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Citation: 47 Case W. Res. L. Rev. 797 1996-1997



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ARTICLES

PUBLIC DISCOURSE IN  
CONTEMPORARY GERMANY

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I would like to thank Professors David Currie of the University of Chicago, Donald Kommers of the University of Notre Dame, and Bodo Pieroth of Westfälische Wilhelms-University, Münster, Germany, for their valuable comments on earlier drafts of this article. I would also like to thank Professor Bernhard Grossfeld of Westfälische Wilhelms-University, Münster, Germany, who graciously arranged my visit at the University's Institute on International Business Law and Comparative Law in the Summer of 1995 and has always been a source of inspiration. In addition, I would like to thank Dean John Ryan of Roger Williams University School of Law and the German Marshall Fund, who supported my travel and scholarship. Versions of this article were presented at the Universities of Erlangen and Konstanz, Germany in May 1995. I would also like to thank Theresa Kruczek who helped prepare this article and Debra Noll for her valuable research assistance. All translations are mine unless otherwise noted.

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Public discourse in contemporary Germany is marked by an open, vibrant, sometimes caustic exchange of the central issues of the day. As in the United States, guarantees of freedom of expres-

sion are central to the constitutional order and structure of German society. Unlike speech freedoms in the United States, however, German communication rights are carefully circumscribed by distinct textual, legal, cultural, and civility limits. Notwithstanding those limits, contemporary German expression is a spirited and sophisticated body of law that presents both lessons and pitfalls to an American observer.

This article explores the concept of public discourse in contemporary Germany, with a view toward comparing German law to its American counterpart. By public discourse, I mean public discussion of issues, personalities, or items of general concern to society. Through this critical exchange of ideas, a democracy determines its purposes and a culture is constructed.<sup>1</sup> A comparative exploration of the quality and range of public discourse in each country can shed light on the role free expression plays, or should play, in western constitutional democracies.

Part I examines the historical, legal, and textual context of the German Basic Law and its guarantees of expression. Part II describes the nature and evolution of modern German public discourse. Part III evaluates the seminal 1958 decision of the German Constitutional Court on freedom of opinion, the *Lüth*<sup>2</sup> case, where the Court envisioned expression of opinion to be both an integral component of the human personality and constitutive of a democratic society. Part IV describes later cases of the 1970s in which the Court retracted preference of free expression. Part V examines cases of the late 1970s and 1980s in which the Court strove to achieve an intermediate level of protection for communication freedoms. Part VI examines current public discourse in Germany by reviewing important cases of the 1990s. These modern cases evi-

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1. As developed by the United States Supreme Court, public discourse entails discussion of all "ideas and opinions on matters of public interest and concern" and not just governmental policies, actions, or actors. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). The concept of public discourse relates both to the building of culture and the functioning of a democracy. These ideas are developed more fully in Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1179-81 (1994). For comparative purposes, I am tracing the same essential concept of public discourse in German law. Under German law "public opinion" can be thought of as the "central structural element of modern democracy." Walter Schmitt Glaeser, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts* (1. Teil) in 97 ARCHIV DES ÖFFENTLICHEN RECHTS 60, 107 (1972).

2. 7 BVerfGE 198 (1958). For discussion of *Lüth*, see *infra* notes 47-130 and accompanying text.

dence a return to the view in *Lüth* that freedom of expression is a preferred freedom in the German constitutional order. Part VII concludes with some comparative observations about public discourse in Germany and the United States.

### I. HISTORY OF THE GERMAN CONSTITUTIONAL ORDER AND ITS PROTECTION OF EXPRESSION

The adoption of the *Grundgesetz*, or Basic Law, in 1949 marked a new constitutional order for modern Germany. Emerging from the darkness of the Nazi period, the Basic Law sought to capture the best aspects of German thought and experience of the preceding one hundred years. Tracing its lineage to the 1849 Frankfort (*Paulskirche*) Constitution and the 1918 Constitution of the Weimar Republic, the Basic Law sought to base the social order on the liberal, social, and democratic principles of those earlier constitutions.<sup>3</sup> The Basic Law departed from those constitutions, among other ways, in that it instituted a comprehensive system of judicial review, whereby legislative, executive, and judicial action would be judged for conformity with the Basic Law.<sup>4</sup>

The American and German constitutions differ in their philosophical grounding. While the Basic Law arose from three major legal traditions—classical liberalism, democratic socialism, and

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3. German constitutionalism began with the constitutions of the south German states. These constitutions tended to couple rights with duties; they did not contain basic rights in the American or French sense. Representative of these constitutions were those of Baden (1818), Bavaria (1818), and Württemberg (1819). See BODO PIEROTH & BERNHARD SCHLINK, *GRUNDRECHTE STAATSRECHT* II 9 (10th ed. 1994). The first national constitution arose out of the revolution of 1848, resulting in the 1849 St. Paul's Church (*Paulskirche*), Frankfurt Constitution. This constitution, heavily influenced by leading academics, never came into effect. The first national constitution to come into effect was that of the Weimar Republic in 1918. Both the Frankfurt and Weimar constitutions influenced the framing of the current Basic Law.

4. The institution of comprehensive judicial review of basic rights flows from Article 1(3) of the Basic Law, which provides: "The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law." By contrast, in the Weimar period, fundamental rights limited only the executive and judicial branches, not the legislative branch. Instead, parliamentary democracy, representing the supreme will of the people, was thought a sufficient guarantee of freedom. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 185 (1994). Thus, comprehensive judicial review was a new development in German constitutional history. See Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 248 (1989). Indeed, institution of comprehensive judicial review in any country is notable.

Christian-natural legal thought<sup>5</sup>—the United States Constitution drew its inspiration from liberalism and natural law. Further, the Basic Law obligates the state to realize a set of objectively ordered values and sets forth both rights and duties,<sup>6</sup> whereas the United States Constitution is value-neutral pursuant to a scheme of negative liberties, specifically enumerating rights upon which government may not infringe, but not stating comparable duties citizens must assume or values government must realize. These philosophical differences reflect differing historical impulses and events. In the United States, the struggle over the law of seditious libel formed an important background to the development of First Amendment law.<sup>7</sup> In Germany, the totalitarian control of information by the Nazi regime formed a main motivation for the drafters of the Basic Law; they sought to guarantee broad expression and informational rights as a means to prevent any recurrence of totalitarianism.<sup>8</sup>

The Basic Law contains a number of distinct provisions that protect expression freedoms. The main provision is Article 5, which contains seven separate freedoms.<sup>9</sup> The most important of

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5. Each of these traditions played a formative role in German legal history and was represented at the 1949 Constitutional Convention. These traditions corresponded to the leading political parties then active in Western Germany. Classical liberalism was associated with the Free Democratic Party (FDP), the social democratic tradition with the Social Democratic Party (SPD), and Christian natural law with the Christian Democratic Union (CDU). The liberal tradition was mainly responsible for the Bill of Rights provisions Articles 1 through 19, while the socialist tradition influenced social welfare clauses; and Christian thought added provisions on morality, family, education, and enshrinement of institutionally established churches. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 36-37 (1989).

6. In actuality, duties are only sparingly spelled out in the Basic Law. For example, Article 6(2) provides that "[t]he care and upbringing of children is a natural right of and a duty primarily incumbent on the parents. The state shall watch over their endeavors in this respect." Art. 6 § 2 GG. Article 14(2) states that "[p]roperty imposes duties. Its use should also serve the public weal." Art. 14 § 2 GG. Article 5(3) provides that freedom of teaching "shall not release anyone from his allegiance to the constitution." Art. 5 § 3 GG. In fact, "duties" may arise more from internationalization of cultural norms (of how one ought to exercise rights) than from textual enumeration. For elaboration of the Basic Law's concept of duties, and how they mirror basic rights, see PIEROTH-SCHLINK, *supra* note 3, at 55-56.

7. See Quint, *supra* note 4, at 249.

8. See *id.* at 249-50.

9. Article 5 of the Basic Law provides:

(1) Everyone shall have the right freely to express and disseminate his opinion in speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of

these are freedom of opinion, freedom to inform oneself, and freedom to pursue art, science, teaching, and research. In addition, Article 5 provides for freedom of the press and reporting through broadcasts and film, and prohibits censorship. Article 5 is thus notable for its specificity and provision of modern communicative methods, in comparison to the older and more generally phrased First Amendment.<sup>10</sup> Freedoms of opinion, information, press, and reporting are subject to the limitations in "the provisions of general statutes,"<sup>11</sup> in statutory provisions for the protection of youth,<sup>12</sup> and in the right to respect for personal honor,<sup>13</sup> while artistic, research, and scientific freedoms remain unbounded.<sup>14</sup> The limitation placed upon the main communicative freedoms would imply that expression should not be an absolute value. Indeed, Article 5 ex-

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broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honour.

(3) Art and science, research and teaching shall be free. Freedom of teaching shall not release anybody from his allegiance to the constitution.

Art. 5 §§ 1-3 GG.

10. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I; *see also* KOMMERS, *supra* note 5, at 366-67. These differences should be expected in provisions drafted in 1949 (Article 5) as compared to 1791 (First Amendment).

11. Art. 5 § 2 GG. The general law limitation is a generally applicable neutral law that is not directed at expression. Thus, the law must further a legal interest independent and separable from expression itself; it cannot be directed at the content of the speech. Despite its similarity to the American concept of First Amendment content neutrality, the two are not the same. In German law, a "general law" can affect speech and yet be permissible so long as it applies "generally" and is not aimed at expression. The general civil code provision at issue in *Liith* is an example of such a law. *See infra* note 53 and accompanying text; *see also* CURRIE, *supra* note 4, at 179. This concept of the "general law" arose in connection with interpretation of the Weimar Constitution and is meant to counter the notion that the legislature can change speech protections at will. *See* PIEROTH & SCHLINK, *supra* note 3, at 161-63.

12. The concern for protection of youth reflects the family and social interests that the young be able to develop with proper nurturing and care. It might be linked to Article 6 family guarantees, including the parental right to bring up children. *See* Art. 5 § 2 GG.

13. The limitation of personal honor seems attributable to Germany's aristocratic tradition, which places comparatively high value on one's good name and honor. *See id.*

14. The right to freely pursue art, research and science reflects the influence of the 1849 Frankfurt Constitution. This provision, written by leading intellectuals, was designed to assure the autonomy of academic work and the German university. *See* KOMMERS, *supra* note 5, at 426. Unlike art, research, and scientific freedoms, teaching is subject to the qualification that it "not release anyone from his allegiance to the constitution." Art 5 § 3 GG.

pressly limits freedom of expression through the triad of qualifications.<sup>15</sup>

Article 5 is not expressly directed at the government, in contrast to the First Amendment. The text of the Article is phrased in positive, declarative form, not prohibitory language. However, since Article 1(3) provides that "basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law,"<sup>16</sup> communication rights appear to restrain only official actions. The apparent discrepancy between these provisions raises an important question: whether Article 5 is limited to official action, as with the First Amendment, or whether it also applies to private actors.<sup>17</sup> Not until 1958 did the Constitutional Court resolve this question, in the decisive *Lüth* case, determining that the Basic Law "influences" interpretation of ordinary law. Thus, to the extent private individuals seek settlement of their disputes through the courts, the Basic Law is enforceable against them as well.<sup>18</sup>

Article 8 protects the right of assembly, while Article 9 secures rights of political association. Article 17 provides for the right of petition and Article 21 guarantees rights of political parties, which are to participate in the formation of the public will. The German enumeration of all these freedoms encourages separate analytical treatment of each right.<sup>19</sup> By comparison, the United States Constitution groups all expressive freedoms in the First Amendment. The Supreme Court has tended to develop all First Amendment freedoms within the same basic construct of a fundamental right to expression and thought.<sup>20</sup>

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15. Professor Kommers observes that the Article 5 limitations on expression "invite [their] interpretation in light of other basic value decisions of the Constitution whose effect is often to confine the range or intensity of speech." KOMMERS, *supra* note 5, at 413.

16. Art. 1 § 3 GG.

17. See KOMMERS, *supra* note 5, at 366; Quint, *supra* note 4, at 257-58.

18. See *Lüth*, 7 BVerfGE 198, 204-05 (1958). Thus, Article 1 seems to require that the courts (civil and public) are bound by basic rights. For ordinary courts, this means that they too must enforce these rights, a conclusion that gave rise to the Basic Law's "indirect" influence on private law through the Reciprocal Effect Theory. For discussion of these points, see *infra* notes 69-78 and accompanying text. By ordinary courts, I mean those courts that apply the general law; that is, all law—civil, criminal, or administrative—other than constitutional law. Thus, the ordinary law is the background against which constitutional law is applied.

19. See Quint, *supra* note 4, at 250.

20. See *id.*



Despite their contemporaneous growth in the period following World War II, the development of both countries' laws reflect differences in doctrine and technique. Demonstrating the contrasting doctrines and quality of public discourse in each country may thereby shed light on the role free speech plays in comparable western constitutional democracies. Such a comparative examination is meaningful for several reasons. First, it is worthwhile to explore the similarities and differences in constitutional doctrine and legal culture—in itself and as a basis for assessing the transplantation of legal norms. Second, this comparison may yield a set of higher principles of constitutional order or a sounder public law philosophy. Third, the foreign legal regime may serve as an alternative standard by which to measure the work of the native court.<sup>21</sup> Fourth, this examination may lead to the realization of a mutual cultural influence—a benefit to both societies in an increasingly interdependent world.<sup>22</sup>

## II. THE NATURE AND HISTORY OF GERMAN PUBLIC DISCOURSE

### A. *The Nature of German Public Discourse*

American free expression law encourages individuality and diversity in the dissemination of opinions as well as tolerance with respect to the consideration of differing opinions.<sup>23</sup> The American system seeks to foster tolerance and open-mindedness among its individual citizens as well as a more “perfect policy,” evidenced ideally by a more democratic, informed, and just society.<sup>24</sup>

German law similarly values expression along both individual and social dimensions, although their contours differ. The personal dimension of communication entails the individual right to speak, think, and inform oneself free from official and, notably, private intrusion.<sup>25</sup> Historically, this individual strand has been rooted in

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21. See Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657, 658-59 (1980).

22. See Bodo Pieroth, *An Essay on an Export from the United States: Constitutional Doctrine and Ideas*, 9 ST. LOUIS U. PUBL. L. REV. 311, 322 (1990).

23. These ideas are elaborated in Eberle, *supra* note 1, at 1137, 1180-82.

24. See *id.* at 1137-38.

25. For example, see the recent case of *Soldiers are Murderers I*, 45 NJW 2943 (1994), discussed *infra* at notes 372-86 and accompanying text. “The right to freedom of opinion guarantees everyone the right to assert freely their opinion: Everyone has the right to say what she thinks, even when she does not provide or cannot provide any verifiable

the human need for intellectual and spiritual communication and dialogue. Recent cases of the Constitutional Court markedly emphasize the importance of speaker autonomy as an integral component to the unfolding of human personality (*Persönlichkeitsentfaltung*), a distinct rooting of free speech in human personality rights, which enjoy high status in Germany.<sup>26</sup> This enhanced commitment to an individual's right to speak one's mind is a notable characteristic of German law in the 1990s.

Nevertheless, while enjoying enhanced prominence in recent years, the individual strand of German communication law has historically been subordinate to its more highly valued social component.<sup>27</sup> Communication is valued to the extent it contributes to the battle of opinions (*Meinungskampf*) over matters of public concern, especially what the Constitutional Court views as fundamentally essential questions (*wesentliche berührende Frage*).<sup>28</sup> As in America, speech is thus valued most highly to the extent it aids democratic self-government, facilitating discussion, and formation of the public will.<sup>29</sup>

In part, this reflects the value-ordering function basic rights perform in Germany, including communication rights. Speech is valued according to its utility in promoting desirable ends. At the

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reasons for her view." *Id.*

26. See, e.g., *Soldiers Are Murderers I*, 45 NJW at 2943 (holding that communication freedoms are "in the interest of the right to personal development, with which communication is closely linked, as well as in the interest of the democratic process, for which it has constitutive meaning.").

27. A prominent commentator, current Justice of the Constitutional Court Dr. Dieter Grimm, asserts that German law solved the ongoing struggle in American law of whether to prefer the individual component of speech (self-determination) or the social component (self-government) by treating both as important and equally weighted. See Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, 48 NJW 1697, 1698 (1995). However, a review of German case law reveals the same essential development as in American law. The main emphasis on both laws has been on the value of expression in relation to democracy. Recently, the focus of both laws has shifted to a heightened emphasis of the individual dimension of expression.

28. See *Lüth*, 7 BVerfGE 198, 208 (1958). Under Article 5, the key determinant is whether the communication contains opinion, not whether a communication is made, as in America. See Grimm, *supra* note 27, at 1698. Classification as an opinion depends on whether the statement contains elements of taking a position, personal valuation, or estimation. See *NPD Europe*, 61 BVerfGE 1, 8 (1983); GRUNDGESETZ, KOMMENTAR, Art. 5, 16 (Theodor Maunz, et al. eds., 1993) [hereinafter MAUNZ COMMENTARY].

29. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (2d ed. 1965) (original title: *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)).

top of this hierarchy is public or political speech because it is essential to the operation of democracy. German courts view communication through the prism of its contribution to "public" dialogue. To the extent speech possesses "public" importance, it is presumptively protected through operation of the Presumption Principle (*Vermutungsprinzip*), a key tool by which the Constitutional Court structures public discourse.<sup>30</sup> While such public or political communication is perhaps most prized, art, academic research, or scientific communication also enjoy high status. In contrast, speech that concerns private or self-interests, such as commercial or economic goals, is considered less valuable. Such communication will often yield to higher valued constitutional principles, such as Article 1 human dignity or Article 2 personality rights.<sup>31</sup> Purely commercial speech is not principally protected. However, expression of commercial topics is protected to the extent it involves opinion or is covered under press rights, which include publication of certain informational advertisements.<sup>32</sup> Other content-based exceptions include expression that threatens the democratic social order,<sup>33</sup> vio-

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30. See *infra* notes 89-91 and accompanying text.

31. See, e.g., *Soraya*, 34 BVerfGE 269, 283-84 (1973) ("An imaginary interview adds nothing to the formation of real public opinion. As against press utterances of this sort, the protection of privacy (derived from Articles 1 and 2) takes unconditional priority."). For a discussion of *Soraya*, see notes 190-92 and accompanying text.

32. The status of commercial speech, as conventionally understood under American law, see, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (commercial speech is that which "proposes a commercial transaction"), is complicated under German law. Pure commercial speech in the sense of the proposal of an economic transaction or advertising has been held to be unprotected. See *Chemist Advertising Case*, 53 BVerfGE 96 (1980); see also *Physician Advertising Case*, 71 BVerfGE 162 (1985) (prohibition on advertising upheld on ground that the government must protect public from undue influence and preserve public confidence in physicians). Thus, this form of German commercial speech can be regulated by the legislature through operation, essentially, of a deferential rational basis review test. However, to the extent commercial speech contains elements of opinion, it may receive protection under Article 5. See, e.g., *Physician Advertising Case*, 71 BVerfGE at 175; see generally Glaeser, *supra* note 1, at 72.

Advertisements may also be protected as news under the press freedom or under citizens' general right to inform themselves. See, e.g., *Südkurier*, 21 BVerfGE 271, 278-80 (1967) (invalidating prohibition on advertisement of foreign job opportunities as violating press freedoms and the individual right to inform oneself from "generally available sources."). With these toeholds, it is quite possible German law will develop as American law has, resulting in general protection for commercial speech. Moreover, pure commercial advertising may receive constitutional protection under the Article 12 occupational guarantees.

33. See *Flag Desecration Case*, 81 BVerfGE 278 (1990) and *National Anthem Case*, 81 BVerfGE 1 (1990) discussed *infra* at notes 288-324 and accompanying text.

lence,<sup>34</sup> hate speech,<sup>35</sup> group defamation, and incitement to hate.<sup>36</sup> These exceptions are attributable to the German preoccupation with preventing the recurrence of totalitarianism and the rise of extremist groups and to preserve social harmony.<sup>37</sup> Such exceptions stand in dramatic contrast to American law, which protects seditious libel,<sup>38</sup> hate speech,<sup>39</sup> and group defamation,<sup>40</sup> and places expression beyond the limitations of the general law.

### *B. Historical Evolution of German Law*

Critical to an understanding of contemporary law is its evolution through four distinct phases since the founding of the Federal Republic in 1949. The first phase is marked by *Lüth*,<sup>41</sup> distinguished by the Constitutional Court's application of heightened scrutiny to evaluate incursions on communication. During this phase, the Court independently examined the underlying facts and interests at issue with a view toward protecting speech.

A second, more deferential approach was employed by the Constitutional Court in the 1970s. This phase was initiated by the *Mephisto* case.<sup>42</sup> While *Mephisto* concerned artistic rights, the Court extended the deferential approach of that case to other communication freedoms. Under this approach, the Constitutional Court tended to defer to the ordinary courts' balancing of expression rights against countervailing rights or interests. Given the resurgence of Article 1 human dignity and Article 2 personality rights in this era, these rights tended to predominate over communication rights.

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34. See *Horror Film Case*, 87 BVerfGE 209 (1992). See *infra* notes 334-37 and accompanying text.

35. See *Cripple*, 86 BVerfGE 1 (1992). See *infra* notes 341-51 and accompanying text.

36. See *Auschwitz Lie*, 90 BVerfGE 241 (1994). See *infra* notes 447-60 and accompanying text.

37. These content-based exceptions are also attributable to the fundamental German concept of a "militant democracy," which underlies the Basic Law. This term refers to government's obligation actively to protect society against threats to its stability or well-being. See *infra* note 110 and accompanying text (elaborating on the concept of "militant democracy"). They might also be thought to flow from the Article 5(2) triad of limitations. See *supra* note 9.

38. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

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

40. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). See *infra* note 457 and accompanying text.

41. 7 BVerfGE 198 (1958). See discussion *infra* notes 47-130 and accompanying text.

42. 30 BVerfGE 173 (1971). See discussion *infra* notes 156-88 and accompanying text.

The case of *Deutschland-Magazin*<sup>43</sup> marked the third phase. Under this approach, the Court moved away from the extreme deference of *Mephisto* and sought to strike a middle position between such deference and the heightened approach of *Lüth*.<sup>44</sup> The Court announced a variable standard of review; the degree of the Court's scrutiny depended on the severity of the incursion of the constitutional right. The *Deutschland-Magazin* approach thus resulted in enhanced protection of rights. Paradoxically, this had mixed results for communication. On the one hand, the Court employed the variable standard of review to vindicate speech interests.<sup>45</sup> On the other hand, the Court used the technique to enhance protection of other constitutional rights, such as dignity and personality protections. When juxtaposed against communication interests, personality rights tended to prevail.<sup>46</sup>

The 1990s have evidenced yet another phase. Under current German law, the Constitutional Court applies intensive scrutiny to incursions of expression freedoms to determine whether the lower courts correctly assessed the facts, interpreted accurately the ordinary law and Basic Law, and explained its conclusions thoroughly and convincingly. The result of this approach is a more conscious acceptance of critical, sharp, and polemical expression and a more heightened emphasis of the individual right to speak one's mind. In these respects, the 1990s signal a return to the view in *Lüth* that expression is a preferred right. With this overview in mind, a more detailed examination of German law can proceed.

### III. THE FOUNDATIONAL CASE OF *LÜTH* AND ITS PROGENY

#### A. *Lüth*

Modern German public discourse jurisprudence begins with *Lüth*.<sup>47</sup> In its first major case dealing with Article 5 freedoms, the Constitutional Court laid out the objective set of constitutionally mandated values (*eine objektive Wertordnung*) that must be realized

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43. See 42 BVerfGE 143 (1976). See *infra* notes 197-203 and accompanying text.

44. See Quint, *supra* note 4, at 318.

45. See, e.g., *Art Critic Case*, 54 BVerfGE 129 (1980). See discussion *infra* notes 212-15 and accompanying text.

46. See, e.g., *Böll*, 54 BVerfGE 208 (1980). See *infra* notes 218-19 and accompanying text.

47. 7 BVerfGE 198 (1958).

in German society. In so doing, the Court clarified the relationship between basic constitutional rights and private law. The Court further identified freedom of opinion as central to the value structure of the Basic Law, elaborated the basic rationale of free expression, underscoring its individual and social dimensions, discussed the essential purposes served by communication, and, finally, set forth the general balancing of interests test to be applied to determine Article 5 protections.<sup>48</sup>

The controversy in *Lüth* concerned a Hamburg press official, Erich Lüth, who called for the boycott of a new film by an infamous film director, Veit Harlan. Harlan had produced notoriously anti-Semitic films during the Nazi period.<sup>49</sup> During that time he had worked under the general direction of Nazi propaganda minister Josef Goebbels, producing Nazi propaganda and anti-semitic films, some of which were later determined to be crimes against humanity.<sup>50</sup>

Lüth was active in a group seeking to repair relations between Christians and Jews. Incensed by Harlan's reemergence on the German film scene, Lüth's call for a boycott was motivated by his desire to demonstrate to the world that the new German cinema was free from the darkness of the Nazi period.<sup>51</sup> He believed Harlan's Nazi past would bring moral condemnation to Germany, inside and outside.<sup>52</sup> Suing in the civil courts, the producer and distributor of Harlan's film were able to obtain an injunction against Lüth that prohibited him from continuing the call for a boycott on the theory that this caused injury to their business interests under Section 826 of the German Civil Code (BGB). Section 826 is one of the famous general clauses of the Code.<sup>53</sup> The Con-

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48. See KOMMERS, *supra* note 5, at 368.

49. Erich Lüth was the Director of the Hamburg press office. See *Lüth*, 7 BVerfGE at 198, 199. In that capacity and as Chairman of the Hamburg Press Club, he addressed a group of film producers and distributors as part of a celebration of German film. He called upon them and all Germans not to attend the newly released film *Immortal-Lover* directed by Veit Harlan. See *id.* at 199-200.

50. After the war, a criminal court convicted Harlan of a crime against humanity by making a film, the notorious *Sweet Jew* (Jud Süß), that contributed to the persecution of Jews during the Nazi period. He was subsequently acquitted of the crime because the war tribunal could not disprove his assertion that he worked under "compulsion." He was also later "exonerated" in de-Nazification proceedings. See *id.* at 219, 222-26; see also Quint, *supra* note 4, at 253 n.16.

51. See *Lüth*, 7 BVerfGE at 199-200; see also Quint, *supra* note 4, at 253.

52. See *Lüth*, 7 BVerfGE at 199-200.

53. *Id.* at 200-02. The court regarded Lüth's action as an incitement in violation of

stitutional Court overturned the injunction, elaborating the fundamental principles governing interpretation of Article 5 freedoms and the general relationship between basic rights and the private law.

Because this was the first case involving important issues of freedom of opinion, the Constitutional Court had to clarify a number of preliminary points concerning the Basic Law, freedoms of communication and private law.<sup>54</sup> First, it was necessary for the Constitutional Court to clarify the nature of basic constitutional rights in Germany, and then determine their relationship to the body of private law. As foreseen in the Basic Law, basic rights are, above all, defensive rights, safeguarding a personal sphere of liberty.<sup>55</sup> By their enumeration of basic rights, the Framers of the Basic Law meant to stress the primacy of the human being and her dignity before the power of the state.<sup>56</sup> In rights theory, such defensive rights are characterized as negative liberties, meaning that they delimit a sphere of personal autonomy beyond governmental control. In German law, such rights are referred to as "subjective," denoting a set of rights exercisable by individuals. The essential character of this subjective dimension to rights corresponds to the American conception of individual constitutional rights.

However, the nature of German rights differs from American rights in that German rights also possess an objective dimension that obligates the government to create the proper conditions to effectuate their realization. For example, this objective component requires affirmative state support and protection of broadcasting institutions such as television and radio stations.<sup>57</sup> A comparison

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Article 826 of the Civil Code which reads: "Whoever causes damage to another person intentionally and in a manner offensive to good morals is obligated to compensate the other person for the damage." KOMMERS, *supra* note 5, at 368 (trans.). The "general clauses" of the German Civil Code contain open language designed to bring the Code into conformity with contemporary needs, as determined by courts and scholars. The collaborations facilitate the Code's "interpretation out of itself," constituting a living, complete law. Certainly this runs counter to the prevailing view that European codes are so specific that they allow for the rote-application of cases to enumerated language. Instead, the general clauses allow for significant judicial creativity. See Quint, *supra* note 4, at 253. An integral aspect of "good morals" is the principle of free speech, given effect through the famous Reciprocal Effect Theory (*Wechselwirkung*) developed in Lüth. See *infra* notes 75-78 and accompanying text.

54. See Quint, *supra* note 4, at 254.

55. See Lüth, 7 BVerfGE at 204.

56. See *id.* at 205.

57. See CURRIE, *supra* note 4, at 184 n.37.

of the constitutions further illustrates this difference. Unlike the United States Constitution, the Basic Law is value-ordered, not value-neutral. "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. . . . Thus, basic rights obviously influence civil law too."<sup>58</sup>

"The concept of an 'objective' ordering of values . . . [is] a central concept in German constitutional doctrine."<sup>59</sup> In German legal theory, an "objective" value is one that applies in general and in the abstract, quite apart from any tangible or specific relationship.<sup>60</sup> By interpreting basic rights as establishing an "objective" ordering of values, the Constitutional Court was stating that those values were 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 possessing significance for all legal relationships.<sup>61</sup> In short, basic rights are a constituent part of the "objective" order of fundamental principles that governs German society. They might even be viewed as "permanent ends of the state, . . . [that] cannot be changed, even by constitutional amendment."<sup>62</sup>

Because basic rights are essential to the public good, it follows that basic rights must be protected against impairment from private as well as public actors. Since basic rights form part of the

58. *Lüth*, 7 BVerfGE at 205.

59. Quint, *supra* note 4, at 261. Many commentators have focused on the defensive character of rights, especially as an outgrowth of classical liberal theory. See, e.g., KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 415 (Rudolf Wassermann ed., 2nd ed. 1989) [hereinafter WASSERMANN COMMENTARY]. But the objective dimension of rights is just as relevant. Under this concept, rights influence not only interpretation of the legal norms, but also obligate the state to realize rights and to support, secure, and solidify them. This means that the state must create the proper cultural, economic, and social conditions for realization of rights. See *id.* at 418. Thus, the relationship between objective and subjective dimensions is best seen as a mutually supportive one. In fact, one could say that the function of objective principles is to make the subjective component real. See *id.* at 429. Accord, MAUNZ COMMENTARY, *supra* note 28, at 9; Schmitt Glaeser, *supra* note 1, at 114.

60. See Quint, *supra* note 4, at 261.

61. The "*ordre public*" means the mandatory law of the state. *Lüth*, 7 BVerfGE at 206.

62. Quint, *supra* note 4, at 261 (noting Art. 79 § 3 GG), which prohibits amendments of the Basic Law that affect certain constitutional principles, including basic rights).



“objective” legal order, they must apply generally in society—against both state and private actors that would act to curtail them.<sup>63</sup> Thus, basic rights must also affect private individuals insofar as they seek enforcement of their claims and interests through the rules of private law.

The Basic Law’s “influence” on civil law contrasts notably with that of American law. The United States Constitution applies when the government acts. In the absence of official action, the Constitution does not apply. This is, however, subject to the contours of the state action doctrine under which some private actors are held to be acting as “public” officials, thereby triggering application of the Constitution.<sup>64</sup> The state may also “act” when the rule enforced by the court has been formulated by government, even if the parties in dispute are private. The rules of libel at issue in cases following *New York Times* fit this category.<sup>65</sup> Since the business law claim at issue in *Lüth* was formulated by government, *Lüth* might likewise make out state action under this doctrine of American law. However, in comparison to the Basic Law’s “objective” ordering of society, the United States Constitution withdraws from the important private sector of society. For example, except

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63. See *id.* at 261-62:

The permanence of these fundamental values in the Basic Law was intended to contrast with what was seen as the legal relativism of the Weimar Constitution, in which basic principles could be easily altered by constitutional amendment, and seems to reinforce the view that the basic rights are intended not only to grant individual rights against the state but also to apply more generally in all legal relationships.

*Id.*

64. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (holding that the close relationship between coffee shop and state-owned enterprise led to state action); *Marsh v. Alabama*, 326 U.S. 501, 505-06 (1946) (holding that town citizens may not be denied freedom of press and religion merely because the town is owned by a private as opposed to a municipal corporation). Under American law, there are also more elaborate notions of state action. For example, in the leading case of *Shelley v. Kramer*, 334 U.S. 1 (1948), the Court found state action in the judicial enforcement of a racially restrictive covenant. In *Shelley*, the dispute was between private parties. State action was found solely through judicial enforcement of the covenant, which was held to violate the Fourteenth Amendment’s equal protection clause. Because *Shelley* involves judicial enforcement of constitutional norms against a purely private dispute, it is perhaps the closest analogue to the German concept of the influence of the Constitution on private norms. Cf. Art. 1 § 3 GG. For elaboration of these points, see Quint, *supra* note 4, at 267-72.

65. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 323 (1974) (holding that *New York Times* protection against liability for defamation does not apply where the defamed individual is neither a public official or public figure).

as noted above, the United States Constitution ordinarily has no impact on private law relations, such as those governed by contract, tort, or trusts and estates. In this way, the reach of the German Basic Law is broader than its American counterpart.

When state action triggers application of the United States Constitution—whether on account of government action or private actors acting under cloak of the state—the Constitution applies fully and directly. The Basic Law likewise applies fully and directly against governmental action in Germany. On the other hand, the Basic Law theoretically only “influences” the civil law’s regulation of private actors, even if they might be deemed to be acting under color of state action. In this respect, it would seem that the Basic Law would have a weaker influence on society than the United States Constitution. However, while this was so in the past, we shall see that the contemporary Constitutional Court has considerably tightened its review of the ordinary courts’ interpretation and application of expression rights even in purely private disputes. In significant part, this reflects the belief that the real threats to expression in German society come from private actors and social forces, and not from the state.<sup>66</sup> Thus, from the standpoint of law in the 1990s, there is effectively no difference in the standard of review applied by the Constitutional Court to purely private or public law disputes.<sup>67</sup> Still, the nature of the Constitutional Court’s review of expression rights, while probing, still falls short of the intensity of strict scrutiny review conventionally applied in free speech cases by the Supreme Court. In summary, the impact of the American Constitution on society is in some respects stronger than the Basic Law (when state action applies and the Supreme Court applies strict scrutiny review) and in some respects weaker than the Basic Law (when purely private law disputes are at issue).<sup>68</sup>

A return to *Lüth* illuminates these matters. *Lüth* presented the Constitutional Court with its first opportunity to clarify the nature

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66. Interview of Dr. Albert Bleckmann, Professor of Law, Westfälische Wilhelms-University, Münster, Germany, by Edward J. Eberle (May 12, 1995) (on file with author).

67. Letter from Dr. Bodo Pieroth, Professor of Law, Westfälische Wilhelms-University, to Edward J. Eberle (Aug. 26, 1995) (on file with author); Letter from Dr. Stefan Pieper, Assistant Professor of Law, to Edward J. Eberle (Sept. 15, 1995) (on file with author).

68. For elaboration of these points, see Quint, *supra* note 4, at 272-80. The stronger impact of the American Constitution on society relates to the Supreme Court’s application of strict scrutiny review to free speech cases, a more heightened standard of review than employed by the Constitutional Court. See *infra* notes 98-100 and accompanying text.

of the relationship between basic rights and private law (*Drittwirkung*).<sup>69</sup> It was necessary for the Court to resolve the question because the plaintiff in *Lüth* raised a public law freedom of opinion claim against the private business law claims of Harlan's producer and distributor. A plaintiff in *Lüth*'s position might have asserted that because Article 5 reads in a positive, declarative form, and because there is no express limit to its reach, private actors can be held liable. Indeed, if basic rights form part of the "objective" legal order, they govern all legal relations, public and private.<sup>70</sup>

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69. In Germany, the relationship between public and private law remains a question of deep and long-running dispute. Historically, German law has distinguished sharply between public and private law. Private law refers to the body of law governing relations between private individuals. For example, tort, contract, and trusts and estates would be subjects of private law. Deeply influenced by the philosophical theories of Kant and his emphasis on free will, autonomy, and equality, the framers of the German Civil Code:

[V]iewed the civil law primarily as a means of adjusting purely individual and private rights in [these] traditional areas. . . . The apparatus of the state was excluded from private law, except to the extent necessary for the judiciary to enforce the rights agreed upon by private parties, as recognized by the Civil Code, and these rights generally implied a maximum of individual autonomy and a minimum of intervention to redress individual or group inequalities already existing in society.

Quint, *supra* note 4, at 255. One might even argue that "the rules of private law were thought to enhance a more general freedom of individuals not to be interfered with by the state—particularly in commercial relationships but also in other areas of everyday life." *Id.* at 256.

Public law, by contrast, is the body of law governing the relationship between the government and individuals. Constitutional and administrative law are paradigms of this law. In Germany, public law has always been the domain of special tribunals, not the ordinary courts—perhaps because it "was relatively new . . . [or] because it was thought to require a special perspective." *Id.*

This public/private distinction relies on Roman law roots, and is typical of European legal systems. German theorists of the 18th and 19th Centuries, including such notable figures as Kant, Herder, von Savigny, and Windscheid, also exerted significant influence on this development of German law.

70. This conclusion could derive support from records of the constitutional convention indicating that the human dignity concept anchored in Article 1(1) was meant to bind individuals as well as government, and that all basic rights were meant to protect human dignity. See CURRIE, *supra* note 4, at 183. In addition, an influential decision of the Federal Labor Court concluded that a private employer offended speech protections if it dismissed a worker on political grounds. To reach this decision, the Court concluded that the basic right to expression applied against private persons too:

Not all, but a number of significant basic constitutional rights are meant not only as guarantees of freedom *vis-à-vis* state authority but also as organizing principles [*Ordnungsgrundsätze*] for the entire society which, to an extent to be determined from the nature of each right, have immediate significance for the

On the other hand, since opinion freedoms are themselves facially limited in article 5(2), one in Harlan's position could argue that his business law claims were general law limitations on the reach of freedom of opinion. In fact, several influential commentators argued that the Basic Law only applies against government.<sup>71</sup> If that were the case, the controversy in *Lüth* would be resolved only by reference to the rules of civil law. In short, the textual evidence was inconclusive. Thus, much depended on the Constitutional Court's interpretation of the relationship of the Basic Law to the civil law.

The Constitutional Court opted for an intermediate, but creative, solution to this relationship. Between the extremes of the Basic Law being limited to governmental action and its application to any action that curtails rights, public or private, the Court struck a compromise; it decided that the Basic Law should apply "indirectly" to private law. By "indirect" application, the Constitutional Court meant that constitutional norms should "influence" rather than govern private law norms.<sup>72</sup> "A certain intellectual content

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legal relations of citizens with one another. . . . The basic right to free expression of opinion . . . would be rendered [largely] ineffective . . . if . . . individuals and others with economic and social power . . . were in a position by virtue of that power to restrict this right at will. . . .

1 BAGE 185, 192-94 (1954); CURRIE, *supra* note 4, at 182 (trans.). Thus, the Federal Labor Court concluded that speech protections had an immediate limiting impact (*unmittelbare Drittwirkung*) on the actions of private parties. Not surprisingly, not everyone agreed with the conclusion of the Federal Labor Court. See, e.g., MAUNZ COMMENTARY, *supra* note 28, at Art. 1 Abs. III, Rdnr. 129-30 (arguing that direct application of basic rights to private actions "strikes at the root of private autonomy"); see also CURRIE, *supra* note 4, at 183.

71. In German legal theory, at least two opposing views have been asserted concerning the reach of basic rights. On the one hand, commentators have asserted that constitutional rights are directed only against the state. In this view, therefore, a dispute between solely private parties, as in *Lüth*, would be decided solely by the rules of private law. See CURRIE, *supra* note 4, at 257. See generally 1 H. VON MANGOLDT, F. KLEIN & C. STARCK, DAS BONNER GRUNDGESETZ 136 (3d ed. 1985); see also CURRIE, *supra* note 4, at 182 (arguing that Article 1(3) means that basic rights only apply against the state).

On the other hand, other commentators have asserted the opposite view that basic rights apply generally, against both individuals and the state. See, e.g., ALBERT BLECKMANN, STAATSRECHT II: ALLGEMEINE GRUNDRECHTSLEHREN 162 (2d. ed. 1985).

The court in *Lüth* discussed both theories, before opting for the intermediate solution discussed above. See *Lüth*, 7 BVerfGE at 204-06.

72. *Lüth*, 7 BVerfGE at 205 (the Basic Law "influences obviously also civil law; no civil law provision may contradict the Basic Law; all (legal provisions) must be interpreted consistent with its spirit").

'flows' or 'radiates' from the constitutional law into the civil law and affects the interpretation of existing civil law rules."<sup>73</sup>

Therefore, when faced with Article 5(1) claims, ordinary courts must view the "general law" textual constraint not as a one-sided limitation on communication freedoms. Rather, Article 5 freedoms and general law norms have a mutual effect on one another. It is as much the case that Article 5 can influence interpretation of the general law as the opposite. Under the theory of objective values, general laws "must be interpreted in light of the value-establishing significance of the basic right in a free democratic state, and so any limiting effect on the basic right must itself be restricted."<sup>74</sup> In German law, the mutual reciprocal effect that basic rights and the general law have on each other is known as the Reciprocal Effect Theory (*Wechselwirkung*).<sup>75</sup>

The Court's conclusion is somewhat startling when one considers that it implied a fundamental limitation on the reach of the express general law limitations on communication rights. This illustrates the profound effect of the objective theory on German constitutionalism. It also illustrates the high regard the Court placed on the value of free expression in a democratic society.

Under the Reciprocal Effect Theory, the Constitutional Court had to assure that the private law courts adequately take into account the "objective" order of values.<sup>76</sup> Exactly what this entails has varied over time, as the Court has taken both speech protective

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73. Quint, *supra* note 4, at 263; *see also* *Lüth*, 7 BVerfGE at 205 (from the Basic Law "flows a certain constitutional content").

74. *Lüth*, 7 BVerfGE at 209.

75. *Id.* at 208. The *Lüth* court noted:

The relationship between basic rights and the private legal order must be calibrated as follows: general statutes must be interpreted in light of the important limiting effect of basic rights, so that a specific content of the basic rights carries over into all areas of law out of recognition of the fundamental importance of free discussion to a free democratic order. This leads to a presumption that free discussion is protected, and must be preserved especially concerning matters of public life. The mutual relationship between basic rights and general statutes is thus not a one-sided limitation of the effect of basic rights through 'general statutes' but must be interpreted in light of recognition of the value-establishing significance of basic rights for a free democratic state so that the basic right itself establishes a limitation on general statutes.

*Id.* at 208-09.

76. *See id.* "The Constitutional Court must test to see whether the ordinary courts have adequately taken into account the scope and impact of basic rights on civil law." *Id.*

and speech restrictive approaches.<sup>77</sup> Still, the dispute “remains substantively and procedurally a dispute of civil law.”<sup>78</sup> Thus, the civil law courts will have the last word, subject to the Court’s control of constitutional principles. The interpretations of the ordinary courts must be harmonious with the objective system of values.

With this background, we are now in a position to evaluate the Court’s view of expression. According to the Court, freedom of opinion occupies a central place in the scale of constitutional values. Theoretically, the Court values communication both as an end in itself and as a means to accomplish other worthy ends:

As the most immediate manifestation of the human personality in society, the basic right to free expression of opinion is one of the noblest of all human rights. . . . To a free democratic constitutional order it is absolutely basic [*schlechthin konstituierend*], for it alone makes possible the continuing intellectual controversy, the contest of opinions that forms the lifeblood of such an order. In a certain sense it is the basis of all freedom whatever, “the matrix, the indispensable condition of nearly every other form of freedom.”<sup>79</sup>

Viewed as an intrinsic value, communication is an important facet of being human. Free expression is therefore an immediate and tangible manifestation of human character that is necessary for spiritual and moral growth.<sup>80</sup> The linkage of communication to

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77. See *supra* notes 41–46 and accompanying text.

78. Lüth, 7 BVerfGE at 205.

79. *Id.* at 208 (citing *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.), translated in CURRIE, *supra* note 4, at 175.

Professor Wassermann observes that while both the individual and social components to speech are especially valued today, particularly for their worth in promoting truth and justice, this dual character of speech has roots that go back to the 1800s. See WASSERMANN COMMENTARY, *supra* note 59, at 415. From the standpoint of today, Professor Kriele notes that expression promotes many values, including self-realization, truth, democracy, and a checking value. See Martin Kriele, *Ehrenschutz und Meinungsfreiheit*, 30 NJW 1897 (1994). As in American law, German law is thus seeking to support expression on a multi-valued foundation, as compared to reliance on any single root value. See Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 429–31 (1992) (arguing that a web of mutually reinforcing values provides a surer footing for expression freedoms). American and German law thus may be pursuing similar theoretical rationales.

80. This reflects the basic human desire that one’s opinion count for something—that

human personality has deep roots in modern German law. The Basic Law's protection of human dignity in Article 1 is the supreme value in the constitution's ordering of objective values. The Article 2 rights to free development of personality are perhaps the next most valued norm. Together, these two articles form a certain sphere of inviolable human autonomy. Thus, the interaction between human communication and human dignity may itself be a constitutive element of being human.

The German valuation of communication for its own intrinsic worth has close parallels to American law. In American law, various nonconsequential justifications for speech have been put forth, including the views that speech is an integral part of personal development; it is necessary to the achievement of control over our destinies;<sup>81</sup> it is a constituent element of our moral autonomy that entitles us to dignity and respect,<sup>82</sup> and it provides a basis for self-determination or self-realization in defining who we are.<sup>83</sup>

Also, as in American law, German law supports communication on consequential rationales. The main German consequential rationale mirrors the American one: the promotion of democracy. In German law, free communication is absolutely constitutive (*schlechthin konstituierend*) to a free democratic order.<sup>84</sup> Communication facilitates the ongoing public dialogue necessary for the success of democratic society.<sup>85</sup> American law has similarly

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one be able to influence the world. See Schmitt Glaeser, *supra* note 1, at 68-69.

81. See Martin H. Redish, *Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679-80 (1982) (justifying speech because it may aid self-realization, including the ability to achieve control over one's destiny); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (arguing that the value of speech rests on its relation to self-respect and thus self-determination).

82. See Ronald Dworkin, *The Coming Battles Over Free Speech*, N.Y. REV. OF BOOKS, June 11, 1992, at 55, 56-57 (asserting that the constitutive feature of a just, political society is that government treats its people as responsible moral agents); Richards, *supra* note 81, at 62-63 (stating that the value of speech is as strong as its "best moral argument").

83. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47-48 (1989) (noting that self-fulfillment and participation in change are key values, together implying "a notion of freedom oriented toward self-realization and self-determination"); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 11-13 (1984) (claiming that self-realization is the only true value served by free speech).

84. See *Lüth*, 7 BVerfGE 198, 208 (1958).

85. The articulation of an opinion (*Meinungsäußerung*) has an immediate "intellectual effect on the world . . . that helps build public opinion and attempts to convince adherents." *Id.* at 210.

viewed democratic self-government as a central justification for speech.<sup>86</sup> In this way, both societies see communication as a preferred freedom—indeed, “the matrix, the indispensable condition of nearly every other form of freedom.”<sup>87</sup> The difference in the two societies is that free speech is the preferred legal value in America, whereas it is an important, but not the preeminent, value in Germany; human dignity is the most favored German value.

In view of the German focus on communication as central to the functioning of democracy, it is not surprising that public speech lies at the core of Article 5 protection. A central determination in German law, accordingly, is whether communication contributes to the formation of public opinion. If it does, it is presumptively protected.<sup>88</sup> German expression is consequential; its value depends on the ends it produces. Specially prized is communication with important political or social content. A consequence of this preferencing of public speech is that it can impact detrimentally on private rights. For example, in *Lüth*, the high value of the public communication concerning Harlan’s reemergence in German culture eclipsed the specific private right issues of Harlan’s reputation and business interests.

The public/private distinction is a central determination in German communication law. Both terms differ somewhat from conventional uses in American law. The definition of “public” for purposes of fixing the boundaries of public discourse is similar in that both German and American law interpret the term broadly to include matters of general or public interest.<sup>89</sup> Thus, in both cultures public speech can relate to the formation of political will necessary to democratic self-government or to the discussion of general social matters necessary to the building of culture.

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86. See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 55-56 (1960). Free speech “stands alone, as the cornerstone of the structure of self-government. If that uniqueness were taken away, government by consent of the governed would have perished from the earth.” *Id.*

87. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), as cited in *Lüth*, 7 BVerfGE at 208. The Constitutional Court’s patterning of expression on American roots was not coincidental.

88. See *Lüth*, 7 BVerfGE at 212 (stating that when expression “makes a contribution to the intellectual struggle for formation of public opinion through one of the publicly important questions, the expression is presumptively protected”).

89. “Free expression possesses special value to a free democracy because it facilitates open discussion over all matters of general interest and serious content.” *Id.* at 219.



A main difference is that the German court more actively evaluates communication to determine whether it is "public," whether it is "serious" enough to make a contribution to public discussion, whether it is an opinion and not a fact, and whether a fact is true or false. The German Constitutional Court also actively probes a speaker's motives and purposes to determine the value of the communication pursuant to these goals. For example, in *Liith* the Court determined that the speaker genuinely desired to influence public opinion, as compared to speaking out of a selfish motivation.<sup>90</sup> This was significant in determining the high level of protection accorded the communication. In American law, by contrast, motive or intent is irrelevant to fixing the boundaries of public discourse.<sup>91</sup>

"Private" speech has a different connotation in German law. It means speech uttered for a private purpose or out of self-interest. Pursuit of economic motives is a pristine example of this, as illustrated in the *Blinkfuer* case, where the Springer publishing house's self-interest in promoting an economic boycott of publication of East German programming was deemed subordinate to the speaker's interest and social interests in the dissemination of such information.<sup>92</sup> Private or economic communication will often yield to higher valued constitutional principles, such as the core speech rights in *Blinkfuer* or dignity or personality rights. By contrast, in American law such economic or purely self-interested speech is likely to be accorded intermediate protection under the commercial speech doctrine.<sup>93</sup> In American public discourse "private" denotes speech communicated privately or in a nonpublic forum.<sup>94</sup>

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90. See *id.* at 215-16.

91. Public discourse in America means any communication uttered "publicly," regardless of motive or intent. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (First Amendment protects speaker's deliberate vilification of Fundamentalist minister). Assessment of the value of the communication lies more with the people than the Court. See Eberle, *supra* note 1, at 1183 (arguing that the speaker controls the legality of the speech).

92. 25 BVerfGE 256 (1969).

93. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that the First Amendment protects basic advertising).

94. See Eberle, *supra* note 1, at 1186 & n.361. An example of such private speech is *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), in which the Court allowed a defamation award against a credit reporting agency for false reporting of a company's bankruptcy on the theory that only "private" speech, not public defamation, was involved. Such private speech was entitled to less protection.

On account of these fundamental principles, the Reciprocal Effect Theory requires that the general law must be interpreted in light of the significance of the communication. In this way, Article 5 exerts a powerful limiting influence on private legal relationships.<sup>95</sup> It is the special role of the Constitutional Court, as guardian of the Constitution, to control interpretation of expression freedoms and other Basic Law norms in the German legal order.

To accomplish this, the Constitutional Court reviews decisions of the ordinary courts to see whether the scope and impact of basic rights are adequately considered.<sup>96</sup> However, the Court only reviews the constitutional aspect of the case. The Constitutional Court is not a court of general, ultimate jurisdiction like the United States Supreme Court. Rather, it is a specialized court, hearing only constitutional claims and certain public law controversies.<sup>97</sup> This is in keeping with the Continental tradition of centralized judicial review. In Germany, the court system is organized by subject matter, with separate courts for administrative, labor, social welfare, civil, and criminal matters, among others.<sup>98</sup>

In reviewing the constitutional aspects of a case, the Constitutional Court does not engage in the comprehensive review of lower court decisions in the fashion familiar to American court observers. Instead, the Constitutional Court tests the lower court decision to determine whether appropriate weight was given the basic right, and that its essential content (*Wesensgehalt*) was respected. The Court does not make factual determinations nor does it always independently scrutinize factual questions. Rather, it mainly relies on the ordinary courts for the fixing of factual relationships. However, while the Court tries not to substitute its judgment for that of the lower court in these matters, its pronouncements on constitutional issues often anticipate desired solutions of concrete cases.<sup>99</sup> Thus, the main goal of the Court is to supervise and guide the

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95. See *Lüth*, 7 BVerfGE at 209.

96. See *id.* at 207.

97. See KOMMERS, *supra* note 5, at 3. For example, the Court decides separation of powers controversies, disputes between the federal and state governments, international law cases, and abstract questions of constitutional law (akin to advisory opinions). Letter of Dr. Bodo Pieroth, Professor of Law, Westfälische Wilhelms-University, Münster, Germany, to Edward J. Eberle (Nov. 27, 1995) (on file with author).

98. See KOMMERS, *supra* note 5, at 3.

99. See Letter of Professor Dr. Bodo Pieroth to Edward J. Eberle (November 27, 1995) (on file with author).

ordinary courts' interpretation and application of constitutional norms.

Within this framework, the intensity of the Court's scrutiny has varied. The Court's approach in *Lüth* was quite intensive, whereas in *Mephisto* it was deferential. Today, the Court has returned to the more exacting standard of *Lüth*.<sup>100</sup> Still, the nature of review employed by the German Court is less probing than the "strict scrutiny" applied by the United States Supreme Court in conventional First Amendment cases. The review is more akin to that applied by the Supreme Court in administrative law decisions.<sup>101</sup>

To assure compliance with Article 5 norms, the Constitutional Court employs a general balancing of interests test (*Güterabwägung*). "The decision can only be supported upon a consideration of the effect of all essential circumstances of the individual case. An incorrect balancing of these factors can lead to a violation of basic rights."<sup>102</sup> This test is familiar enough to an American observer: it is essentially a full consideration of all relevant factors. In American balancing regimes, its most similar analogue would be an ad hoc balancing test.<sup>103</sup> As with an ad hoc balancing test, the balancing must be performed anew in each case. There is no preconceived weighing of the values to be applied. Thus, communication values are balanced against countervailing interests in the circumstance of each case to see which is weightier.<sup>104</sup>

One difference is that the German version of balancing includes a wider range of interests than is typical in America. For example, in *Lüth* the Court considered aspects of Lüth's career and activities, his motives, and the general underlying social and cultural milieu that arguably justified his call for a boycott.<sup>105</sup> The nature of this balancing regime is best viewed through an assessment of its appli-

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100. See *supra* notes 41-46 and accompanying text.

101. Compare, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978) (courts should guide but not dictate the decision making process of agencies) with *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (strict scrutiny necessary to protect First Amendment freedoms).

102. *Lüth*, 7 BVerfGE at 212.

103. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 979 (1987) ("[A]d hoc balancing . . . demands a new balance in every case.").

104. See Quint, *supra* note 4, at 283-84.

105. See *Lüth*, 7 BVerfGE at 215-16; see also Quint, *supra* note 4, at 285.

cation. In *Lüth*, constitutional protection of the call for a boycott could only be determined by balancing Lüth's communication rights against the business interests of Harlan's distributors. Assessing Lüth's speech interests, the Court observed that the issues he raised were of great importance to the German people. Following Germany's emergence from the horror of World War II, it was extremely important to show the world that Germany was no longer associated with its Nazi past. Lüth genuinely believed that the reemergence of the former Nazi director of anti-Semitic films would lead the world to think that nothing had changed in Germany. His call for a boycott was a clear attempt to demonstrate that Harlan was not a fit representative of the German people. He acted out of genuine conviction, and not for personal or economic gain. His statements could thus be viewed in light of these general political and cultural goals.<sup>106</sup> To the Court, these matters were very essential questions for the German people.<sup>107</sup> Accordingly, they were of strong public concern and merited the highest value. Under the operation of the Presumption Principle, the communication was presumptively protected because it was an indispensable contribution to the formation of public opinion.

Against these powerful communication interests, Harlan's private economic interests were distinctly subordinate.<sup>108</sup> "When the formation of public opinion on a question important to the general welfare is at stake, private and particularly economic interests of individuals must basically yield."<sup>109</sup> The remedy for the harmful speech in *Lüth*, according to the Court, was more speech or counterspeech;<sup>110</sup> a solution familiar enough to American readers.<sup>111</sup> "Only in an equal competition of viewpoints can public opinion be realized, and can individual members of society form their personal views."<sup>112</sup> Unmistakably, the German Constitutional Court pursued its own "marketplace of ideas" metaphor, phrased as

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106. See *Lüth*, 7 BVerfGE at 215-16.

107. See *id.* at 216.

108. See Quint, *supra* note 4, at 286.

109. *Lüth*, 7 BVerfGE at 219.

110. See *id.* "Whoever feels slighted by the public utterance of another, can nevertheless seek recourse through public channels." *Id.*

111. See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

112. *Lüth*, 7 BVerfGE at 219.

“an intellectual struggle of opinions” (*geistigen Meinungskampf*).<sup>113</sup>

While the result in *Lüth* is speech protective, it is easy enough to imagine speech restrictive outcomes given the Court's reliance on a general balancing of interests test. The *Lüth* Court itself recognized this possibility. “Speech rights must yield to protectable interests of another of a higher rank that are violated by the exercise of expression. . . . Whether such private interests of another are to be preferred depends on an assessment of all relevant circumstances.”<sup>114</sup> As we shall see, the seeds sown by *Lüth* bear fruit in subsequent cases, especially those in the 1970s, where dignity and personality interests generally eclipsed communication rights.<sup>115</sup>

Even at this early stage, there are obvious problems for a communication regime founded on a general balancing of interests methodology. First, the balancing depends on the balancer. Without objective rationalizing norms, the balancing is likely to reflect the prejudice of the balancer. This presents a great danger of subjectivity and manipulation. Second, this calls into account the legitimacy of the Court. Lacking cabinining principles, the Court's exercise seems more like the raw exercise of power than the work of the law. This exercise also seems more appropriate to the legislature than the judiciary. Third, there is a general lack of structure to such regimes. Each case presents a new set of factors to be balanced. No two cases are likely to be exactly the same. Thus it will take some time to identify an organizing principle by which to structure the law. In the meantime, however, uncertainty as to the range of basic rights is likely to arise. Since communication rights are justifiably assumed to be fragile, such uncertainty is likely to chill or discourage exercise of communication freedoms.<sup>116</sup> For

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113. Compare *id.* at 208 (“For a free democratic state order is (expression) absolutely fundamental because it facilitates the ongoing intellectual exchange, the struggle (or battle) of opinions that is its life element.”) with *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”). Choice of this metaphor in Germany seems designed mainly to facilitate the structure of public discourse, especially for achievement of a political will, as compared to seeking a more central value, like truth or advancement of knowledge more common to the American scheme.

114. *Lüth*, 7 BVerfGE at 210-11.

115. See *infra* notes 155-88 and accompanying text.

116. See generally Quint, *supra* note 4, at 288-90 (discussing the effect of uncertainty resulting from general balancing methods).

many of these reasons, American free speech law has mainly abandoned general balancing of interest methodologies in favor of weighted forms of balancing.<sup>117</sup>

As is obvious in the *Lüth* decision, the Constitutional Court actively realized the "objective" order of values set in the Basic Law. Freedom of opinion is a central value in this order, both for its own sake and for its support of other values, especially the functioning of democracy.<sup>118</sup> The self-governmental aspect of communication is tangibly linked to specific textual mandates in the Basic Law which, in turn, make up other parts of this "objective" order of values. For example, the Basic Law provides for a "militant-democracy," which refers to the state's authorization to defend society against threats to the basic democratic order.<sup>119</sup> For example, all basic rights are subject to forfeiture when used to "combat the free democratic basic order" under Article 18.<sup>120</sup> Article 19(2), however, provides that "[i]n no case may the essence of a basic right be encroached upon."<sup>121</sup> Under Article 21 political parties shall participate in the formation of the political will of the people.<sup>122</sup> Their internal structure, however, must conform to democratic principles. By contrast, parties that seek to impair or

117. See, e.g., *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 343-44 (1974) (rejecting ad hoc balancing in libel actions). While the Supreme Court has generally rejected ad hoc balancing in questions dealing with regulation of the content of speech, it does employ the technique in regulation of the time, place, manner, or circumstance of the speech. See, e.g., *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647-48 (1981) (balancing the interests of the religious organization with the interests of the state regarding a regulation of the place of the speech). Weighted forms of balancing place emphasis on a particular interest which is to apply generally as a legal principle. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that libel is protected speech in absence of actual malice).

118. See *supra* notes 79-89 and accompanying text.

119. See, e.g., *Klass Case*, 30 BVerfGE 1, 19-20 (1970), translated in KOMMERS, *supra* note 5, at 230 (citation omitted):

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 '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.

120. Art. 18 GG.

121. Art. 19 § 2 GG.

122. See Art. 21 GG.

abolish the free democratic order are unconstitutional under Article 21(2).<sup>123</sup> The Constitutional Court has twice outlawed political parties under this Article; the Socialist Reich Party, successor to the Nazi party in 1952,<sup>124</sup> and the Communist Party in 1956.<sup>125</sup> Under Article 79(3), basic rights are inviolable against future amendment.<sup>126</sup>

Other content-based restrictions on communication are also designed to safeguard German democracy from extremism, thereby helping safeguard it. Article 5(3) requires teachers to be loyal to the Basic Law.<sup>127</sup> The ban on speech advocating Nazism and militarism, which was instituted in the denazification period following World War II, remains beyond constitutional attack.<sup>128</sup> Likewise, limitations on group defamation, incitement of hate, and hate speech are designed to safeguard the social order and promote social harmony. And, of course, Article 5 communication freedoms are themselves expressly subject to the triad restrictions of the general laws, and laws protecting youth and personal honor.<sup>129</sup> Each of these content-based restrictions are policed by the Constitutional Court to limit their abuse by social actors.<sup>130</sup> Still, it is

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123. See Art 21 § 2 GG.

124. 2 BVerfGE 1 (1952).

125. 5 BVerfGE 85 (1956). The Constitutional Court has not reviewed the constitutionality of a political party since the Communist Party Case. In the current political climate, it is unlikely that the government will move to have a political party banned. The old communist party ("KPD") reorganized itself in 1968 in West Germany as the German Communist Party ("DKP"). The government failed to move against the DKP, even though it resembled the old KPD. Similarly, the government did not initiate proceedings to have declared unconstitutional an extremist right wing party, the National Democratic Party of Germany ("NPD"). However, the government did monitor the organization and publicize its findings, including its conclusion that the NPD was a "party engaged in anti-constitutional goals and activity," was "radical right and an enemy of freedom," and "a danger to the free democratic basic order. 40 BVerfGE 287 (1975), translated in KOMMERS, *supra* note 5, at 231. The toleration of these extremist parties would seem to evidence the heightened sense of toleration and security of modern Germany. With the reunification of Germany, the Party of Democratic Socialism ("PDS"), successor to the old controlling East German Socialist Unity Party ("SED"), is active.

126. See Art. 79 § 3 GG. ("Amendments of this Basic Law affecting the division of the Federation into Länder, the participation in principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20 shall be inadmissible.")

127. Art. 5 § 3 GG.

128. See Art. 139 GG. For description of how this problem is treated in contemporary Germany, see Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies,"* 85 MICH. L. REV. 277 (1986).

129. See Art. 5 § 2 GG; see *supra* notes 11-14 and accompanying text.

130. See Art. 5 § 2 GG; KOMMERS, *supra* note 5, at 377 (noting that approval of the

notable that most of the German content-based exceptions would be unacceptable under American free speech doctrine. This points out, again, the value-ordered nature of the German Constitution as compared to the value-neutral American one. Of course, there is certainly more justification for such content-based exceptions in Germany than the United States. Unlike Germany, the United States has never experienced as severe a threat to its stability nor the ensuing horrors of Nazism or militarism.

In sum, *Lüth* is the foundational case for interpretation of freedoms of opinion. First, the Constitutional Court established the objective ordering of values that must influence the social structure. Second, the Court determined that basic rights are integral to this order and, therefore, affect private law. By doing so, the Court also saw to it that the ordinary courts take proper cognizance of this aspect of the basic order. Third, the Court established the basic individual and social dimensions of free communication. Fourth, the Court set forth the basic structure of public discourse. Communication that contributes to the formation of public opinion is most highly valued and, therefore, presumptively protected. The more significant the public issue addressed, the more enhanced protection the communication receives. Lastly, the Court established the general balancing of interest test used to control the ordinary courts' interpretation of Article 5. This essential framework has been adhered to by all communication decisions coming after *Lüth*.

### B. Cases Following *Lüth*

In view of its explication of the central value of communication, and its careful assessment and ultimate preference of communication, *Lüth* can fairly be characterized as a speech-protective case. Other cases followed the *Lüth* paradigm. For example, in the *Schmid-Spiegel*<sup>131</sup> case, a high-ranking state judge (Schmid) lambasted the German press, asserting that it favored employers in labor strikes. The famous German weekly newsmagazine, *Der Spiegel*, responded, characterizing the judge as having communist sympathies even though it had information to the contrary. Judge Schmid struck back by writing in a daily newspaper, accusing the magazine of lying about him and comparing its political reporting to pornography. *Der Spiegel* was able to secure a libel judgment

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Federal Constitutional Court is necessary to carry out these articles).

131. 12 BVerfGE 113 (1961).



against Schmid, which became the basis of the lawsuit.<sup>132</sup> On appeal, the Constitutional Court concluded that the lower courts had inadequately balanced communication freedoms against the interest in enforcing private law rules regulating defamation. Accordingly, the Court overruled the lower court decision. Applying the theory of Reciprocal Effect (*Wechselwirkung*), it held that private law norms are influenced by basic rights, just as basic rights may be influenced by the "general laws."<sup>133</sup> In view of the intrinsic and social value of communication, such freedoms are entitled to heightened protection in the general balancing of interests test:

Only a free public discussion over all matters of general significance guarantees the free building of public opinion that is necessary to a free democratic state. This dialogue necessarily occurs pluralistically involving contrasting views arising from contrasting motives, freely disseminated. Above all, it consists of speech versus counterspeech. Every citizen is guaranteed the right through Article 5 to take part in this public discussion.<sup>134</sup>

As with the reputation of the German film industry in *Lüth*, the personal politics and trustworthiness of an important judge is a matter of deep public significance. Accordingly, the communication was entitled to presumptive protection under the application of the Presumption Principle (*Vermutungsprinzip*).

In structuring public discourse, the Constitutional Court added an important doctrinal tool, the concept of counter-attack (*Gegenschlag*), which complements the Presumption Principle. As developed in *Schmid-Spiegel*, the harsh nature of the *Spiegel* article justified Schmid's harsh public reply to counter its impact on the formation of public opinion.<sup>135</sup> That a sharp attack merits a reply in kind has become a central feature of German law since *Schmid-Spiegel*.<sup>136</sup> *Schmid-Spiegel* is also important for announcing the

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132. See *id.* at 126-31. For a summary of these facts, see KOMMERS, *supra* note 5, at 377.

133. See 12 BVerfGE at 124-25 (citing *Lüth*, 7 BVerfGE at 207).

134. 12 BVerfGE at 125.

135. See *id.* at 128-32. "An attack on the periodical's general reputation for veracity was a more powerful defense than denial of its particular allegations standing alone, and 'Der Spiegel' had opened itself up to such charges by its unreliable treatment of the facts in this case." CURRIE, *supra* note 4, at 190.

136. See, e.g., the *Art Critic Case*, 54 BVerfGE 129 (1980) (holding that a radio

doctrine that false statements of fact, in comparison to value judgments (*Werturteil*), are a verifiable limit on public discourse.<sup>137</sup> False facts can mislead or distort and thus hinder the quality of public discourse. This truth/falsity dichotomy has general resonance in American law.<sup>138</sup>

To an American observer, the Constitutional Court's structuring of public discourse as an open, robust, even caustic dialogue is reminiscent of American doctrine.<sup>139</sup> In both the American "marketplace of ideas" and German "battle of opinions" (*Meinungskampf*), the remedy for sharp or harsh speech is not suppression but more speech. Both countries seem committed to entrusting the nature of this aspect of public discourse to the people. In this way, *Schmid-Spiegel* mirrors certain of the great Supreme Court cases, decisions like *Whitney v. California*<sup>140</sup> or *Cohen v. California*.<sup>141</sup>

commentator's nasty response to a sculptor's harsh criticism of the practices of art critics and museums was justified under the Counter-Attack Theory). For comparative purposes, it is worth noting that a similar right of reply has been rejected by the U.S. Supreme Court with respect to newspapers. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a state statute granting a right of reply to political candidates attacked by newspapers). Of course, *Tornillo* is premised on newspapers' First Amendment right not to speak. Moreover, *Tornillo* does not prohibit a victim from counter-attacking in other forums.

137. *Schmid-Spiegel*, 12 BVerfGE at 130. "Since the press has responsibility for contributing to the formation of public opinion, it must test for truth news and statements it publishes . . . . [I]t is impermissible to lightly publish false news . . . . [T]he truth may not consciously be distorted." *Accord Böll*, 54 BVerfGE 208, 219 (1980) (holding that false quotations are not protected); see also MAUNZ COMMENTARY, *supra* note 28, at 52.

138. See, e.g., *Gertz v. Robert Welch*, 418 U.S. 323, 339-40 (1974) (while "[u]nder the First Amendment there is no such thing as false idea . . . there is no constitutional value in false statements of fact."). *Id.* A key difference in the two laws is that American law is "more careful not to punish false statements without more when central speech values are at [issue]." Letter of David Currie, Professor of Law, University of Chicago Law School, to Edward J. Eberle (Nov. 3, 1995) (on file with author); see, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964) (speech protected despite false statements of fact). By contrast, German courts actively police the truth/falsity of statements. See, e.g., *Schmid-Spiegel*, 12 BVerfGE at 130 (quoted *supra* note 137).

139. A difference between the laws is, as Professor Kommers notes, that German law "protects robust and caustic speech but not always reckless speech." KOMMERS, *supra* note 5, at 381. For example, the use of false quotations in *Böll*, 54 BVerfGE 208, 219 (1980), could be considered reckless and, therefore, unprotected. See *infra* notes 225-28 and accompanying text.

140. 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring) ("If there be time to expose through discussion . . . falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence.").

141. 403 U.S. 15, 24 (1971) ("The constitutional right of free expression . . . is de-

The *Blinkfuer*<sup>142</sup> decision of 1969 reveals another important limitation on public discourse. Coercive economic force may not be used to support viewpoints in the contest for public opinion. The powerful Springer publishing house called for an economic boycott of news dealers who sold program guides to East German television and radio. According to the Court, calls for boycotts that express opinions are valid contributions to the intellectual struggle of opinions.<sup>143</sup> However, Springer's use of economic force in threatening to boycott noncomplying dealers severely distorted the free formation of public opinion by violating the equality of opportunity necessary to that free formation.<sup>144</sup> As conceived by the Constitutional Court, public opinion may not be stifled by the pressure of economic force. In this respect, Springer's call for a boycott differed fundamentally from Lüth's, which "was simply an appeal to the moral and political responsibility of his audience."<sup>145</sup>

The German limitation of economic coercion is similar to American free speech doctrine, which also excepts from constitutional protection coercive boycotts.<sup>146</sup> But in another respect, German law is fundamentally different. Out of commitment to the "objective" constitutional order, the Constitutional Court actively regulates the structure of public discourse to help assure an equality of opportunity in the dissemination of opinions, as delineated in *Blinkfuer*.<sup>147</sup> Out of concern that weaker or disfavored social

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signed and intended to remove governmental restraints from the area of public discussion . . .").

142. 25 BVerfGE 256 (1969).

143. See *id.* at 264. The Constitutional Court relied on *Lüth*, 7 BVerfGE 198, 212 (1958), in reaching its decision.

144. See *id.* at 264-65 (holding that boycotts are not protected insofar as they rely upon social or economic pressure to force their will upon listeners: "The exploitation of economic pressure . . . violates equality of opportunity in the process for formation of public opinion."). The emphasis on autonomous self-determination reflects the influence of Kant, particularly his view that opinions and actions be freely chosen. See also PIEROTH-SCHLINK, *supra* note 3, at 152 (indicating that coercion or pressure is not part of the "intellectual struggle for opinion" that the Constitutional Court has emphasized).

145. *Blinkfuer*, 25 BVerfGE at 267, translated in KOMMERS, *supra* note 5, at 383.

146. See generally *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607 (1980) (holding that picketing designed to encourage consumers to boycott a secondary business is not protected by the First Amendment).

147. Under the "objective" dimension of the Basic Law, the Court is obligated to realize the fundamental norms of the constitution. See *supra* notes 59-65 and accompanying text; see also WASSERMANN COMMENTARY, *supra* note 59, at 418, 432.

groups not be drowned out by those more powerful, the Court limited the use of coercive silencing measures by powerful economic groups.<sup>148</sup> By contrast, the United States Supreme Court has consistently rejected the notion that it ought to police the effect of powerful economic groups' might or otherwise regulate opportunity to communicate, relying instead on the American conception of a value-neutral constitutional order under which social members will fight it out in the "marketplace of ideas."<sup>149</sup>

The *Blinkfüer* Court went on to hold that Springer's call for a boycott violated Blinkfüer's right to publish information about East German programs.<sup>150</sup> The implication of this result, derived from the reciprocal "indirect" effect of the Basic Law on private law, is that Blinkfüer had an enforceable claim against Springer to vindicate its press rights. Thus, the theory of Reciprocal Effect seemingly created "a constitutional cause of action [authorizing] private individuals to *enforce* their constitutional interests against other private individuals."<sup>151</sup> Later, the Constitutional Court expressly approved creation of a constitutional cause of action by one private individual against another to vindicate basic rights pursuant to the

148. See *Blinkfüer*, 25 BVerfGE at 268-69. The Court stated:

In order to protect the institution of a free press, the independence of organs of the press must be assured against the incursions of powerful economic groups using inappropriate means. . . . The goal of freedom of the press—to encourage and protect the formation of free public opinion—thus requires protection of the press against attempts to suppress the competition of ideas by means of economic pressure.

*Id.*, translated in Quint, *supra* note 4, at 277-78 n.100. As Professor Quint notes:

[T]his language suggests that in a system in which the constitution may impose some limitations on private persons, the question of whether the constitution limits a private person in any specific case may sometimes depend upon the social or economic power wielded by the person. The danger to objective constitutional rights presented by a person or group with strong social or economic power is naturally greater than the danger presented by other private individuals.

*Id.* These concerns may require the government to adjust private law relations to redress social and economic imbalances. See *id.*

149. See generally *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (striking down a Massachusetts statute that prohibited certain corporations from making contributions to influence voters on matters not materially affecting such corporations).

150. See *Blinkfüer*, 25 BVerfGE at 267-69; see generally Quint, *supra* note 4, at 275-78.

151. Quint, *supra* note 4, at 277. *Blinkfüer* "was constitutionally entitled to an interpretation of the general clauses of the private law that would afford it a remedy against another private individual for a constitutional violation under these circumstances." *Id.*

theory of Reciprocal Effects.<sup>152</sup> These developments are attributable to the objective German constitutional order, obligating government to realize the fundamental values of the Basic Law. In *Blinkfüer* and *Soraya*, this was accomplished through the Court's insistence on the "influence" of constitutional principles on private law relations. It is hard to imagine a more dramatic contrast with American law.<sup>153</sup>

A final notable development in *Blinkfüer* is its solicitude for listener interests. Article 5 protects the right to gather information from generally available sources, such as the East German programming guide at issue in *Blinkfüer*. This informational right,

152. See *Soraya*, 34 BVerfGE 269 (1974) (holding that pursuant to Reciprocal Effect Theory individual may sue magazine for fabricated interview on theory this violates constitutional right of privacy). In *Soraya*, the Constitutional Court approved a line of cases developed by the Federal Supreme Court ("BGH"), the ultimate interpreter of the civil code, in which the BGH had found a "general right of personality" in Articles 1 and 2 of the Basic Law, and that this constitutional right was enforceable against infringement by the state and also by individuals. See *id.* As a next step, the BGH found that this constitutional right of personality could be invoked to create a damage remedy for violation of the right, enforceable by one private individual against another individual. See *id.* Professor Quint notes:

"[I]n the *Soraya* case, the BGH found that the influence of Articles 1 and 2 of the Basic Law overrode the clear statutory command (excluding a damage remedy) and established a damage remedy by one private individual against another for the invasion of the constitutional right or personality. The BGH found that the impact of the constitution on private law required this result because otherwise the values of Articles 1 and 2 would not be adequately protected against the actions of individuals.

Quint, *supra* note 4, at 280; see also *id.* at 278-81 (discussing extensively those developments); *infra* notes 191-92 and accompanying text.

The results in *Blinkfüer* and *Soraya* dramatically contrast with the American concept of state action. See *supra* notes 64-68 and accompanying text. In these cases, the Court implied a private right of action, derived from the Reciprocal Effect Theory, so that private individuals could enforce constitutional rights against other private individuals. In essence, this is "a constitutional requirement that a new cause of action be created to protect one private individual against the actions of another." Quint, *supra* note 4, at 281 (noting that no such constitutional requirement exists in American law).

153. See generally *DeShaney v. Winnebago County Dept. Social Serv.*, 489 U.S. 189 (1989). In *DeShaney*, the Court stated:

[Nothing] 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.

separate from the freedom of opinion guarantee, is designed to allow people freely to determine what information they need and how to use it. It is part of an overall theory of self-governmental control of information. These developments led to the Constitutional Court's announcement of a general right to inform oneself in the leading *Leipzig Newspaper* case.<sup>154</sup>

#### IV. DEFERENTIAL REVIEW AND THE SPEECH RESTRICTIVE APPROACH OF THE 1970S

Implicit in the general balancing of interests methodology introduced in *Lüth* is the notion that protection of communication depends on the nature of the balancing and the sense of the balancer. Under the *Lüth* approach, application of the test yielded communicative-protective results because the Constitutional Court placed high value on expression and scrutinized ordinary courts' valuation of speech in relation to interests of the private law under the theory of Reciprocal Effects. However, altering the weight assigned to private law interests (such as reputation, honor, or rights of personality) over the weight assigned to expression would convert the methodology from speech-protective to speech-restrictive. This was the approach used by the Constitutional Court in the 1970s.

Under this deferential approach, the Constitutional Court tended to prefer human dignity and personality rights over communication. They 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."<sup>155</sup> Under the Reciprocal Effect theory, 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

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154. 27 BVerfGE 71 (1969). In the *Leipzig Newspaper* case, customs officials seized copies of the *Leipzig Tageszeitung*, an East German newspaper, because they believed it contained communist propaganda. A subscriber to the newspaper successfully challenged the seizure. The Constitutional Court reasoned that a general "right to inform oneself is a necessary foundation of the right to speech itself." KOMMERS, *supra* note 5, at 385. This "right to inform oneself" was not part of the Weimar Constitution. *See id.* Rather, it is a reaction against the Nazi's totalitarian control of information. *See* MAUNZ COMMENTARY, *supra* note 28, at 31.

155. Art 5 § 2 GG.

rights. In relation to Article 5(1) freedoms, this approach represented, in essence, an application of the Reciprocal Effect Theory inverse to that of *Lüth*; the general law limitations were interpreted to exert a powerful limiting effect on communication freedoms.

#### A. Mephisto

The case cementing the shift was *Mephisto*, decided on artistic rights, not opinion guarantees.<sup>156</sup> In *Mephisto*, the Constitutional Court split 3-3 in upholding an injunction against publication of a novel by Klaus Mann, son of the great German writer Thomas Mann, on the ground that the novel defamed the memory of a famous deceased actor.<sup>157</sup> The central character of the novel was an actor named Hendrik Höfgen, who 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."<sup>158</sup> Interestingly, like *Lüth*, *Mephisto* had its roots in the Nazi era.

The story was based on a real life actor, Gustaf Gründgens, whose career paralleled the fictitious Höfgen in important respects.<sup>159</sup> Mann never claimed to be presenting an accurate portrait of Gründgens.<sup>160</sup> Instead, his aim was to portray a general type of opportunistic artist during the Third Reich. The novel was a product of Mann's imagination.<sup>161</sup> Nevertheless, the civil courts relied upon differences between Mann's portrayal and Gründgens'

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156. 30 BVerfGE 173 (1971).

157. Under German law, a tie vote results in the lower court ruling remaining in effect. See Federal Constitutional Court Law (BVerfGG) § 15(3).

158. *Mephisto*, 30 BVerfGE at 174, translated in CURRIE, *supra* note 4, at 193.

159. Mann and Gründgens were friends in the 1920s. Gründgens married Mann's sister, although the marriage did not last. With the rise of Hitler, the Mann family was forced to emigrate, spending the war years in America and Switzerland, among other places. Gründgens' career soared as an actor. Eventually, he became a director of the Prussian State Theater, accomplished through his friendship with Hermann Göring, leader of the Luftwaffe.

160. In the foreword to the book, Mann had written that "all characters in this book represent [general] types, not portraits." *Mephisto*, 30 BVerfGE at 177. On the other hand, the fictitious Höfgen was clearly modeled on Gründgens. Ironically, Thomas Mann was also accused of falsifying portraits of prominent Lübeck citizens in his classic novel *Buddenbrooks*. See CURRIE, *supra* note 4, at 196 n.88.

161. The Constitutional Court conceded that the novel was a work of art. *Mephisto*, 30 BVerfGE at 189-91.

actual life to conclude that Gründgens was defamed by making him appear to be more evil than he actually was. The suit on behalf of Gründgens was successful, even though he had died before it was initiated.<sup>162</sup>

*Mephisto* thus became the first occasion for the Constitutional Court to decide the scope of artistic freedom under Article 5. Textually, artistic freedom is separate from Article 5(1) general communication rights.<sup>163</sup> Unlike those freedoms, art, science and research guarantees are not subject to the general restraints of the law, nor youth, nor personal honor protections. Instead, these freedoms are textually unbounded. Thus, it would seem logical to view artistic freedoms as meriting higher protection than even political speech or other expression of opinion. One might even argue that art should be viewed in an "absolutist" sense, not unlike the famous position of Justice Black concerning the first amendment.<sup>164</sup>

The German preference of art over other expression seems consistent with the German emphasis on a strong right of personality rooted in Articles 1 and 2, which can outweigh speech interests. Such German preference is also consistent with German history and culture, which has tended to place a premium on individuals' inner

162. Gründgens' adopted son "proceeded under BGB Section 823(1), a general tort provision that provides a civil remedy against any person who 'intentionally or negligently infringes on the life, body, health, freedom, property or other right of another person, in a manner contrary to law.'" Quint, *supra* note 4, at 291 n.147.

Some years later, the novel was published again, with appropriate explanations of the relationship of Gründgens to the book. This publication did not trigger any legal limitations. See Letter of Professor Dr. Bodo Pieroth, Professor of Law, Westfälische Wilhelms-University, Münster, Germany, to Edward J. Eberle (Nov. 27, 1995) (on file with author).

163. These include the freedoms of opinion, to inform oneself, press and reporting by means of broadcasts and films. This last right is a particularly important guarantee of electronic media and film freedom. See *supra* note 9; see also Letter of Professor Dr. Bodo Pieroth to Edward J. Eberle (November 27, 1995) (on file with author).

164. See, e.g., *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting). Justice Black stated:

I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field . . . . [T]he very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence").

*Id.*; see also Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 882 (1960) (discussing the Bill of Rights as it bears on the powers of the federal government).



spiritual life over the public life, which has often been viewed with disdain. Traditionally, Germans prize artistic and cultural endeavors more than political activities.<sup>165</sup> This view contrasts significantly with American law, which has always preferred political speech over other forms of expression. Some American commentators have even resisted extension of constitutional protection to artistic endeavors.<sup>166</sup>

However, despite the apparent textual mandate of Article 5(3), and despite interpreting artistic freedoms broadly to "guarantee autonomy of the arts without reservation,"<sup>167</sup> the Court did not find that artistic liberty was without limit.<sup>168</sup> Instead, the three-person half of the Court sustained the injunction, reasoning that basic rights must be interpreted within the context of the value order of the Basic Law. Since the Basic Law is founded on the view "of the human person as an autonomous being developing freely within the social community,"<sup>169</sup> artistic freedoms must be

165. See Quint, *supra* note 4, at 294 n.157 (discussing *Mephisto*).

166. Compare, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (arguing that "constitutional protection should be accorded only to speech that is expressly political"), with Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 262-63 (arguing that literature and art are protected by the First Amendment because they have special importance).

167. *Mephisto*, 30 BVerfGE at 191, translated in KOMMERS, *supra* note 5, at 427. The Constitutional Court also observed that the essence of artistic freedom is to protect such creation from state interference. See *id.* at 190. Artistic freedom also encompasses protection of distributors or other intermediaries who facilitate the public's access to artistic works. See *id.* at 191.

Despite the restrictiveness toward communication freedoms that *Mephisto* signalled in comparison to the more protective approach of *Lüth*, *Mephisto* was a landmark decision in its own right, especially for artistic freedoms. For example, in *Mephisto*, the Court set down the definitive definition of art:

The essential characteristic of artistic activity is the artist's free and creative shaping of impressions, experiences and events for direct display through a specific language of shapes. All artistic activity is a mix of conscious and unconscious events that is not rationally orderable. Intuition, phantasy and artistic understanding all effect artistic creations, such creations are primarily not informational but rather an immediately direct expression of the individual personality of the artist.

*Id.* at 188-89, translated in part in KOMMERS, *supra* note 5, at 427. From a constitutional standpoint, *Mephisto* was a decisive step in the progress of artistic freedoms, emphatically rejecting an earlier line of more restrictive decisions. See Letter of Professor Dr. Bodo Pieroth, Professor of Law, Westfälische Wilhelms-University, to Edward J. Eberle (Nov. 27, 1995) (on file with author).

168. *Mephisto*, 30 BVerfGE at 192. ("[T]he right of artistic liberty is not unlimited.").

169. *Id.* at 193, translated in KOMMERS, *supra* note 5, at 428.

measured against Article 1 human dignity, the supreme value governing the objective order of values.<sup>170</sup> Artistic or communication freedoms may conflict with human dignity. For example, in *Mephisto*, it might be argued that the tangible effect of Mann's communication was to tarnish or harm the memory of Gründgens. Disparagement of the dead could be thought to be inconsistent with human dignity.<sup>171</sup> "[A]n artist's use of personal data about people in his environment can affect their social rights to respect and esteem."<sup>172</sup> Hence, communication freedoms must yield to the superior value of dignity. In this manner, the Court implied limits on the seemingly boundless guarantee of artistic freedom, as it previously had implied limits to the seeming express limitation of opinion rights in *Lüth*. The Constitutional Court thus employed a certain creativity in interpretation.

In contrast to *Lüth*, however, the Court's approach in *Mephisto* imperiled communication freedoms. Since ways can always be found to recast reputational or privacy interests into the capacious constitutional concepts of human dignity or personality, the enhanced constitutional protection for art may be more apparent than real.<sup>173</sup> Personality rights can thus have a powerful limiting effect on art and expression.<sup>174</sup>

This reasoning also points to a fundamental contrast with American law. Anchoring reputational rights in the basic rights of human dignity and 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. 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."<sup>175</sup> Accordingly, public men

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170. Professor Quint astutely observes that *Mephisto* "illustrates what might be called the 'imperialism of balancing.' Although the Court stated clearly that GG art. 5 section 3 was not subject to the limitations of GG art. 5, section 2, it nonetheless found that Klaus Mann's right of artistic expression must be balanced against other possible constitutional interests." Quint, *supra* note 4, at 313 n.209.

171. See *Mephisto*, 30 BVerfGE at 194.

172. *Id.* at 195.

173. See Quint, *supra* note 4, at 296-97 (discussing the German balancing of the rights of artistic freedom and countervailing constitutional interests).

174. See *id.* at 299 (discussing how the language of the German Constitution gives "maximum opportunity for casting personal interests of reputation and privacy as constitutional rights of the person affected by the speech or other expression").

175. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (quoting *Crain v.*

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.<sup>176</sup> Under American principles, Gründgens would qualify as a public figure, thereby subjecting him to these immunity rules.<sup>177</sup> On the other hand, 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*) developed in *Schmid-Spiegel*,<sup>178</sup> and by its assumption that public figures must endure sharp scrutiny and critique.<sup>179</sup>

A further contrast relates to a substantive right to self-development. German law has a much stronger justification for protecting this right, anchored in human personality, than American law. First, Articles 1 and 2 provide express textual anchors for a constitutional right to free development of human personality. Because of scant textual support, such a substantive right has not been found in the American Constitution. Second, the positive conception of basic rights obligates the German government to provide affirmative conditions for the emergence of human personality rights. This is out of character for the more basic American conception of negative liberties. The absence of these factors perhaps explains some of the difficulties American law has experienced in striving to realize a right of privacy regime.

A further weakening of artistic rights occurred through the Constitutional Court's balancing approach. In reviewing the civil court's balancing of human dignity and expression, the Constitutional Court essentially deferred to the lower courts' determination. In a marked departure from *Lüth*, the Court concluded that it was

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Hurney, 331 U.S. 367, 376 (1947), and discussing published criticism of government officials, such as elected city commissioners).

176. The leading case is *Sullivan*. See, e.g., *id.* at 283 (holding that in order to prove violation of First Amendment rights of public official, plaintiff must demonstrate "actual malice").

177. Gründgens would likely be "an individual . . . [who] achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (establishing the test for who is public figure).

178. See *supra* notes 136-37 and accompanying text.

179. See *Stern Strauss Interview*, 82 BVerfGE 272, 277, 282 (1990) (holding that the freedom of expression takes precedence over a public figure's right to protection of honor). See also *infra* notes 255-57 and accompanying text.

not authorized to substitute its evaluation of a case for that of the lower court.<sup>180</sup> Rather it could only determine whether the civil courts have failed to balance competing constitutional rights or have fundamentally misconceived the importance of a right. Thus, there was to be no independent review by the Court. *Mephisto*, therefore, posited a substantially restrained view of the role of the Constitutional Court.<sup>181</sup>

*Mephisto* is inconsistent with *Lüth* in a more general way than its seeming withdrawal of the Court from intensive judicial review. The Court in *Lüth* deemed expression a preferred right in the objective ordering of values basic to German society. Freedom to express opinion was "constitutive" to democratic society, the "very 'matrix' of all other freedoms."<sup>182</sup> By allowing private law values to be recast as constitutional rights, and then balancing those rights against expression, the Court in *Mephisto* essentially placed communication at the level of the private values. Communication no

180. See *Mephisto*, 30 BVerfGE 173, 197 (1971).

181. Three Justices disagreed with this deferential approach, arguing that the Court should have independently assessed the facts to assure adherence to the Basic Law's catalogue of fundamental rights. The result in *Mephisto*, they argued, was inconsistent with long-standing precedent, especially *Lüth*, where the Court itself determined whether the ordinary courts had correctly applied the balancing of interests. According to Justice Stein, the lower courts "ignored the novel's aesthetic aspects" and "overemphasized the detrimental affects of the novel on the protected sphere of . . . Gründgens' personality." 30 BVerfGE at 203, translated in KOMMERS, *supra* note 5, at 429. There was little danger that the public would mistake the novel for a biography; thus there seemed to be little ground for finding defamation. See *Mephisto*, 30 BVerfGE at 204-08. By giving too much weight to countervailing personality interests, the Court had failed its role as guardian of basic rights. See *id.* at 202.

According to Justice Rupp-von Brünneck, extraordinary latitude should be accorded polemic communicated in a matter of significant public concern that contributes to the building of public opinion. For this proposition, she cited the counter-attack theory (*Gegenschlag*) of *Schmid-Spiegel* and *New York Times v. Sullivan*. See *id.* at 224-25. This can only be accomplished through more thorough judicial review. See *id.* at 219-21.

To an American observer, the cite to *New York Times v. Sullivan* is especially apt, for in this landmark case the Supreme Court reconceived the relationship of First Amendment law to state defamation law. By immunizing persons who polemicize against public figures from the sanctions of traditional state law, the Court facilitated the "uninhibited, robust and wide-open" public dialogue that now marks American discourse. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). To accomplish this objective, the Court independently assesses the facts at issue and judges their relation to First Amendment protections. In this way, the Court determines the meaning of the Constitution. The contrasting approach of the Constitutional Court, one might argue, leaves communication freedoms too vulnerable.

182. *Lüth*, 7 BVerfGE 198, 208 (1958) (citing *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

longer possessed any special or preferred status.<sup>183</sup> The view of expression in *Mephisto* is thus similar to the prevailing view in the United States in the 1950s. This view, perhaps most associated with the position of Justice Frankfurter, held that speech had no "preferred position" over other constitutional rights.<sup>184</sup>

*Mephisto's* seeming disinterest in the specific results that were derived from an application of general principles reveals perhaps a more fundamental difference between European and American law.<sup>185</sup> In the civil law tradition, there is an emphasis on general rules, usually set forth in codes, and a relative lack of interest in the specific application of the rules. The focus is on building an intellectually coherent system of law. Thus, one tends to look for a statement of the general principles more than its specific application in a concrete case.<sup>186</sup> The abstract general principle has a life of its own, independent of its application. In German law, this is manifested as the "objective" order of values, apart from their "subjective" impact on particular cases. *Mephisto* seems consistent with this tradition in its deferential review of civil courts, principally looking only to see whether the court correctly stated the constitutional principle and brushing over the specific applications thereof.

The Anglo-American view is, of course, different. Principles do not exist independent of results. In the common law methodology, the results of each new case alter the meaning of the principle. Principles arise inductively from case to case, as compared to the inverse continental emphasis on deductive reasoning. Hence, in Anglo-American law, courts pay close attention to case-by-case applications of principle. The Supreme Court's independent assessment of facts to assure lower courts' fidelity to the constitutional principle in *New York Times* is emblematic of this approach.<sup>187</sup>

In summary, *Mephisto* marked the Court's shift from a speech-protective regime to a speech-restrictive regime. First, the growth

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183. See Quint, *supra* note 4, at 307 (discussing implications of the *Mephisto* decision).

184. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (Frankfurter, J.); *Dennis v. United States*, 341 U.S. 494, 526-27, 539-40 (1951) (Frankfurter, J., concurring).

185. Justice Rupp-von Brünneck in her dissent scolds the Court for its disinterest in the specific results reached through its theories. See *Mephisto*, 30 BVerfGE at 219-20.

186. See Quint, *supra* note 4, at 311-12 (comparing civil and common law in the use of general principles and individual cases in arriving at constitutional decisions).

187. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (assessing the lower court's application of *New York Times* scrutiny).

of human personality rights, achieved by anchoring the values of private law in Articles 1 and 2, significantly limited communication freedoms. Second, the reassertion of these private law values corresponded with the Court's withdrawal of serious independent review. Under the deferential approach of *Mephisto*, the Court essentially deferred to ordinary courts' fixing of the balance of interests.<sup>188</sup>

### B. *Post-Mephisto*

In the period immediately following *Mephisto*, the Constitutional Court employed its new deferential technique and continued *Mephisto's* trend of emphasizing reputational and privacy interests as limitations on free communication.<sup>189</sup> In the famous *Soraya* case, for example, the Court upheld an award of damages for publication of a fictitious interview with the former wife of the Shah of Iran.<sup>190</sup> The award was predicated on a newly created constitutional right of personality, derived again from the influence of objective constitutional principles on the private law.<sup>191</sup> This right

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188. The argument for the Constitutional Court's deference to others' determination of basic rights cases is different than that applicable to the U.S. Supreme Court, as Professor Quint observes. In the U.S., the argument for deference is usually based on issues of federalism or out of concern that the Supreme Court will usurp the democratic process. Neither of these applies to Germany. First, the ordinary courts apply federal law. All the great German private and public law codes are part of a unified federal legal structure. Thus, there is no federalism concern. Second, the judgments of the ordinary courts that proponents would have the Constitutional Court defer to are judgments of courts, not democratically elected institutions. Thus, deference does not solve the "counter-majoritarian" difficulty. At bottom, therefore, the argument is that the Constitutional Court should defer to the decision of another court over a constitutional matter. See Quint, *supra* note 4, at 309-10. Perhaps this is because of the traditional respect and prestige of the civil law, bolstered by German legal science, over the relatively new constitutional law.

189. See CURRIE, *supra* note 4, at 198 (discussing restrictions on freedom of expression in Germany).

190. *Soraya*, 34 BVerfGE 269 (1973).

191. See *id.* 281:

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, *inter alia*, by the legal rules relating to the general 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 by which one private individual could enforce a right to privacy against another private individual. In *Soraya*, these privacy interests operated as a limitation of communication freedoms. "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."<sup>192</sup>

Later in the year, the Constitutional Court concluded in the *Lebach* decision that such privacy interests, including an interest in rehabilitation, outweighed any public speech interest in publicizing an individual's role in a crime for which he had already paid the penalty.<sup>193</sup> According to the Court, the convicted robber's privacy interest in being let alone was a higher priority.<sup>194</sup> Crucial to the Court's finding was its implication from Articles 1 and 2 of a right of "informational self-determination:" a right "exclusively [to] de-

*Id.*; see also Quint, *supra* note 4, at 278-81 (discussing the *Soraya* case).

192. *Soraya*, 34 BVerfGE at 283-84, translated in CURRIE, *supra* note 4, at 198. The reasoning of *Soraya* was later picked up in *Böll*, 54 BVerfGE 208 (1980), where the Court determined that false quotations are not protected by Article 5. For discussion of *Böll*, see *infra* text and accompanying notes 213-16. "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 4, 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 (1991) (holding that deliberate falsification of quotations does not rise to the level of actual malice falsity required by *New York Times v. Sullivan*; accordingly, it is protected speech).

193. See *Lebach*, 35 BVerfGE 202 (1973). In *Lebach* the Court prohibited the showing of a documentary film depicting, accurately, "the planning of a famous robbery of an army munitions depot which resulted in the deaths of four soldiers." Quint, *supra* note 4, at 299.

194. The film was to have displayed the individual's photograph and mentioned his homosexuality. The Court noted:

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 protecting one's individuality. This includes the right to remain alone, to be oneself within this sphere, and to exclude the intrusion of or the inspection by others. It also encompasses 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.

KOMMERS, *supra* note 5, at 414-15 (translation of the *Lebach* decision).

termine whether and to what extent others might be permitted to portray his life story in general, or certain events from his life."<sup>195</sup> Significantly, this privacy right concerning one's image was determined to outweigh even an accurate, truthful broadcast.<sup>196</sup> These aspects of *Lebach* illustrate how expression freedoms might be eclipsed by privacy interests, especially when combined with consideration of social factors. In this way, German law is more communal than American. *Lebach* illustrates again the dramatic impact of objective constitutionalism on German law.

#### V. INTERMEDIATE REVIEW: THE COURT'S ATTEMPT TO RECAPTURE THE VALUE OF COMMUNICATION

If communication was to realize again its place as a central value in the German legal order, a way had to be found to recalibrate the balance in favor of communication. The case of *Deutschland-Magazin*<sup>197</sup> provided the setting for the Constitutional Court's attempt to make this recalibration. In *Deutschland-Magazin*, the Court signaled its move away from its extreme deference to decisions of the lower courts toward a more intermediate level of scrutiny. This mid-level scrutiny, however, still fell short of the probing scrutiny of *Lüth*.

##### A. Deutschland-Magazin

Right-wing politics was again the topic of controversy. A labor union press service distributed an article attacking the conservative *Deutschland-Magazin* as "a right-radical hate sheet" (*rechtsradikales Hetzblatt*), a form of nasty political epithet in post World War II Germany.<sup>198</sup> Confirming the judgments of the lower courts, the

195. *Lebach*, 35 BVerfGE at 220, translated in Quint, *supra* note 4, at 299-300.

196. See Quint, *supra* note 4, at 300-301 (discussing the implications of the *Lebach* case). Under American law, in contrast, expression interests would receive much more weight. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (First Amendment protects disclosure of rape victim's name obtained from public documents). It is worth noting, however, that the California Supreme Court has reached a conclusion quite similar to *Lebach*. See *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971) (holding that a cause of action for invasion of privacy arose when an article was published disclosing "truthful but embarrassing facts" about an individual's past life); see also CURRIE, *supra* note 4, at 199 n.96; Letter from David P. Currie, Professor of Law, University of Chicago, to Edward J. Eberle (Nov. 3, 1995) (on file with author).

197. 42 BVerfGE 143 (1976).

198. See *id.* at 144. The term "right-radical hate sheet" has clear historical overtones, dredging up memories of the Nazi hunting and persecuting its victims. This appears to be



Constitutional Court ruled that the labor union was entitled to make the basic criticism, but that it had to express its charge in words less scurrilous than the ones chosen. The Court viewed the content of expression as different and separable from the particular form of expression.<sup>199</sup>

In reaching this result, the Constitutional Court announced a new standard for judging communication cases as they impact on the private law:

There are no rigid and invariable limits on the court's intervention. We retain a degree of freedom to consider the particular facts of special situations. Important in this regard is the severity of the encroachment upon a basic right: The Constitutional Court may not disturb the judgment of a lower court simply because if it had decided the case it would have balanced the equities differently and therefore arrived at a different conclusion. The Constitutional Court may step in to defend an objective constitutional right at the point where the civil courts have erred in assessing the significance of a basic right. . . . The more a civil court's decision encroaches upon the sphere of protected rights, the more searching must be the Constitutional Court's scrutiny to determine whether the infringement is constitutionally valid; and where the infringement is extremely burdensome, the court may even substitute its judgment for that of the civil courts.<sup>200</sup>

So stated, the test in *Deutschland-Magazin* is a variable standard of review; the Court's level of review rises with the severity of intrusion of the right.

In *Deutschland-Magazin*, the Court did not find the curtailment of the speaker's rights to be a particularly severe measure. The speaker was only prohibited from using the phrase "right-radical hate sheet." The essence of the statement could easily be expressed in other language. Thus, it might be argued, the Court had not

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the basis on which the Court viewed this phrase as particularly ill-chosen. See Quint, *supra* note 4, at 319 n.222 (discussing the impact of the *Deutschland-Magazin* case).

199. *Deutschland-Magazin*, 42 BVerfGE at 149-50. ("Restrictions on opinion freedoms which are exclusively limited to the form of expression are less severe limitations. . . . Generally—if not always—formulations of thoughts may be changed without difficulty without harming the idea sought to be communicated.")

200. *Id.* at 148-49, translated in KOMMERS, *supra* note 5, at 388.

really prohibited communication of the idea so much as the form of that communication. Moreover, the sanction placed on the speaker—the prohibition on repeating the phrase—was thought to be minor.<sup>201</sup> Accordingly, no high-level review was merited. *Deutschland-Magazin* is thus distinguishable from *Lüth*, where the injunction against communication of the speaker's idea was a severe limitation that merited searching review.

From an American perspective, the *Deutschland-Magazin* Court's restriction of the speaker's chosen communication would hardly be viewed as mild. Choice of the medium of expression is a fundamental aspect of free speech in the American view.<sup>202</sup> In America, control of the use or abuse of speech lies primarily with the people in the exercise of self-government. In Germany, by contrast, the Court takes a more activist role in circumscribing the terms of public discourse around a more ascertainable line of propriety. Sharp and caustic speech is permissible, but not reckless or insulting language.<sup>203</sup>

### B. Echternach

The Constitutional Court's decision in *Echternach*,<sup>204</sup> a companion case to *Deutschland-Magazin*, seemed to suggest that the standard announced in *Deutschland-Magazin* indeed was sound, despite its mild application. In *Echternach*, the Court found that an injunction against use of the charge that the German Foundation

201. See *id.* at 151; Quint, *supra* note 4, at 321.

202. For example, the Supreme Court noted:

[M]uch linguistic expression serves a dual communicative function; it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971). The Supreme Court even scrutinized expressive conduct to make sure that "the government interest is unrelated to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (citations omitted) (qualifying the more lenient standard of *United States v. O'Brien*, 391 U.S. 367 (1968)).

203. The Constitutional Court similarly excised a particular use of "cripple" in the *Cripple* case, 86 BVerfGE 1 (1992), discussed *infra* at notes 330-38 and accompanying text. See KOMMERS, *supra* note 5, at 381.

204. 42 BVerfGE 167 (1976).

(*Deutschland-Stiftung*), the publisher of the *Deutschland-Magazin*, was a "nationalistic enterprise in democratic clothing" or words with a similar meaning, was a severe curtailment of communication rights justifying searching review.<sup>205</sup> "The more a civil court's decision infringes the predicates of free existence and action that are protected by a basic right, the more searching must be the Constitutional Court's investigation to determine whether the infringement is constitutionally justified."<sup>206</sup>

Probing review was justified, the Court concluded, because the civil court's order "prohibited the expression of a certain thought-content."<sup>207</sup> This was "a limitation of the speaker's freedom of opinion which touches the basic right of Article 5 of the Basic Law not only at the margin, but in its central meaning."<sup>208</sup> The Constitutional Court's review thus encompassed examination of the lower court's interpretation of general communication principles (the objective aspect) as well as its specific application of those principles to the facts before it (the subjective aspect). Perhaps this is the most notable development in *Echternach*.

The lower court also erred, according to the Constitutional Court, in finding that critical value judgments (*Werturteil*) of matters of important public interest could not be communicated without displaying an adequate factual basis.<sup>209</sup> "The basic right to free expression of opinion is intended not merely to promote the search for truth but also to assure that every individual may freely say what he thinks, even when he does not or cannot provide an examinable basis for his conclusion."<sup>210</sup> Value judgments, the Court would later decide, are the essence of one's right to freely express opinions, and are protected by Article 5(1). Unlike factual statements, falsity is no defense against value judgments.<sup>211</sup>

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205. *Id.* at 163, 168-71. The Court also rejected the lower court finding that the Foundation was misusing the name of former Chancellor Adenauer for its own political purposes. *See id.* at 164, 168-71.

206. *Id.* at 168. In its probing review of the facts, the Constitutional Court's scrutiny resembled that of American courts.

207. *Id.* at 169.

208. *Id.*

209. *See* CURRIE, *supra* note 4, at 203.

210. *Echternach*, 42 BVerfGE at 170-71, translated in CURRIE, *supra* note 4, at 203. As in American law, the basic right also includes the right not to speak. *See* MAUNZ COMMENTARY, *supra* note 28, at 13. *Cf.* *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating an action making the pledge of allegiance compulsory for school children).

211. *See* *NPD of Europe*, 61 BVerfGE 1, 7-8 (1982) (removing injunction against call-

*Deutschland-Magazin* and *Echternach* evidence a willingness by the Court to employ a more heightened review in certain instances of incursion of basic rights. However, the degree of review varies with the perceived degree of intrusion. Notably, much depends on the Constitutional Court's evaluation of the case. *Deutschland-Magazin* and *Echternach* illustrate the difference. The mild scrutiny employed in *Deutschland-Magazin* was appropriate, according to the Court, because the limitation on expression concerned only its form, and not its content.<sup>212</sup> This was thought by the Court to be only minor curtailment of the right. By contrast, the Court perceived a greater incursion of speech in *Echternach* because the limitation concerned the thought-content as well as the form of expression.<sup>213</sup>

It is interesting to note that the difference between *Deutschland-Magazin* and *Echternach* seems to rest on a distinction between the content and form of expression. In turn, this bears a striking similarity to the more general distinction in continental legal thought between communication of the general principle and its application to specific cases.<sup>214</sup> As noted by Professor Quint, this reflects the underlining view that "there is an intelligible, but disembodied 'content' that can remain unimpaired even though its expression in a particular 'form' is prohibited."<sup>215</sup> This relates, in turn, to the view that there is an intelligible abstract principle that is separable from its specific application. For example, reconsider the nature of the Court's review in a case like *Mephisto*. There the Court looked only to see whether the lower court recognized the principles of free communication and free artistic expression, while essentially passing over the specific results reached.

The methodology of common law reasoning is exactly opposite. In the common law the case is all-important. Deciding the case yields insight into the relevant factors at issue. Only over time

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ing mainstream conservative party, Christian Social Union (CSU), "the National Socialist Party (NPD) of Europe"). Again, this truth/falsity dichotomy has general resonance in American law. Compare *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 339-40 (1973) ("Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction . . . on the competition of other ideas.") with *id.* at 340 ("[B]ut there is no constitutional value in false statements of fact.").

212. See *Deutschland-Magazin*, 42 BVerfGE 143, 151 (1976).

213. See *Echternach*, 42 BVerfGE at 169.

214. See Quint, *supra* note 4, at 323-24.

215. *Id.* at 324.

through case by case application can any general principle be deduced. Such general principles themselves change through specific application. Thus, the view that there could be any abstract principle separable from its application is quite foreign to the American system. "The life of the law has not been logic; it has been experience."<sup>216</sup>

### C. Assessing Deutschland-Magazin

While the variable standard of review announced in *Deutschland-Magazin* is an improvement, for a system of free expression, over the deferential test of *Mephisto*, the variable test poses its own problems for communication. First, the test itself is vague. It is not clear which factors trigger higher or lower review. Adding to this the overall amorphousness of the general balancing of interest test, we are confronted with a highly uncertain, complex and malleable test.<sup>217</sup> Lacking precision of the circumstances justifying variable review, and the weight to be accorded speech in the general balancing of interests test, the test is too beholden to the judge applying it. The value of communication can too easily be called into question, depending on the interests asserted in juxtaposition.

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216. OLIVER WENDEL HOLMES, THE COMMON LAW 1 (1881). *Deutschland-Magazin* provoked again a strong dissent from Justice Rupp-von Brünneck, who favored a higher standard of review because of the "fundamental" value of communication. *Deutschland-Magazin*, 42 BVerfGE at 154. Echoing core American doctrine, Rupp-von Brünneck forwarded several arguments: the freedom of opinion guarantee should fundamentally protect the right to say what one likes in the way one likes; it is the responsibility of the Court to assure a strong system for communication of ideas; it is inadequate to protect against only speaker sanctions; and the Court must also see to it that exercise of communicative rights not be chilled by ordinary courts' decisions placing "negative effects on the general exercise" of speech rights. *Id.* at 158-61. Rupp-von Brünneck concluded that the variable standard of review set forth in *Deutschland-Magazin* is too narrow a conception of the role the Court should play in sustaining communication rights. *See id.* at 156.

217. *See generally* Quint, *supra* note 4, at 329 (noting several problems with an adjustable standard of review). Moreover, Professor Quint points out Justice Rupp-von Brünneck's observation "that the Court's restraint in reviewing decisions of private law courts appears inconsistent with other decisions of approximately the same period which greatly expanded the scope of the Court's review of acts of the legislature in certain areas." *Id.* at 329 n.258. For this point, Justice Rupp-von Brünneck cited two controversial cases, the *First Abortion* case, 39 BVerfGE 1 (1975) (Court invalidates federal statute permitting most abortions during first trimester), and the *University* case, 35 BVerfGE 79 (1973) (invalidating state statute granting students, nontenured faculty members and workers a share in university governance). *See Deutschland-Magazin*, 42 BVerfGE at 156 (Rupp-von Brünneck, J., dissenting). In its degree of scrutiny of facts, *Deutschland-Magazin* is also inconsistent with *Echternach*, as observed above. *See supra* notes 204-16 and accompanying text.

Subjectivity in interpretation and uncertainty in results are likely to be the outcomes.

A second major defect is the lack of any specific resolution of the clash between communication and other constitutional rights. As we recall, the *Deutschland-Magazin* test was prefigured by *Lebach*, where the Court applied heightened review to personality interests in limitation of expression. What remained unresolved by *Deutschland-Magazin* was determination of this conflict between speech rights and personality rights. Thus, the key determination ahead for German law was which of these rights would have precedence and under what circumstances.

#### D. Employing *Deutschland-Magazin*

Notwithstanding the difficulties inherent in the *Deutschland-Magazin* test, it continued to be the Court's standard methodology in the 1980s. However, given its variability, the test could be used to both support and oppose speech-protective outcomes. For example, the enhanced review of constitutional rights signalled by *Deutschland-Magazin* could be used to support speech interests. A good example of this strand is the *Art Critic* case of 1980,<sup>218</sup> where the Court invalidated a damage award for defamation levied against radio broadcasters who had criticized a lecture given by a sculptor. The Court viewed the damage award as an especially serious sanction of speech as compared to the more typical sanction of an injunction.<sup>219</sup> Because of this severe impact on communication, the Court scrutinized the lower courts' interpretation and application of Article 5, ultimately invalidating them.<sup>220</sup>

Notwithstanding speech-protective outcomes in cases like the *Art Critic* case or *Echternach*, the *Deutschland-Magazin* test paved the way for speech-restrictive outcomes as well. This was accomplished by recasting the private law emphasis on personality interests as one of constitutional dimension through Article 1 human dignity and Article 2 personality rights. Thus, the *Deutschland-Magazin's* methodology could be employed to provide enhanced

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218. 54 BVerfGE 129 (1980).

219. See *id.* at 135-36. Under German law, injunctive relief is the common remedy as compared to damage awards, which are unusual. Under American law, of course, the situation is reversed. See Quint, *supra* note 4, at 330 n.261.

220. See *Art Critic*, 54 BVerfGE at 130, 136.

review of these constitutional rights, even, paradoxically, over communication rights.<sup>221</sup>

The cases of *Böll*<sup>222</sup> and *Wallraf*<sup>223</sup> illustrate this speech-restrictive strand. In these cases, the Court exercised vigorous constitutional review of personality rights to curtail communication rights, as it had previously in *Mephisto*, *Soraya*, and *Lebach*.<sup>224</sup> In *Böll*, a television commentator criticized the Noble-prize winning author Heinrich Böll for allegedly making statements that aided terrorism, then an acute problem for Germany.<sup>225</sup> 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.<sup>226</sup>

Uncovering 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.<sup>227</sup>

In comparison to established doctrine, the violation of Böll's personality rights arose from a court's nonaction in foreclosing Böll's

221. See Quint, *supra* note 4, at 331.

222. 54 BVerfGE 208 (1980).

223. 66 BVerfGE 116 (1984).

224. See discussion *supra* notes 156-94 and accompanying text.

225. 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.'" *Böll*, 54 BVerfGE at 209, translated in Quint, *supra* note 4, at 332 n.265.

226. See *Böll*, 54 BVerfGE at 211-13.

227. *Id.* at 217, translated in KOMMERS, *supra* note 5, at 419. The Court continued: "The use of a direct quotation as proof of 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. *Id.* at 421. Again, the contrast with American law over the use of false quotations is dramatic. See *supra* note 192.

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. The Constitutional Court then found that there was no Article 5 protection for false statements such as the misquote. Thus, Böll's personality rights prevailed.<sup>228</sup>

The *Wallraff*<sup>229</sup> case is another illustration of how objective rights can sometimes limit subjective, individual speech rights. Interestingly, this case involved a clash between objective and subjective aspects of expression rights. The sensationalistic newspaper *Bildzeitung*, part of the conservative Axel Springer publishing house, sued Günter Wallraff, an investigative reporter, for publishing a book that described in a negative way the paper's editorial practices. Wallraff worked clandestinely, under a fictitious name, as a reporter for the paper in order to obtain information as to its workings.<sup>230</sup>

The Federal Supreme Court dismissed the *Bildzeitung's* suit, deciding that the public interest in the information reported by Wallraff overrode any competing interest. The Constitutional Court reversed upon its independent scrutiny of the fact pattern:

Editorial confidentiality is one of the prerequisites of a free press, and it can be infringed not only by the state but also by societal forces and individuals. To that extent, editorial

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228. See *Böll*, 54 BVerfGE at 217-18; Quint, *supra* note 4, at 333-34. On remand, the Federal Supreme Civil Court ("BGH") upheld the decision in Böll's favor. See 1982 NJW 635. The case of *Eppler*, 54 BVerfGE 148 (1980), provides an interesting contrast with *Böll*. Decided on the same day, *Eppler*, a well-known politician, "sought an injunction prohibiting opponents from repeating their charge that Eppler . . . desire[d] to 'test the endurance of the economy' through his social policies." Quint, *supra* note 4, at 334 n.-273. The statement implied that Eppler was willing to take undue risks with the economy. Accordingly, Eppler viewed the statements as an attack on his constitutional right of personality. As in *Böll*, a lower court dismissed the suit. Unlike *Böll*, however, the Constitutional Court found that the remarks did not "pose a severe danger to Eppler's constitutional right of personality. See *id.* The Court thus applied a low level of review under the variable standard of *Deutschland-Magazin*, rejecting the complaint. See *id.* The contrast between *Böll* and *Eppler* seems a good illustration of the variability, if not inconsistency, of the *Deutschland-Magazin* approach. On the other hand, since *Böll* involved a false quotation whereas *Eppler* concerned an opinion, the two cases can be doctrinally distinguished.

229. See 66 BVerfGE 116 (1984).

230. See *id.* at 117-18.



confidentiality is an aspect of the guarantee of the independence of the press as an objective principle which governs the interpretation and application of the relevant rules of the civil law. . . .<sup>231</sup>

The assertion of a press right to editorial confidentiality contrasts notably with American doctrine.<sup>232</sup> Moreover, *Böll* and *Wallraff* point out once again how the objective aspect of basic rights makes a difference in the two legal cultures. Motivated by its desire to realize the "objective" constitutional order, the Constitutional Court acted to sustain protected freedoms: objective press rights in *Wallraff*, objective personality rights in *Böll*. These objective dimensions to rights can trump even subjective, individual rights to free communication. *Böll* and *Wallraff* thus illustrate the complicated, interrelated ordering of values so central to German law and so foreign to American law.

#### VI. THE 1990S: HEIGHTENED REVIEW AND THE PREFERENCING OF EXPRESSION

With the uneven application of the *Deutschland-Magazin* variable standard of review, German communication law stood at a threshold as it approached the 1990s. The value of communication would depend on the proclivities of the German Constitutional Court at any one time. In the 1990s, the Court recognized that it faced a choice: whether to prefer communication or personality rights.

Ultimately the Court preferred communication rights. In a series of cases, it commenced the task of building an analytical framework that would restore communication's primacy among societal values, as envisioned in *Lüth*.<sup>233</sup> The Court embarked upon this task in a remarkable series of decisions at the outset of the 1990s. In two important cases involving the prominent and controversial German politician, Franz Josef Strauss,<sup>234</sup> and in two cas-

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231. *Id.* at 135, translated in KOMMERS, *supra* note 5, at 423.

232. In American law, the Supreme Court has consistently rejected the claim that the press should have a right of editorial confidentiality. See *Herbert v. Lando*, 441 U.S. 153 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

233. 7 BVerfGE 198, 208 (1958).

234. *Stern-Strauss Interview*, 82 BVerfGE 272 (1990); *Anti-Strauss Placard*, 82 BVerfGE 43 (1990). Franz Josef Strauss brought out the furies in people, who often savagely at-

es involving denigration of national symbols, one involving the national flag<sup>235</sup> and the other the national anthem,<sup>236</sup> the Court served notice that communication rights had a more essential role to play in German society.

### A. *The Strauss Cases*

#### 1. *Stern-Strauss Interview*

The case marking the shift most dramatically was *Stern-Strauss Interview*,<sup>237</sup> which involved an interview with a prominent writer, Ralph Giordano, published in the leading magazine, *Stern*, to mark the death of the former Nazi leader, Rudolph Hess. In the course of the interview Giordano used Strauss as an illustration of his view that not all German politicians were true democrats; some were "opportunistic democrats" (*Zwangsdemokraten*)—those who, out of political necessity or opportunism, proclaimed democracy and adopted democratic ideals, even though they might prefer to act more dictatorially.<sup>238</sup> "For me Franz Josef Strauss is the personification of this type. . . . This type—which I want to depersonalize, because it in no way concerns only Franz Josef Strauss—is very active in the Federal Republic."<sup>239</sup> As powerful men and personalities, these people appeal to the "not yet resolved German desire for a strong man, the so-called German version (*Verschnitt*) of a national socialism Leadercult (*Führerkult*)."<sup>240</sup> Giordano, who was a Jewish survivor of a concentration camp and had a long history of opposition to the reestablishment of Nazism in Germany,

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tacked him. Strauss often resorted to the courts to defend his "honor." See Judgment of Appellate Court of Hamm, 1982 NJW 659 (Strauss depicted as sweating, stampeding bull, covered with red arrows, attacking a group of young people); Judgment of Appellate Court of Munich, 1971 NJW 844 (Strauss caricatured with limbs in form of swastika); Judgment of Appellate Court of Hamm, 1982 NJW 1656 (depicted as blood-soaked butcher, laughing as he sharpens a long knife); Judgment of Munich Court ("VGH") 1984 NJW 1136 (depicted as big bad wolf in scene from Little Red Riding Hood); Georgios Goundalakis, *Freiräume und Grenzen politischer Karikatur und Satire*, 13 NJW 809, 810 n.4 (1995). By contrast, current Chancellor Helmut Kohl, himself subject to innumerable savage attacks, has never sought judicial relief to vindicate perceived slights of his honor. See *id.* at 816. Obviously, the granting of judicial relief encourages public figures to sue.

235. See *Flag Desecration*, 81 BVerfGE 278 (1990).

236. See *National Anthem*, 81 BVerfGE 298 (1990).

237. 82 BVerfGE 272 (1990).

238. See *id.* at 273-74.

239. *Id.* at 273.

240. *Id.* at 273-74.

viewed such "opportunistic democrats" as a danger to German democracy.<sup>241</sup> The lower courts accepted Strauss' argument that he had been libelled, enjoining further use of his name to personify the term "opportunistic democrat."<sup>242</sup>

In exercising constitutional review, the Constitutional Court signaled its return to the view that communication was special, as expressed in *Lüth*.<sup>243</sup> While it is true that freedom of opinions rights are limited by the general law, the Court noted that the general law is subject to the fundamental values of the Basic Law according to the Reciprocal Effect Theory.<sup>244</sup> The lower courts failed adequately to take this constitutive value of the Basic Law into account. To assure compliance with the Basic Law, the Court therefore found it necessary to heighten its scrutiny. Thus, intensive, full-scope judicial scrutiny would be applied to the lower courts' misinterpretation of the meaning and range of the right.<sup>245</sup> This may arise when courts wrongly interpret a communication, assign a meaning to a communication that it does not objectively have, or when a court interprets a communication in a way that leads to a finding of unconstitutionality without adequate substantiation of the reasons underlying its choice, including the reasons why other plausible, legal interpretations were dismissed. Communication rights are also improperly denied when courts misclassify opinions as unprotected factual assertions, libel, or defamation.<sup>246</sup>

As phrased, this full-range review<sup>247</sup> posits a limited, but intensive, role for the Constitutional Court. The role is limited in that the Court regularly defers to the ordinary courts' fixing of procedure, establishment and evaluation of the facts, and interpretation of the ordinary law—as is customary in the German constitutional order. However, the role is intensive in that the Court noticeably sharpens its review of the lower courts' interpretation of constitutional norms, as described above. This is an important change

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241. *Id.* at 274.

242. *Stern-Strauss Interview*, 82 BVerfGE at 275. The suit continued even though Strauss had died before its resolution, illustrating the importance attached to personal dignity in Germany.

243. *See id.* at 280 (citing *Lüth*).

244. *See id.*

245. *See id.*

246. *See id.* at 281.

247. *Stern-Strauss Interview*, 82 BVerfGE at 281.

compared to earlier, more deferential versions of judicial review, such as that in *Mephisto*<sup>248</sup> or even *Deutschland-Magazin*.<sup>249</sup>

To an American observer, the standard of review announced in *Stern-Strauss Interview* is more reminiscent of American "hard look" administrative law review than American strict scrutiny constitutional law review. As in American hard look review, the German Constitutional Court looks to see whether the lower courts have correctly fixed the procedure, assessed the facts, interpreted the general law and the Basic Law accurately, and thoroughly explained its conclusions.<sup>250</sup> If these factors are correctly applied, the Court will normally uphold the lower court decision, even if it would have reached a different conclusion. True to its continental roots, the German Court will not ordinarily substitute its judgment for that of the lower courts. This attempt to respect the authority of ordinary courts and yet uphold constitutional norms probably explains the Court's choice of this form of intensive review as compared to the stricter scrutiny of American courts.<sup>251</sup> The German Court is somewhat more constrained by its desire not to intrude too deeply into the province of the ordinary courts, a hesita-

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248. See *supra* notes 156-88 and accompanying text.

249. See *supra* notes 198-203 and accompanying text.

250. Cf. *Motor Vehicle Mfg. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The Court noted:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."

*Id.* at 43 (citations omitted).

251. Under conventional American doctrine, violations of 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." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

tion not always shared by the United States Supreme Court. Still, by forcing ordinary courts to make their reasoning transparent, the Constitutional Court better performs its assigned role as guardian of the Constitution.

Acknowledging the lower court's recognition of the prevalent view that communication rights are qualified by personality rights, the Constitutional Court in *Stern-Strauss Interview* found it necessary to recalibrate speech freedoms within the German constitutional order. The Court reasoned that communication freedoms are essential to the free development of personality, with which they are closely linked.<sup>252</sup> So defined, communication is an important part of human dignity. The Court thereby reasserted the importance of the individual component of expression. By this reasoning, the Court set out to recapture the earlier prominence of communication as developed in cases like *Lüth* or *Schmid-Spiegel*. Reemphasis of this individual component still compliments the democratic component of expression, as regulated by the conventional Presumption Principle favoring political speech.<sup>253</sup> Indeed, the Constitutional Court went on to sketch the contours of public discourse in a way previously envisioned by the United States Supreme Court in cases like *New York Times Co. v. Sullivan*<sup>254</sup> or *Cantwell v. Connecticut*.<sup>255</sup> "Especially in public dialogue, including political campaigns, criticism must be accepted, even exaggerated and polemical forms, because otherwise there is a danger of chilling or limiting

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252. See *Stern-Strauss Interview*, 82 BVerfGE at 281.

253. See *id.* ("The dimension of (Article 5) protection depends, to be sure, on the purpose of the communication. Contributions to the dialogue of publicly important questions enjoy stronger protection than statements that only serve private interests.")

254. 376 U.S. 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.")

255. 310 U.S. 296, 310 (1940). The *Cantwell* Court stated:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenants of one may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

*Id.* at 310.

the process by which opinion is formed."<sup>256</sup> Public persons naturally must expect criticism.<sup>257</sup>

Assessing the facts anew against this revised doctrinal framework, the Court found fault with the interpretation of the lower court. Certainly the comments about Strauss could be viewed as denigrating. Labeling anyone a Nazi in post-war Germany is a very low blow.<sup>258</sup> Measured against the German version of "hard look" review, however, this was not the only interpretation of the statement. It is much more likely that the statement was directed to the German people as a warning that their longing for a "strong man" was dangerous to German democracy. Strauss was merely an object of this longing. This seemed especially likely to the Court because Giordano had previously counted Strauss as an "opportunistic democrat" and an object of the German longing for a strong man, but specifically rejected any comparison of Strauss to Hitler.<sup>259</sup> Moreover, the author had sought to depersonalize the reference to Strauss. Thus, viewing the statement "objectively," it simply did not have the defamatory meaning ascribed to it by the lower court.<sup>260</sup> In fact, the lower courts interpreted the statement in the worst possible light, leading to a finding that it was unprotected libel. Rather than defamation, the statement was an important contribution to the free formation of opinion, protected under the Presumption Principle because of its value to German democracy.<sup>261</sup>

This reassessment of the communication forced the Court to redefine libel for purposes of Article 5 freedoms. Purposeful denigration and insult do not themselves constitute libel, the Court reasoned, in a move in the direction of American law.<sup>262</sup> Rather,

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256. *Stern-Strauss Interview*, 82 BVerfGE at 282.

257. *See id.* at 277 ("To be sure, people who participate in public life increase the chance they will be objects of criticism. Those who render harsh judgments in the struggle for the formation of public opinion must be ready to accept sharp reactions."). Of course, this is the Counter-Attack Theory developed in *Schmid-Spiegel*, see *supra* notes 117-18 and accompanying text, and is reminiscent of the *New York Times*' "public figure" standard. *See also* *Gertz v. Robert Welch*, 418 U.S. 323 (1974) (distinguishing between public and private figures).

258. *See Stern-Strauss Interview*, 83 BVerfGE at 277.

259. *See id.* at 283.

260. *See id.* at 277.

261. *See id.* at 283-85.

262. *See id.* at 283. American libel law is governed by the *New York Times* actual malice standard. *New York Times*, 376 U.S. at 280 (holding that actual malice exists when

the line between protected speech, even if sharp or insulting, and unprotected libel lies at the point at which the statement primarily defames the person without any other substantive value. Obviously, such a distinction is not an easy one to make, and one might question the ability of the Court, or any court, to work out such an obtuse standard.<sup>263</sup> The Court ought to delineate clearer boundaries between protected expression and unprotected libel or defamation. A useful legal transplantation in this context would be the technique of definitional balancing or categorization employed by the Supreme Court in cases like *New York Times*.<sup>264</sup> In the absence of sharpening legal definitions, the standard must, most like-

the statement is made "with knowledge that it was false or with reckless disregard of whether it is false or not").

263. See *Stern-Strauss Interview*, 82 BVerfGE at 283-84. The indefiniteness of this standard is problematic for a system of law. See WASSERMANN COMMENTARY, *supra* note 28, at 441. Unfortunately, there has not yet been a further concretization of the standard. See Letter from Dr. Bodo Pieroth, Professor of Law, Westfälische Wilhelms-University, to Edward J. Eberle (Aug. 26, 1995) (on file with author). In the recent case of *Böll Book Review*, 22 NJW 1462 (1993) the Court applied the *Stern-Strauss Interview* standard and found that a critic defamed the reputation of the author Heinrich Böll in a book review of Böll's work that, among other things, called Böll "stone-dumb, clueless and talentless." To an American observer, this is somewhat of a surprising outcome, since the critique seems no more severe than standard fare in the American scheme. This would seem to illustrate the manipulability of the vacuous defamation standard, in contrast to the precise *New York Times* standard. See *New York Times*, 376 U.S. at 379-80.

More recently, the Court tightened application of the defamation standard in *Soldiers are Murderers II*, 22 EuGRZ 443 (1995), discussed at *infra* notes 417-23 and accompanying text.

264. For example, the right to be free from defamation and libel as mediated by *New York Times* was thought by Professor Nimmer to be a classic case of definitional balancing. See MELVILLE B. NIMMER, NIMMER ON FREE SPEECH § 2.03 at 2-15 to 2-16 (1984). As Professor Nimmer explains elsewhere:

*Times* points the way to the employment of the balancing process on the definitional . . . level. That is, the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as "speech" within the meaning of the first amendment.

. . . .

. . . By in effect holding that knowingly and recklessly false speech was not "speech" within the meaning of the first amendment, the Court must have implicitly (since no explicit explanation was offered) referred to certain competing policy considerations.

Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942-43 (1968) (footnotes omitted).

ly, await clarification through case application, not unlike the American common law method.

Applying this test, the Court interpreted the statement as concerning primarily the role of opportunistic politicians in German public life, not a defamatory personal attack on Strauss. "In the foreground was the objective statement and [Strauss] came into play only as an illustration of the type."<sup>265</sup> The statement was primarily a warning that it is necessary to protect and safeguard the German democratic order from threats."<sup>266</sup> Since the appellate court (*Oberlandesgericht*) had inaccurately interpreted the statements, the Constitutional Court remanded the case with instructions to reperform the balancing of interests with greater attention to expression values.<sup>267</sup>

## 2. *Anti-Strauss Placard*

The second *Strauss* decision, decided a few months earlier, illustrates the Court's use of "hard look" review to scrutinize interpretations of communications that lead to a finding of unconstitutionality without adequate explanation of the reasons underlying the choice. In the *Anti-Strauss Placard*<sup>268</sup> case, demonstrators took to the streets to protest the policies of Franz Josef Strauss, the Bavarian minister president at the time. The point of contention was a display of placards. One placard stated: "Strauss protects Fascists;" another banner asserted "Strauss, the Fascist's friend, protects Hoffmann, the Oktoberfest murderer."<sup>269</sup> Offended by these statements, Strauss sued for insult and won in the lower courts. To the Court it was unfathomable that such simple statements could be viewed as defamation. "The statement 'Strauss protects Fascists' is so short, clear and simple, that it would seem impossible to misconstrue it, as appeared here."<sup>270</sup> The Court concluded that the signs were subject to several plausible interpretations, not just the

265. *Stern-Strauss Interview*, 82 BVerfGE at 284.

266. *Id.* at 285.

267. *See id.*

268. 82 BVerfGE 43 (1990).

269. *Id.* at 44. The reference to "Hoffmann, the Oktoberfest murderer," concerns a right-wing extremist who set off a bomb at the Munich Oktoberfest, which killed and wounded a number of people. Letter from Dr. Bodo Pieroth, Professor of Law, Westfälische Wilhelms-University, to Edward J. Eberle (Aug. 26, 1995) (on file with author).

270. *Anti-Strauss Placard*, 82 BVerfGE at 48. The speaker believed that statements could be supported by certain activities of Strauss that linked him to fascist groups. *See id.* at 48-49.



unfavorable one reached by the lower court. In such situations, where a court chooses an interpretation that leads to a finding of unconstitutionality, the court must substantiate and explain the reasons for its choice.<sup>271</sup> If these factors are not present, the Constitutional Court cannot defer to the lower court, as is customary.<sup>272</sup> Rather than defamation, the Court concluded, the communication was an important contribution to the intellectual struggle for the formation of opinion since it dealt with an important public issue—namely, the policies of Minister President Strauss. The importance of these issues to the general public must be considered in judging the meaning of a communication, not merely the speaker's intention.<sup>273</sup>

In further probing the communication, the Court found that the lower court had improperly interpreted the protests by attributing the actions and statements of certain other members of the Anti-Strauss Committee to the speaker, treating all as in league with one another, which the evidence did not bear out. For example, the district court attributed to the speaker the views of certain committee members that Strauss was the main representative of fascist forces in the Federal Republic.<sup>274</sup> A speaker can only be responsible for the content of her communications, not the views or actions of others:

Every person has the right to express freely his opinion, and under circumstances for which he is accountable . . . and not for circumstances or events he does not know [or is not accountable] . . . . The statements of third parties can be considered only when they are part of the total communication and so consciously made or obviously supported [by the speaker]. . . . Otherwise, it would be possible to curtail an individual's opinions—if opinions of others, or opinions that the speaker has [but has not articulated] or stated on another occasion—were attributed to her even though they were not made in the concrete case. In this way, not only individual freedoms would be limited but also substantially the freedoms of Article 5 as a whole.

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271. *See id.* at 51-52.

272. *See id.* at 48-49.

273. *See id.* at 53.

274. *See id.* at 52-53.

Even more importantly, this could threaten injury to the process by which public opinion is formed, when someone who makes public statements must reckon with the fact that his statements will be burdened by [the statements] of those [listeners or] group members present or their views.<sup>275</sup>

On these points, Germany has begun to aspire towards developments in American law: separating the intent of expression from its content, and separating individual expression from group associations for purposes of fixing the boundaries of free discourse.<sup>276</sup>

The Court further elaborated the triggers for intensive scrutiny. Where criminal sanctions are at issue, the Court must itself determine whether a proper assessment of the facts has been made since criminal sanctions can gravely harm communication interests.<sup>277</sup> Additionally, scrutinization of the facts is essential for expression that might give rise to civil sanction, like defamation, since it may determine whether statements are protected or not.<sup>278</sup> The Court's increased scrutiny of facts is a notable departure from its earlier, traditional deference to the authority of the ordinary courts, and bespeaks the Court's recognition that establishment of the facts is itself central to protection of a system of free expression. Intensive review is also necessary when a false fact or personal insult is involved, since a consequence of those determinations is that the communication is not protected. It further applies to instances involving defamation which, in contrast to personal insults, is not absolutely without Article 5 protection.<sup>279</sup> Finally, intensive review applies when the meaning of a communication is at issue, because the determination of the content of a communication determines whether it is classified as a factual assertion (*Tatsachen-*

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275. *Anti-Strauss Placard*, 82 BVerfGE at 52-53.

276. See, e.g., *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46 (1988) (holding that deliberate vilification of Reverend Falwell is protected); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (holding that First Amendment protection of association prohibits state from excluding person from profession based on membership in undesired political organizations).

277. See *Anti-Strauss Placard*, 82 BVerfGE at 50.

278. See *id.* at 50-51.

279. Under German law personal insults are without Article 5 protection because they involve a violation of personal honor. Thus, the protection of personality outweighs expression in this context. See StGB § 192. In contrast, defamation may receive some protection, depending on whether opinion content predominates over the personal criticism.

*behauptung*), value judgment (*Werturteil*), formal insult (*Formal-beleidigung*), or defamation (*Schmähkritik*)—all categories denoting specific levels of protection in the German system.<sup>280</sup> “In all these cases, the Constitutional Court must make sure that the classification of a statement will not prejudice the range and weight of the basic right, so that free intellectual dialogue will not be curtailed.”<sup>281</sup> The Court’s enhanced safeguarding of the structure of public discourse is a notable development of German law in the 1990s.

### 3. *Strauss Political Satire Case*

The *Strauss* cases thus mark a noticeable heightening of the scrutiny applied by the Constitutional Court. A brief look at an earlier *Strauss* case, the *Strauss Political Satire* case,<sup>282</sup> illustrates the difference. There, caricatures of Strauss were published that depicted him as a sexually active pig, copulating with other pigs dressed in judicial robes meant to portray justices. Applying the sliding scale standard of *Deutschland-Magazin*, the Court found that this ribald satire exceeded the bounds of propriety.<sup>283</sup> The crude depiction could only be viewed as a sharp, scurrilous attack on Strauss, the Court reasoned. Sexual acts are intimate components of human dignity. Depicting humans as animals, especially in sexual acts, is a severe intrusion of human personality. By such reasoning, the Court found a violation of Strauss’ dignity as a person.<sup>284</sup> The case thus illustrates the immediately preceding regime: human dignity and personality rights limit individual speaker rights.

The *Strauss Political Satire* case contrasts dramatically with American law. In *Hustler Magazine v. Falwell*,<sup>285</sup> decided around

280. See *Anti-Strauss Placard*, 82 BVerfGE at 51. Under German law, protection of factual statements depends on their truth/falsity, whereas value judgments are presumptively protected, regardless of whether true or false. See *supra* notes 137-38 and accompanying text.

281. *Id.* at 51.

282. 75 BVerfGE 369 (1987).

283. See *id.* at 379.

284. See *id.* at 380. Technically, this was considered a criminal insult under the German Criminal Code (*Strafgesetzbuch*). See StGB § 185.

285. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The comparison of *Hustler* with the *Strauss Political Satire Case* is a popular topic in Germany. See, e.g., Goundalakis, *supra* note 234, at 810; Nolte, *Falwell vs. Strauss: Die Rechtlichen Grenzen Politischer Satire in den USA und in der Bundesrepublik*, 1988 EuGRZ 253.

the same time, the Supreme Court protected *Hustler's* deliberate insult of Reverend Falwell through its depiction of his first sexual encounter as occurring between a drunken Falwell and his mother in an outhouse. This caricature could not plausibly be viewed as a statement of fact, nor could it reasonably be construed as sufficient to make out "actual malice."<sup>286</sup> Thus, what was left—damage to personal reputation, hurt feelings, and asserted emotional harms—were, according to the Supreme Court, pains to be borne in service to the American ideal of unfettered discourse.<sup>287</sup> In these respects, German and American law contrast dramatically over the limiting influence that personality rights have on expression.

## B. National Symbol Cases

### 1. Flag Desecration Case

Further dramatic contrasts and similarities between both legal systems can be seen in the *Flag Desecration*<sup>288</sup> and the *National Anthem*<sup>289</sup> cases, which are strikingly similar to the American flag-burning cases.<sup>290</sup> The *Flag Desecration* case concerned the sale of a satiric book of anti-military prose and poetry. The controversy concerned the back cover of the book. The bottom half showed soldiers at attention saluting the German flag.<sup>291</sup> The top-half depicted a man, with fly open, urinating. A urine trail was noticeable behind the flag. Putting the collage together, it looked like the man was urinating on the German flag. The lower courts found this to be a violation of the German Criminal Code, which made it an offense to desecrate the flag.<sup>292</sup>

286. *Hustler*, 485 U.S. at 56-57.

287. See Eberle, *supra* note 1, at 1184.

288. 81 BVerfGE 278 (1990).

289. 81 BVerfGE 298 (1990).

290. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

291. *Flag Desecration*, 81 BVerfGE at 280.

292. Section 90a of the German Criminal Code declares:

(1) Whoever publicly, in an assembly or through the distribution of publications . . .

1. insults or maliciously casts into contempt the Federal Republic of Germany or one of its states or its constitutional order, or
2. defames the colors, the flag, the coat of arms or the anthem of the Federal Republic or one of its states, will be punished by imprisonment

Although the book cover contained obvious political opinion, the courts classified the expression as involving artistic, not opinion, rights.<sup>293</sup> The assessment of criminal sanctions triggered heightened review because criminal sanctions can have especially severe consequences for individual and social interests in expression.<sup>294</sup> Because artistic freedoms were at issue, the Constitutional Court needed to determine whether the book cover was properly evaluated as art in addition to policing interpretation of the right.<sup>295</sup> Determination of the bounds of art is necessary, since artistic freedoms, like opinion freedoms, are essential to the free formation of ideas.<sup>296</sup> It was easy to characterize the book cover as art. The photo collage tangibly involved the artistic process, the essential standard laid down in *Mephisto*.<sup>297</sup> It did not lose its status as protected art because it was offensive or opinionated, since the government may not prescribe orthodoxy in art and since art can express opinion.<sup>298</sup>

Having found that the book was art did not end the inquiry—despite the absolute language of Article 5(3). Artistic freedoms can be limited by countervailing constitutional norms, the essential teaching of *Mephisto*. These countervailing constitutional interests can be individual or social. “[A]n orderly human life in a community presupposes not only the mutual consideration of the citizens, but also a functioning state order, which is necessary to secure effective protection of basic rights in the first place.”<sup>299</sup> The

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of up to three years or by a fine. . . .

StGB § 90a, as translated in Peter E. Quint, *The Comparative Law of Flag Desecration; The United States and the Federal Republic of Germany*, 15 HASTINGS INT’L & COMP. L. REV. 613, 628 n.86 (1992).

293. *Flag Desecration*, 81 BVerfGE at 291.

294. *See id.* at 290; *accord Anti-Strauss*, 82 BVerfGE at 50.

295. *Flag Desecration* 81 BVerfGE at 289-91; *see also Mephisto*, 30 BVerfGE at 189, discussed *supra* at notes 155-87 and accompanying text.

296. *See Flag Desecration*, 81 BVerfGE at 291. Theoretically, it should make a difference whether artistic or opinion freedoms are at issue since art is textually unbounded in comparison to the textual circumscription of opinion. In practice, however, the Constitutional Court has implied limitations on artistic freedoms as, of course, it previously implied limitations on the express qualifications of opinion freedoms. *See, e.g.*, discussion of *Lüth* at *supra* notes 72-76 and accompanying text. Thus, in reality there is no practical difference between artistic and opinion freedoms. *See supra* notes 163-72 and accompanying text.

297. *See Flag Desecration*, 81 BVerfGE at 292.

298. *See id.*

299. *Id.*

Court went so far as to assert that the regulation of artistic expression is not limited to threats of a "clear and present danger." Works of art that denigrate the constitutionally protected order cannot be regulated only when they directly threaten the existence of the state or constitution. Rather, courts must balance artistic rights against the countervailing constitutional interests. This balance must involve a concrete working out of the values in context in an attempt to maximize both.<sup>300</sup> The balancing of interests test applicable in artistic expression is essentially the same as that applicable to freedom of opinion cases.<sup>301</sup>

In contrast to the personality rights at issue in *Mephisto*, the competing norm here was protection of the flag, derived somewhat free-handedly from the Article 22 provision specifying that the flag must be red, black, and yellow.<sup>302</sup> From this straight-forward text, the Court interpreted Article 22 to presuppose "the right of the state to use state symbols to self-present itself" in order "to appeal to the state-feeling (*Staatsgefühl*) of citizens."<sup>303</sup> "As a free state, the Federal Republic is dependent on the identification of its citizens with the fundamental values symbolized by the flag. These protected values are present in the colors of the flag . . . which stand for the free democratic basic order."<sup>304</sup> On this interpretation, "the point of the countervailing constitutional value incorporated into section 90a becomes clear."<sup>305</sup> "As the flag serves an important means of integration through the state goals it embodies, so can its denigration injure the authority of the state which is necessary to internal peace."<sup>306</sup> Thus, Professor Quint argues, "the countervailing interest recognized by the Court is the interest of the state in being free from attack on its basic principles and 'authority'—a freedom from a form of seditious libel that would injure the authority of the state and endanger 'internal peace.'"<sup>307</sup>

300. *See id.* The principle of trying to balance optimally conflicting constitutional values to achieve some form of harmony is known as concordance (*Konkordanz*).

301. *See supra* notes 101-04 and accompanying text.

302. *See* Art. 22 GG.

303. *Flag Desecration*, 81 BVerfGE at 293.

304. *Id.*

305. Quint, *supra* note 292, at 632.

306. *Id.*

307. *Id.* "Criminal code section 90a(1)(1) therefore seems to be quite frankly a seditious libel statute of the type fundamentally rejected in the United States under the principles of *New York Times*." *Id.* at 632 n.113.

This interest in seditious libel contrasts with American law where that interest is not accorded much weight unless a "clear and present" danger of violence is present. Certainly seditious libel was not a factor in the two flag burning cases, *Texas v. Johnson*<sup>308</sup> and *United States v. Eichman*.<sup>309</sup> As compared to American law, German law accords more weight to the values of stability and internal peace and grants the state more power to fight threats to its existence. Underlying this view is the important German concept of a "militant democracy," under which the state actively fights to preserve "the free democratic basic order."<sup>310</sup> Certainly Germany's historical experiences are a major reason for these views.

The lower court assumed that these state interests outweighed the artistic values of the collage. Examining this decision, the Court determined that the lower court had mistakenly interpreted the photo collage as an attack on the German state.<sup>311</sup> According to the Court, the "symbolic protection [of the flag] cannot be used to immunize the state from criticism. A concrete consideration of the competing interests is necessary."<sup>312</sup> It was this consideration that the lower court neglected. A more plausible interpretation was that the collage was a protest against militarism. The content of the message was just "clothed" in the picture of a man urinating. Under German doctrine, the means (*Einkleidung*) of artistic expression are judged more leniently than the content (*Aussagen*) because the means chosen are the very transformative elements that make it art.<sup>313</sup> The mistake of the lower court was to see insult in the urination rather than value in the protest. Accordingly, the Court sent the case back to the lower courts with instructions to accord more weight to the artistic values in performing its balancing of interests. Like the *Anti-Strauss Placard* case, the *Flag Desecration* case illustrates the hard look prong that a court may not choose an

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308. 491 U.S. 397 (1989).

309. 496 U.S. 310 (1990).

310. Quint, *supra* note 292, at 633. "Thus protection of the flag forms one of the bulwarks . . . against subversion of the state." *Id.* at 634.

311. See *Flag Desecration*, 81 BVerfGE at 294-95.

312. *Id.* at 294.

313. See *id.* at 295 (addressing the need to judge the collage more leniently because it is a means of artistic expression).

interpretation of a communication that results in an unconstitutional holding without adequate substantiation of its reasoning.<sup>314</sup>

One might take issue with the Constitutional Court. Evaluation of the expression seems to be somewhat in the eye of the beholder. Although the Constitutional Court seems correct in its decision, it presents no rationale for differentiating its view of expression from that of the lower courts. This failure to lay down a clear standard is a serious weakness of the general balancing of interests test, tending to result in a degree of unpredictability in the law. While an expression-protective outcome was reached here, it is just as easy to imagine contrary outcomes,—as in *Mephisto*.<sup>315</sup> In this way, the *Flag Desecration* case is more of a transitional case—between the vaguer *Deutschland-Magazin* regime<sup>316</sup> and the more precise scrutiny of *Stern-Strauss Interview*,<sup>317</sup> which was decided a few months later. Perhaps most notable to an American observer is that *Flag Desecration* presupposes that the State can protect itself against seditious libel.<sup>318</sup> In more pathological periods, the protection of art might be turned against itself.<sup>319</sup> Still, it is worth observing that the Court sought to protect communication—a trend in keeping with the enhanced protection accorded Article 5 freedoms in the 1990s.

## 2. The *National Anthem* Case

A companion case, the *National Anthem* case<sup>320</sup> illustrates the same techniques as the *Flag Desecration* case. An article was published in a Nürnberg magazine that satirized the German national anthem, parodying the first two stanzas in biting criticism of modern German life and aspects of it, such as the crass pursuit of money, German peep shows, Pershing Tanks, and the plight of Turks in Germany.<sup>321</sup> As in the *Flag Desecration* case, the lower court found this to be seditious libel under the German criminal

314. See *supra* notes 268-74 and accompanying text.

315. See *supra* notes 156-87 and accompanying text.

316. See *supra* notes 197-202 and accompanying text.

317. See *supra* notes 237-67 and accompanying text.

318. See *supra* notes 292-96 and accompanying text.

319. For example, in a period of relative insecurity, attacks on state symbols may be perceived as attacks on the government or social order itself, leading to suppression of expression.

320. 81 BVerfGE 298 (1990).

321. See *id.* at 299-300.



code, justifying police seizure of copies of the books and a four-month jail sentence for the publisher.<sup>322</sup> The Constitutional Court acknowledged that the national anthem, like the flag, received constitutional protection, but noted that this protection extended only to the first verse, and not other verses, which were the subject of the parody.<sup>323</sup> Thus, there was actually no constitutional interest against which artistic expression must be judged. Independently assessing the communication, the Constitutional Court then found the parody to be a satirical portrayal of the "contradiction between the pretensions and reality" of German society.<sup>324</sup> By contrast, the lower courts had interpreted the expression in the worst possible light—as a seditiously libel attack on the state.

### C. Summary of 1990s Review

These cases illustrate the more preferred position accorded expression in the 1990s, in marked contrast with the preceding *Deutschland-Magazin* regime.<sup>325</sup> As we move through the 1990s, the characteristics of how modern German law achieved this position become evident. First, the Court tightened the level of review applied to expression cases. Under intensive "hard look" review, the Court subjects the decisions of the lower court to tough scrutiny to determine whether the courts correctly assessed the facts, correctly interpreted the ordinary law and the Basic Law, and thoroughly and convincingly explained its conclusions. Second, the Court spelled out the circumstances justifying such intensive review, an important improvement from the *Deutschland-Magazin* approach, thereby lending a necessary degree of clarity and predictability to German law. These circumstances obtain when there is a fundamentally false interpretation of the right. For example, intensive review applies when a court assigns a meaning to a communication that it does not objectively have, as in the *Stern-Strauss Interview* case,<sup>326</sup> or when a court chooses an interpretation that

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322. See *id.* The police acted pursuant to the same statute at issue in the *Flag Desecration* case. See *supra* note 292.

323. *National Anthem*, 81 BVerfGE at 308.

324. *Id.* at 307. According to the Court, the parody was actually a portrayal of German daily life. See *id.* at 305.

325. See *supra* notes 197-202 and accompanying text.

326. See also *supra* notes 237-67 and accompanying text.

leads to unconstitutionality without adequately considering legal alternatives, as in the *Anti-Strauss Placard* case.<sup>327</sup>

Third, the Court demonstrated an increased willingness to assess independently the facts at issue to assure adequate protection of expression freedoms, as in the *Anti-Strauss Placard* case, a notable departure from prior law. Fourth, there is a more conscious structuring of public discourse to encompass critical, exaggerated, or polemical communication, and to remove impediments to the free formation of opinion. For example, the sharp insults of Strauss held to be protected in the two *Strauss* cases of 1990 illustrate this more speech-protective approach in comparison to the caricature not protected in the earlier *Strauss Political Satire* case.<sup>328</sup> Similarly, the national symbol cases show more tolerance for seditious libel—always a touchy subject in Germany. Calling into question the state's identity or substance is perhaps the heart of political freedom, as long recognized by the Supreme Court.<sup>329</sup> Finally, heightened emphasis of the individual right to speak one's mind is evident. For example, in both *Strauss* cases, the Constitutional Court highlighted the connection of expression to the right of personal development.<sup>330</sup> In these ways, German law is moving in the direction of its American counterpart.

#### *D. Reconsideration of Limitations on Expression*

Although the development of German law in the 1990s is decidedly more expansive of communication freedoms, it is still subject to more circumscription than American law. The textual limitations of opinion freedoms by the general law, youth, and personal honor still remain in place, as do other long-recognized exceptions, such as depiction of violence, hate speech, and group defamation. The status of pure commercial speech remains unresolved.<sup>331</sup> Still, German law in the 1990s is tightening permissi-

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327. See *supra* notes 268-75 and accompanying text.

328. See *supra* notes 282-84 and accompanying text.

329. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (affixing peace symbol to displayed flag as protest against Vietnam War is protected expression); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that free expression protects against state compelled pledge of allegiance law).

330. See *Stern-Strauss Interview*, 82 BVerfGE at 281; *Anti-Strauss Placard*, 82 BVerfGE at 52.

331. See *supra* note 33 and accompanying text. For example, the Court upheld a ban on inappropriate and ostentatious advertising by pharmacists in 1980 on the ground it limited no opinions, but only certain excesses. See 53 BVerfGE 96, 99 (1980); see also

ble exceptions to public discourse in a way similar to the journey embarked upon by the Supreme Court in *New York Times v. Sullivan*. In contrast to American law, the German focus is not on reconceptualization of historical limitations, such as *New York Times v. Sullivan's* redefinition of libel or *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.'s*<sup>332</sup> reconception of commercial speech. Rather, the focus is on narrowing the limitations. Thus, the German trend is much more like the Supreme Court's reconsideration of the clear and present danger test.<sup>333</sup> Several important cases evidence this trend.

### 1. Horror Film Case

In the *Horror Film* case,<sup>334</sup> the Court acknowledged that there could be reasonable time, place, and manner regulation of violence, gruesomeness, or cruelty that appears on films accessible to youth. Under German law, such violence can be considered a violation of fundamental human dignity, since it portrays people in inhumane and socially destructive ways.<sup>335</sup> A complicated rating system is designed to balance expression values with the state interest in protecting youth.<sup>336</sup> Despite the Basic Law's concern with protecting youth, the Constitutional Court tightened the permissible range of youth regulation—there must be a close fit be-

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CURRIE, *supra* note 4, at 176.

332. 425 U.S. 748 (1976).

333. Compare, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (relying on the clear and present danger test), with *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*) (departing from the clear and present danger standard).

334. 87 BVerfGE 209 (1992).

335. See *id.* at 217. According to the Court:

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

*Nudist Magazine Case*, 30 BVerfGE 336 (1971), translated in KOMMERS, *supra* note 5, at 423-24.

336. The rating system involves five categories, ranging from admission without limitation to admission only at age 18. See *Horror Film*, 87 BVerfGE at 212. Classification within these categories depends on a determination of the threat to youth posed by films containing racial hatred, violence, sexual acts, or similar content. A board widely representative of the community makes these decisions.

tween the end desired and the means used to effectuate that end. The Court found the state's seizure of an American horror film, *The Evil Dead*, an impermissible prior restraint because the film was confiscated before its classification under the rating system could be determined. Even if a film were not suitable for adolescent viewing, a distributor of a film could decide to show the film only before adult audiences. Alternatively, a distributor could cut or edit scenes in an attempt to meet the concerns of the rating board.<sup>337</sup> The denial of these decisions violated the Article 5 prohibition against censorship.

### 2. *Josefine Mutzenbacher*

In a second case, *Josefine Mutzenbacher*,<sup>338</sup> the Constitutional Court declared that a novel recalling the experiences of a Viennese prostitute could not be restricted as dangerous to youth, despite its graphic depiction of sex, promiscuity, and child prostitution, because the lower court had failed to give sufficient attention to the novel's artistic merit. The lower courts had assumed that the overriding interest in protecting youth justified limiting artistic freedom. Instead, the Court demanded a concrete balancing of the artistic merits of the work with its danger to youth and set forth the factors so to be considered upon remand.<sup>339</sup> There were also constitutional deficiencies in the make-up of the rating boards authorized to make decisions on what is appropriate for youth.<sup>340</sup>

### 3. *Cripple*

The last of these cases, *Cripple*,<sup>341</sup> is controversial from an

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337. *See id.* at 230-33.

338. 83 BVerfGE 130 (1990).

339. *See id.* at 142-47.

340. For example, the board was not provided with adequate direction, and the legislature had not sufficiently reached core decisions as to the composition of the board. *See id.* at 150-52.

341. 86 BVerfGE 1 (1992). Under German law, denigrating speech over race, ethnicity, gender and physical appearance, among other categories, is outlawed:  
*Article 130*

Inciting to hatred. Whoever, in a manner apt to breach the public peace [public order] attacks the human dignity of others by

1. inciting to hatred against parts of the population,
  2. provoking to violent or arbitrary acts against them,
  3. insulting, maliciously making them contemptible, or defaming them,
- shall be punished by a term of imprisonment of three months to five

American perspective because it excises certain hate speech from public discussion, a solution opposite to the American one.<sup>342</sup> In fact, *Cripple* illustrates both the increasing freeness of German public discourse and its distinct limitations. Much of *Cripple* is similar in tenor to other speech-protective cases of the 1990s.<sup>343</sup> The Court applied intensive review to a lower court's assessment of criminal sanctions against published political satirization of a soldier who had recently been rendered a quadriplegic in an automobile accident.<sup>344</sup> Despite his disability, he wanted to serve in the German army as a Czech translator. In a widely circulated Sunday paper, *Bild am Sonntag*, the soldier had asserted: "I don't know why the army declined my offer to serve: My head is still o.k. . . ."<sup>345</sup> A satirical magazine, *The Titanic*, poked fun at the

years.

#### Article 131

Representation of violence. Instigating race hatred.

(1) Whoever

1. disseminates,
2. publicly exhibits, posts, presents, or otherwise makes accessible,
3. offers to, leaves with, or makes accessible to a person below the age of eighteen, or
4. produces, subscribes to, supplies, stocks, offers, announces, recommends, undertakes to import into, or export out of, the territory in which this law applies, in order to use them, or pieces derived from them, in the manner indicated in 1 to 3 above, or to enable others to do so, writings (art. 11, para. 3) that incite to race hatred or describe cruel or otherwise inhuman acts of violence against humans in a manner which glorifies or minimizes such acts of violence or represents the cruel or inhuman aspects of the occurrence in a manner offending human dignity, shall be punished by a term of imprisonment of up to one year or by a fine.

(2) The same punishment shall apply to any person who disseminates a presentation with the contents indicated in paragraph 1 by means of broadcasting.

(3) Paragraphs 1 and 2 are not applicable when the act is in the service of reporting on current events or history.

. . . .

StGB Art. 130-31, translated in Stein, *supra* note 128, at 322-23.

342. Compare *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (holding that states may constitutionally punish hate-inspired conduct), with *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (holding that hate-inspired fighting words not beyond First Amendment protection).

343. See e.g., the *Strauss* cases, discussed *supra* notes 237-81 and accompanying text, and the *National Symbol* cases, discussed *supra* notes 288-324 and accompanying text.

344. See *Cripple*, 86 BVerfGE at 2-3.

345. *Id.*

soldier by featuring him in a regular column, "The Seven Most Embarrassing Personalities of the Month," complete with picture, alongside the designation "born murderer."<sup>346</sup> Text accompanying the picture stated that it was obscene to imagine that a quadriplegic would still want to serve in the army. "My head is still o.k., he says . . . Soldiers are still able to act with impunity as potential murderers."<sup>347</sup> The lower courts interpreted these statements in the column literally to say that the soldier was genetically born to be a murderer. As such, they violated the former soldier's personality rights.

On this point, the Constitutional Court found that the lower court misinterpreted the communication. Rather than an attack on the former soldier, it was obvious that the piece was intended as political satire and as an antimilitaristic statement.<sup>348</sup> In protecting these aspects of the communication, the Court displayed sensitivity to critical speech, noting that such is offensive and prone to suppression, which the Court must guard against.

While these aspects of the Court's decision were speech protective, the Court's approval of a ban on use of the word "cripple" was speech-restrictive. In response to the soldier's suit, *The Titanic's* publisher printed a reply in the magazine in which he stated that he found it obscene that the soldier, now a cripple, would want to serve in the military. "The fact that you, a cripple, . . . are determined to join . . . the German army, whose purpose it is to cripple or kill people we found obscene and named you as one of the seven most embarrassing personalities of March."<sup>349</sup> Use of the word "cripple" is demeaning, the Court

346. The designation "born murderer" was a biting pun. One of the other personalities featured that month as "embarrassing" was listed with her maiden names which in German is "born" ("geb."). The then-German president, Richard von Weizsacker, also was listed as "born citizen." Thus, the term "born murderer" was satire directed at this common usage. *Id.* at 2.

347. The reference to soldiers as murderers came from an earlier speech by the publisher in which he asserted that every soldier is a potential murderer. The German army prepares people to be murderers. The speech attracted a lot of attention, resulting in the speaker being sanctioned. *See id.* at 3-4. Indeed, the cultural reference to "soldiers are murderers" has a long, and infamous, history in Germany. *See infra* discussion of *Soldiers are Murderers I and II* at notes 372-430 and accompanying text.

348. *See Cripple*, 86 BVerfGE at 11-12. The mistake of the lower court was to interpret the usage "murderer" in a literal sense, applying the criminal code. The magazine was itself devoted to satire, the Court reasoned. Thus, readers knew what to expect.

349. *Id.* at 4.

reasoned, because it connotes that a person is of lesser human worth. "Today, calling someone a 'cripple' is understood as a humiliation. It stamps someone as a person of lesser worth. . . . This is a severe violation of the complainant's personality rights . . . [banning the word] is not a burden on freedom of opinion."<sup>350</sup> As such, it is a formal insult punishable under the criminal code. *Cripple* teaches unmistakably that certain words are prescribable as a violation of fundamental human dignity.

While the strength of personality rights as a restraint on Article 5 freedoms has diminished from its zenith in the 1970s, *Cripple* attests to the continuing strength of such rights. The German outcome contrasts dramatically with American law. Under American law, words themselves are almost always protected, notwithstanding their harm, because of the overriding value of speech, a principle made dramatically apparent in recent battles over hate speech.<sup>351</sup> Indeed, American law over the last thirty years has sought to place almost no expression beyond free discourse, while concomitantly narrowing the range of any such exceptions.

As a matter of comparative law, the divergent German and American outcomes reveal differences in culture. In Germany, the integrity of the human person, as protected by Article 1 human dignity and Article 2 personality rights, is the ultimate legal value. One might say human dignity justifiably limits certain communication, such as degrading personal epithets, since these can be viewed as an attack on the inviolability of human personality. In comparison, in American law and American society protection of the integrity of the human personality is less highly valued as a legal value. Our concern is more with individual and social freedoms, of which free speech plays a leading role. In turn, this reveals the tremendous amount of importance we place on free speech, a degree of

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350. *Id.* at 13. Use of the term was not even justifiable in the context of describing the horrors of war. To some, use of the word "cripple" conjures memories of the Hitler era, since the disabled, viewed as "inferior" stock, were often victims of Nazi persecution.

351. Compare *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (holding that the state may constitutionally punish hate-inspired conduct), with *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (holding that hate-inspired fighting words are not beyond First Amendment protection). For strong arguments favoring excision of hate speech, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

freedom no other country reaches. We might say free speech is to us what human dignity is to the Germans.

### E. Applying Intensive, "Hard Look" Review

Certainly the *Cripple* case, the *Horror Film* case and the *Josefine Mutzenbacher* case reveal the continuing strength of German circumscription of public discourse. Within those constraints, however, modern German law has begun to approximate the freeness of American law. The most notable developments here have been the use of intensive, "hard look" review and the heightened emphasis on the individual component of speech. With hard look review in place, the Constitutional Court now concentrates on safeguarding the communicative structure of public discourse and the integrity of expression. Notable examples of the 1990s regime are the *Hitler T-Shirt* case, the *Bayer Dissident Stockholders* case and its companion, the *Nursing Home* case.

#### 1. *Hitler T-Shirt* Case

The Court reaffirmed the centrality of freedom of expression in the *Hitler T-Shirt* case<sup>352</sup> by lifting sanctions against a manufacturer of a t-shirt that parodied Hitler (and the Germans) by depicting his torso with a swastika wrapped around the map of Europe under the motto "European Tour." Written above the map were the names and dates of Hitler's invasions. The lower court had assumed that an average reader would fail to perceive the irony of the depiction, and instead interpreted the T-shirt to involve an appeal to Germany's Nazi past, which is illegal under German law.<sup>353</sup> According to the Constitutional Court, this was a fundamentally unsound interpretation. A court may not choose an interpretation of a communication that leads to invalidity without supplying satisfactory reasons for its choice.<sup>354</sup> By then this was a familiar doctrine.

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352. 82 BVerfGE 1 (1990).

353. *See id.* at 5. Under German law, it is prohibited to display Nazi paraphernalia. *See* StGB Art. 86a.

354. *Hitler T-Shirt*, 82 BVerfGE at 5.



## 2. Bayer Dissident Stockholders

More controversial was the *Bayer Dissident Stockholders* case,<sup>355</sup> where the Constitutional Court applied "hard look" review to protect critical commentary of the Bayer Pharmaceutical Company. A pamphlet criticized Bayer for damaging the environment and human health, and "violating democratic principles, human rights and political fairness in its limitless search for profits."<sup>356</sup> The point of contention was the criticism that Bayer spied upon and pressured critics, and "supported pliable, right-wing politicians."<sup>357</sup>

The doctrinal problem posed was how to disentangle fact from opinion. Under German law, protection of facts depends on their truth or falsity. True facts are protected because they contribute to information which, in turn, aids the formation of opinion. But false facts are not protected because they do not so contribute to the development of opinion,<sup>358</sup> a dichotomy essentially mirrored in American law.<sup>359</sup> By contrast, dissemination of opinion is protected, regardless of whether it is true or false. The relatively free reign granted freedom of opinion is necessary to assure "everyone the right to assert and disseminate opinion."<sup>360</sup> Thus, much depended on classification of the communication as fact or opinion.

The Constitutional Court's review centered on the appellate court's finding that the statement was not wholly protected opinion, but opinion that depended on factual assertions (namely, that Bayer violated democratic principles, and supported pliant right-wing politicians and spied on critics), which the court had subjected to a burden of truth that the speaker was unable to meet. The imposition of the truth burden triggered heightened review, according to the Constitutional Court, because the burden might unjustifiably block the free formation of opinion.<sup>361</sup> Applying intensive review, the Court determined first that instances of mixed fact/opinion, as here, should be treated as protected opinion to the extent the com-

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355. 85 BVerfGE 1 (1991).

356. *Id.* at 3.

357. *Id.*

358. *See id.* at 15.

359. *See supra* note 138 and accompanying text.

360. *Bayer*, 85 BVerfGE at 14; *see also* Schmitt Glaeser, *supra* note 1, at 61 (noting that opinion rights are to be broadly construed).

361. *See Bayer*, 85 BVerfGE at 17.

munication contains elements of personal valuation—the essential test of opinion.<sup>362</sup> This conclusion follows from the Court's desire to interpret the basic right liberally in a speech-protective manner.

Examining the statements at issue, the Court concluded that the assertions that Bayer "spied upon" and "exerted pressure" on critics and "supported pliable right-wing politicians" were to be understood as protected opinion, even if exaggerated or caustic.<sup>363</sup> Thus, it was inappropriate to place a truth burden on the communication since this hampers the free formation of opinion. The Court thus remanded the case to the lower court with instructions to balance concretely opinion freedoms against the opposing legal interests.<sup>364</sup>

Notable also in *Bayer Dissident Stockholders* is further evidence of the Court's increasing emphasis on the individual right to speak one's mind, a theme first introduced in *Lüth* and reasserted following a hiatus in modern cases like *Stern-Strauss Interview*. "Everyone has the right to assert and disseminate their opinion . . . regardless of whether it is with or without value, true or false, grounded or ungrounded, emotional or irrational. Sharp, exaggerated opinions are also protected."<sup>365</sup>

### 3. *Nursing Home*

The more overt emphasis of the individual component of communication is also evident in the companion case, *Nursing Home*,<sup>366</sup> where a member of an environmental and peace group published a fourteen-point report in the form of a questionnaire raising serious issues about the quality of care being provided in a nursing home. Applying intensive scrutiny to the lower court's view that the questionnaire contained facts subject to verification, the Court found these conclusions ungrounded, as in *Bayer Dissident Stockholders*, since the statements at issue in the questionnaire more reasonably asserted opinion.<sup>367</sup> To require that a speaker verify as true all factual assertions of a communication would

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362. See *id.* at 15; see *supra* note 28 (discussing the difficulty in distinguishing between fact and opinion).

363. *Id.* at 18-20.

364. See *id.* at 20-22.

365. *Id.* at 14-15.

366. 85 BVerfGE 23 (1991).

367. See *id.* at 43-46.

impermissibly curtail public discourse.<sup>368</sup> “The basic right of freedom of opinion guarantees everyone the right to express freely their opinion without distinguishing between fact and opinion.”<sup>369</sup> “Free expression is constitutionally protected because it is an immediate expression of the human personality, as well as indispensable to democratic society.”<sup>370</sup> “Freedom of opinion is thus not limited to the protection of individual expression, but also secures the individual and public interest in the free formation of opinion.”<sup>371</sup>

*Bayer Dissident Stockholders* and the *Nursing Home* cases illustrate the increasingly active role assumed by the Court in policing the structure of public discourse to assure that opinion may be freely asserted, a role long played by the United States Supreme Court. Added to the application of intensive review and the increased emphasis of the individual dimension of communication, the characteristics are present that make the 1990s regime more expression-protective. The effects of this German liberalization are discernible in the increasingly more controversial decisions of the Constitutional Court. Having secured the basis of free expression, the Court appeared ready to tackle the next step in the development of a vibrant system of free expression: protection of critical and dissident speech.

#### 4. *Soldiers Are Murderers I*

Few cases have stirred modern passions as much as the recent *Soldiers are Murderers* decisions.<sup>372</sup> The controversy resulted, ironically enough, from a chamber opinion, a procedure reserved for the issuance of uncontroversial applications of established principles. Unlike the official publication of opinions, which involve the whole Court and is reserved for more important or more doctrinally innovative cases, the chamber opinion involves an unsigned, usually short opinion, issued by a three-judge panel and is usually reserved for straightforward matters. Conceived as a simple

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368. See *id.* at 34. Whether questions could constitute opinion was an issue of first impression for the Court. The Court concluded that questions could also raise opinions. See *id.* at 46.

369. *Id.* at 31.

370. *Nursing Home*, 85 BVerfGE at 31 (citing *Lüth*, 7 BVerfGE 198, 298 (1958)).

371. *Id.*

372. *Soldiers are Murderers I*, 45 NJW 2943, 2943 (1994); *Soldiers are Murderers II*, 22 EuGRZ 443 (1995).

case, *Soldiers are Murderers I* reaped immediate and sharp criticism among the German public, necessitating a response by the full Court in *Soldiers are Murderers II* only one year later.

At issue in *Soldiers are Murderers I* was a protest of the 1991 Gulf War. Affixed to the car of the protestor, himself a famous conscientious objector from the draft, was a sticker "Soldiers are Murderers."<sup>373</sup> The *T* in the German word for soldier (*Soldaten*) was replaced with a cross. Below the sticker was a facsimile signature of Kurt Tucholsky, a reference to a famous playwright of the 1930s.<sup>374</sup> Another sticker depicted the famous photo by Robert Capa of a soldier during the 1936 Spanish Civil War shown being killed by a bullet at the point of impact with hands outstretched and weapon falling, with the caption, "Why?"<sup>375</sup> A third sticker pronounced "Turn swords into plowshares."<sup>376</sup> The lower court took the expression "murderer" literally, subjecting it to the criminal code, and interpreted "why?" and "soldiers" as directed at the German army, as compared to soldiers or war generally.<sup>377</sup> Based on this reasoning, the lower court ruled that the communication was prescribable as insulting and as hate-inciting (*Volksverhetzung*).<sup>378</sup>

Subjecting these findings to "hard look" review, the Court found that the communications simply did not objectively have those meanings. Rather, it interpreted the communications as a general protest against war.<sup>379</sup> The use of "murderer" had a slang, idiomatic sense, not a technical criminal meaning; "why" and "soldiers" were meant as a general protest against war, not as an attack on the military. Reflecting conventional doctrine, the Court noted that such scrutiny of the "interpretation and valuation" (*Erfassung und Würdigung*) is necessary to assure an effective protection of the right to freedom of opinion.<sup>380</sup> The Constitutional Court thus remanded the case to the lower court to reperform

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373. *Soldiers are Murderers I*, 45 NJW 2943, 2943 (1994).

374. *See id.* In Germany, "Soldiers are Murderers" is a ready cultural reference to a famous 1931 work by Kurt Tucholsky. *See infra* notes 393-94 and accompanying text.

375. *Soldiers are Murderers I*, 45 NJW at 2943.

376. *See id.*

377. *See id.* at 2944.

378. *See id.* at 2943-44.

379. *See id.*

380. *Soldiers are Murderers I*, 45 NJW at 2943.

the balancing of interests in light of the Court's holdings on the value of expression.<sup>381</sup>

While viewed as an easy case by the Constitutional Court and to an American observer, the decision provoked a great outcry in Germany.<sup>382</sup> Perhaps this is because German civility norms have generally succeeded in shielding soldiers and governmental officials from sharp attack. Perhaps this is because the public recognizes what is apparent: German law in the 1990s is freer in its individualism, and the change has occurred in a relatively short time, sneaking up on cat's feet on an unprepared public. The free individualism of German law has had the effect of encouraging a crude or rude tone to German public discourse, as in American law.

The theoretical underpinning for this enhanced emphasis on individualism flows from a recalibration of German constitutional norms. *Soldiers are Murderers I* illustrates this doctrinal adjustment. The Court defined communication freedoms as "in the interest of the right to personal development, with which communication is closely linked, as well as in the interest of the democratic process, for which it has constitutive meaning."<sup>383</sup> Since "the purpose of communication is to try to exert intellectual influence on the world—to effect the formation of opinion, and to convince [others],"<sup>384</sup> one can say that to speak freely is essential to the human condition. So conceived, communication can be linked integrally to the central values of Article 1 human dignity and Article 2 development of personality. Conceived as an essential part of human dignity, communication freedoms have a more solid theoretical ground than, for example, reliance on self-government. Thus, communication freedoms in the 1990s have been reconceived as truly among the most fundamental values of German society, a realization of the *Lüth* paradigm.<sup>385</sup>

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381. See *id.* at 2944.

382. See, e.g., Gerhard Herdegen, *Kommentar zum "Soldaten sind Mörder,"* 45 NJW 2933 (1994) (discussing the difficulties in determining the subjective and objective meaning of an expression).

383. *Soldiers are Murderers I*, 45 NJW at 2943.

384. *Denial of Responsibility for World War II*, 90 BVerfGE 1, 14 (1994).

385. These thoughts are echoed in the Court's now common ringing defense of the individual right to speak one's mind: "The right to freedom of opinion guarantees everyone the right to assert freely their opinion: Everyone has the right to say what she thinks, even when she does not provide or cannot provide verifiable reasons for her view." *Sol-*

In these respects, the development of modern German law parallels the movement in America, where the law has recently also emphasized the individual right to speak one's mind. In cases like *Hustler Magazine*, *City of St. Paul*, or *Simon Schuster*, one might say free speech has almost become an end unto itself, pursued for the sake of the ideal of unfettered discourse, notwithstanding serious social and personal consequences that may ensue.<sup>386</sup>

### 5. *Soldiers Are Murderers II*

Far from resolving the issue, the Constitutional Court's protection of remarks that "soldiers are murderers" continued to fester and percolate throughout German society, resulting in serious and sustained criticism of the Court.<sup>387</sup> Attempting to suture this open wound—more from a social perspective than a legal one—the Court revisited these issues in *Soldiers are Murderers II*.<sup>388</sup> The Court's review, coming on the heels of its earlier "resolution" of the controversy was an unprecedented gesture. Perhaps sensing its leadership role was on the line, the Court attempted to quell the controversy, acting in a manner reminiscent of the Supreme Court in the great American desegregation and abortion controversies.<sup>389</sup>

*Soldiers are Murderers II* typifies certain doctrinal progressions in German free expression jurisprudence, most notably an intense focus on the facts and language at issue in the communication, a narrowing of the group defamation concept, and an expansion of speaker control over both the content and form of expression. The case, however, primarily elaborated upon the holding reached in *Soldiers are Murderers I* that the remarks are protected within

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*diers are Murderers I*, 45 NJW at 2943. "Even sharp and extreme criticism does not lose protection. Value judgments are protected, regardless of whether they are 'valuable' or 'worthless,' 'true' or 'false,' 'emotional' or 'rational.'" *Id.* This trend of explicit linkage of communication to personality rights is deliberate. It is a reaction against tying expression too exclusively to political speech, which might have the effect of limiting speech rights. Thus, Article 5 has a certain ethical quality as an end in itself, paralleling the development in American law. See MAUNZ COMMENTARY, *supra* note 28, at 18.

386. See Eberle, *supra* note 1, at 1181-86.

387. See, e.g., Stephen Kinzer, *An Old Stab At Soldiers Opens Battle in Germany*, N.Y. Times, Jan. 15, 1996 (citing, for example, Chancellor Helmut Kohl: "We cannot and must not stand by while our soldiers are placed on the same level with criminals.").

388. 22 EuGRZ 443 (1995).

389. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*), *aff'd* by *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*), *reaff'd* by *Cooper v. Aaron*, 358 U.S. 1, 4 (1958); *Roe v. Wade*, 410 U.S. 113 (1973), *aff'd in part and rev'd in part* by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Article 5, even if they are insulting or sharp. One significant difference between the two cases is the manner of their issuance. Unlike the chamber decision issued in *Soldiers are Murderers I*, the whole first Senate of the Constitutional Court rendered its decision in *Soldiers are Murderers II*. Indeed, reflecting the division of opinion prevailing throughout the country, the full Court split five to three over the disposition of three of the four cases decided in the consolidated appeal. Only the second case was decided by an unanimous vote.<sup>390</sup>

Each of the above cases involved remarks that "soldiers are murderers" or "soldiers are potential murderers." In the first case, a thirty-year old well-known conscientious objector protested a NATO military maneuver occurring near Rothenburg ob der Tauber by attaching a placard to a traffic signal that stated "a soldier is a murderer."<sup>391</sup> The protestor was not proficient in English, and there was a dispute as to whether he meant to say "a soldier is a murder" or "a soldier is a murderer."<sup>392</sup>

The second case also involved a recognized conscientious objector. Motivated by an exhibit at a local trade school that caricatured the German army (*Bundeswehr*), the protestor composed an illustrated pamphlet with text that included:

Are soldiers potential murderers? One thing is clear: Soldiers are trained to be murderers. 'You should not kill' becomes 'you must kill.' worldwide. Even in the German Army. Mass extermination, Murder, Destruction, Brutality, Inhumanity, Revenge, Retaliation

. . . .

That is soldier's work. Worldwide. Even in the German army.

. . . .

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390. *Soldiers are Murderers II*, 22 EuGRZ at 443, 456. Only Judge Haas wrote a dissenting opinion, in which she decried the Court's use of intensive scrutiny, preferring that the Court defer more to the ordinary courts. She also believed that soldiers, including their honor, merited protection from the legal system instead of scorn. *See id.* at 457-58. Her views thus seemed in accord with a fair portion of the German public.

391. *Id.* at 443-44.

392. Owing to the speaker's poor English, the district court believed that the protestor inadvertently used "murder," actually intending to mean "murderer. In part, this confusion arises from the close similarity of English and German (murder = Mord; murderer = Mörder). The appellate court believed the protestor, finding that the intended remark was "Mörder." *See id.* at 444.

Militarism kills, even without weapons, even without war. Therefore, there is only one answer: For peace, disarmament and humanity—decline military service. Resist militarism!<sup>393</sup>

The protestor distributed twenty to thirty copies of the pamphlet in the hall of the trade school and placed additional copies on the windows of cars parked nearby.

The third case concerned a letter to the editor of a local newspaper in which the writer expressed solidarity with a doctor's acquittal in a famous judicial proceeding involving anti-military activities. The letter read, in relevant part:

“There were four long years in which murder was obligatory in every square mile of the land, during which he could not withdraw from for even one-half hour. I said: Murder? Naturally murder. Soldiers are murderers.” This quote is from Kurt Tucholsky from the world theater of 1931, for which the producer, and later Nobel peace prize winner, Carl von Ossietzky, was himself charged and acquitted, and which is even today, yes even today actual.

. . . .

Conscientious objectors are recognized by us only when they decline military service because they find murder objectionable . . . . The task of all armies includes preparation for war . . . . state legitimated mass murder.

. . . .

I declare myself in full solidarity with the acquitted and hereby declare publicly: “All soldiers are potential murderers!”<sup>394</sup>

The fourth case arose from an exhibition by the German army showing videos and pictures of German military hardware, especially military uses of motorcycles.<sup>395</sup> The German army had an information stand at a motorcycle exhibition at the Munich Olympic hall. Before the information stand, four people distributed anti-military leaflets.<sup>396</sup> Two people then unfolded a large placard that stated: “Soldiers are potential murderers.” Offended by these per-

393. *Id.* at 445.

394. *Id.* at 447. The trial of the doctor was known as the “Frankfurt soldier’s trial.”

395. See *Soldiers are Murderers II*, 22 EuGRZ at 448.

396. See *id.*



ceived slights, the soldiers sued on the ground that their honor was violated by such insults.<sup>397</sup> The other cases heard in the consolidated appeal were also initiated by soldiers seeking to reclaim their honor.

The ordinary courts in all four cases found the speech sanctionable as criminal insult or slander, and assessed money damages.<sup>398</sup> The courts reasoned that calling soldiers "murderers" stamped them as "criminals," thereby dehumanizing and denigrating them in the eyes of the public.<sup>399</sup> The courts relied on an earlier decision of the Federal Supreme Court (*Bundesgerichtshof*), which held that defamation of a distinct group of people (such as Catholics, auto workers, or the German army) could be implied from defamation resulting from a more general usage of the term (such as all Christians, all laborers, or all soldiers).<sup>400</sup> Construed as an "insult," the statements were beyond Article 5 protection, since they fit within a "general law" limitation of opinion rights.<sup>401</sup> The reasoning mirrored that of the lower courts in *Soldiers are Murderers I*, which the Constitutional Court had overturned in the chamber decision.<sup>402</sup>

In deciding to rehear the controversy, the Court was more interested in addressing the German public, and the judges of the ordinary courts, than addressing the technical legal merits of the dispute, which, after all, it had already resolved. The main goal of the Court was thus educational: to restate the fundamental tenants of free expression jurisprudence so that these lessons of German constitutionalism might best be imparted to society. The Court emphasized a preference for free expression rights over protection of honor and personality; a confirmation of the "hard look" review process initiated by the Court in the 1990s; and a general enhancement of the individual right to speak one's mind. *Soldiers are Murderers II* thus confirms the trend of modern German law as

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397. *See id.* at 448.

398. *See id.* at 443-49.

399. *Id.*

400. *See, e.g., Soldiers are Murderers II*, 22 EuGRZ at 444. The Federal Supreme Court decision is published at 36 BGHSt 77 (1951).

401. The insult at issue was codified in Article 185 of the German Criminal Code. *See* Art. 185 StGB. Additionally at issue was Article 193 of the Code which justified use of harsh criticism when made in "relation to scientific, artistic or business performance . . . or in defense of rights or in consideration of justifiable interests." *See* Art. 193 StGB.

402. *See supra* notes 379-80 and accompanying text.

one very much following the pattern of the more absolutist American law.

Because this case dealt with a controversy finding no resolution in German society, the Court felt compelled to scrutinize the facts of each case and restate the tenets of modern German law.<sup>403</sup> The Court began its discussion by confirming that the essence of free expression is the fundamental right to speak one's mind. Notably, the Court made clear that this right entails not only freedom to determine the content of expression, "but also its form."<sup>404</sup> Protected also is choice over the time and place of communication. A speaker possesses the right not only to publicize his opinion; he may also choose those circumstances which best afford the greatest dissemination or the strongest effect for his views.<sup>405</sup> In establishing such definitive speaker control over the form and circumstance of communication, the Court deepened the scope of communication rights. The development seems to mark a clear break with the more restrictive approach of *Deutschland-Magazin*, where the Court viewed the content and form of speech as separable.<sup>406</sup> The development is another move in the direction of American law—treating form and content as integrated aspects of communication.<sup>407</sup>

The Court noted, however, that expression must at times yield to defamation. To prevent the excessive protection of personal honor from suffocating speech freedoms, the Court held that the category of prescribable defamation must be narrowly construed.<sup>408</sup> To the extent the speech involves an "essentially important question" of public discourse, even personal privacy interests may have to yield. Questions decisive for public discourse are presumptively protected.<sup>409</sup>

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403. The detailed recitation of the facts and the elaborate restatement of fundamental legal premises is a stance somewhat out of the ordinary for the Constitutional Court, as it is for the Supreme Court.

404. *Soldiers are Murderers II*, 22 EuGRZ at 449.

405. *See id.* at 550.

406. *See supra* notes 189-202 and accompanying text.

407. *See, e.g.,* *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").

408. *See Soldiers are Murderers II*, 22 EuGRZ at 451.

409. *See id.*

Shifting focus from principle to application, the Court next considered the importance of the words or language actually used. "The precondition for every legal evaluation of a communication is . . . that its meaning be appropriately discerned."<sup>410</sup> "Failure to understand a remark may lead to its suppression," which can chill the assertion of expression rights.<sup>411</sup> Thus, it is critical to focus first on the meaning of the disputed remark. The Court's commitment to discern the "plain meaning" of an expression is commendable, and itself significant to a system of free expression. Only by fairly understanding the content of speech, independent of its effects, can one determine its worth. Accordingly, the Court explained the criterion by which to judge expression:

The goal of interpretation is to discern the objective meaning of a statement. The measure for this is neither the subjective intention of the speaker nor the subjective understanding of those affected by the communication. Rather, this is to be determined from the standpoint of an unbiased and sensible public. The reference point is always the language of the remark itself. But this may not always be self-evident. One must therefore also consider the context of the statement and the circumstances surrounding its expression insofar as indicia therefor are available. An isolated view of a disputed part of a statement thus does not meet permissible standards of interpretation.<sup>412</sup>

With the criterion for interpretation established, the Court applied "hard look" review to the remarks at issue. Under this intensive form of review, it may be recalled, wrong or implausible interpretations are to be struck in favor of supportable ones. Since "many words or concepts can have in different contexts many meanings," it is a serious constitutional error to ascribe technical legal meanings to words that are used in a vernacular sense.<sup>413</sup>

Considered against these principles, the conclusions reached by the ordinary courts did not measure up. Even conceding that calling soldiers murderers inflicts harm,<sup>414</sup> whether such harm out-

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410. *Id.*

411. *Id.*

412. *Id.*

413. *Soldiers are Murderers II*, 22 EuGRZ at 451.

414. Calling soldiers "murderers" inflicts harm because it is denigrating and dehumaniz-

weighs the value of the speech can only be determined by a full consideration of the statement, including its context and the circumstances giving rise to it. The ordinary courts, however, assumed the remarks to be insulting without satisfactorily substantiating that conclusion.

First, the speakers made reference to all soldiers, not specific, identifiable ones nor even the defined set of soldiers who were members of the German army. The reference to the German army was just to make clear that the "statement all soldiers applied also to soldiers in the German army."<sup>415</sup> The context thus suggests that the statement condemned soldiers and war generally. "Use of the word 'murderer' does not necessarily connote . . . its criminal connotation. It is much more likely that what was meant was that killing during wartime is not an impersonal event but rather an act of man."<sup>416</sup> Thus, one cannot exclude an interpretation intending to show that the speaker meant to prick the conscience of soldiers so that they would assume personal responsibility for their actions and perhaps become conscientious objectors. In short, the Court sensed that the remarks were meant more as a type of Brechtian theater—designed to produce a shock effect and thus focus attention on an important message—rather than as personal insults.

Second, the ordinary courts' conclusions that the statements were defamatory did not meet the prevailing definition of defamation. *Stern-Strauss Interview* held that defamation was sanctionable only when the communication intended personal harm and any substantive content receded into the background.<sup>417</sup> This definition is construed very narrowly out of concern that loose interpretation will detrimentally chill the exercise of expression rights.<sup>418</sup> The Constitutional Court chose to do this by tightening the application of the definition. By contrast, the Supreme Court has accomplished the same end by narrowing the definition of defamation itself and then scrutinizing its application.<sup>419</sup> Despite the differing methodologies, the end result is the same: protecting expression through

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ing. *See id.* at 452.

415. *Id.*

416. *Id.*

417. *See id.* at 454; *see also supra* notes 264-67 and accompanying text.

418. *See Soldiers are Murders II*, 22 EuGRZ at 454.

419. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 285-88 (1964) (holding that public official may recover for defamation only after showing actual malice and then determining that the facts did not support a finding of actual malice).

limiting its restriction to specifically enumerated, narrowly defined, categories. Thus, the remarks are prescribable only "if they actually involved defamation."<sup>420</sup>

Tested against the standard of *Stern-Strauss Interview*, the Court did not find the remarks in *Soldiers are Murderers II* to be defamatory. "The questions whether war and military service and their resulting killing of men is morally justifiable or not" is an important issue.<sup>421</sup> Indeed, "resistance to militarism and support of pacifism constitutes an essentially important question for public discourse for which a presumption of protection applies."<sup>422</sup> Thus, the ordinary courts needed to consider whether these substantively valuable comments were pushed into the background by elements of defamation, as compared to the courts' approach of assuming that the statements were defamatory without independently proving their harm. Lacking persuasive proof of harm, the remarks could not be defamatory. Further, the Court doubted such proof would be forthcoming. The remarks were not directed personally at any individuals or a group of soldiers, but "concerned all soldiers without differentiation."<sup>423</sup> It was improper for the courts to imply harm of individual German army soldiers.

In contrast to American law, German law still provides for a concept of group defamation, as made clear in *Auschwitz Lie*<sup>424</sup> or *Soldiers are Murderers II*. Even under the concept of group defamation, the element of harm to group members must be at the fore.<sup>425</sup> This is likely to occur in two ways. The first is recognizable hate speech, consisting of denigration of characteristics like "ethnicity, race, or physical or mental attributes."<sup>426</sup> The denigration of Jewish people in *Auschwitz Lie* is an example of this.<sup>427</sup> The second is when statements denigrate specific people or associations of people.<sup>428</sup> In both situations, proof of harm is necessary,

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420. *Soldiers are Murderers II*, 22 EuGRZ at 454.

421. *Id.*

422. *Id.*

423. *Id.*

424. 90 BVerfGE 24 (1990), discussed *infra* at notes 447-55 and accompanying text. The individual treatment of defamation under American law is discussed *infra* at notes 457-60 and accompanying text.

425. See *Auschwitz Lie*, 90 BVerfGE at 24.

426. *Id.*

427. See *infra* notes 447-58 and accompanying text.

428. See, e.g., *Soldiers are Murderers II*, 22 EuGRZ at 454.

which was not evident in any of the cases at issue in *Soldiers are Murderers II*. Outside of these two categories, it is likely that any remark involves critical, but protected, commentary on a group's activities or social function.<sup>429</sup>

By tightening these definitions and demanding clear proof of harm caused by communication, the Court delineated legal categories so that they might be applied discriminately. By separating communication from harm, each can be evaluated independently. The relative merits and demerits of each can be compared using the Court's complete balancing scheme. In these ways, the Court is following the path of the Supreme Court. The failure of the ordinary courts to do this led to the Court's remand of the cases so that a full balancing of interests could be performed in view of the explicit instructions of the Court.<sup>430</sup>

### 6. *Denial of Responsibility for World War II*

Two recent cases illustrate the main themes of German communication law in comparison to American freedom of speech law: the increased emphasis on individual freedom with a concomitant circumscription of those freedoms in ways uniquely German. In the *Denial of Responsibility for World War II* case,<sup>431</sup> the Constitutional Court protected an author's right to publish a book that denied German responsibility for the cause of World War II. The decision rested on Article 5(1) opinion rights. The Constitutional Court did, however, uphold the decision of the Federal Administrative Court denying protection of the book as "history" under the research and science guarantees because the book exhibited no "serious search for truth," but was instead a propagandistic, one-sided presentation.<sup>432</sup> By contrast, in the *Auschwitz Lie* case, the Court upheld the denial of a group's right to assemble and demonstrate in order to publicize its assertion that Germany had not

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429. *See id.*

430. *See id.* at 456.

431. 90 BVerfGE 1 (1994).

432. *Id.* at 13-14. The Court noted that the right to free scientific inquiry functions as a negative, subjective right, guaranteeing an individual zone of autonomy to determine the path of scientific pursuit, free from governmental coercion. *See id.* at 1. In this way, the Court's solution very much parallels the American solution: truth is to be determined in the marketplace of ideas, not the courtroom. However, the Court was competent to decide whether a work qualified as a "serious search for truth," the essential test for scientific inquiry. Here the book did not so qualify as "science."

persecuted Jews nor committed the Holocaust.<sup>433</sup> The basis for this determination was that such assertions were demonstrably false, and thus beyond Article 5, and that they also constituted individual and group defamation against Jewish people, a small group of whom still live in Germany. Notably, World War II, its personalities and its consequences are a persistent and pervasive theme of German law.

The *Denial of Responsibility for World War II* case demonstrates certain strengths of modern German law. Having set out to exonerate the Nazis from their worst deeds, the book then depicted the Nazi regime as harmless and as an acceptable political alternative.<sup>434</sup> Because of the glorification of the Nazis, the book was determined to be dangerous to youth and, therefore, subject to the restrictions of youth law, which included a ban on advertising and certain limits on distribution.<sup>435</sup> Exercising heightened review, the Court overturned the decision of the lower courts on the ground that it violated opinion rights.<sup>436</sup>

The Court concluded that the book constituted protected opinion because it exhibited the author's views on history and Naziism, views that could not be reduced to verifiably false facts, as the Federal Administrative Court had done.<sup>437</sup> Rather, the book was a complicated mix of fact, judgment, and estimation of historical events.<sup>438</sup> The mistake of the Federal Administrative Court was to believe that a book could be restricted merely on account of its historically false portrait of the Nazi ideology and their responsibility for the war.<sup>439</sup> Certainly the Nazi ideology—which is filled with racial hatred, lust for war, and contempt for democracy—could threaten the morals of youth if presented in a glorified or harmless manner.<sup>440</sup> According to the Constitutional Court, however, it was as likely that the book dealt with a central question of modern German history, even if presented in a controversial manner.<sup>441</sup> As such, “the democratic state fundamentally has faith

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433. See *infra* note 448 and accompanying text.

434. See *Denial of Responsibility for World War II*, 90 BVerfGE at 1-3.

435. See *id.* at 18-19.

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

437. See *id.* at 20-24.

438. See *id.*

439. See *Denial of Responsibility for World War II*, 90 BVerfGE at 20-24.

440. See *id.* at 20-21.

441. See *id.*

that the public dialogue between different opinions will produce a multifaceted picture, out of which generally controversial views premised on false facts will not be accepted. The free discussion is the real foundation of a free and democratic society."<sup>442</sup>

The Court next addressed the place of youth in such a democratic society. Since the book is part of the free exchange of ideas, youth must learn how to become a participant in this dialogue.<sup>443</sup> The fostering of abilities of discretion and critical judgment is essential to young people's education and development as citizens. If German society is to realize a truly free democratic order, inculcation of democratic values and civic virtue is essential. "The ascertainment [by youth] of historical events and their critical engagement with dissenting opinions can prepare and protect youth much more effectively for encounters with distorted historical presentations than can any classification of such opinions as presenting an improper lesson."<sup>444</sup>

A similar sentiment was expressed in the *Student Article* case<sup>445</sup> in which the Court protected a young apprentice from denial of a job position on account of publication of a controversial article in a student newspaper. To deny the position on account of the article would create a severe chill of communication rights, the Court reasoned, which would impart the wrong lesson about living in a democratic society. The Court continued:

Also to be considered is that this case deals with an article published in a student magazine. . . . These constitute a practice field for [youth's] participation in the formation of public opinion. The articulation of opinions and exposure with contrasting ideas must also be learned. Student newspapers have a valuable role to play in this process. But this can only be accomplished when students can feel secure and without fear that participation [in student newspapers] will not later affect their career opportunities.<sup>446</sup>

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442. *Id.* at 21.

443. *See id.*

444. *Id.* One might also attribute the Constitutional Court's concern with the proper development of youth to its role in realizing an objective order of constitutional values. Development and the fostering of youth is critical to achievement of these objectives.

445. 86 BVerfGE 122 (1992).

446. *Id.* at 131-32. These cases thus have a certain parallel with earlier American attempts to inculcate the values of citizenship and respect for fundamental liberties. *See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("[S]tu-



In view of these expression values, the Constitutional Court remanded the case to the Federal Administrative Court with instructions to perform a more concrete balancing of communication freedoms with the goal of protecting youth.

### 7. *Auschwitz Lie*

If the *Denial of Responsibility for World War II* case illustrates the increased freedom of modern German law, the *Auschwitz Lie* case<sup>447</sup> shows the continuing vitality of its limitations. Here the Court approved a prior restraint of a planned demonstration to publicize the demonstrators' belief that the Holocaust never occurred.<sup>448</sup> Despite the broad presumption favoring opinion rights, especially over public matters, the Court reasoned that the demonstration was based on the demonstrably false fact that the Holocaust never occurred.<sup>449</sup> False facts are without protection under German law. Innumerable eye witnesses, historians, and judicial proceedings have established beyond doubt that the Holocaust occurred, and that Germany bears responsibility for it.<sup>450</sup> The *Denial of Responsibility of World War II* case is distinguishable, the Court reasoned, because there the book dealt with complicated historical judgment, not verifiable fact.<sup>451</sup> Contrasting the two cases demonstrates the continuing bite of the fact/opinion dichotomy.

Alternatively, the Court reasoned, the ban would still stand if the communication was viewed as a mixed fact/opinion case.<sup>452</sup> Under German doctrine such cases are presumptively treated as protected opinion out of concern that otherwise a chilling of ex-

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dents . . . [do not] shed their constitutional rights to freedom of speech or expression at the school house gate." Since *Tinker*, the Supreme Court has cut back on such protections. See, e.g. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding high school principal's exclusion of two stories from school newspaper). Thus, the trend of the Constitutional Court would seem to be more speech protective in this area than that of the Supreme Court.

447. 90 BVerfGE 241 (1994).

448. German law allows prior restraint where planned events will likely lead, as perceived here, to criminal acts. See § 5 Nr.4 VerG.

449. See *Auschwitz Lie*, 90 BVerfGE at 249.

450. See *id.*

451. See *id.*

452. See *id.* at 248-49.

pression will result.<sup>453</sup> With such opinion cases, however, a balance must yet be struck with countervailing limitations. In applying the balance, opinions based on false facts receive little weight. By contrast, the law prohibiting group defamation and incitement of racial hatred, acting as a "general law" limitation on opinion rights, is a strong interest.<sup>454</sup> For Jewish people, the Holocaust is inextricably part of their identity and personal dignity. Respect for their dignity, a fundamental principle of Germany, is a key guarantee that such persecution will not take place again. On such reasoning, the demonstration will produce group defamation, which outweighs the minimal communicative value at issue.<sup>455</sup>

In modern Germany, group defamation, especially when based on incitement of hate against race or ethnicity, is taboo.<sup>456</sup> Obviously, this reflects the catastrophe of World War II, never far from the minds of modern Germans. That lesson has now been incorporated into the objective ordering of values in Germany, subsumed within constitutional concepts like Article 1 human dignity and articulated by the Constitutional Court in *Auschwitz Lie*. The recent rise of neo-Nazi groups and other extremists following the reunification of Germany, and their persecution of German minorities, fortifies this conclusion. These cases illustrate vividly the distinct circumscription of German communicative freedoms, notwithstanding its flowering in recent years.

It is hard to imagine the case coming out the same way under American law. First, American fundamental rights are conceived as individual, personal rights, not group rights. On this reasoning, a right to be free from group defamation has long been rejected, despite herculean efforts otherwise.<sup>457</sup> Second, even conceived as individual rights, the United States may be the only land which tolerates hate speech, and other extremist speech, to such an extent.

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453. *Id.* at 248 (citing *Bayer Dissident Stockholders*, 85 BVerfGE 1, 15 (1991)).

454. See *Auschwitz Lie*, 90 BVerfGE at 243.

455. See *id.* at 252-54.

456. See §§ 130-31 StGB, discussed in Stein, *supra* note 128, at 281-86, and note 341 and accompanying text.

457. It is fair to say that *New York Times* overrules *Beauharnais v. Illinois*, 343 U.S. 250 (1952) on this point. In *Beauharnais*, the Court affirmed the conviction under a group libel law of a speaker who demeaned black Americans. For arguments favoring group defamation approaches, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

Cases like *R.A.V. v. City of St. Paul*<sup>458</sup> or *Collin v. Smith*<sup>459</sup> are explainable only as commitments to the American ideal of unfettered public discourse. These ideals are worth adhering to, in the American view, despite the painfully high price to be borne in service to them. Third, American concepts of human dignity and personality rights are underdeveloped in relation to Germany. Thus, in the United States, expression has a relatively free reign, less encumbered by such civility norms. Freedom to speak one's mind, however crudely or rudely, is quintessential to being American. Fourth, prior restraints are so highly disfavored in the United States, that it is virtually impossible to meet the high burden of proof necessary to sustain one.<sup>460</sup> In the United States, punishment of subsequent conduct is preferable to prior restraint.

## VII. COMPARATIVE OBSERVATIONS

The communication law of Germany and the United States has developed similarly after World War II. There is much the two laws have in common. Both view expression as essential to individual development, democratic self-government, and the formation of public opinion. Both accord wide scope to an individual's right to speak one's mind, protection of which does not depend on popularity or utility. Both countries centrally protect political, literary, artistic, and scientific speech.<sup>461</sup> The Courts of both countries consider communication freedoms to be fragile and, accordingly, scrutinize proposed restrictions and actively police the structure of public discourse to facilitate its exercise.

Notwithstanding these similarities, a closer look at the two laws reveals differences. First, American law is freer in its individualism and more zealous in its protection of expression. Over the last thirty years especially, the Supreme Court has sought to realize an

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458. 505 U.S. 377 (1992) (holding that state may not selectively proscribe racist fighting words).

459. 578 F.2d 1197 (7th Cir. 1978), cert. denied 439 U.S. 916 (1978) (state may not prohibit demonstration of neo-Nazis seeking to publicize that Holocaust was fictional). In this way, *Collin* and *Auschwitz Lie* illustrate the contrasting approach of the American and German Courts on this question.

460. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding that government did not meet its burden of showing justification for the imposition of a prior restraint of expression).

461. See Kommer, *supra* note 21, at 692 (discussing common themes between German and American law).

ideal of unfettered discourse, freeing individuals to think as they like, speak as they like, and discourse freely, independent of governmental or community control.<sup>462</sup> By contrast, German individual freedoms are more circumscribed, notwithstanding the recent pronounced emphasis on the right to say what one likes, whether "valuable or valueless, true or false, rational or irrational."<sup>463</sup> For example, in *R.A.V. v. City of St. Paul*,<sup>464</sup> the Supreme Court protected the right of white individuals to express hatred by placing a burning cross in the dead of night in the fenced-in yard of a black neighbor. In the *Auschwitz Lie* case, the Constitutional Court banned a demonstration intending to assert that the Holocaust never occurred. Certainly one may doubt the wisdom of the relative freeness of American discourse. But, comparatively speaking, American law is freer than German law.

Second, and ironically, German law has a broader influence on society than American law. This is on account of the "objective" ordering of values in the German Basic Law, which obligates the state to realize the fundamental values of the Basic Law in the German legal order.<sup>465</sup> In this way, the value-ordered Basic Law is a blueprint for society, whereas the value-neutral United States Constitution is a framework for government. The German system requires a closer fit between the text of the Basic Law and society.<sup>466</sup>

The way to realize these values is the Reciprocal Effect Theory, devised in *Lüth*, under which the general law must take into account basic constitutional norms in adjusting private law relationships. The result of this is that German basic rights, such as expression freedoms, effect all legal relationships, not just public law relationships as in the United States. The "indirect" effect of the Basic Law on private law relationships is fundamentally a German concept, without a real analogue in American law.<sup>467</sup> Most of the

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462. See Eberle, *supra* note 1, at 1212 (discussing the goals of the Supreme Court in the twentieth century).

463. *Denial of Responsibility*, 90 BVerfGE at 15; *Soldiers are Murderers I*, 45 NJW 2943 (1994).

464. 505 U.S. 377, 381 (1992) (state may not selectively proscribe fighting words).

465. See *supra* notes 59-62 and accompanying text.

466. See KOMMERS, *supra* note 5, at 45 (speaking of the "steering" or "integrating" function of Basic Law).

467. The closest American analogue would be *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Court found state action in a state court enforcement of a private racially restrictive covenant. *Lüth* and other German cases similarly involve purely private actions.

major German expression cases are products of this "indirect" influence of the Basic Law on fundamentally private law relations.<sup>468</sup> Thus, if American law penetrates more deeply into society, the impact of German law is wider.

Third, the contrasting influence of the constitutions in private law reveals a fundamentally different view concerning the distinction between public and private law, and the impact of the constitution on society. In the United States, the assumption is that there is a clear conceptual difference between the public and private realm. Private actors are free to act beyond the influence of the Constitution, their conduct shaped primarily only by the standards of statutory or common law. Only public actions must adhere to the Constitution, together with those private parties acting on behalf of government under the state action doctrine. Thus, the operative question in the United States for determining the reach of the Constitution is who is acting: state action is a prerequisite to application of the Constitution. These doctrines, in turn, reveal the pervasive American concern: limiting the reach of state authority in order to preserve private liberty.

In Germany, by contrast, no clear conceptual line is posited between the public and private sphere. This position is ironic in view of the traditionally clear distinction between public and private law in German legal theory.<sup>469</sup> The German view rests on the assumption underlying the Basic Law that certain basic values are so fundamental that they "should permeate state and society. . . ."<sup>470</sup> Constitutionally, there is to be no absolute distinction between public and private law. Under German doctrine, the status of a person, whether public or private, is of no particular relevance, in contrast to American law. Rather, the operative question is whether the basic right is being curtailed. Private and social forces can threaten rights just as severely, if not more so, than state actions. There is an affinity between German doctrine and the views of the American legal realists.<sup>471</sup>

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The Constitutional Court steps into this dispute only to assure that constitutional values are adequately taken into account in the ordinary courts' adjustment of the legal relationship. In this way, Germany is striving for a more comprehensive approach to rights.

468. See *Stern-Strauss Interview*, 82 BVerfGE 272 (1990); *Deutschland-Magazin*, 42 BVerfGE 143 (1976); *Lüth*, 7 BVerfGE 198 (1958).

469. See Quint, *supra* note 4, at 340.

470. *Id.*

471. See *id.* at 341; see, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L.

Fourth, German civility norms of privacy and reputational interests are a stronger limiting influence on communication freedoms than American ones. This is the most important doctrinal difference between German and American law. For example, one can say "white son of a bitch, I'll kill you"<sup>472</sup> in America, but one cannot call someone a "cripple" in Germany.<sup>473</sup> Or one can parody a politically active preacher in America by describing his first sexual experience as occurring in an outhouse with his mother while drunk,<sup>474</sup> but one cannot caricature a prominent politician in Germany as a sexually active pig, cohabiting with justice.<sup>475</sup>

Yet, this last difference also points out an important similarity between the two laws. A key demarcation point in both societies is where communication interests intersect with recognized privacy interests. The working out of this tension determines the scope of public discourse. The difference, restated, is that German privacy and reputational interests exert stronger force than in American law, resulting in a concomitant limitation of public discourse. Perhaps the more interesting question is why the two laws differ in this respect. Partly, of course, the difference is textual: the German Basic Law expressly circumscribes communication freedoms and orders more highly personality rights, in comparison to the textually unbounded First Amendment, which encounters no other express constitutional limitation. Yet, this just focuses attention on the reasons for the deliberate ordering of values in Germany in comparison to the United States' value-neutral structure.

In Germany, this question goes back to the prioritization of human dignity and its corresponding right to free development of personality as the highest legal and cultural values. The silhouette of the German person is thus one of the integrity of personhood, including the right to shape one's character, a shaping to occur within the social community.<sup>476</sup> Obviously, this partly reflects the

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REV. 553 (1933); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935). The affinity between German doctrine and American legal realism should not be surprising, since German legal theory was the major influence on the American movement. See e.g., James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

472. *Gooding v. Wilson*, 405 U.S. 518 (1972) (holding the Georgia law at issue overbroad and therefore unconstitutional).

473. *Cripple*, 86 BVerfGE 1, 8 (1992).

474. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

475. See *Strauss Political Satire*, 75 BVerfGE 369 (1987).

476. See *Kommers*, *supra* note 21, at 675 (discussing the German Federal Constitutional

deep desire to protect the integrity of the human person, a lesson learned bitterly from the horrors of Naziism. It also reflects the influence of Kantian idealism and its emphasis on inner personal autonomy. It is worth pointing out, however, that Kantian autonomy is to unfold in a manner consistent with moral obligations, as compared to the American view of autonomy as seemingly the value itself. In modern Germany, these ideas are rooted in the value-ordered Basic Law, which emphasizes positive and negative liberties, rights, and responsibilities, as compared to the United States Constitution's provision only of negative liberties and emphasis only on rights.

By contrast, American law has had a tortured relationship with the development of personality rights, known on this side of the Atlantic as rights of privacy. American law has never really accepted the call by Warren and Brandeis for a fundamental right to be let alone.<sup>477</sup> In part, this reflects the absence of any concrete textual anchor in the Constitution, as compared to the German enumeration of those freedoms. In part, this reflects the general resistance to usurpation by the Supreme Court of a value structure beyond control of the majoritarian process. Perhaps these difficulties have cleared the way for the full assertion of speech freedoms. American free speech law has certainly encountered fewer obstacles to development as compared to German law.

Another explanation for the comparatively free development of American law is the relative lack of cultural restraining norms. Unlike Germany, we have never had an aristocracy, monarch, dominant state church, unified educational system, or relatively homogenous population. For Germany, these factors have led to more of a shared sense of cultural norms which, in turn, have led to a greater constraining influence on expression freedoms. For example, the sense of personal honor in Germany is still quite highly regarded, reflecting Germany's aristocratic and feudal past. Thus, insulting or degrading speech is likely to be viewed more seriously as a personal affront, finding sanction in the law. In this

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Court's human dignity jurisprudence).

477. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (arguing that the right to privacy rests on notion of "an inviolate personality."). Professor Quint notes that the Warren-Brandeis theory might have guided evolution of American law along the lines of post-World War II German law, although there would have been serious conceptual difficulties for American law along this path. See Quint, *supra* note 4, at 279 n.106.

way, cultural norms link freedoms to a greater sense of responsibility, braking the excesses of freedom. By contrast, here the emphasis is more on people's free self-determination of the very norms that constitute society, free from almost any official constraint—a quest for which free speech has been indispensable. Our free speech law, in fact, maps out our quest to be free—from convention, order, and control.

If American law can thus be characterized as pursuing freedom for its own sake, German law defines freedom as realizable only through the social community and its value structure. Historically, the German state has been viewed as the corporate representative of community, and its protector of basic values, as compared to the American continual rebellion against authority. In this way, there is a more amicable relation between freedom and authority in Germany.<sup>478</sup> In turn, this frees the German state to play a more active role in helping achieve a society in which rights can thrive. A notable example of this is the Constitutional Court's active support of institutional press freedoms in *Wallraff*, where the Court protected editorial confidentiality over individual expression.<sup>479</sup> By contrast, American law posits no role for the state.

From an individual's perspective, German law empowers a person with both rights and responsibilities. In communication freedoms, this view is most evident in the Constitutional Court's active valuation of expression to determine whether it makes a real contribution to the formation of public opinion and does not violate other community values, such as imperiling the state or intruding on another's privacy rights. In this way, the Constitutional Court judges speech by its content, pursuant to its value according to the objective order of values, as compared to the Supreme Court's quest for absolute content-neutrality.<sup>480</sup> Stated another way, German expression is valued more for its ability to create and sustain community<sup>481</sup> in comparison to the American search for absolute

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478. See Kommers, *supra* note 21, at 694.

479. *Wallraff*, 66 BVerfGE 116 (1984).

480. Professor Kommers notes: "The Supreme Court demands a legal posture of neutrality toward *all* political ideas uttered in the public forum; the Federal Constitutional Court envisions a polity capable of legally defending those fundamental political values and principles of the Basic Law." Kommers, *supra* note 21, at 693.

481. For example, Germany's proscription of group defamation and hate speech out of a desire to curb discord in society. See *Cripple*, 86 BVerfGE 1 (1992).



individual freedom. The contrasting treatment of group defamation, hate speech, and seditious libel evidences this.<sup>482</sup>

From these differences, we can extrapolate some deeper cultural differences. In the United States, free speech is the preeminent value. It is what links us to our fellow Americans, our country, and our own identity. Through public discourse, we decide who we are as a people, what values we hold, and what ends are worth pursuing.<sup>483</sup> In this way, American law is self-deterministic, individualistic, and absolutist in orientation. One might say that American law is radically individualist. American law represents freedom, near absolute freedom, freedom striving to transcend the social order.

In Germany, by contrast, communication freedoms are an important, but not the preeminent value that human dignity is. Carefully circumscribed by the variant values of human dignity, German law channels conduct along more distinct civility norms. In Germany, more than in the United States, communication freedoms are exercised, or ought to be exercised, within the constraints of the social order. One ought to speak in a way cognizant of the impact of speech on others and society. Individuals should attempt to be in accord with the sense of society. In this way, German law is more communal in approach.

These differences in treatment of speech may simply reflect the contrasting confidence and maturity of the two societies. Never having truly faced undemocratic or totalitarian regimes and being relatively well acclimated to a multi-cultural, pluralistic society, the United States may simply exude more confidence in individuals' ability to perceive their own best interests and govern themselves.<sup>484</sup> Certainly this is an ideal on which the country is found-

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482. See *supra* notes 453-60 and accompanying text (discussing the differences between German and American law).

483. See Eberle, *supra* note 1, at 1137 (discussing the vision of the Supreme Court regarding First Amendment jurisprudence).

484. Obviously, this is more an ideal than reality. Events such as the bombing in Oklahoma City on April 19, 1995 might give one pause about the viability of such faith. Nevertheless,

[t]he constitutional right of free expression . . . put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

ed. The current individualistic trend in Germany may likewise reflect the country's greater self-confidence along these lines.

Alternatively, American law may reflect the uncoupling of freedom from responsibility. Perhaps the United States needs a stronger rooting of its freedoms in a broader social construct in which one shares common goals with, and common obligations to one's fellow citizens, as in the German Social State. Perhaps the United States needs to define freedom less as a value unto itself, and more as a value in relation to community. Such a fundamental reconception would obviously take a radical change in thinking.

Despite these differences, there is much to learn from the two laws and much the two countries can learn from each other. For example, an important lesson to be learned from German law is the premise that threats to free expression can come from private as well as public sources. If free speech is truly the most prized freedom in the United States, it would make sense to guard against all threats to its exercise. Thus, there may be something to the call for a New Deal for Speech.<sup>485</sup> Conversely, if one justifiably takes the position that expression freedoms are highly valued but also fragile, then the Constitutional Court might profitably transplant many of the techniques used by the Supreme Court to safeguard a vibrant system of free expression. Use of tools like strict scrutiny, categorical or weighted forms of balancing, and the overbreadth doctrine could help lend needed clarity and coherence to German law. These concepts might profitably transplant across cultures, albeit with some adjustments.

Still, most remarkable is the growing convergence of the two laws. The similar development of expression in two different legal cultures suggests something transcendent about the value of communication. We might say that communication rights are an essential part of a just and free society. Let us hope both countries can remain faithful to that ideal.

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Cohen v. California, 403 U.S. 15, 24 (1971).

485. See CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 16 (1993).

