beyond any American action for libel or invasion of privacy. The Constitutional Court thus seems to be picking up the call by Warren and Brandeis for a general right to privacy, an argument never fully developed in America. Of course, in America, the positions are reversed: Speech values predominate over dignitarian values.

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384 Judge Posner captures the sense of American law well: "[W]e have no right, by controlling the information that is known about us, to manipulate the opinions that other people hold of us." Posner, supra note 284, at 408.

385 Under American law, expression interests would probably predominate in a case like Lebach. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (refusing to allow state to impose liability on newspaper for publishing rape victim's name); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (holding that state may not sanction accurate publication of victim's name listed in public records). But see Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 43-44 (Cal. 1971) (remanding for determination whether publication of plaintiff's name in connection with criminal activity 11 years after plaintiff's involvement violated right of privacy); Restatement (Second) of Torts § 652D cmt. k (tentative draft no. 22, 1976) (suggesting that lapse of time since event making individual public figure is factor in determining whether publicity unreasonably reveals facts about person who has resumed private and lawful life).

386 Picking up the call by Professor Cooley for a right "to be let alone," THOMAS M. COOLEY, TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888), Warren and Brandeis argued for a fully developed right to inviolability of personality in their seminal article. See Warren & Brandeis, supra note 59, at 193, 205, 207. Other prominent scholars have, from time to time, furthered this call. See Roscoe Pound, The Interests of Personality, 28 HARV. L. REV. 445, 445-46 (1915) (discussing individual interest in honor and reputation).

Despite these strong calls, American privacy law never fully developed as German law has. In significant part, this may be due to conceptual confusion as to what privacy is. As Professor Keeton observes, "To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff [appropriation of, for example, one's name or likeness; unreasonable intrusion; public disclosure of private facts; and false light in the public eye], which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be left alone.'" W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 851 (5th ed. 1984). Conceptually, such privacy is grounded in a mix of concepts: property (appropriation), confidentiality (unreasonable intrusion and public disclosure of private facts), and harm to feelings (false light). In comparison to German law, American privacy lacks an architectonic concept, such as human dignity or personality, which may have facilitated its natural growth.

Today, moreover, First Amendment considerations have eclipsed the tort rights of public disclosure and false light. The tort of appropriation is grounded in the market economy, protecting against unauthorized use for money or profit. Thus, it exists as property, not a personality emanation. That leaves only unreasonable intrusion as a sound protection of the person.

Little remains, therefore, of Warren and Brandeis' original aim. See Harry Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 333-39 (1966) (criticizing tort of privacy as vague on basis of liability, theory of damages, and basis for prima facie case); Mintz, supra note 284, at 427 (asserting that right to be let alone "is so vague and so broad that it probably does more jurisprudential and philosophical harm than good"); Diane L. Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 CORNELL L. REV. 291, 362-65 (1983) (arguing that tort of privacy should not be preserved because it encourages litigation and does not identify exchanges of information that deserve protection).
3. Böll: Right to Personal Honor and One’s Own Words—Right Not to be Misquoted

In Böll, a television commentator criticized the Nobel-prize winning author Heinrich Böll for allegedly making statements that aided terrorism, which was, and to an extent still is, an acute problem for Germany. In making his charge, the commentator misquoted Heinrich Böll. Böll asserted that the misquote invaded his sphere of personality. A state supreme court agreed with Böll, but the Federal Supreme Court dismissed the action.

Breaking new ground, the Constitutional Court determined that the dismissal of the suit violated Böll’s personality rights because an individual has a constitutional interest in not being misquoted. A misquote

impair[s a person’s] constitutionally guaranteed general right to an intimate sphere. Among other things this right includes personal honor and the right to one’s own words; it also protects the bearer of these rights against having statements attributed to him which he did not make and which impair his self-defined claim to social recognition.

The Court went on to say: “The use of a direct quotation as proof of a critical evaluation is . . . a particularly sharp weapon in the battle of opinions and very effective in undermining the personality right of the person being criticized.” In essence, a speaker becomes a “witness against himself” in the contest for public opinions. These wounds were particularly grievous because the personal attack was made on television, assuring broad dissemination.

The contrast with American law governing the use of false quotations is dramatic. In the recent Supreme Court case, Masson v. New Yorker Magazine, Inc., the Court determined that the use of deliberately altered quotations in a published interview was protected speech because such conduct did not rise to the standard of proscribable actual malice falsity established in the landmark case New York Times Co. v. Sullivan. In the absence of such malice, free speech and the social interest in

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305 BVerfGE 208 (1980).
306 The commentator stated: “Heinrich Böll characterized the liberal state [Rechtsstaat]—against which the [terrorists’] violence was directed—as a ‘pile of dung’, and said that he saw only ‘the remnants of decaying power, which are defended with ratlike rage.’ He accused the state of pursuing the terrorists ‘in a pitiless hunt.’” Id. at 209, translated in Quint, supra note 14, at 332 n.265. There have also been recent terrorist attacks in Germany. For example, Alfred Herrhausen, head of Germany’s largest bank, Deutsche Bank, was assassinated in 1989. Detlev Rohwedder, leader of the Treuhandanstalt, the agency set up to privatize assets of former East Germany following reunification in 1990, suffered the same fate. See Timothy Aeppel, Murder Heightens Eastern German Crisis, WALL ST. J., Apr. 3, 1991, at A17.
307 See Böll, 54 BVerfGE at 211–13.
308 Id. at 217, translated in CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 419.
309 Id. at 218.
310 See id. at 216.
311 See 501 U.S. at 517.
"uninhibited, robust and wide-open" public discourse were found more important than privacy.

The contrast between Böll and Masson thus further illuminates the differing value structures of the two countries. In Germany, at least in the 1970s and early 1980s, personal honor, rooted in Article 1 human dignity and accompanying Article 2 personality rights, outweighed expression rights in certain circumstances. In America, by contrast, such personality interests never outweigh public discourse unless one can prove the speech fits the narrow category of actual malice falsity, or other such enumerated exceptions to protected speech. In this way, human dignity, and its particular radiation of personal honor, seems the ultimate value of the German legal order, whereas free speech seems to enjoy this status in America.

Another aspect of Böll illustrates a further contrast with American law. The violation of Böll's personality rights arose from a court's nonaction in foreclosing Böll's right to redress, as compared to the more conventional official action which invades the right. In German law, this could be justified from the positive dimension of rights, which obligates the state to create the conditions in which rights can thrive—here Böll's right to the integrity of his personality. Lacking this positive conception of rights, American law is unlikely to yield an outcome as in Böll, where the Constitutional Court found that there was no Article 5 protection for false statements, such as the misquote. Thus, Böll's personality rights, protected in Germany, would not have found protection in America.

VI. IDENTITY, SELF-DETERMINATION, AND AUTONOMY

A final strand of German personality law relates to attributes of identity and personal self-definition. This strand is also grounded in the innermost reach of personhood, as are those other strands emanating from the personal sphere discussed in Part IV. These areas also help define who one is in relationship to the world. They thus entail an element of self-determination and autonomy, as in American law. In fact, this strand of German law has the greatest overlap with American law. Accordingly, German law will be discussed closely against the backdrop of American law, illuminating points of convergence and divergence.

As in American law, there are many themes in German autonomy law. These include the right to know one's parenthood and heritage; the right to determine one's...
sexual identity,\textsuperscript{400} including having official records changed to reflect one's chosen
gender; and certain rights to choose one's name.\textsuperscript{401} Some of these same themes
resonate in American law. For example, rights to know one's heritage\textsuperscript{402} and sexual
autonomy\textsuperscript{403} have been major themes in American law. However, the American cases
proceed from an assumption of privacy, rather than from dignity or personality, and
reach conclusions different from the German cases. Other American privacy themes,
such as decisions relating to marriage, procreation, and contraception,\textsuperscript{404} are absent
from German law. From the German standpoint, however, this may simply reflect the
Constitutional Court's lack of opportunity to enumerate these rights. Certainly the
Basic Law and case law seem to offer sufficient textual and precedential authority to
support this endeavor.\textsuperscript{405} These points are best brought out through a comparative look
at the two laws, through the lens of German law.

\textbf{A. Right to Know One's Heritage}

The right of a person to know her heritage, including the identity of her
biological parents, has been an important theme of German law. Two major cases of
the Constitutional Court have addressed this topic, the recent \textit{Right to Heritage II},\textsuperscript{406}
and its predecessor, \textit{Right to Heritage I}.\textsuperscript{407} Both cases are important. \textit{Right to Heritage}
\textit{I} adds to the range of substantive personality rights by holding that knowledge of one's
heritage is integral to healthy personality development and self-identity. \textit{Right to
Heritage II} is noteworthy in a number of ways. First, it is among the most recent of the
Court's pronouncements on substantive personality rights, confirming the Court's
conclusions in \textit{Right to Heritage I}. Second, the Court employed a new methodology
in the case to protect substantive personality rights: a tightened means/end analysis
under the Proportionality Principle. \textit{Right to Heritage II}, therefore, cements the
heightened scrutiny methodology employed by the Court to protect freedom of
expression rights in the 1990s.\textsuperscript{408} Third, the case lays out the proper role of the Court
within a constitutional democracy. Although the Court should strive to respect the
legitimate decisions of the majoritarian process, it must intervene to protect important
values of the constitutional order.

\textsuperscript{400}See \textit{Transsexual Case}, 49 BVerfGE 286 (1978).
\textsuperscript{401}See \textit{Name Change Case}, 78 BVerfGE 38 (1988).
\textsuperscript{402}Cf. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (plurality opinion) (holding that due
process does not require recognition of right of natural father to challenge legitimacy where state statute created
presumption that mother's husband was child's father).
\textsuperscript{403}Compare \textit{Bowers v. Hardwick}, 478 U.S. 186, 190–96 (1986) (refusing to recognize fundamental
(extending fundamental right to use contraceptives to single persons).
\textsuperscript{404}See authorities discussed \textit{supra} notes 173–78 and accompanying text.
\textsuperscript{405}See \textit{supra} notes 53–74 and accompanying text.
\textsuperscript{406}See \textit{Right to Heritage II}, 90 BVerfGE 263 (1994).
\textsuperscript{408}See Eberle, \textit{Public Discourse}, \textit{supra} note 6, at 852–59. This heightened scrutiny review is now
generally applied in rights analysis.
At issue in both cases were provisions of the family law, book four of the German Civil Code. The concern in Right to Heritage I was that these provisions did not allow a child who had recently acquired majority status to pursue judicially a declaration of her legitimacy or illegitimacy so that she could determine her heritage, except when her parents had been divorced or separated for three years. Because these circumstances might not be present, the ability of young people to ascertain their identity might be foreclosed. This constricted their personality rights too severely.

Right to Heritage II dealt with another part of the family law—a two-year statute of limitation period in which to seek a judicial declaration of (il)legitimacy. If judicial process was not sought within this period (perhaps because the young person was not aware of her background or because her legal guardian pursued no process), the young person might lose any opportunity to learn of her origin.

I. Right to Heritage I

In this context, the Court announced a substantive right to learn one's heritage. "It is a violation of general personality rights ... to limit a majority age child's ability to determine her heritage to the statutorily enumerated circumstance." Relying on the sphere of interiority established in Microcensus, the Court observed: "The right to free development of personality and human dignity guarantees all individuals an autonomous area of private life formation in which they can develop and protect their individuality." Yet, "knowledge and development of individuality are closely bound with certain constitutive facts. Among these is included one's heritage." Knowledge of heritage is decisive because it reveals genetic origin and is central to individual identity. It is a "key factor for individual self-discovery and self-understanding." "As an individual character trait, ethnicity and knowledge of heritage offer individuals ... important connections to understanding and development of their own

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409 See §§ 1593-96, 1598 BGB.
410 See Right to Heritage I, 79 BVerfGE at 257. Under German law, such (il)legitimacy can only be determined pursuant to judicial proceedings, as in American law. See § 1593 BGB. Cf. R.I. Gen. Laws § 33-1-8 (1995).
411 See Right to Heritage II, 90 BVerfGE at 265; § 1598 BGB.
412 Right to Heritage I, 79 BVerfGE at 268. Note that questions concerning the determination of one's heritage implicates other constitutional guarantees. Equal protection provides that "[n]o one may be disadvantaged or favored because of his ... parentage, his race, ... his homeland and origin." Art. 3(3) GG, translated in CURRIE, supra note 7, at 344. Article 6 provides for certain marital, family, and parental rights, including parental control of child rearing, see Art. 6(2) GG, translated in CURRIE, supra note 7, at 345, and also that "[i]llegitimate children shall be provided by legislation with the same opportunities for their physical and mental development and for their place in society as are enjoyed by legitimate children." Art. 6(5) GG, translated in CURRIE, supra note 7, at 345.

The Basic Law thus provides explicitly what the Supreme Court has inferred from the Constitution. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (holding that fundamental freedoms inhere in marriage and family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (finding liberty of parents to direct upbringing and education of children).
413 Right to Heritage I, 79 BVerfGE at 268.
414 Id.
415 Id. at 269. The Court noted that biological origin is not the only determinant of personality. More "significant are multiple [life] events and experiences." Id.
individuality. Therefore, personality rights include knowledge of one's heritage.\textsuperscript{[416]} Yet, because there still might be cases where it would be impossible to determine biological origin, the Court held that "Article 2 in conjunction with Article 1, confers no right to obtain knowledge of one's heritage, rather they protect against the withholding of attainable information."\textsuperscript{[417]} The substantive right recognized by the Court, therefore, was an informational right—a right to obtain all relevant accessible information.

Measured against these requirements, the Court held the family law provisions untenable. The law had been constructed to facilitate family peace, a concern grounded in the Article 6 guarantee of marriage and family, which claims the state's "special protection."\textsuperscript{[418]} Certainly a harmonious family is important, and in cases where a marriage would be destroyed or seriously harmed, children's process rights might justifiably be limited.\textsuperscript{[419]} However, the Bundesrat had drawn the measure with too much emphasis on the interest in family peace, overshadowing the interests of the children.\textsuperscript{[420]} It was easy to envision cases in which determination of paternity would not disrupt family peace, particularly when children have reached majority status. For example, both children and their mothers or stepfathers might want to establish paternity. Or the children may already have established relations with their biological fathers, and now want to have this legally determined. For these reasons, the Court ruled that the legislature must craft a solution which would have a less restrictive (durch mildere, aber gleich wirksame Mittel) impact on young adults' personality rights.\textsuperscript{[421]}

2. Right to Heritage II

In the second case, Right to Heritage II, the Court invalidated the two-year statute of limitations period in which adults newly of age could seek judicial declaration of their biological origin. Since discovery of one's heritage could occur, in most cases, only if a child or her legal guardian (usually the mother) pursued legal process within the relevant time frame, the law might operate to foreclose any possibility for young people to discover their heritage. Out of concern for family tranquility, legal guardians might not act, or might not inform their children that they are illegitimate. Certainly the statute created a conflict between the child's best interests and the family's.\textsuperscript{[422]} If children did not know of their status, they could not know they had the option to pursue legal process. In this way, they might lose all opportunity to learn of their heritage.\textsuperscript{[423]} "The impossibility of clarifying one's own

\textsuperscript{[416]} Id. The Court saw significance in knowledge of heritage for individual self-discovery beyond what is documented empirically. See id.

\textsuperscript{[417]} Id.

\textsuperscript{[418]} Id. at 270; see also supra note 412 and accompanying text.

\textsuperscript{[419]} See Right to Heritage I, 79 BVerfGE at 270.

\textsuperscript{[420]} See id.

\textsuperscript{[421]} See id. at 271–74.

\textsuperscript{[422]} See id. at 273.

\textsuperscript{[423]} See id. at 272–73.
heritage can be a considerable burden and can undercut one's [inner] security." In view of this, the Court held that the law must be changed, consistent with personality rights, so that a child might learn her identity.

While these conclusions are important, the significance of Right to Heritage II lies in the methodology the Court used to reach them. The case evidences a noticeable tightening of the scrutiny employed by the Court to test incursion of personality rights. The Court stated that a law curtailing personality rights is "permissible only when it serves to protect a weighty end, is necessary, and when the end is so significant that it justifies intrusion on personality rights." Such heightened scrutiny represents a distinct tightening of the relationship between means and end, and strikes general resonance with American heightened scrutiny review. In German law, this tightened methodology can be traced to developments in rights analysis generally, particularly free expression rights. It represents a more rights-protective approach, as compared to earlier more deferential methodologies, such as that employed in Elfes, or the Deutschland-Magazin variable standard of review of the 1970s, employed in cases like Lebach or Böll.

Applying the methodology demonstrates the bite of tightened proportionality. The statute of limitations provisions at issue in Right to Heritage II "serve legal security ... [which] is an important goal. Certainly it is a considerable burden when those interested must consider who legally is the father of a child. It also serves the public interest" to bring clarity to this. However, the Court found it "questionable whether it is necessary to tie a young adult's possibility of clarifying his origin to this concern for legal security." Less restrictive alternatives could be employed. For example, the Bundestag could arrange for a young adult "to clarify his heritage ... without effect on his relatives." Perhaps young people could learn this in secret or in camera, thereby saving their relatives from disruption. Alternatively, children's knowledge of their status could become the tolling event for the statute. Certainly the legislature had to structure a closer fit between the means and the end.

As written, however, the law "considerably limits the right to know one's own heritage." Consistent with the Proportionality Principle, therefore, "the interest in legal security does not carry so much weight that it can justify this severe incursion of personality rights." Thus, at bottom, there was no justification for so curtailing personality interests.

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424 Id. at 271.
425 Id.
426 See supra notes 147, 408 and accompanying text.
427 See supra notes 142–47 and accompanying text.
428 See supra notes 364–83, 387–98 and accompanying text. Under Deutschland-Magazin, 42 BVerfGE 143 (1976), the Court applied a variable intermediate standard of review. The degree of protection varied with the severity of the rights incursion. See id. This led to inconsistency in application. See Eberle, Public Discourse, supra note 6, at 843–52.
429 Right to Heritage II, 90 BVerfGE at 271.
430 Id. at 272.
431 Id.
432 See id. at 276.
433 Id. at 272.
434 Id. at 273.
It is interesting to observe that announcement of this heightened methodology parallels the development of American law. In American law we can trace heightened scrutiny in rights analysis to the early free speech cases and, formally, to the 1942 Korematsu v. United States case, if not the famous Carolene Products footnote of 1938. Since the 1950s, strict scrutiny has become a standard part of the American legal landscape.

However, in Germany the path has been more circuitous. In Germany, as in America, the origins of heightened scrutiny lie in free expression law. The watershed 1958 Lüth case, for example, evidences the Constitutional Court’s independent analysis. However, after Lüth, expression cases went through several metamorphoses—from a low-level deferential approach of the 1970s, to a variable standard of review in Deutschland-Magazin in the 1980s, to, finally, the intensive approach of today. The Court has given personality preference as a seminal value of the legal order since Microcensus in 1969, and especially in the 1970s, starting with Mephisto, and then Soraya, where the Court valued personality rights even over expression rights. Still more intensive scrutiny of personality rights is evident in the 1983 Census Act Case and the 1989 Right to Heritage I case, for example. Finally, Right to Heritage II sets forth a formal statement of “strict” scrutiny, similar to that expressed in America in the 1942 Korematsu case. Thus, both Courts have devised similar rationales and methodologies for rights analysis. This is certainly an American export to German soil, even if as by an invisible hand.

These concerns led the Court, in Right to Heritage II, to confront more generally its role with respect to the legislature. Certainly the Court must strive to respect the legislature. Where possible, laws should be interpreted in a “constitutionally-conforming” manner. But there are limits to such deference, where, for example, “the text and intent of the legislature are in contradiction,” as they were in Right to

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439 BVerfGE 198 (1958); see Eberle, Public Discourse, supra note 6, at 808–27 (comprehensively examining Lüth).
440 BVerfGE 143 (1976).
441 BVerfGE, Public Discourse, supra note 6, at 807–08.
442 BVerfGE 1 (1969); see supra notes 188–208 and accompanying text.
443 See supra notes 315–26, 338–40 and accompanying text.
444 BVerfGE 1, 44–51, 64–66 (1983); see supra notes 260–71 and accompanying text.
445 BVerfGE 174 at 270–73; see supra notes 412–21 and accompanying text.
446 BVerfGE 90 (1990).
447 See id. at 275.
448 Id. This is an example of striving to conform legislation to the higher law of the Basic Law. This involves a process of actualization (aktualisiert) of the values of the Basic Law. See Brugger, supra note 20, at 398; see also supra note 20.
In such circumstances, "[r]espect for the democratically legitimate legislature forbids" the Court from rewriting the statute. However, "norms inconsistent with the Basic Law are invalid." The Court thus has no choice: the law must be invalidated, and the Bundestag must remedy the defect, in this case, "by the next legislative session." Such posture mirrors the role of the Supreme Court in our constitutional scheme. Both Courts, it seems, have staked out positions as last preserves of individual liberties, even if the majoritarian process must be supplanted.

The closest American Supreme Court case to the two Right to Heritage cases is Michael H. v. Gerald D., which also dealt with the right to determine legitimacy. The issue in the American case was the biological father's rights, rather than the rights of the child, who sought to maintain a relationship with her biological father. In comparison to the solicitude given children by the German Court, Victoria D. got short shrift: The law gave her no chance to establish her origin, and the Supreme Court was wholly unconcerned with this state of affairs.

Rather than establishing a child's right to know her heritage or a natural parent's right to maintain a relationship with his child, the Court valued more highly "the integrity of the marriage union," and the concern that the state might have to "recognize multiple fatherhood [which] has no support in the history or traditions of this country." Viewed from the perspective of the Germans, Michael H., in reaching an opposite outcome, seems to have sacrificed children's welfare for the sake of judicial restraint. In this way, history and tradition operate to straitjacket personality, whereas in Germany personality is free to develop in view of modern conditions.

### B. Sex, Sexuality, and Identity

Sex and sexuality are major topics in both German and American law. In German law, sex is viewed as integral to personal self-definition and identity, like other
personality rights. In America, sex is conceived as part of privacy, not personality. Thus, acts like procreation, contraception, and abortion are conceptualized as part of autonomy rights.

1. Transsexual Case

Perhaps no German case voices these themes better than the Transsexual Case, which, as its name implies, concerned an individual who was born male but desired to live as a female. The plaintiff underwent a sex change operation, which transformed him into a female as far as biologically possible. However, after the sex change, German records still listed her as male. Consequently, she sought official recognition of her acquired sex.

The question of sexual identity “belongs to the most intimate areas of personality, where all official power is removed,” the Court observed. Only the most compelling public interest would justify intrusion therein. “Human dignity . . . and free development of personality require . . . that one be allowed to determine what sex one belongs to, according to one’s psychological and physical constitution.” Physical traits, legal regulation of gender, or sexuality itself is not decisive. Rather, the Court ruled that “the striving toward unity of psyche and body” is decisive. These concerns outweigh any moral or legal limitation of such self-realization, and for these reasons, the Court held that a person is entitled to have his or her chosen sex registered in official records.

2. Transsexual Equal Protection

Based on the Transsexual Case, in Transsexual Equal Protection, the Court invalidated a requirement that an individual must be twenty-five years old before sex

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459See Sex Education, 47 BVerfGE 46, 73 (1977) (“The Basic Law has placed the intimate and sexual domain of human activity under the constitutional protection of Article 2(1) in conjunction with Article 1(1). These provisions of the Basic Law guarantee to individuals the right to determine their own view of sexuality.”); Homosexuality, 6 BVerfGE 389, 432 (1957) (“This right [of personality] comprises also the free sexual activity of persons.”).


459BVerfGE 286 (1978). The plaintiff had married, but the marriage ended in divorce after 11 years. A child came from the marriage, although the plaintiff later learned the child was not his. The plaintiff started to feel increasingly like a woman. These feelings were accelerated when one of his testicles was removed due to an accident; later the other testicle was amputated too. See id. at 290.

459Id. at 298.

459Id.

459The Court canvassed the latest scientific research on sex and identity before settling on the human spirit as the decisive factor.

459Transsexual Case, 49 BVerfGE at 299. Viewed in this way, the sex change operation would be the “realization of this goal.” Id.

459Even a future marriage to a male would not violate the morality limitation of Article 2(1). See id. at 300.

459BVerfGE 123 (1982).
changes could officially be registered. The Court held that this violated equal protection, since the requirement unjustifiably treated adults under twenty-five differently than older adults. The decisive event was the operation, according to the Court, not the age.467

3. American Law

These cases on transsexuality contrast, again dramatically, with American law. The closest American case is Bowers v. Hardwick468 which, of course, dealt with consensual homosexual activity in the privacy of the home. Bowers is notable, in the time before Planned Parenthood v. Casey, as the second death of substantive due process.469 Relying again on tradition, as in Michael H., the Court asserted that "[p]roscriptions against . . . [sodomy] have ancient roots;"470 therefore, homosexual acts could receive no constitutional protection as privacy rights. Chief Justice Burger put the moral point starkly: "Condemnation of . . . [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards."471

The role of morality and tradition as a constraint on personality rights thus reveals itself to be a defining trait in both legal orders. American morality seems to be grounded more in convention and mores; German morality reflects deep roots in Kantian idealism: dignity, self-determination, equal worth, and respect. The fate of the 1957 Homosexuality case fortifies this conclusion. Here the Constitutional Court applied moral convention to find homosexuality outside morality and, therefore, beyond personality protection. Homosexuality thus seems in accord with Bowers. However, whereas Bowers has only recently been questioned,472 Homosexuality473 has been held in disrepute for some time.474 This would seem to underscore the difference in culture. One might say America is backward looking in its tethering of liberty to tradition and convention, whereas Germany seems forward looking, embracing modern social attitudes insofar as they fit concepts of moral autonomy.

467See id. at 133. Under the Article 3 equal protection guarantee, the Constitutional Court has endeavored to achieve more substantive equality than has the Supreme Court under the Fourteenth Amendment. See CURRIE, supra note 7, at 322–28.
468478 U.S. 186 (1986).
469Compare Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) (plurality opinion) ("[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"); with Bowers, 478 U.S. at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").
470Bowers, 478 U.S. at 192.
471Id. at 196 (Burger, C.J., concurring).
4736 BVerfGE 389 (1957).
474Professors Pieroth and Schlink observe that Homosexuality’s proscription has been invalid since 1969. See PIEROTH & SCHLINK, supra note 19, at 103. The Transsexual Case’s reconsideration of the morality limitation concerning sexual attitudes is further proof of this. See Transsexual Case, 49 BVerfGE at 299–300.
C. Identity: Right to One’s Own Name

In a fashion similar to the transsexuality cases, the Constitutional Court has also determined that a person has a right to choose his or her name as a reflection of personality. This conclusion arose in the Name Change Case,\(^4\) in which a German national wished to keep his birth name rather than be registered under his Austrian wife’s maiden name.\(^4\) The Court recognized that “[a] name protects against anonymity and dissolution of personality in mass, modern industrial society.”\(^4\) It is thus part of one’s personality rights. However, the Court conversely pointed out that, while personality rights must be respected, such rights are not unlimited, but must be measured within community constraints. Thus, strangely, the Constitutional Court upheld the German customary requirement reflected in the Civil Code that married couples must maintain a common family name, which usually was the husband’s.\(^4\)

Yet, while that family name must be used for “official” purposes, the Court ruled that a person was free to use the name of her choice in personal settings.\(^4\) One can thus have two names, one for official and one for personal use—certainly an uneasy compromise between freedom and social order.

D. American Law

The direction of American law with respect to identity, self-determination, and autonomy has been quite different than German law. In American law, the root construct for these rights has been privacy, not dignity as in German law. From the privacy construct, the Supreme Court has afforded constitutional protection to a range of personal decisions relating to marriage, procreation, contraception, abortion, and family relationships, among others.\(^4\) Yet, these decisions, being grounded in privacy, facilitate individual freedom from state interference. Thus, their concern is freedom as an individual right, not the particular quality of the choice resulting from that freedom, nor the well-being of the right holder. Unlike German law, there is no real focus on the quality of human personality. Instead, the American focus is on “the right

\(^{45}\) BVerfGE 38 (1988).

\(^{46}\) Under German customary law, as codified in section 1355 of the BGB, a married couple must maintain a common family name. The name chosen for the family can be either the husband’s or the wife’s. This German customary requirement is not consistent with international practice. See id. at 40. In this case, the Austrian wife registered her family name in Austria so that she could preserve it under Austrian Law. German authorities interpreted this to mean that the couple had chosen the wife’s name as the common family name. The suit concerned the couple’s right to maintain their own names, at least officially.

\(^{47}\) The right to bear and control one’s name has deep roots in German law. See §§ 12, 823, 1004 BGB.

\(^{48}\) See Name Change Case, 78 BVerfGE at 38–39, 49 (interpreting § 1355 BGB).

\(^{49}\) The Court determined that a common family name was a highly valued legal interest, constituting an important public law relationship, and guaranteeing the “unity of the family,” which has constitutional dimension under Article 6. Families are a unit, not a collection of individual members, revealing again the communitarian bent of German law. See id. at 49. Thus, the German customary norm satisfied the Proportionality Principle. See id. at 49–50. Still, since use and choice of name lies within the protection of personality rights, one is free to choose the name used in personal or business relations. See id. at 50–52.

\(^{50}\) See supra notes 171–79 and accompanying text.
to be let alone.” These privacy rights thus map out how we can be free to be let alone from official interference. As autonomous individuals, Americans are then free to choose the values with which to constitute and govern themselves. These “choices [are] central to personal dignity and autonomy.”

However, the two legal orders differ fundamentally on the conception of dignity in this regard. For Americans dignity means the right to choose. Worth and stature follow from respect for choices. Germans share this aspect of self-determination; the difference lies in how self-determination unfolds. In America, personal autonomy is simply the right to choose. Personal autonomy is thus the value itself, an integral part of one’s rights. In Germany, by contrast, personal autonomy is an aspect of human dignity. Dignity imposes obligations as well as endows freedom. Thus, personal autonomy is relevant to shaping one’s character and personality, but that shaping is to occur, not in isolation, but within a social and moral community. True autonomy, in the German view, is to unfold in a manner consistent with moral obligations, which themselves are reflected in the Basic Law as individual and social duties. The state, official actors like the Constitutional Court, and society are all responsible partners working cooperatively with individuals to achieve this moral vision. One might say the difference between the two cultures is between American “rights-talk” and German Kantian philosopher-kings. Put another way, the difference is over the conception of autonomy, with (German) and without (American) the limiting construct of a workable definition of morality.

VII. ABORTION

No discussion of dignity, privacy, and personality in German and American law would be complete without an evaluation of abortion law. This is particularly the case because abortion has been the subject of heated debate in both countries for over thirty years, starting with the original abortion decisions, issued within two years of each other: The Supreme Court decided Roe v. Wade in 1973; the Constitutional Court decided Abortion I in 1975. In the 1990s, moreover, both Courts fundamentally rethought both decisions: the Supreme Court in 1992, in Planned Parenthood v. Casey, and the Constitutional Court, in 1993, in Abortion II. Thus, abortion is a unique opportunity to compare and contrast the constitutional visions of two leading constitutional courts in two important western democracies.

401Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (discussing Fifth Amendment protection against use of evidence gained in violation of Fourth Amendment rights).
402Casey, 505 U.S. at 851 (plurality opinion).
404Even the Courts recognized this. See Abortion II, 88 BVerfGE 203, 214 (1993); Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992) (plurality opinion) (recognizing criticism of right to abortion found in Roe v. Wade, 410 U.S. 113 (1973)).
405110 U.S. 113 (1973).
40639 BVerfGE 1 (1975).
Yet, abortion law has been so extensively discussed in both Germany and America that there is little need to discuss its particulars again here. Instead, I shall focus on the conflict between a woman's right of self-determination and a fetus' right to life as specific manifestations of dignity and personality, and as illustrations of the balances drawn between liberty and community in the two legal orders.

The most fascinating phenomenon in this regard has been the recent convergence of the two laws, in *Casey* and *Abortion II*, despite the very different legal premises of the two constitutions. In both cases, the Courts recognized a woman's right to choose concerning abortion, provided that she evaluate the consequences of the act from the perspectives of the fetus, others affected (such as the father, family, or attending medical personnel), and the community—interests made manifest in counseling, waiting periods, and related regulations. Thus, both in Germany and America, society is justified in circumscribing abortion to address these concerns, reflecting balance between individual liberty and community.

**A. The Different Premises of German and American Abortion Law**

Perhaps the best way to understand abortion in Germany and America is, first, by considering the very different premises of the two constitutions, and then moving to the similarities and differences of the two laws.

**1. Germany**

In Germany, the explicit textual enumeration of human dignity once again provides the starting point. "Developing life also partakes of the protection of human dignity," the Court asserted in *Abortion I*, since "where human life exists, human dignity attaches." Human dignity thus does not depend "on birth or a developed personality." "Everyone shall have the right to life" echoes the text of Article 2(2), and this guarantee extends to "developing life in the mother's womb" according to the Court. "Life in the sense of individual existence... begins according to undisputed biological and physiological knowledge... fourteen days after conception." Once begun, life is "a continuous event, which knows no sharp phases and does not contain

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489 Abortion I, 39 BVerfGE at 41.
490 Abortion II, 88 BVerfGE at 251.
491 Abortion I, 39 BVerfGE at 41, 46.
492 Id. at 37; see also Abortion II, 88 BVerfGE at 251 ("The Basic Law obligates the state to protect human life. The unborn belong to human life. Therefore, they also receive the protection of the state.")
distinct boundaries between the different stages of development." By this reasoning, the Court established that an unborn person is entitled to human dignity, and that the Article 2 guarantee of a right to life is an independent legal value.

In the next step of the development, the Court transformed these provisions, through objective constitutionalism, into positive commands of the German constitutional order; the state became positively charged with the duty to protect life (Schutpflicht). "This duty of protection has its basis in Article 1(1), which, after all, calls on the state "to respect and protect" human dignity as "the duty of all state authority." "The object and scope of this duty is more specifically determined by Article 2(2)," the right to life guarantee. Thus, German protection of fetal life derives from the radiation of human dignity, as reflected in the right to life clause, which then is transformed into a positive command of the state to protect. Certainly this follows both from the Nazi experience, particularly the Holocaust and the Federal Republic's reaction against it, and from the Christian natural law tradition, as made manifest in the Basic Law. Owing to this unique crystallization of values, Germany, as a matter of comparative law, can view with plausible skepticism the experiences of other lands with abortion, especially the United Kingdom and the United States, countries then and now with more liberal abortion schemes.

The duty to protect life is all-encompassing. "The duty to protect the unborn is owed each individual, not just to human life in general." This duty is imposed on all levels of state authority, especially the legislature, which makes the laws. Accordingly, "the legal order must guarantee the appropriate legal foundation for the development of the unborn in relation to its own right to life." How to do this is a matter of legislative discretion. However, the Court directed that, at a minimum, the Bundestag must declare abortion to be illegal, and must require that women carry the unborn to term. For these reasons, government has the duty to intervene against forces or people who would terminate life, and to create the proper social and economic conditions for life to thrive. Finally, government must raise public consciousness that the unborn have a right to life, through education, informational campaigns, or other means. Such certainly constitutes a remarkable assertion of proactive governmental power.

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495 Abortion I, 39 BVerfGE at 37; see also Abortion II, 88 BVerfGE at 244 ("From a biological perspective, life is a continuum that begins with the joining of egg and semen and ends with the death of the person.").
496 Abortion II, 88 BVerfGE at 203.
497 Id.
498 In Abortion I, the Court observed that Germany would not be unduly influenced by the abortion experiences of other countries on account of the uniqueness of the German value-order and the country's history with Nazism. See Abortion I, 39 BVerfGE at 60.
499 Abortion II, 88 BVerfGE at 203, 252.
500 See id. at 252.
501 Id. at 203.
502 See id. at 253 ("The fundamental prohibition of abortion and the fundamental duty to carry a child to term are two indispensable, inseparable elements of the constitutionally commanded protection.").
503 See id. at 261. "The state also had to reinforce the general public's consciousness of the claim of the unborn to protection—this duty obliged the schools, public information and counseling offices, and both public and private broadcasting." Gerald L. Neuman, Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany, 43 AM. J. COMP. L. 273, 281 (1995).
Yet, Germany is also a country committed to basic human rights, including substantial protection of privacy and personality, as we have seen. Thus, right to life guarantees cannot be applied in isolation. Countering their exercise are a pregnant woman’s rights. Her right of human dignity, as radiated in her personality rights, protects her decisional autonomy. Her right to life protects her against undue risk in the pregnancy. And her right to physical integrity, guaranteed also in Article 2(2), safeguards her bodily integrity. Thus, under the German Basic Law, abortion triggers an epic conflict among these foundational values, one certainly not easy to resolve.

In German law, this conflict among constitutional values triggers application of the fundamental principle of Concordance (Konkordanz), an attempt to maximize realization of the values at issue. We have seen this before in, for example, the conflict between personality and expression rights, particularly in the 1970s in cases like Soraya and Lebach. Resolution of the conflict in these cases was difficult at best. In the abortion cases, the conflict is even more severe. Attempting to achieve balance between rights to life and to choose seems theoretically impossible. One cannot honor a woman’s choice and yet sustain a fetus’ life in all cases. Such was the essential conclusion of the Constitutional Court. In both abortion cases, accordingly, the Court recognized that fetal life must prevail over women’s self-determination as a matter of valuation. Therefore, abortion must be treated as wrong, a violation of the values of the legal order. In both cases, however, the Court recognized that respect for the woman’s dignity and related Article 2 guarantees necessitated that the duty to bring a fetus to term be excused in certain circumscribed circumstances, such as danger to the mother’s life or health, as described more fully below. This balance resulted in women’s access to abortion upon justification in Germany.

2. America

Abortion in America proceeds from different premises. A woman’s right to choose is grounded in the right to privacy, rooted in Fourteenth Amendment liberty established by the Supreme Court in Griswold v. Connecticut. “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty . . . as we feel it is, or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” As a constitutional right, the right to choose is entitled to significant constitutional protection. Under the rights methodology prevailing at the time of Roe,
measures limiting abortion rights were subject to judicial “strict scrutiny.”

Under this tough standard of review, the Court invalidated numerous state regulations, including requiring abortions to be performed in hospitals, written informed consent provisions, twenty-four-hour waiting periods, and regulations requiring physicians to inform women of the risks attendant in the abortion procedure.

Yet, abortion is not just a matter of exercise of individual liberty, as with other American fundamental rights. There is something “unique” or “sui generis” about abortion, as the Casey Court recognized:

It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist; procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.

Yet, unlike in Germany, there is no American fetal right to life after conception, nor is there any state duty to protect life, although the state may act to protect life after the point of viability. Rather, there is a “potentiality of human life” that the state is justified in protecting. Under Roe this “grows in substantiality as the woman approaches term and, at a point during pregnancy . . . becomes ‘compelling.’” Thus, in Roe, the Court balanced the compelling points of abortion rights against the developing fetal rights. Even in Roe, the Court recognized that “[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus.” The Court fixed this balance pursuant to the trimester scheme: “[T]he abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician” in the first trimester; in the second trimester “the State [can] . . . regulate the abortion procedure in ways that are reasonably related to maternal health,” and, finally, the state can “regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother” in the third trimester.

While the Casey Court dispensed with Roe’s trimester scheme, the Court drew the line circumscribing a woman’s autonomy at the same point of fetal viability as the Roe Court had, although medical developments, in the ensuing twenty years had

510 Id. at 155. “Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” Id. Strict scrutiny is, of course, still the prevailing methodology for rights-analysis, although there have been notable departures from it, such as in Casey. See infra notes 547–50 and accompanying text.
512 Casey, 505 U.S. at 852 (plurality opinion). Even in Roe, the Court recognized that abortion was different than other situations involving rights. See Roe, 410 U.S. at 159.
513 The Roe Court considered carefully and rejected the notion of a fetal right to life, stating that “the unborn have never been recognized in the law as persons in the whole sense.” 410 U.S. at 162.
514 Id. at 164.
515 Id. at 162–63.
516 Id. at 159.
517 Id. at 164–65.
pushed this point back four weeks. Thus, in America, there is only one constitutional right at issue, a woman’s autonomy right, as compared to the constellation of rights at stake in Germany. Against autonomy rights is balanced the strength of the interest in fetal life, as exercised by the state pursuant to the trimester scheme of Roe, or its replacement, the undue burden standard of Casey. The Court in Casey was more solicitous of fetal interests than was the Roe Court. A closer look at the German and American decisions illustrates how they balanced dignity, personality, and privacy in abortion law.

B. The Abortion Decisions

1. Germany

(a) Abortion I

The 1975 Abortion I decision of the Constitutional Court, a long and complicated decision filling ninety-five pages of the official reporter, invalidated a federal statute that would have decriminalized abortion in the first trimester, provided the woman received counseling and medical advice, and the procedure was performed by a licensed physician. After the first trimester, abortion would have been permitted “if the pregnancy threatened the life of the woman or serious damage to her health, and within twenty-two weeks if it appeared that the child would be born with severe birth defects.”

The federal statute was a product of the center-left coalition between the Social Democrats and Free Democrats. Acting pursuant to the procedure for abstract judicial review, the conservative Christian Democrats in the Bundestag and several Länder challenged the statute. The Court held that decriminalization of abortion

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518 See Casey, 505 U.S. at 870 (plurality opinion). “We conclude the line should be drawn at viability, so that before that time the women has a right to choose to terminate her pregnancy.” Id.

519 See Casey, 505 U.S. at 877 (plurality opinion). “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” Id.

520 See id. at 869. “The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.” Id.

521 See Neuman, supra note 503, at 274 (citing Fünftes Gesetz zur Reform des Strafrechts, 1974 BGBI. I S.1297; Donald P. Kommers, The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?, 10 I. CONTEMP. HEALTH L. & POL’Y, 1, 6 (1994) (noting that German justices, particularly Justice Ernst Benda, were quite familiar with Roe and American constitutionalism, because Justice Benda had been student at University of Wisconsin in the 1950s).

522 Neuman, supra note 503, at 274–75.

523 See id. at 274.

524 The Constitutional Court may decide questions concerning the interpretation or compatibility of federal or state law with the Basic Law in the “abstract,” meaning outside the context of a real legal dispute, at the request of the federal or state government or of one-third of the members of the Bundestag. See Art. 93(1) GG. In this case, the Länder of Bavaria, Baden-Württemberg, Rheinland-Pfalz, Saarland and Schleswig-Holstein filed suit. See Abortion I, 39 BVerfGE at 18. Abstract judicial review is thus most like the notion of an advisory opinion in American law, which, since the founding of the Republic, the Supreme
during the first trimester violated the state duty to protect the life of the fetus (Schutzpflicht), as guaranteed by human dignity and the right to life.\textsuperscript{525} The Christian Democrats were thus able to accomplish judicially what they were unable to accomplish politically. As in America, commitment to independent constitutional review necessitates occasional supplanting of the majoritarian process.

According to the Court, the state must apply criminal sanctions to protect fetal life in order to realize the value structure of the Basic Law, at least in the absence of suitable alternative protective measures.\textsuperscript{526} Nevertheless, certain exceptional circumstances demanded too much from pregnant women who, after all, also had certain dignitarian and personality rights. In reaching this balance, therefore, the Court approved certain of the "indications" for legal abortion provided for in the statute: threats to women's health or life and severe birth defects. The Court also declared an indication for pregnancy resulting from sex crimes, such as incest or rape, and more broadly, for a "general situation of need" indication when "continuation of the pregnancy would impose extreme hardship on the woman comparable in intensity to the other indications."\textsuperscript{527} Otherwise, abortion must be made a crime. "The constitutionally commanded legal disapproval of abortion must clearly be reflected in the legal order."\textsuperscript{528}

The Bundestag passed a new law that implemented these teachings. In practice, most women could obtain an abortion if they desired under one of the indications, especially the general situation of need. This state of affairs led supporters of Abortion I to argue that new, stricter legislation was required. Supporters of abortion rights, by contrast, argued that the resulting legislation was too restrictive of abortion rights.\textsuperscript{529} Thus, one might plausibly conclude that Abortion I did not settle the abortion controversy in West Germany.

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\textsuperscript{525}See Abortion I, 39 BVerfGE at 42–43.

\textsuperscript{526}See id. at 45–47. The Court noted that how to protect unborn life was fundamentally a decision for the legislature. See id. at 44. However, in the case of abortion, the value of life itself was implicated, a premier value of the legal order, and, therefore, the state must protect it through criminal measures. Abortion is an "act of killing" that the legal order must condemn in strong terms as a way of educating the nation on the value of life. Id. at 46.

\textsuperscript{527}Id. at 49–50.

\textsuperscript{528}Id. at 53.

\textsuperscript{529}See Neuman, supra note 503, at 276. The implementation of the abortion law also varied by region, "leading women to travel within Germany, as well as to the Netherlands, for abortions." Id. In the context of further abortion litigation, the "Court has held that payment for abortion by public medical insurance carriers does not violate any right of fellow beneficiaries, and that the requirement of wage continuation for employees undergoing abortions does not violate the property rights of employers." Id. at 276–77 (citations omitted). This contrasts with the American experience. See Harris v. McRae, 448 U.S. 297, 326–27 (1980) (upholding Hyde amendment, which prohibited use of federal Medicaid funds for abortion unless life of mother was in danger); Maher v. Roe, 432 U.S. 444, 469–70 (1977) (holding that state regulation may deny funding for nontherapeutic abortions).
(b) Abortion II

The Constitutional Court was presented with a wholly different problem in 1993, when it was asked again to review the constitutionality of abortion as provided in the Pregnancy and Family Assistance Act (1992 Abortion Reform Act).\(^5\) With the unification of the two Germanies came the necessity of reconciling the more restrictive West German abortion law with the more liberal East German one.\(^51\) The 1992 Abortion Reform Act was the product of compromise between the Social Democrats and Christian Democrats of the West and the parties of the East. The new law eliminated the requirement of third-party determination of indications during the first trimester of pregnancy.\(^52\) Abortion, instead, would be "not unlawful" (\emph{nichts rechtswidrig}) if the woman chose to terminate her pregnancy after mandatory counseling designed to induce her to "make her own decision of conscience with awareness of responsibility," and after a three-day waiting period designed to reinforce the importance of choice.\(^53\) After the first trimester, indications excusing the unlawfulness of abortion could only be met upon third-party determination of a serious birth defect or a threat to the woman's own life. Abortion due to birth defects also required counseling, and was not permissible after twenty-two weeks.\(^54\) In essence, the 1992 Abortion Reform Act had converted the criminal provisions of the 1975 Act into mandatory counseling provisions, substituting persuasion for the sanction of the criminal law. Moreover, the 1992 Abortion Reform Act spoke to abortion in the context of broad-ranging social protection of women and children, including provisions providing for day care, vocational training and placement for primary care parents, housing and rent control, and increased welfare benefits for pregnant women and single parents, all measures designed to encourage women to bring their pregnancies to term.\(^55\)

In a 6-2 decision filling 164 pages of the official reporter, the Constitutional Court reaffirmed the essential core of its 1975 \emph{Abortion I}, "Dignity attaches to the physical existence of every human being... before as well as after birth.... Unborn life is a constitutional value that the state is obligated to protect that attaches to each human life, not life generally."\(^56\) In keeping with this holding, the Court found that the

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\(^{50}\) The formal name of the Act was a mouthful: Act for the Protection of Prenatal-Developing Life, for the Promotion of a More Child-Friendly Society, for Assistance in Pregnancy Conflicts and for the Regulation of the Termination of Pregnancy (1992 Abortion Reform Act), 1992 (BGBl. I S.1398) (amending §§ 218-19 of the German Criminal Code or \emph{Strafgesetzbuch} [StGB]). These amended sections constitute the 1992 Abortion Reform Act.

\(^{51}\) The law of East Germany granted women the right to have an abortion during the first trimester. The Unification Treaty made special provision for abortion, permitting East German law to remain in effect in the East until new, unified German legislation could be worked out. See Kommers, supra note 521, at 10-11; Neuman, supra note 503, at 277. Many expected that the East German law would provide the basis for compromise.

\(^{52}\) See 1992 Abortion Reform Act (codified as amended at § 218(a)(2) StGB).

\(^{53}\) Id. (codified as amended at § 219(1) StGB); see also \emph{Abortion II}, 88 BVerfGE at 299.

\(^{54}\) See 1992 Abortion Reform Act (codified as amended at §§ 218a(2)-(3) StGB). The provisions are discussed in Kommers, supra note 521, at 13-14, and Neuman, supra note 503, at 277-78.

\(^{55}\) See 1992 Abortion Reform Act, arts. 1-16.

\(^{56}\) Abortion \emph{II}, 88 BVerfGE at 252.
provisions of the 1992 Abortion Reform Act making all abortions legal during the first trimester were unconstitutional. Consistent with Abortion I, the Court further held that the statute must make clear that "as a matter of general principle abortion is, in fact, illegal, and that the pregnant woman has a legal duty, again as a matter of principle, to carry the child to term. The fundamental prohibition of abortion and the fundamental duty to carry the child to term are two inseparably bound elements of the constitutionally commanded duty of protection." 537

The major change in Abortion II was that the state, in fulfilling its duty to protect life (Schutzpflicht), did not have to criminalize all illegal abortions. Therefore, an abortion, while "illegal," might nevertheless be available, although only upon justification, such as pursuant to the medical, eugenic, or criminal indications. Moreover, an abortion, under what had been the social indication, could be obtained without punishment if the state created a comprehensive counseling system with the goal of convincing the pregnant woman to carry the child to term. 538 The criminal-based system of Abortion I had proved ineffectual, creating antagonism among women; the state felt a counseling system would be more effective, appealing to women's sense of responsibility and trust. 539 Thus, the counseling system represented an adjustment of the law to meet changed social conditions. In the ensuing twenty years since Abortion I, women had become more assertive and self-deterministic; the law recognized this changed reality. 540

From an American perspective, this counseling system constituted content-based advocacy, questionable from a First Amendment view, designed to educate women about their maternal responsibilities. 541 Yet, these counseling provisions had the significant effect of recognizing, for the first time in Germany, that a woman could have an abortion during the first trimester of her pregnancy for any reason without fear of criminal punishment:

[T]he state may validly conclude that in view of the reality of abortion in modern society, the more effective solution to the problem of unwanted pregnancy is to stay the hand of would-be prosecutors, to make an ally and friend of the woman in distress, to forswear threats of punishment, and to induce her to cooperate voluntarily with the state without any fear of retribution or loss of personal integrity. 542

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537 Id. at 253.
538 See id. at 257. To be effective, counseling must be backed up with social support measures designed to encourage women to decide against abortion. See id. at 258.
539 See Neuman, supra note 503, at 282. This had been the position of Justice Rupp von Brünneck in her dissent in Abortion I, 39 BVerfGE at 76, 85–86.
540 See Komsers, supra note 521, at 19 (noting that social context had changed radically since 1975, evidenced by 1990 opinion polls indicating that most Germans supported easing restrictions on abortion).
541 The Court noted that counseling could be effective only if the end result remained open. The Court stated that the counseling must be designed to help the woman to resolve her dilemma whether to have the child or not. Yet, "the counseling ... must necessarily be directed to the protection of unborn life." Abortion II, 88 BVerfGE at 282. "The counseling should encourage, not frighten; enhance understanding, not instruct; reinforce responsibility, not patronize." Id. at 283.
542 Komsers, supra note 521, at 20 (citing Abortion II, 88 BVerfGE at 282).
The Court then scrutinized the counseling provisions to assure that they were sufficiently attentive of the fetus' right to life. Several of the provisions were struck as being insufficient. These provisions were held insufficient because they did not adequately proclaim and protect the right of the fetus to live; they did not describe adequately the social welfare and public support measures that would encourage a woman to bring the fetus to term; they did not guarantee with enough clarity the right of the woman to return to her job after the pregnancy; they did not encourage sufficiently the woman to state her reasons, resolve her conflict, and preserve anonymity; and the provisions did not sufficiently provide for support, or protect against outside pressures of family or friends supporting or militating against pregnancy. Moreover, the counselor, not the woman, had to certify when the counseling was complete. For these reasons, the Court ordered the Bundestag to rework the counseling provisions.

2. America

From its start, Roe was a controversial decision. The ensuing twenty years have done nothing to lessen the controversy. Casey, like Abortion II, provided the occasion for the Supreme Court to rethink fundamentally its original decision on abortion, which the Court did in a long and complicated opinion of ninety-four pages, echoing the length, if not the complexity, of the German cases. To the surprise of many, the Casey Court confirmed the essential holding of Roe:

[1] a recognition of [a woman's right] to choose to have an abortion before viability and to obtain it without undue interference from the State . . . [2] confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health . . . [and 3] the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Yet, the Court also redefined the balance between women's autonomy rights and fetal rights, as struck by the state. The Court replaced Roe's trimester framework with an

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543 See Abortion II, 88 BVerfGE at 301–09. For detailed discussion of these provisions, see Neuman, supra note 503, at 282–84. The state's obligation to protect unborn life also required it to take measures that prevented situations which would place undue burdens on pregnant women. Thus, the state should protect against educational and job discrimination, compensate through social security law long periods of uncompensated childrearing, and provide family subsidies as a means of preventing abortion, among other measures. In short, the state needed to create a "child-friendly" society. See Abortion II, 88 BVerfGE at 258–61; see also Neuman, supra note 503, at 280–81.

544 See Abortion II, 88 BVerfGE at 286.

545 See, e.g., Ely, supra note 490, at 927 (stating that "difficult questions yield controversial answers"). Like the German abortion cases, Roe was long, filling 65 pages in United States Reports.

546 See Casey, 505 U.S. at 844 (plurality opinion) ("Liberty finds no refuge in a jurisprudence of doubt. Yet nineteen years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, . . . that definition of liberty is still questioned.").

547 Id. at 846.
“undue burden” test, by which the Court would evaluate interference with women’s autonomy to determine if it placed “a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”

The Court invented the “undue burden” test for Casey, uncannily similar to the “unreasonable burden” (unzumutbar Belastungen) standard of the Constitutional Court, lending support to the sui generis aspect of abortion, just as the Constitutional Court had invented a state duty of protection of life in the abortion cases. Perhaps abortion is indeed a unique act, or perhaps it is an issue over which it is difficult to think objectively and apply standard rights methodologies. As with the abortion cases, elaboration of the right or rights would depend on their application in concrete circumstances. In Casey, this called for application of the undue burden standard.

Applying the undue burden test to the Pennsylvania law at issue, the Court invalidated a spousal notification requirement, but upheld the other four provisions: informed consent, twenty-four hour waiting period, reporting, and parental consent requirements. Of these provisions, informed consent and the twenty-four hour waiting period are noteworthy, since they provide both the most graphic contrast with the Roe approach, and the greatest similarity with Abortion I.551 The informed consent provision requires the physician performing the abortion to inform the woman of the nature of the procedure, the attendant health risks, the gestational age of the fetus; and the availability of state information concerning social welfare programs, such as “information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.”

This provision bears an uncanny resemblance to the mandatory counseling provision validated in Abortion I.552 Like that provision, the informed consent requirement in Casey is not value-neutral, but is “designed to influence the woman’s informed choice between abortion or childbirth.” As such, under American free speech principles, it could quite plausibly be considered content-based and, therefore, subject to heavy justification under strict scrutiny analysis. Likewise, if the choice over abortion were

548 Id. at 877.
549 The Court described the test as follows: “Unreasonableness can, to be sure, not arise out of circumstances that remain within the realm of normal pregnancy. Rather, burdens must exist that demand a measure of sacrifice of one’s own life values that are not to be expected from women.” Abortion I, 88 BVerfGE at 257.
550 See Casey, 505 U.S. at 857 (plurality opinion) (“Finally, one could classify Roe as sui generis.”).
551 See id. at 879–900. The spousal notification requirement was invalidated on the basis of equality between the sexes and the belief that its implementation would lead to domestic violence and abuse. See id. at 891–98.
552 See Akron, 462 U.S. at 449–51 (invalidating informed consent, 24-hour waiting periods, and other provisions as imposing excessive burdens on access to abortion).
553 Casey, 505 U.S. at 881 (plurality opinion).
554 See Abortion II, 88 BVerfGE at 257–59, 282–84; see also supra notes 536–44 and accompanying text.
555 Casey, 505 U.S. at 881 (plurality opinion) (quoting Akron, 462 U.S. at 444). Under the provision, the physician “must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.” Id.
considered a fundamental right, the provision would ordinarily be subject to strict scrutiny for that reason as well. This, in fact, had been the Supreme Court’s conclusion under the Roe regime.556

A similar analysis applies to the twenty-four hour waiting period. This provision, too, bears striking resemblance to the three-day waiting period validated in Abortion II.557 Significantly, both waiting periods are designed to force the woman to reflect carefully about the consequences of her choice. Combined with the laws’ mandatory counseling provisions, the requirements are designed to influence the woman to carry the fetus to term, if at all possible. As was the informed consent provision, waiting periods were previously infirm under the Roe approach.558

3. Convergence and Divergence in Abortion Law

In assessing modern abortion law in both countries, what seems most remarkable is the growing convergence of the two laws, notwithstanding different constitutional premises and different initial judicial approaches. Both countries provide for qualified access to abortion during the first trimester, if desired, provided that the pregnant woman undergoes mandatory counseling designed to convince her to have the child, and provided that she consider this possibility for a specified period prior to undergoing the abortion procedure. This is a remarkable degree of convergence over abortion.

This seems especially so considering the very different precedents the two Courts confronted in the 1990s. Abortion I was a very autonomy-rights restrictive, pro-life protective decision; Roe was the opposite. The contrast between Abortion I and Roe was itself quite fascinating: Both Courts acted quite countermajoritarian in achieving opposite outcomes; they regulated with precision the extent of abortion “rights” and “duties” in a manner that plausibly left them open to attack for overstepping separation of powers by acting “legislatively.”559 Starting from these precedents, the Constitutional Court in Abortion II ameliorated some of the harshness of Abortion I from the woman’s perspective by decriminalizing abortion, and thereby allowing women, for the first time, to have abortions during the first trimester provided they followed the statutory requirements.560 In Casey, the Supreme Court restructured the equation set in Roe to address more fully state and community interests in protection of fetal life, similar to the German abortion cases. It might be said that Casey thereby recognized
the magnitude of a fetal claim to life, and the community’s interest therein, for the first
time, as the Constitutional Court had done in 1975 in Abortion I. In essence, the two
Courts split the distance between them. 561

There are deeper similarities and differences in the two laws. The differences in
treatment of abortion illustrates the different rights regimes at issue. In Germany, a
constellation of rights apply, and these rights are coupled with duties. On behalf of the
fetus, human dignity and the right to life combine to impose on the state an obligation
to protect life. This exists in counterpoise to the woman’s autonomy rights, as derived
from her guarantee of human dignity, and her rights to personality and bodily integrity.
Especially when coupled with the affirmative state duty to protect and nurture life,
these rights and duties illustrate the twin positive and negative dimensions of German
constititutional guarantees. In America, the equation seems simpler: There exists a
constitutional right of privacy which confers limited decisional autonomy, and is
balanced against the potentiality of life.

The most notable difference in the enumerated values of the two constitutions is
the right to life. In Germany this is explicitly enumerated in Article 2(2). The
Constitutional Court interpreted this protection, in conjunction with human dignity,
to encompass fetal life. 562 By contrast, the American Constitution is silent regarding
a right to life generally, including that of a fetus. Moreover, through textual exegesis,
the Court in Roe determined that rights apply only postnatally. 563

Germany’s pro-life focus is a product, preeminently, of its recent Nazi history,
which drove Germans deep into their tradition, notably Kantian morality. 564 For this
reason, abortion must be “wrong” in the eyes of society, even though it might be
allowed in certain limited circumstances. By contrast, it is simply legal in the United
States. In this way, there is more of an educational, or hortatory value to German law,

561 It would seem the two Courts had their eyes on each other. American constitutional law is well
known in Germany. Justice Benda, in particular, was quite cognizant of Roe in structuring Abortion I. See
supra note 521 and accompanying text. On the current Court, Justice Dr. Dieter Grimm is well versed in
American law, especially free speech law. See Dieter Grimm, Die Meinungsfreiheit in der Rechtsprechung
des Bundesverfassungsgericht, 48 NJW 1697 (1995). Likewise, Justice Dr. Paul Kirchhof is knowledgeable
of American law. See PAUL KIRCHHOF & DONALD P. KOMMERS, GERMANY AND ITS BASIC LAW:
PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM (1993). It is not uncommon for the
Constitutional Court to cite to American cases. See, e.g., Lath, 7 BVerfGE 198 (1958) (citing Palko v.
Connecticut, 302 U.S. 319, 327 (1937)).

By contrast, the Supreme Court almost never consults the work of another country’s jurisprudence,
although recent cases may signal otherwise. See, e.g., Printz v. United States, 117 S. Ct. 2365, 2404–05
(1997) (Breyer, J., dissenting) (analyzing extensive inventory of comparable federal systems, including those
of Switzerland, Germany, and the European Union, in seeking illumination of the proper relationship between
(reviewing other countries’ treatment of assisted suicide, especially the Dutch experience, in rejecting
constitutional right to die). But see Printz, 117 S. Ct. at 2377 n.11 (opinion by Scalia, J.) (“We think such
comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite
relevant to the task of writing one.”).

562 See Abortion I, 39 BVerfGE at 36–37.

563 See Roe, 410 U.S. at 157–58.

564 See Abortion I, 39 BVerfGE at 36 (“The express inclusion in the Basic Law of a self-evident right
to life—different as compared to the Weimar Constitution—is explainable primarily as a reaction against the
‘annihilation of life valued unworthy,’ of a ‘final solution’ and ‘liquidation’ that was pursued as official
policy by the Nazi regime.”).
than to American law. Consistent with this pro-life stance, the Basic Law also outlaws capital punishment.\footnote{See Art. 102 GG.}

Moreover, Article 1 obligates the state "to respect and protect" human dignity. Thus, the essence of the value-order is a commitment to the value of life. Kantian idealism, with its emphasis on the value of each life, fortifies this concept. In this light also is radiated the pro-family and pro-child social welfare provisions coupled around abortion regulation. The 1992 Abortion Reform Act reflects the social state directive and, of course, the pragmatic desire to influence the choice over abortion.\footnote{See supra notes 541-43 and accompanying text.} Germany thus reveals itself to be consistently pro-life, and deliberately child-friendly.

Another distinguishing trait of the two countries is the objective constitutionalism of German law. Under Article 1, the German state is obligated to respect and protect human dignity. In combination with the right to life, the Constitutional Court, for the first time in \textit{Abortion I}, implied a positive obligation of the state to protect life, anchoring a fetus’ right to life. As a matter of interpretation, the implication of this positive state duty represents a stunning act of judicial activism, justifying, presumably, far-reaching state intrusion into society, even if in contravention of majoritarian determination.

A comparative evaluation of other right to life cases puts this activism into bold relief. Apart from abortion, the Constitutional Court has not invoked Article 1 to impose duties on government to protect life. The Court rejected this argument in relation to the prevention of kidnaping or the rescuing of its victims in the \textit{Schleyer Kidnaping Case}.\footnote{See \textit{Chemical Weapons Case}, 77 BVerfGE 170 (1987) (rejecting any constitutional claim that storage and transportation of chemical weapons violated Basic Law).} The Court also rejected the argument in relation to an asserted need to guard against threats posed by the storage and transportation of chemical weapons,\footnote{See \textit{Mülheim-Kärlich Nuclear Reactor}, 53 BVerfGE 30, 57–60 (1979).} nuclear reactors,\footnote{See \textit{Chemical Weapons Case}, 77 BVerfGE 170 (1987) (rejecting any constitutional claim that storage and transportation of chemical weapons violated Basic Law).} and aircraft noise and highway noise.\footnote{See \textit{Millheim-Karlich Nuclear Reactor}, 53 BVerfGE 30, 57–60 (1979).} In these cases, the Constitutional Court seemed quite cautious about extending any claim to governmental obligation to ensure safety or life as a matter of constitutional law, a caution certainly echoed in the American regime. Accordingly, the Court deferred substantially to legislative determinations, in bold contrast to its intensive scrutiny of the parliamentary determinations at issue in the abortion cases.\footnote{See \textit{Neuman}, supra note 503, at 300.} The inconsistent treatment of this duty to protect life might suggest a factual differentiation among these cases, or it may indicate preferred treatment based on the value of fetal life. In view of the \textit{Casey} Court’s use of a newly-minted undue burden standard, there is evidence of exaggerated treatment of abortion, from the perspective of rights-methodologies, in both countries. Perhaps this is because of the value of life, including fetal life.
Considering the American concern for limited government and rejection of affirmative state obligations, it is hard to envision how we could find any positive duty of government to act. The difference in state powers is thus a distinguishing trait in the two legal orders. In our abortion cases, the state acts on behalf of the potentiality of life as part of its police powers. Thus, fetal claims exist as an interest of the social order, not as a constitutional right, as in Germany.

It is worth pointing out, however, that the positive German state obligations help facilitate the communitarian bent of German law, as illustrated in the abortion cases. Rights are not just a matter of individual exercise in the German scheme, but are to unfold in a manner consistent with the value-order of the Basic Law. Rights are thus coupled with responsibilities. By contrast, the American Constitution is silent about these matters. Rights, seemingly, can be exercised outside the context of a value-order or, even, a sense of responsibility, except for the responsibility one chooses to recognize voluntarily. Certainly the two legal orders differ on the concept of community. Germany and America also differ over individuality. From the standpoint of women’s autonomy, the German cases seem distrustful and disrespectful of their decisional authority, whereas the American cases are premised on women’s self-determination.

VIII. COMPARATIVE OBSERVATIONS

Having evaluated human dignity, personality, and privacy in German and American constitutional law, the similarities and differences in the countries’ constitutional visions, doctrines, and techniques become evident. Certainly there is much the two laws have in common. Both developed formatively in the period after World War II, evidencing the emerging phenomenon of human rights, particularly in western legal culture. Both accord broad freedom to individuals to shape their destiny, while balancing individual aspiration against the demands of maintaining social order. Both laws rely on an activist high court to shape these freedoms against the clutches of majoritarian control.

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DeShaney
were decided according to German law, it is probable that the Constitutional Court would value quite highly the young boy’s right to life, especially since the state had notice of the abuse he was suffering. Therefore, the Court would likely impose affirmative obligations on the government to scrutinize with care any asserted state interests in juxtaposition to the right to life, as the Court had done in the abortion cases.

573In this light, the Court’s discussion in 
Casey
of the consequences of the abortion act, injecting a communitarian dimension, stands in contrast to much of American law. See supra note 512 and accompanying text.

574In Germany, personality rights have a long lineage in the private law. See Krause, supra note 59, at 485–88. However, the modern cases, starting with 
Elfes,
6 BVerfGE 32 (1957), mark the essential development. In the United States, cases like 
Meyer
v. 
Nebraska
and 
Skinner
v. 
Oklahoma
might be thought of as originating an emphasis on autonomy. See 
Meyer
v. 
Nebraska,
262 U.S. 390, 401–02 (1923) (holding unconstitutional prohibition of teaching German in schools); 
Skinner
v. 
Oklahoma,
316 U.S. 535, 541 (1942) (holding unconstitutional sterilization of habitual criminals). But 
Griswold
v. 
Connecticut
is the essential case for this development of American law. See 
Griswold
v. 
Connecticut,
381 U.S. 479, 485 (1965) (recognizing that use of contraceptives is individual liberty protected by constitution).
Notwithstanding these similarities, a closer look at the two laws reveals more difference than similarity. First, and foremost, the countries differ over the nature of their constitutional vision, as set out in the text of their basic charters and as amplified by the two high courts. The German vision, set out with reasonable clarity and reflecting the systematization of German legal science, centers around the human person and her dignity—a “spiritual-moral” individual with the ability to realize her potential and with the desire for personal satisfaction. Human values are thus the focal point of the legal order.

By comparison, the American constitutional vision is simpler, if not sketchier. Our focus is preeminently on outlining the limits of government, reflecting our original republican revolution, and securing a basis for the pursuit of liberty and happiness. In keeping with this defensive focus, the American charter does not set forth a comprehensive vision of how liberty or happiness are to be pursued. This is mainly left to individual discretion, in contrast to the circumscription of that choice in the German scheme. Certainly we do not have the core consensus on value structure that the Germans have.

The countries’ contrasting value structures may be attributable, in part, to the differing complexion of the populations. America is extremely heterogenous; Germany, by contrast, is relatively homogenous. It stands to reason that the more homogenous the population, the greater possibility there is for consensus. Since America is so pluralistic, it is difficult for the population to agree on core values. Hence, it makes sense to leave value choices to individuals.

However, America’s population at the time of the Constitution’s framing was, like Germany’s, relatively homogenous. Thus, the difference may have more to do with the Courts’ approach to interpretation of the basic charters than any original intent. The difference in population complexion would seem to be a significant factor during the last fifty years, the formative period of judicial interpretation of the two laws.

Second, enumeration of rights and responsibilities in the two legal orders follows from these contrasting visions. The German value-order, grounded in the underlying philosophic thought of Kant, reflects a careful calibration of rights and responsibilities, interpreted by the Constitutional Court as an “objective value-order,” one that must apply generally in society, affecting all legal relationships. Since human dignity is the apex of this value structure, it naturally radiates throughout the legal system, in both public and private law. An essential part of human dignity are basic rights, and their corresponding obligations.

While basic rights are mainly defensive or subjective in function, connoting a personal sphere of liberty, only rarely is such subjective liberty a matter of complete discretion. Instead, personal liberty is subject to limitation by the constitutional order, textually secured through express reservation or by necessary implication. In this sense, rights are limited by obligations to others, as made manifest through the law. Yet, limitations of liberty are themselves not a matter of parliamentary discretion or social control. Rather, liberty may be restrained only upon justification pursuant to the

575 See, e.g., Arts. 2, 5 GG.
value order. In this sense, dignitarian morality acts as the "higher law" of German constitutionalism.

German rights also contain an objective or positive dimension, obligating government to effectuate their command. Human dignity makes decisive claims to official action along these lines. Notable examples of this include the Constitutional Court's implication of a zone of privacy to protect individuals from a prying public in the context of fabricated, sensationalistic reporting in Soraya, or accurate, but negative, reporting in Lebach. The Court's implication of a positive duty to protect fetal life in the abortion cases, even against the dignitarian rights of women to determine their fate, is another notable example of the far-reaching claim to governmental action that can result from such objectivism.

By contrast, Americans share the concept of negative liberties with the Germans, but do not have a corresponding principle of positive rights or duties. Thus, we have little claim to governmental action, even over matters of human dignity. American rights, like privacy, are instead mainly spheres of personal autonomy. Unlike German negative liberties, American rights are not coupled with responsibilities, either through textual reservation or by implication, except those that can be reasonably ferreted out of the legal system itself. Not surprisingly, lacking the context of an underlying philosophic base, American rights have more of an absolutist quality to them; there are few textual or philosophical restraints on individual freedom.

Third, the contrasting visions of the two laws have dramatic consequences for their concepts of human dignity, personality, and privacy. German concepts are reasonably well thought out, constituting an integrated whole, reflecting again the classification and comprehensiveness of German legal science. There is an inner dimension, focusing on humanity's "moral-spiritual" essence, and there is a corresponding outer dimension, reflecting activity in the world. Both dimensions, of course, radiate from the same source of human dignity.

American law, by contrast, mainly reflects a search for personal identity and self-realization. These themes fit uneasily into an inner/outer dichotomy. Personal decision making over topics like procreation, contraception, or child rearing certainly partakes of self-realization in relation to the world, but also bespeaks inner identity. These American rights mainly reflect personal autonomy, pursuant to the negative concept of liberties.

A closer review of the specific enumeration of American privacy and German personality rights illuminates these points. German personality law reflects the broad

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576 In all cases, the essence of the right must be preserved. See Art. 19(2) GG.
577 By higher law, I mean that all actions must be judged for conformity with dignity, as the dispositive norm of the Basic Law's value order. Note, for example, the contrasting effect of human dignity in E/fes and Mephisto. See E/fes, 6 BVerfGE 32 (1957); Mephisto, 30 BVerfGE 173 (1971); see also supra note 306 and accompanying text.
578 See supra notes 338-40, 364-83 and accompanying text.
579 See supra notes 496-508 and accompanying text.
581 See supra notes 90-97 and accompanying text.
582 See supra notes 96-98, 172-81 and accompanying text.
themes of German law: human dignity and its cognates, including valuation of life as an end in itself, worth and equal worth, and freedom to act within the constraints of the value-order. This accounts for some of its sharpest departures from American law. Foremost among these is the focus on the interior component of human personality, an emanation of the inner striving for freedom. Through its jurisprudence, the Constitutional Court has attempted to capture and preserve the essence of human personality and personality, and safeguard it amidst the challenges of modern society. Hence, the Constitutional Court seeks to identify and fortify an Inner Space, “in which to develop freely and self-responsibly... personalities... [into] which [people] can retreat, barring all entrance to the outer world, in which one can enjoy tranquility and a right to solitude.”

The census cases, by limiting official use of personal information on account of human autonomy, show how such nurturing of human personality can make a difference with respect to modern social and economic developments.

While the census cases are the most dramatic illustrations of this strand of interiority, the Constitutional Court has carved out related emanations of human personality, limiting political and social forces in service of the inner person. Most notable here is the right to control personal information, crystallized into a general right of informational self-determination. Intimate information reflects human personality, according to the Court, because it is an important component of both the inner person and the public persona. Accordingly, the person participating in this aspect of “life-formation” should have a measure of control over these matters. Based on this reasoning, the Court has extended degrees of protection over personal data, honor, and rights to one’s good name, portrayal of self, image, and spoken word.

These doctrines are simply not part of American constitutional law. This may be because the textual support in our constitution is scant as compared to the German constitution. It may be because we lack the certitude of a vision corresponding to the German focus on the centrality of personality. Perhaps this explains why the Supreme Court takes a more cautious approach than the Constitutional Court.

The Supreme Court’s cautiousness may also be out of regard for state sovereignty, the value underlying federalism. Most American substantive due process cases involve a second-guessing of state actions, which the Court is hesitant to do. By

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583Microcensus, 27 BVerfGE 1, 6 (1969).
584See supra notes 195–97, 239–42, 251–56 and accompanying text. Lebach, with its concern for rehabilitation of an individual, evidences this too. See Lebach, 35 BVerfGE 202 (1973); see also supra notes 377–82 and accompanying text.
588See, e.g., Lebach, 35 BVerfGE 202 (1973).
589See, e.g., Boll, 54 BVerfGE 208 (1980).
590Note, for example, Justice Harlan’s famous formulation: Judicial self-restraint... will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American
contrast, in Germany, a different federal state, personality cases mainly involve federal law. Hence, any second-guessing is at least with respect to a coordinate branch of government. On such level field, the full steering effect of the Constitutional Court can be exercised, perhaps without the inhibition that faces the Supreme Court. Still, with the integrated German court system, many German cases require the Constitutional Court to second-guess the ordinary courts, which the Court too is hesitant to do. Thus, at bottom, the two Courts are cautious for different reasons attributable to the different federal structures.

The difference in constitutional doctrine may also be because our private law, unlike German law, did not develop these concepts comprehensively, and, thus, unlike German constitutional law, American law had no ready base to stand on. Moreover, American private law does not connect to constitutional law in the more seamless way that it does in Germany. Lacking grounding in personality, other values, most notably free speech, can be exercised without the braking influence of dignitarian concerns.

Even in the area of greatest overlap between the two laws—issues relating to identity, self-determination and autonomy—these differences are still evident. German law is grounded in the philosophy of human capacity and dignity, "factors constitutive for individual self-discovery and self-understanding." These desires yield a "striving toward unity of psyche and body." American autonomy decisions, such as those over contraception or procreation, by contrast, are grounded in privacy rights and self-realization, not dignity and its elevated cognates, like human inviolability. American rights thus do not couple freedom with a concomitant concern for well-being, as do German rights.

These differences in the concept of personality reflect differences in the two legal cultures. The German vision reflects careful ordering of the characteristics of human personhood to facilitate well-being, especially those characteristics called upon in social intercourse. Freedom to develop human capacity is sought, indeed encouraged, to the maximum extent compatible with the freedom of everybody else. Thus, moral freedoms.

Griswold, 381 U.S. at 501 (Harlan, J., concurring).

The German federalist structure differs from the American. The German federal government contains most legislative powers, including all those exercised in the United States. In addition, the German federal government has power over private law, such as contract, tort, or criminal law, areas that in America are traditionally left to the states. Some powers are exclusively federal in Germany; others are shared with the Länder. By contrast, federal legislation, interestingly, is mainly carried out by the Länder. CURRIE, supra note 7, at 34. For description of the nuances of German federalism, see id. at 33-101; CONSTITUTIONAL JURISPRUDENCE, supra note 8, at 69-120.

See supra note 146 and accompanying text.

Despite strong arguments for a law based on the notion of an "inviolate personality," see, e.g., Warren & Brandeis, supra note 59, at 205-07; Pound, supra note 386, at 445, which may have mirrored the German law, American personality law never fully developed. See supra note 386. In part, this is due to the serious conceptual difficulty in American law of private causes of action ordinarily lacking enforcement through the state or through constitutional actions. See Quint, supra note 14, at 279 n.106. Moreover, since the rise of First Amendment law, signaled most dramatically by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), interests of personality, especially honor and reputation, have been eclipsed by free speech interests.


See supra notes 174-78 and accompanying text.
obligation and respect for others requires that freedom be exercised within the bounds of community. In this view, freedom can truly exist only with provision for well-being, mutual toleration, and respect. It is in this sense that the "human person is an autonomous being developing freely within the social community." She is not "isolated and self-regarding," but "related to and bound by the community." Thus, individual self-determination is offset by responsibility, civility, and participation.

By contrast, American law places tremendous faith on the individual's ability to choose and realize choice. Our root value is personal liberty, more than any moral concept, like dignity. Choosing our fortunes is integral to our system of self-government. In this sense, freedom is more complete in America than in Germany, unbounded by any value constraining liberty, except those that we determine ourselves.

Viewed in this light, the German vision of constitutional democracy serves as an alternative strategy to organize society, one that reflects the benefits, perhaps, of added perspective and experience. There are obvious indigenous influences that led to the erection and make-up of the German value-order, especially values that empower and guide personal decision making. Kantian philosophy and nineteenth century German legal science are decisive theoretical influences. The German experience with anarchy during the Weimar Republic, and the dehumanization during the Nazi period, including severe limitation of human personality and capacity, and even annihilation of life itself, are crucial histories. The erection of the German value-order may, in fact, reflect a desire to channel human behavior out of fear of the evil that might arise (again) from unchained human passion.

Alternatively, however, German constitutionalism might reflect the added wisdom of comparative experiences. For example, much would seem to have been learned from the lessons of more unrestrained majoritarianism, as in France, or even England, and its tendency to limit human capacity. Other lessons might be learned from more unbounded liberty, as in America, and its tendency to encourage excessive

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503 The French Revolution was a pivotal event for Germany and Europe generally. Under the influence of the philosophy of Rousseau, the leaders of the Revolution tried to ascertain the true common good of the political community. Hence, liberty lay with the people as a whole, unrestrained by notions of fundamental rights. This led to significant abuses and horrors.
504 Since the Puritan Revolution of 1642, England has been ruled by Parliament. With the Glorious Revolution of 1689, the monarchy was restored, but on Parliament's terms. Thus, the rule of Parliament, representing the will of the people, is supreme, unbounded by a written, strong guarantee of fundamental rights.
passion or unleash unbridled social or economic power that might overshadow personal dignity. Against these histories and experiences, emphasis on the inviolability of human personhood becomes a final check against power, official or private, that might operate arbitrarily. That is an important contribution to public philosophy.

The countries' contrasting constitutional visions might explain the different stances of the two constitutional Courts. Both Courts are countermajoritarian institutions, asserting the values of the constitutional order against the excesses of majoritarian rule. As a matter of comparative law, this is itself notable: It is worth recognizing that, outside our borders, the Supreme Court is not the only activist judiciary. In fact, the Constitutional Court is aggressively activist in a way that our Supreme Court is not. The Constitutional Court actively sets out to realize in society the values of the Basic Law, attempting to coordinate constitutional text with social reality. The wholesale rewrite of legislation in the census cases and the abortion cases attests to this. The Constitutional Court thus acts somewhat more like our Supreme Court did in the first third of this century under substantive due process, censoring governmental actions for reasonableness when necessary.

By contrast, the Supreme Court today mainly rules when it must to enforce a limitation of government. It is hard to imagine the Supreme Court creating claims to governmental action to protect constitutional values, as the Constitutional Court did in implying a right to protection of life in the abortion cases or in facilitating redress of privacy and personality claims in *Mephisto*, *Soraya*, or *Lebach*. In this way, the Basic Law, as interpreted by the Constitutional Court, acts like a blueprint for society, whereas the American Constitution is more like an outline of government.

The approaches of the two Courts mirror their different missions. The German Court places a premium on the text of the Basic Law, its structure and purpose, and its applicability to current social and economic conditions. By comparison, the Supreme Court focuses on text, Framers' intent, and precedent. The Constitutional Court openly makes use of background principles not always clearly set out in constitutional text, such as the rule of law, the Social State Principle, and, of course, the capacious concept of "human dignity." In some cases, most notably in *Soraya*, the Constitutional Court even openly acknowledged that it would employ its perceived notions of justice to rectify wrongs in the written law.\(^6\) The Supreme Court, by contrast, is uncomfortable using extra-textual sources, such as natural law, reflecting its desire to adhere to a stable rule of law founded on a defensible basis.\(^6\) The Constitutional Court actively attempts to maintain the essence of constitutional concepts while keeping constitutional text "in tune with the times."\(^6\) Recall, for example, the Constitutional Court's attempts to preserve the principle of human dignity amidst a changing world in the census cases, in relation to changing computer technology, or the transsexuality cases, in relation to evolving medical and moral

\(^6\)See [*supra* notes 341–63 and accompanying text; see also Elfes, 6 BVerfGE at 41.]


\(^6\) *Griswold*, 381 U.S. at 522 (Black, J., dissenting) (arguing that privacy is not fundamental right, and that states may therefore constitutionally proscribe contraceptive use).
developments. By contrast, the Supreme Court generally makes adjustments to changing social and economic conditions only gradually, and often amidst great anguish and controversy. American constitutionalism thus seems tied to the past in a way that German law is not. In these ways, the Constitutional Court is forward in focus, whereas the Supreme Court looks backward.

From these differences in constitutional vision, technique, and doctrine, we can extrapolate deeper differences in legal culture. The German prioritization of human dignity raises moral autonomy to the forefront of society; it is the higher law of German constitutionalism. Thus, persons have expansive freedom to act and to develop human ability, but that freedom is coupled with a concern for well-being, including solidifying the inner realm of personality. Moral autonomy, moreover, is not a one-way street; it involves responsibility too, including responsibility to others which individuals must recognize, even if through enforcement of the moral order. Accordingly, freedom is to unfold within the social community, which can both empower and limit human activity, depending on resolution of the conflict between individual and social claims.

Rights are thus exercised within a framework of duties and responsibilities, mediated ultimately by the Constitutional Court's interpretation of this higher law.

In American law, by contrast, the focus is on freedom to pursue one's vision of liberty or happiness, unbounded by a strong sense of moral order. We thus tend to exercise rights without a sense of duty or responsibility, except when we have been persuaded to accept duties and responsibilities by influences other than the sanction of the law. Naturally, our rights are more individualistic and absolutist in orientation.

Through examination of these contrasting constitutional visions, we discover alternative conceptions of humanity, personality, and community, as outlined in public law, conceptions that can be enriching, ennobling, or both. Perhaps this is the central purpose of comparative law: We learn, by looking at others, important truths about ourselves, truths which can then be reevaluated or reaffirmed. Certainly there is much to learn about the two laws, much the two laws can learn from each other. For example, the census cases demonstrate a sensible way to preserve the inviolability of personhood and human freedom amidst dramatic technological change. American law might profitably develop similar rights of informational self-determination, a logical evolution of First Amendment law. In addition, if Americans want to pursue a more coherent vision of community, the German method of coupling rights with duties, individually and socially, points the way toward introducing communal values into the social order. Through attempting to secure human dignity for all, we would perhaps

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604 "See supra notes 246–56, 460–65 and accompanying text.
606 Compare, e.g., Transsexual Case, 49 BVerfGE at 299 (rooting sexual identity to sense of well-being), with Bowers, 478 U.S. at 194 (relying on history and tradition in declining to recognize fundamental liberty to engage in consensual homosexual sodomy).
607 Compare, e.g., Mephisto, 30 BVerfGE 173 (1971) (stating that human dignity may constrain free expression), with Transsexual Case, 49 BVerfGE 286 (1978) (reasoning that human dignity empowers sexual self-identity).
be less preoccupied with securing our own claims. In this way, we might escape our obsession with “rights-talk” and learn to appreciate the value of human solidarity.

Conversely, if dignitarian rights are justifiably viewed as indispensable to German law, then the Constitutional Court might profitably transplant certain of the techniques employed by the Supreme Court to preserve fundamental rights. For example, importation of strict scrutiny analysis would lend a degree of clarity and precision to German rights analysis. To an extent, this already has occurred, evidencing the transplantation of concepts across cultures, albeit with some adjustment. Perhaps pursuit of a mutual cultural influence is not so far off after all.

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