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PRURIENT INTEREST AND HUMAN DIGNITY: PORNOGRAPHY REGULATION IN WEST GERMANY AND THE UNITED STATES†

Mathias Reimann*

In the United States, new perspectives are slowly emerging in the revitalized legal debate about pornography.¹ The debate has been fueled by conservative as well as feminist efforts and by the appointment, work, and report of the Attorney General's Commission on Pornography.² In particular, feminist lawyers and writers have called attention to the effect of pornography on the status, role, and, more generally, the dignity of women in society.³ These concerns led the city councils of Indianapolis and Minneapolis to adopt ordinances that declared certain sexually explicit material to be a violation of civil rights because those materials degrade human beings.⁴ These ordinances were de-

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^{1.} I use the terms "pornography" and "pornographic" to denote what the Supreme Court means by "obscene" and "obscene materials," namely materials so sexually explicit that they are generally considered hard-core pornography. For the purposes of this essay, it does not matter that not all material considered to be hard-core pornography by the general public is necessarily obscene under the current test, as laid down in Miller v. California, 413 U.S. 15 (1973). I use the terms "pornographic" and "pornography" because they are the appropriate German legal terms of art ("pornographisch," "Pornographie"; the direct translation of "obscene" ("obszön") is not used in legal German) and because these terms are also widely used in the United States.

^{2.} See Attorney General's Comm'n on Pornography, U.S. Dep't of Just., Final Report (1986) [hereinafter Comm'n on Pornography].

^{3.} See, e.g., A. Dworkin, Pornography: Men Possessing Women (1981); C. MacKinnon, Feminism Unmodified (1987); G. Steinem, Erotica vs. Pornography, in Outrageous Acts and Everyday Rebellions 219 (1983); Violent Pornography: Degradation of Women Versus Right of Free Speech, 8 N.Y.U. Rev. L. & Soc. Change 181 (1979); MacKinnon, Not a Moral Issue, 2 Yale L. & Pol'y Rev. 321 (1984); MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1 (1985) [hereinafter Pornography, Civil Rights].

^{4.} The Indianapolis Ordinance, Indianapolis, Ind., City-County General Ordinance No. 35 (June 11, 1984) (adding, inter alia, ch. 16 § 16-3(q) to the Code of Indianapolis and Marion County), was signed into law by the Mayor and immediately challenged in

clared unconstitutional and vetoed, respectively. The Report of the Attorney General's Commission on Pornography reflects similar views of pornography's effect on human dignity.⁵ The courts, however, have apparently not recognized these ideas as a legal standard⁶ and may not recognize them as such for a while, given the Supreme Court's recent affirmation of its traditional "prurient interest" test for pornography regulation.⁷

In contrast, the West German legal community has discussed the idea of pornography and related phenomena as involving issues of human dignity for more than a decade. This tack is not surprising, because the very first article of the Basic Law (Grundgesetz), the West German Constitution, makes human dignity the highest value in the constitutional order and its protection the superior duty of all state authority.8 Thus, concerns

federal court. The Seventh Circuit held the ordinance unconstitutional in American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

The Minneapolis City Council passed a slightly different version on December 30, 1983. Minneapolis, Minn., Ordinance Amending Title 7, chs. 139, 141, Minneapolis Code of Ordinances Relating to Civil Rights (adding subpar. (gg) to section 139.20). The Mayor subsequently vetoed the ordinance in 1984; it was then reintroduced in a newly elected Council, passed again, and vetoed again. Brest & Vandenberg, Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 STAN. L. Rev. 607 (1987), provides the whole story with ample background information. See also Comment, Feminism, Pornography, and the First Amendment: An Obscenity-Based Analysis of Proposed Antipornography Laws, 34 UCLA L. Rev. 1265 (1987).

- 5. 1 Comm'n on Pornography, supra note 2, at 303-06.
- 6. My research led to only two cases, in addition to Hudnut, in which the courts directly addressed the degrading effect on women of the commercial exploitation of sex. In Morris v. Municipal Court, 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982), the Supreme Court of California declared a county ordinance prohibiting nude dancing unconstitutional, discussing but rejecting the dissent's argument that the ordinance was justified because nude dancing commercially exploited females and thereby degraded women. Id. at 568-69, 577-78, 652 P.2d at 60, 66, 186 Cal. Rptr. at 503-04, 509-10. In Yauch v. State, 109 Ariz. 576, 514 P.2d 709 (1973), the Arizona Supreme Court, sitting en banc, said that the "evil sought to be suppressed [through a statute that banned nude dancing] is not only the infliction of nudity upon a beholder's moral sensibilities, but also the public degradation and debasement of the individual exposed." Id. at 578, 514 P.2d at 711. Other traces of thinking about pornography in terms of how it affects human dignity are scarce in American courts. See, e.g., Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684, 691-92 (1959) (Frankfurter, J., concurring); State v. Shreveport News Agency, Inc., 287 So. 2d 464, 477 (La. 1973) (Summers, J., dissenting); City of Youngstown v. DeLoreto, 19 Ohio App. 2d 267, 281, 251 N.E.2d 491, 501 (1969) (stating that photographs of nude females degrade "the purpose of God's creation").
 - 7. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).
- 8. See infra note 38 and accompanying text. In American constitutional law, the concept of human dignity has traditionally not played a similarly important role. Justice Brennan, however, has expressed the view that "human dignity" is the most fundamental notion underlying the United States Constitution and that it must be considered the ultimate credo of the document as well as the lodestar of its interpretation. Speech by Justice William J. Brennan, Jr., Text and Teaching Symposium, Georgetown University

about pornography and human dignity have engaged the minds of West German legislators and scholarly commentators for a long time. Also, the courts have, in several controversial cases, directly addressed the issue of human dignity in their decisions about pornography and closely related areas.

This Article examines the regulation of pornography in West Germany and compares it to regulation in the United States. Part I provides an overview of the legal framework—constitutional and statutory—of pornography regulation in West Germany. Part II then traces the evolution of the concept of human dignity as a standard for defining pornography in West Germany, and Part III illustrates the practical impact of the idea in two widely debated recent cases. Part IV argues that West Germany's human dignity approach to pornography regulation raises important questions about how to view pornography, but that cultural and constitutional differences between West Germany and the United States caution against the direct application of the German approach in this country. Finally, this Article concludes that a comparison of the approaches to pornography regulation taken by the two countries offers an important, though limited, new perspective for the current debate in the United States.

At the outset, it is important to recognize the limitations of the subject matter of this Article. Essentially, pornography regulation raises at least three distinct questions that courts and commentators mix up all too often. First, does the United States Constitution, in particular the first amendment, allow the regulation of pornography, and if so, to what extent? A comparative study of the law of a foreign country obviously cannot answer this question of domestic American law and, therefore, I do not address this issue here.

Second, if the Constitution permits regulation, should the state use this power? For the resolution of this issue of policy, as well as legislative and administrative wisdom, a look to another

⁽Oct. 12, 1985), reprinted in The Great Debate: Interpreting Our Written Constitution 11, 19, 24-25 (Federalist Soc'y ed. 1986).

^{9.} The first amendment states, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

^{10.} This is the issue addressed in *Hudnut*. For a spirited defense of the decision, see Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv. J.L. & Pub. Pol'y 461 (1986); cf. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589 (arguing that pornography regulation can be defended under traditional first amendment doctrine as regulation of low-value speech because regulation prevents serious, though not clearly proven, harm to individuals, particularly women).

^{11.} See infra notes 193-208 and accompanying text.

country's practical experience—for example, its enforcement of pornography regulation or the regulation's impact on the frequency and nature of sexual crimes—could be helpful. I do not wish, however, to focus directly on West Germany's practical experiences, nor take a position on whether the German system functions better than American endeavors. Instead, this Article looks at a third, possibly even more difficult question: If the state actually wishes to regulate pornography, on what grounds should it do so? The answer to this third question has, of course, an impact on the desirable shape and extent of the purported regulation. This question focuses, however, not on the practical desirability and feasibility of regulation, but instead on its underlying rationale. The German human dignity approach to pornography can make a contribution to the answer of what, if anything, is wrong with pornography. The human dignity concept remains at this time rather vague, and presently raises more questions than it answers. It can, however, lead us to think about the issue from a perspective different from the traditional American notion of pornography—not as something objectionable because it unduly appeals to the prurient interest in sex, but rather as a phenomenon with potentially troublesome effects on our view of human beings.

I. THE LEGAL FRAMEWORK

Before comparing pornography regulation in West Germany and the United States, the German regulatory scheme must be understood. As in the United States, both constitutional and statutory law are important. The emphasis of the debate surrounding pornography legislation in West Germany has been on statutory, rather than constitutional, law, giving the debate a flavor somewhat different from its American counterpart. This statutory emphasis can, however, be properly understood only within the framework of the constitutional provisions about freedom of speech, opinion, and press.

A. Pornography and the German Constitution

Unlike the situation in the United States, the power of the legislature to regulate pornography has never been an important constitutional issue in West Germany. No one has ever seriously challenged this power on constitutional grounds. Moreover,

courts, commentators, and the public do not perceive pornography regulation as raising important free speech issues.¹² The reason for this situation is, however, not that the German Constitution provides no limits on permissible free speech regulation. Instead, this situation has developed because legislation regulating pornography has never seriously strained these constitutional limits. Two main reasons, based on the political and constitutional structure of West Germany, account for this reserve on the part of the government.¹³

First, the legislative action that could possibly cause concern rests almost exclusively with the federal branch of government in West Germany, and the federal government has exercised restraint in regulating pornography. In West German free speech cases, not much room for conflict exists between the federal constitution and actions taken by the individual states. In the United States, in contrast, one of the first amendment's central functions is to impose limits on state laws, particularly criminal statutes, thus creating constant opportunities for testing the constitutional limits. The West German states have very little power to enact laws that threaten free speech because federal preemption almost completely covers all criminal law, including the provisions on pornography, as well as the laws of assembly, association, and demonstration.14 Thus, in West Germany, fewer governmental bodies try to impose their majority's opinion about the proper treatment of pornography on individuals and, therefore, fewer opportunities exist for conflicts with the federal Basic Law.

Second, the West German Basic Law does not protect free speech as rigorously as does the first amendment. The German Constitution gives the government more leeway to regulate speech, and the federal legislature has simply never gone far enough in regulating pornography to test the comparatively wide

^{12.} To this extent, the West German situation parallels the one that existed in the United States until the 1950's, when the Supreme Court entered the arena and pornography regulation became regarded as a major first amendment problem. See F. Schauer, The Law of Obscenity 8-40 (1976).

^{13.} There are also, of course, cultural reasons. See infra notes 209-11 and accompanying text.

^{14.} The issue of federalism and the question of how much freedom the individual states have under the federal constitution—often the central issues in American free speech cases—have almost no significance in West Germany. Free speech issues in West Germany essentially present a conflict between individual freedom and governmental regulation, but normally do not have the flavor of a conflict between the federation and its members. For the basic provision on federal preemption in West Germany, see Grundgesetz [GG] art. 74.

limits. To understand these limits, one must look at the German technique of free speech regulation in general.

American free speech doctrine is essentially built on one sentence in the first amendment, a categorical command to Congress and, through the process of incorporation, the states, not to make any laws that abridge the freedom of speech or press. In contrast, the German Basic Law, in article 5, attempts to combine speech protection with governmental regulatory power in a complex scheme. Its first section provides sweepingly broad guarantees of freedom to various kinds of expression, but its second section responds with almost equally broad restrictions. As a result, the actual applicable constitutional standards lie somewhere in the middle.

The guarantees in section 1 sound most impressive: "Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship." Constitutional scholars and the courts construe this sweeping language very broadly. All speech expressing some point of view, whether valuable and fundamental, or worthless and insignificant, constitutes an "opinion." Furthermore, even if courts believed that pornography does not express a point of view, and thus cannot qualify as an "opinion," the constitution could still protect pornography as "press" (in printed form) or as "film" (in motion picture form)

^{15.} See supra note 9.

^{16.} Article 10 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms employs the same technique. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5.

^{17.} THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 15 (Press and Information Office of the Federal Government, Bonn, 1979) [hereinafter The Basic Law].

^{18.} See Decision of Mar. 23, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] (Decisions of the Federal Constitutional Court) 336, 347, 352; Decision of June 22, 1982, 61 BVerfGE 1, 7-9; G. Leibholz, H. Rinck & D. Hesselberger, Grundgesetz Kommentar marginal note 1 to GG art. 5 (6th ed. 1986) [hereinafter G. Leibholz & H. Rinck, at marginal note/GG article]; 1 T. Maunz, G. Dürig, R. Herzog, R. Scholz, P. Lerche, H. Papier, A. Randelzhofer & E. Schmidt-Assmann, Grundgesetz Kommentar notes 50, 55a to GG art. 5 (1987) [hereinafter T. Maunz & G. Dürig, at marginal note/GG article] (1987); 1 I. Von Münch, Grundgesetz Kommentar marginal note 5 to GG art. 5 (3d ed. 1985) [hereinafter I. Von Münch, at marginal note/GG article]. Some debate still exists as to whether pure statements of fact should be protected as "opinion." See 1 T. Maunz & G. Dürig, supra, at 50/5.

^{19.} This term encompasses all printed materials intended for distribution to the public, in whatever form and with whatever content, and thus also includes materials featuring solely entertainment and sensation. See Decision of Jan. 31, 1973, 34 BVerfGE 239, 283; 1 I. Von Münch, supra note 18, at 22/5.

under article 5, section 1, of the Basic Law.²⁰ This provision covers "press" and "film" as independent categories of expression, regardless of whether they contain any "opinion." In other words, the question of whether pornography qualifies as speech or opinion of any kind, crucial under the first amendment to the United States Constitution,²¹ plays no role here.²²

The above provisions, however, do not mean that pornography completely escapes regulation. At least at first glance, article 5, section 2, in a manner that typifies the Basic Law, immediately and eagerly takes away much of what section 1 has just so generously given. It matches the broad coverage of section 1 with equally broad limitations: "These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour."²³

Most of the pornography regulation currently in force in West Germany²⁴ is constitutionally authorized on the basis that it protects youth from bad influences.²⁵ Even beyond that justification, the possible "general laws" limitation of article 5, section 1, rights seems to sanction any regulation whatsoever, as long as it is by parliamentary statute and is generally applicable.²⁶ In addition, the legislature's regulatory power appears even broader in light of the usual interpretation of section 1's prohibition of

^{20. &}quot;Film" means anything in the technical form of a film. See 1 T. Maunz & G. Dürig, supra note 18, at 198/5; 1 I. Von Münch, supra note 18, at 39/5.

^{21.} See, e.g., Roth v. United States, 354 U.S. 476, 484-85 (1957).

^{22.} Cf. infra notes 35-38 and accompanying text (kind of speech affects the degree of constitutional protection).

^{23.} THE BASIC LAW, supra note 17, at 15.

^{24.} See infra Part II.

^{25.} See id. Article 118, § 2, of the Weimarer Reichsverfassung of 1919, reprinted in Deutsche Verfassungen 119 (1976), already provided in a similar vein: "Also, legislative acts are permissible in the combat against dirty and trashy literature and for the protection of the youth at public exhibitions and performances." The right to inviolability of personal honor plays no effective role in the restriction of pornography. Cf. infra Part III(A).

^{26.} The courts have not construed the constitutional meaning of the clause "general laws" as broadly as its language suggests. It means that, first, limitations on free speech can be imposed only by parliamentary legislation, not through independent acts of the executive or the judiciary. See Decision of Jan. 13, 1982, 59 BVerfGE 231, 264. Second, courts have read the language to confine regulation to those laws that do not attempt to regulate a particular opinion for its substance's sake. In other words, a "general law" must apply to all opinions and expressions alike, regardless of their specific substance. For example, a law can regulate the manner, circumstances, and general limits of expression, but generally cannot discriminate against one kind of opinion or expression. See Decision of Feb. 6, 1979, 50 BVerfGE 234, 240-41; Decision of Apr. 25, 1972, 33 BVerfGE 52, 66; Decision of May 26, 1970, 28 BVerfGE 282, 292; Decision of Apr. 15, 1970, 28 BVerfGE 175, 185-89; Decision of Feb. 4, 1969, 25 BVerfGE 198, 205; Decision of Nov. 22, 1951, 7 BVerfGE 198, 209-10; B. SCHMIDT-BLEIBTREU & F. KLEIN, KOMMENTAR ZUM

censorship to encompass only prior restraints, not post-publication sanctions.²⁷

In result, however, although Basic Law article 5, section 1, does not effectively protect all forms of expression alike, neither does section 2 take all effective protection away. Instead, constitutional scholars and the courts have combined and harmonized both sections. Constitutional law restrains the legislature's regulatory power under section 2 in three ways. First, article 5 itself, in a separate section 3, vests art and science, as well as research and academic teaching, with special protection unbridled by the legislature's power.28 With respect to pornography, this special protection roughly equals the third prong of the American Supreme Court's traditional test under Miller v. California,29 which was in turn based on Roth v. United States. 30 Second. Basic Law article 19, section 2, provides that no matter how the legislature uses its power to limit and regulate basic rights, the legislature must leave the essential content of the various basic rights untouched.³¹ This provision prohibits any regulation that is so severe that it leaves essentially nothing of the basic right.32

GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND marginal note 13 to GG art. 5 (6th ed. 1983).

At first glance, this approach appears to resemble the American distinction under the first amendment between permissible time, place, and manner regulation, and impermissible content regulation. The similarity is only superficial. Under the first amendment, this distinction establishes a line that separates constitutional from unconstitutional speech regulation in general. Under article 5 of the Basic Law, this distinction addresses only the legislature's power to regulate under the authorization of the specific "general laws" clause. There is, however, implied legislative power to regulate speech on other grounds, i.e., outside of article 5 itself, in particular for the protection of other highly ranked constitutional values. This protection can permit even content regulation. See infra notes 35-38 and accompanying text.

^{27.} Decision of Apr. 25, 1972, 33 BVerfGE 52, 71; see also 1 T. Maunz & G. Dürig, supra note 18, at 78/5.

^{28. &}quot;Art and science, research and teaching, shall be free." GG art. 5, § 3. The conclusion that the restrictions in § 2 do not limit these rights is based on the listing of these rights in a separate section, after the restrictions in § 2, and the separate limitation in the second clause of § 3 providing that "freedom of teaching shall not absolve from loyalty to the constitution." For further discussion, see 1 T. MAUNZ & G. DURIG, supra note 18, at 14/5 § 3.

^{29. 413} U.S. 15, 24 (1973).

^{30. 354} U.S. 476 (1957). In *Roth*, the Court defined obscene material as material "utterly without" socially redeeming value. *Id.* at 484. *Miller* tightened this standard and required that the material have "serious" artistic, literary, political, or scientific value. 413 U.S. at 24. I have found no direct German authority concerning the strictness of the standard under GG art. 5, § 3. That issue is, however, irrelevant for the purposes of this Article.

^{31. &}quot;In no case may the essential content of a basic right be encroached upon." GG art. 19, § 2.

^{32.} Considerable uncertainty exists over the exact limits of regulation under GG art. 19, § 2. An overview of the debate is provided by K. Hesse, Grundzüge des Verfassun-

Neither of these restraints, however, effectively protects commercial pornography. Where commercial pornography has, as defined under *Miller*, so no artistic, literary, political, or scientific value, Basic Law article 5, section 3, does not apply. Moreover, to my knowledge, nobody in West Germany has ever argued that the regulation of pornography so severely abridges the rights in Basic Law article 5, section 1, that it destroys the very essential core of these rights and thus violates Basic Law article 19, section 2.

The German Federal Constitutional Court has developed a third restraint on the legislature's power to restrict basic rights. According to generally accepted constitutional doctrine, the restrictive provisions attached to the various guarantees of individual rights in the Basic Law must themselves be interpreted and implemented in the spirit of the very basic right that they concern. In other words, the relationship between basic-rights guarantees and basic-rights restrictions is not unilateral in the sense that only the restriction limits the basic right, but is instead mutual: The basic right also limits the restriction. This doctrine results in a general reasonability test and balancing approach not unlike the one widely believed to be employed by the United States Supreme Court.

Under such a balancing approach, the constitutional permissibility of a basic rights regulation will in effect depend on the weight of the competing goals involved.³⁵ This means that, on the one hand, the nature of the opinion, press, or film claiming article 5 protection becomes highly relevant. Clearly political speech deserves a very high degree of protection, while, for example, commercial speech, entertainment, and sensational press deserve much less, although still some, respect.³⁶ On the other hand, a court must also weigh the regulatory goal envisaged by the legislature. Concerns about public order in general will not justify much interference, although higher constitutional values, such as the basic tenets of the West German system of govern-

GRECHTS DER BUNDESREPUBLIK DEUTSCHLAND marginal notes 332-33 (15th ed. 1985); 2 T. MAUNZ & G. DÜRIG, supra note 18, at 1-29/19 § 2. Article 19, § 2, clearly does not, however, limit restrictions to time, place, and manner regulation.

^{33. 413} U.S. at 24.

^{34.} See Decision of Nov. 22, 1951, 7 BVerfGE 198, 210-11; G. LEIBHOLZ & H. RINCK, supra note 18, at 10/5; 1 I. Von Münch, supra note 18, at 51/5; see also K. Hesse, supra note 32, at marginal notes 72, 317.

^{35.} See Decision of Nov. 22, 1951, 7 BVerfGE 198, 210-11; G. Leibholz & H. Rinck, supra note 18, at 12/5; 1 I. Von Münch, supra note 18, at 51-52/5.

^{36.} The limits of permissible regulation in this area are subtle. For limits on commercial speech, see Decision of November 19, 1985, 71 BVerfGE 162.

ment, will. In particular, the legislature can justify regulation for the protection of the basic rights of other individuals.³⁷ Human dignity and the individual's personhood represent the most important of the protected constitutional values, and the German Constitution enshrines both in its first two articles.³⁸ The protection of these values, therefore, can clearly justify, and in extreme cases perhaps even demand, considerable restriction of other basic rights, such as free speech.

Given the widespread agreement about its comparatively low social value, and the abundance of conceivable reasons for its regulation, it is hardly surprising that pornography does not fare very well on this spectrum of protection. The German Federal Constitutional Court has never fundamentally questioned the legislature's power to regulate pornography.³⁹ To the contrary, most of the current regulations, as well as some of the prior, more restrictive regulations, have been upheld either expressly⁴⁰ or by implication. Therefore, it is hard to discern the possible constitutional limits in this area. Neither the courts nor the scholarly commentators have ever seriously doubted that the legislature has the power to completely outlaw at least all material that is generally considered hard-core pornography.⁴¹ The legislature clearly can also keep all sexually explicit materials

^{37.} Decision of Jan. 25, 1984, 66 BVerfGE 116; Decision of Feb. 24, 1971, 30 BVerfGE 173, 188-97.

^{38.}

Art. 1 (Protection of human dignity)

⁽¹⁾ The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

⁽²⁾ The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

^{(3) ...}

Art. 2 (Rights of Liberty)

⁽¹⁾ Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.

GG arts. 1, 2.

^{39.} Cf. Decision of Mar. 10, 1958, 7 BVerfGE 320. Here the Federal Constitutional Court did not question the legislature's authority to prohibit the distribution of sexually explicit materials to minors. It found, however, that the legislature must make appropriate exceptions for parents giving such materials to their children because GG art. 6, § 2, protects against state interference with parents' right to educate their children. See also Decision of Mar. 23, 1971, 30 BVerfGE 336, infra note 42.

^{40.} Decision of Jan. 17, 1978, 47 BVerfGE 109, 116-20 (upholding the prohibition of public performances of pornographic movies against an attack under the guarantee of freedom of profession in GG art. 12; prohibition found permissible as means of protecting juveniles against pornography).

^{41.} Decision of July 22, 1969, 23 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] (Decisions of the Federal Supreme Court in Criminal Matters) 40 (find-

away from juveniles.⁴² Authority beyond that point barely exists because the legislature has never tried to go further.⁴³ In all likelihood, the legislature could, however, severely regulate all sexually explicit materials for all consumers. It is probably well within the range of legislative discretion to decide that other, more important, social goals, such as the protection of human dignity pursuant to Basic Law article 1, section 1, outweigh the limited value of the publication of sexually explicit materials.⁴⁴ This strongly suggests that the German Constitution allows substantially more regulation of sexually explicit matters than does the first amendment as currently construed by the United States Supreme Court.

Yet it is not so much this potentially greater leniency of the German Constitution that distinguishes the German situation so clearly from its American counterpart. The absence of any serious challenge to the legislature's power to prohibit commercial pornography in West Germany represents the truly important difference. There is no ongoing debate as to whether commercial pornography deserves effective protection as freedom of expression, no suggestion that article 5, section 2, would not permit its prohibition, and no concern that such prohibition would endanger constitutional rights. Whether debate would occur if the legislature imposed more severe regulation is uncertain. Plans to severely restrict access to sexually explicit materials would probably give rise to an intense moral and political debate. Yet the comparative leniency of free speech protection under the German Basic Law, and the justification of restrictions to protect other important values, appear too generally accepted to make a great constitutional debate, or a constitutional challenge of the legislation, very likely.

ing no constitutional difficulty even with the old and much more severe regulation under the pre-1974 version of Penal Code (Strafgesetzbuch [StGB]) art. 184).

^{42.} Initially, the Federal Constitutional Court left this question open. Decision of Mar. 10, 1958, 7 BVerfGE 320, 326. It later upheld the constitutionality of the pertinent legislation by implication. Decision of June 22, 1960, 11 BVerfGE 234. In yet a later case, it affirmed its earlier decision with one exception. It held that the legislature cannot enact an irrebuttable presumption that all material solely containing and advertising nudity presents such danger to minors as to warrant complete prohibition. Decision of Mar. 23, 1971, 30 BVerfGE 336.

See infra Part II.

^{44.} But see GG art. 5, § 3, supra note 28.

B. Statutory Regulations

The West German legislature could go far in regulating pornography without acting unconstitutionally, but it has chosen not to use this authority. Although it probably has more regulatory power than its American counterparts, the West German legislature has decided to exercise less.⁴⁵ The majority of lawmakers and their constituencies feel no need to exhaust the constitutionally permissible.⁴⁶ To the contrary, West German lawmakers substantially liberalized existing pornography legislation in 1974.

In West Germany, various federal statutes concern pornography regulation. Yet nowhere do these statutes provide a definition of what, precisely, constitutes pornography. Indeed, the search for a proper definition has become a highly controversial issue. The definitional and conceptual problem, and its surrounding controversy, go to the very essence of this Article and require more than passing attention. I will therefore address and discuss this problem in depth in a separate Part.⁴⁷ In the present context, however, we will leave it aside and only look at the statutory provisions themselves and at some aspects of their implementation. For this purpose, it is enough to understand pornography in its colloquial sense as highly explicit, hard-core sexual material.

In West Germany, the legislature has traditionally regulated pornography in two separate areas. The criminal provisions in the Penal Code determine the general limits of permissible sexually explicit materials, and special legislation provides specific protection for juveniles.

1. The general criminal law: Choosing tolerance— Until 1974, federal criminal law largely prohibited pornography in West Germany. In substantive result, the laws roughly resembled federal and state criminal law in the United States. Article 184 of the German Penal Code made it a criminally punishable

^{45.} This is true, however, only with respect to sexually explicit material, not with respect to other material, such as that depicting extreme violence. See infra Part III.

^{46.} This view has emerged, in part, because the states generally lack regulatory competence in this area and thus ignore opportunities to respond to the special preferences in their territories. See supra note 14 and accompanying text. Yet this feeling is also a function of different cultural attitudes about sex. See infra notes 209-11 and accompanying text.

^{47.} See infra Part II.

^{48.} All criminal law is federal in West Germany by virtue of GG art. 74, no. 1, and federal preemption, see supra note 14.

offense⁴⁹ to distribute, make publicly available, produce, keep, advertise, import or export, etc., "indecent" material, including writings, printings, films, and objects intended for indecent use.⁵⁰ In effect, this provision completely outlawed, at least on paper, commercial dealing in pornography.⁵¹ No one seriously doubted the constitutionality of these prohibitions.⁵²

In many Western countries, the early 1970's marked a time of liberal ideas concerning the regulation of sexually explicit materials. In the United States, the 1970 Report of the Commission on Obscenity and Pornography reflected this liberal spirit.⁵³ In the Federal Republic of Germany, the 1974 reform of the whole law of sex-related crimes expressed a similar mood.⁵⁴ The question of whether to relax the prohibition of pornography represented only a small part of the long and arduous struggle for this general reform.⁵⁵ The possibility of decreasing the regulation of por-

^{49.} It was technically a misdemeanor, punishable with up to one year's imprisonment and a fine. For an English translation of the pre-1974 Penal Code, see The GERMAN PENAL CODE OF 1871 (G. Mueller & T. Buergenthal trans. 1961).

^{50.} For the definition of the term "indecent" prior to 1974, see infra notes 99-102 and accompanying text.

^{51.} The pre-1974 version of StGB art. 184 also made it criminally punishable to publicly advertise or exhibit contraceptives and devices for venereal disease protection, to make public announcements "intended to cause indecent intercourse." Article 184, nos. 3, 4. Article 184a prohibited selling materials to persons under 16 years of age that, though not indecent, grossly offend modesty.

^{52.} Decision of July 22, 1969, 23 BGHSt 40; see also Decision of June 11, 1970, Oberlandesgericht [OLG], Hamm (appellate court of Hamm), 23 Neue Juristische Wochenschrift [NJW] 1754 (1970); Decision of Feb. 11, 1969, Bayrisches Oberstes Landesgericht (supreme court of Bayaria), 24 Juristenzeitung [JZ] 398 (1969).

^{53.} Commission on Obscenity and Pornography, The Report of the Commission on Obscenity and Pornography (1970).

^{54.} See Viertes Gesetz zur Reform des Strafrechts vom 23. Nov. 1973, 1973 Bundesgesetzelatt, Teil I [BGBl.I] 1725. The scholarly literature on this subject is vast; among the more important contributions are: Becker, Pornographie und Gewaltdarstellung nach dem 4. Strafrechtsreformgesetz, 1973 Film und Recht 593; Becker, Pornographische und gewaltdarstellende Schriften nach dem Vierten Strafrechts-Reformgesetz, 28 Monatsschrift für Deutsches Recht [MDR] 177 (1974) [hereinafter Becker, Pornographische]; Dreher, Die Neuregelung des Sexualstrafrechts—eine geglückte Reform?, 1974 Juristische Rundschau [JR] 45; Hanack, Die Reform des Sexualstrafrechts und der Familiendelikte, 27 NJW 1 (1974); Laufhütte, Viertes Gesetz zur Reform des Strafrechts, 29 JZ 46 (1974); Röber, Neuregelung der Pornographie und Verbot von Gewaltdarstellungen mit weittragenden Auswirkungen für die Filmwirtschaft, 1973 Film und Recht 616; Stefen, Jugendschutz und Pornographie in der Bundesrepublik Deutschland nach dem 4. Gesetz zur Reform des Strafrechts, 1974 Archiv für Presserecht 603.

^{55.} A Special Legislative Committee was appointed by the parliament. As early as 1970, it held hearings and gathered information from a variey of experts about the desirability and possible effects of the contemplated reforms. The materials produced by the Special Legislative Committee contain most of the pertinent information on the legislative history and goals of the 1974 reform. PROTOKOLLE DES SONDERAUSSCHUSSES FÜR DIE STRAFRECHTSREFORM AUS DER 6. WAHLPERIODE 1905 [hereinafter PROT. VI]; PROTOKOLLE

nography emerged, however, as the most hotly debated issue in the legislative bodies as well as among the general public.⁵⁶ The legislative effort to achieve a compromise in this area⁵⁷ resulted, inter alia,⁵⁸ in a complete rewriting of Penal Code article 184. The attempt to include a great variety of ideas and concerns in the new article produced a perplexing complexity, puzzling to the lawyer and so incomprehensible to the layperson that few can tell right from wrong.⁵⁹

The bottom line can nevertheless be summarized in a few sentences. Essentially, the legislature liberalized the law of pornography by making the production, distribution, and sale of

DES SONDERAUSSCHUSSES FÜR DIE STRAFRECHTSREFORM AUS DER 7. WAHLPERIODE 60 [hereinafter Prot. VII]; Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform aus der VI. Wahlperiode 58, Drucksache VI/3521 [hereinafter Bericht VI]; Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform aus der 7. Wahlperiode 10, Drucksache 7/5140 [hereinafter Bericht 7]. Becker provides a summary of the legislative history in Becker, Pornographische, supra note 54.

- 56. See Hanack, supra note 54, at 1-2. The Special Legislative Committee spent most of the time in its meetings on the issue of pornography.
- 57. The original bill, sponsored by the liberal government coalition between Social Democrats (SPD) and Free Democrats (FDP), underwent substantial changes at the urging of the conservative Christian-Democratic opposition (CDU), which would have preferred to retain the complete prohibition of pornography. See Prot. VI, supra note 55, at 1912, 1917, 1928; Prot. VII, supra note 55, at 61; Bericht VI, supra note 55, at 59; Bericht 7, supra note 55, at 11.
- 58. The changes also affected StGB art. 131, see infra Part III, and the special legislation for the protection of minors, see infra Part II.
 - 59. The text of StGB art. 184 reads as follows:
 - Art. 184. Distribution of Pornographic Publications
 - (1) Whoever deals with pornographic publications (art. ll, § 3)* in one of the following manners
 - offers to, leaves in the possession of, or makes accessible to, a person under eighteen years of age,
 - exhibits, posts, displays or otherwise makes available in a place which is accessible to or can be seen by a person under eighteen years of age,
 - offers or leaves in the possession of someone, in retail outside of business premises, drinking halls or other shops which are not normally entered by patrons, through mail-order or in commercial libraries or reading circles,
 - 4. undertakes to import into the jurisdiction of this statute by mail-order,
 - announces or advertises publicly in a place which is accessible to or can be viewed into by a person under eighteen years of age, or through the distribution of printed material outside of the business relations within the trade,
 - 6. causes an unrequested receipt of,
 - shows in a public movie exhibition for consideration which is charged in whole or predominantly for this exhibition,
 - 8. produces, obtains, delivers, stores or imports into the jurisdiction of this statute in order to use them or materials made from them for one of the purposes in No. 1-7, or in order to enable another to such use, or
 - undertakes to export in order to distribute or make publicly accessible, or to
 make possible such a use, in a foreign country in violation of the criminal
 law there in force, shall be punished by imprisonment not exceeding one

most hard core pornography no longer illegal. Penal Code article 184 basically contains a detailed list of exceptions from that general rule, most of which aim to ensure the protection of juveniles. Article 184 continues to penalize pornography in three fundamental respects. First, in section 1, article 184 outlaws the distribution, sale, or exhibition of pornography to minors (i.e., persons under eighteen years of age), including any acts in preparation for and promotion of this end. In this context, it also prohibits some forms of distribution or exhibition of pornography in general, for example through the mails or in general movie theatres, out of concern that effective age control of patrons is not possible. 60 These provisions reflect a concern behind Penal Code article 184 for the protection of juveniles against the harmful influence of pornography.⁶¹ It is interesting to note that American courts are considerably more reluctant to allow such broad regulations that, for the sake of protecting minors, severely limit adult access to certain materials.62

Second, Penal Code article 184 outlaws unwanted confrontation with pornography. Here the law essentially protects the right to decide freely whether or not one wants to be exposed to pornographic materials. The right to be left alone by pornography marks the flipside of the right of access to it. Thus, article 184 criminalizes the mailing of unrequested advertising material

year or by a fine.

(2) Whoever distributes a pornographic presentation through broadcasting shall be equally punished.

- (3) Whoever deals with pornographic publications (art. 11, § 3) which have as their subject violence, sexual abuse of children, or sexual acts of human beings with animals, in one of the following manners
- 1. distributes,
- 2. publicly exhibits, posts, displays or makes otherwise available or
- 3. produces, obtains, delivers, stores, offers, announces, advertises, undertakes to import into the jurisdiction of this statute or to export it from there in order to use them, or materials made from them, for the purposes in No. 1 or 2, or in order to enable another to make such use, shall be punished by imprisonment not exceeding one year or a fine.
- (4) Section 1 No. 1 is inapplicable to acts of one having custody of the person.
- *StGB art. Il, § 3 provides that "publications" also means media of sound and film recording, pictures, and other depictions.
- Of course, virtually every clause and word of this complex provision has been interpreted and analyzed by hundreds of court decisions and scholarly comments.
- 60. See StGB art. 184, § 1, nos. 3, 7, § 2; A. Schönke & H. Schröder, Strafgesetzbuch Kommentar marginal note 3 to StGB art. 184 (22d ed. 1985) [hereinafter A. Schönke & H. Schröder, at marginal note/StGB article]; see also the official legislative reasons, Bericht VI, supra note 55, at 34.
 - 61. Bericht VI, supra note 55, at 58-59; Bericht 7, supra note 55, at 10-11.
- 62. See Jacobellis v. Ohio, 378 U.S. 184, 195 (1964); Butler v. Michigan, 352 U.S. 380, 383-84 (1957); see also infra notes 82-86 and accompanying text; cf. Ginsberg v. New York, 390 U.S. 629 (1968). See generally F. Schauer, supra note 12, at 87-95.

with pornographic content and the public display or distribution of pornographic materials. Likewise, article 184 prohibits the broadcasting of pornographic matter because people may find themselves confronted with it by chance, before they can switch off the program.⁶³

Third, in section 3, article 184 still completely prohibits the production, distribution, public exhibition, sale, and so forth of extreme hard-core pornography. This prohibition encompasses not only pornographic material, but also material that depicts sex-related violence, sexual acts by or on children, and sexual acts of humans with animals. The continuing prohibition of such materials expresses several concurrent concerns. Although the legislature could not ascertain the precise effect of depicted violence, it deemed a detrimental impact on consumers sufficiently possible to warrant prohibition.⁶⁴ The interdiction of child pornography aims primarily at protecting the children involved from abuse. Yet the legislature also became concerned that such material could have an adverse influence on consumers by fostering tendencies to abuse children. 65 Similarly, the legislature considered the depiction of sex with animals to be potentially harmful, at least to people susceptible to deviant behavior. Furthermore, there were concerns that such material could not always be kept from juveniles if allowed on the market at all, and the danger that these materials present to juveniles' development and socialization was considered so great that it justified total prohibition.66

As an overall result, "normal" pornography, i.e., sexually explicit materials not outlawed by section 3 of Penal Code article 184, can by and large be legally produced, sold, and exhibited to consenting adults in West Germany. This is in contrast to the situation throughout the United States, the only, very recent, exception being Oregon.⁶⁷ Three main reasons account for this

^{63.} See StGB art. 184, § 1, nos. 3, 6, 7, & § 2.

^{64.} Bericht VI, supra note 55, at 62 (with further references); id. at 35. For the American side, see 1 Comm'n on Pornography, supra note 2, at 323-47.

^{65.} Bericht VI, supra note 55, at 35. The United States Supreme Court employed similar arguments in New York v. Ferber, 458 U.S. 747 (1982).

^{66.} See Bericht VI, supra note 55, at 35; A. Schönke & H. Schröder, supra note 60, at 1/184]. The vagueness with which the legislative materials refer to these reasons, and the slight evidence they give, however, leaves one with the impression that a consensus existed among the lawmakers that such materials are plainly too offensive to deserve legalization.

^{67.} In January 1987, the Supreme Court of Oregon struck down a state law regulating obscene material. The regulations were tailored after, and were in conformity with, United States Supreme Court case law, but were held to be a violation of the guarantee

liberalization in Germany. First, the lawmakers were concerned mostly for the citizens' freedom to read and see what they pleased. Second, the lawmakers wanted this freedom to prevail because of the unclear nature of the detrimental effects of "normal" pornography. They did not consider notions of sexual morality or decency a sufficient ground for regulation. 68 Moreover, they wished to respond to the general trend toward greater tolerance and leniency in sexual matters that had, as they found, rendered the older, stricter regulation outmoded. Finally, they acknowledged that, similar to the situation in the United States today, 69 the government did not effectively enforce the old law anyway. Therefore, they hoped to establish a new, more restricted, line of defense that the government would enforce firmly in practice. 70

The practical effects of the reform were substantial in that pornographic material is legally and easily available in West Germany today. What was once sold under the counter is now sold over it, though only in special stores that are closed to minors. One can find these stores, so-called "sex-shops," in all major cities, and in airports and many train stations, although zoning and licensing regulations often confine them to certain areas. Besides the customers of these stores, the major beneficiary of the reform seems to be the pornography industry, whose profits have soared. The public appears to have gotten used to the "sex-shops" by and large and seems relatively untroubled by their presence. Although everyone is aware of the easy availability of pornography in West Germany, no popular perception

of freedom of speech, press, and expression under art. I, § 8 of the Oregon Constitution. On the basis of an historical analysis of the respective provisions in the state constitution, the Oregon Supreme Court concluded that "[i]n this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered 'obscene.'" State v. Henry, 302 Or. 510, 525, 732 P.2d 9, 18 (1987).

^{68.} See also infra Part IV.

^{69.} See 1 Comm'n on Pornography, supra note 2, at 366-72.

^{70.} See Prot. VI, supra note 55, at 1908; Bericht VI, supra note 55, at 58-59; Id. at 33; A. Schönke & H. Schröder, supra note 60, at 1/184.

^{71.} In that sense, zoning and licensing ordinances represent major control devices in West Germany as well as in the United States. See City of Renton v. Playtime Theatres, 475 U.S. 41 (1986); Young v. American Mini Theatres, 427 U.S. 50 (1976).

^{72.} The movie and video industry seems to be doing particularly well. See Stolle, "Die-Kunden brauchen den besonderen Kick," Der Spiegel, Mar. 7, 1983, at 216, 217. As of 1983, its annual gross income amounted to roughly 500 million DM (Deutsche Mark) and continues to rise each year. Wie Du und Ich, Der Spiegel, July 2, 1984, at 63. More recent estimates are as high as 1.1 billion DM. Karasek, Ist die sexuelle Freiheit am Ende? Der Spiegel, Jan. 4, 1988, at 122, 125.

^{73.} As of 1987 there were about 1000 sex-shops and roughly 350 movie theatres showing pornographic films in West Germany. Karasek, supra note 72, at 125.

exists that pornography has totally swamped the country, or that the situation has become much worse than before the reform.

Thus, there has been no significant pressure to reverse the liberalization in West Germany.⁷⁴ This may be changing now. Under the influence of the American pornography debate,⁷⁸ feminists in West Germany launched a vehement attack on pornography in the fall of 1987 and received considerable media attention.⁷⁸ They adopted not only the arguments of their American colleagues, but also the idea of a civil remedy by victims against pornographers, as in the Indianapolis and Minneapolis ordinances.⁷⁷ Although it is unlikely that this proposal stands a chance of realization in the near future, the revival of the pornography debate in West Germany may indicate a change of climate. It is, however, too early for a forecast.

2. Special legislation for the protection of juveniles— The protection of minors from pornography through the general criminal law is supplemented by special legislation, particularly the Law on the Distribution of Publications Dangerous to Youths. This special law aims to protect juveniles against publications posing a danger to the character development of minors. For that purpose, the law created a special federal Commission with a unique, quasi-judicial procedure to identify those publications too dangerous to minors. Although the Commission's jurisdiction includes motion picture material, in film or videocassette form, in practice a different system screens such material. The Commission puts any materials found too dangerous to minors on a regularly published list. The law makes

^{74.} The effects of the reform on the number of sexual crimes were reported to be insignificant. See Karasek, supra note 72, at 122; Stolle, supra note 72, at 217;

^{75.} The debate was triggered by the publication in 1987 of the German translation of Andrea Dworkin's book, Pornography: Men Possessing Women, supra note 3, published as Pornographie. Männer beherrschen Frauen.

^{76.} See Karasek, supra note 72, at 122-31.

^{77.} See id., at 131. For the ordinances, see supra note 4 and accompanying text.

^{78.} Gesetz über die Verbreitung jugendgefährdender Schriften [GjS]. The law was originally enacted in 1953, 1953 BGBl.I 377, and has undergone various changes since then. For a thorough study of the law, see P. RAUE, LITERARISCHER JUGENDSCHUTZ (1970); see also R. Scholz, Jugendschutz, Kommentar (1985).

^{79.} See infra notes 88-92 and accompanying text.

^{80.} The Commission has its seat in Bonn and consists of a president appointed by the Federal Minister for Youth, Family, and Health, and of assessors appointed in part by the federal government, and in part by the state governments. Article 1, Implementation Ordinance of the Law on the Distribution of Publications Dangerous to Youths. The federally appointed members are required to be drawn from professionals representing art, literature, book trade, editors, youth organizations, teachers, and religious groups. GjS art. 9. Cf. infra note 84 and accompanying text. All members are independent. GjS

it a criminal offense to sell or make the listed material otherwise available to minors. To ensure the insulation of minors from such material, the law also prohibits the public advertising and the sale, in certain retail stores, of the selected publications.⁸¹

Obviously, the latter restrictions impair the access of adults to the materials in question as well. Consequently, the law and its measures, as well as the Commission and its work, have created controversy since its inception. Supporters welcome stricter scrutiny; opponents call it censorship. ⁸² Like their American colleagues, ⁸³ German booktraders have seen their interests, and the freedom of speech and of the press, impaired and have charged the authorities with overbroad regulation. ⁸⁴ The problem is how far the legislature should be allowed to go in restricting access for adults to protect minors. Although American courts have been somewhat reluctant to give much license to the legislature, ⁸⁶ the German Federal Constitutional Court has upheld the constitutionality of the respective provisions as measures for the protection of youths under Basic Law article 5, section 2. ⁸⁶

- 81. GiS art. 21.
- 82. See P. RAUE, supra note 78, at 13.

art. 10. Only government authorities for juvenile affairs can petition the Commission to declare certain materials dangerous to youths. Article 2, Implementation Ordinance. Twelve members of the Commission decide the case on the basis of an oral argument during which the author and the editor of the material will be heard, GjS art. 12, but which is not public, art. 6, Implementation Ordinance. The decision must contain a written opinion. This decision can be appealed to the general administrative courts, but the scope of their review is limited. The Commission has a certain amount of discretion that the courts will respect. See Decisions of Mar. 3, 1987, Bundesverwaltungsgericht [BVerwG], 40 NJW 1429, 1431, 1434 (1987).

There are two more expedient ways to find publications dangerous to youths. First, if a court of law has found that a publication is either pornographic or in violation of StGB art. 131, see infra Part III, the Commission's president can include the material in the list of publications prohibited for youths without further proceedings. GjS art. 18. Second, a publication can be included on the basis of a summary and unanimous decision by the president and two members of the Commission if the publication clearly qualifies as dangerous. GjS art. 15a. They can also include a publication on the list by preliminary order and thus have its circulation restricted immediately. GjS art. 15. Periodicals can be included for up to 12 months at a time before review. GjS art. 7.

^{83.} See American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

^{84.} German booktraders have especially complained that the Commission includes too much in its list, particularly simply "erotic literature," and that its decisions have become increasingly restrictive. As an act of protest, publishers and authors, who were originally represented on the Commission, completely withdrew from it several years ago. Stolle, Die Harke im Garten der Lüste, Der Spiegel, Feb. 10, 1986, at 195.

^{85.} See supra note 62 and accompanying text.

^{86.} Decision of Mar. 23, 1971, 30 BVerfGE 336; Decision of June 22, 1960, 11 BVerfGE 234; for videocassettes recently, see Decision of Mar. 22, 1986, BVerfG, 39 NJW 1241 (1986); see also Schumann, Werbeverbote für jugendgefährdende Schriften,

The Commission can find publications to be dangerous to minors for a variety of reasons other than sexual explicitness. The legislature also wanted to protect juveniles against the harmful influence of brutalizing materials and materials that instigate violence, crime, or racial hatred or that glorify war.⁸⁷

Theoretically, the Commission's jurisdiction extends over motion picture materials,88 but a different procedure actually is used for these materials. The Youth Protection Laws provides that motion picture performances and, since the most recent amendments, 90 also videocassettes, can be made available to juveniles only after prior approval by the appropriate state authorities. 91 A board of the motion picture industry first licenses the motion picture material for certain minimum ages under a system known as voluntary self-control (freiwillige Selbstkontrolle—FSK). Up to this point, the procedure resembles the rating of films by the Motion Picture Association of America. In Germany, the rating by the industry board is then, however, vested with state authority through official approval by the respective government agencies. This approval is given as a matter of course and imposes restrictions on who may be admitted to shows of the restricted material. Like printed material, motion pictures can be rated as unfit for minors not only because of sexual explicitness, but also because of the glorification of violence or war or the instigation of crime or racial hatred. The Federal Constitutional Court has not determined the constitutionality of this system of prior restraint. It is likely, however,

³¹ NJW 1134 (1978); Schumann, Nochmals: Werbeverbote für jugendgefährdende Schriften, 31 NJW 2495 (1978).

^{87.} GjS art. 1. In fact, the Commission has recently had to deal particularly with publications depicting violence within or without a sexual context. See Stolle, supra note 84; Menssen-Engbergding, Die Bundesprüfstelle und der Videomarkt, 1984 FILM UND RECHT 736. As a consequence of GG art. 5, § 3, publications that serve the goals of art, science, research, and teaching are exempted. GjS art. 1, § 2.

^{88.} GjS art. 1, § 3.

^{89.} Gesetz zum Schutze der Jugend in der Öffentlichkeit, commonly known as Jugendschutzgesetz [JÖSchG].

^{90.} Effective since Apr. 1, 1986, 1986 BGBl.I 425, III 2161/1; see Greger, Die Video Novelle 1985 und ihre Auswirkungen auf StGB und GjS, 1986 Neue Zeitschrift für Strafrecht 8; Von Hartlieb, Gesetz zur Neuregelung des Jugendschutzes in der Offentlichkeit, 38 NJW 830 (1985); Weides, Der Jugendmedienschutz im Filmbereich, 40 NJW 224 (1987).

^{91.} JöSchG arts. 6 and 7. Release of motion picture material for minors under the Youth Protection Law deprives the federal Commission of jurisdiction. JöSchG art. 6, § 7 and art. 7, § 5. De facto, the Youth Protection Law therefore handles motion picture material, while the Commission handles printed matter.

that the Court would find it constitutional as a proper way to protect minors.⁹²

3. A look at essential features— Looking at both the general criminal law and the special legislation for the protection of minors reveals two main characteristics of statutory pornography regulation in West Germany that set it apart from most regulation in the United States. First, West German pornography regulation does not aim primarily at the enforcement of certain notions of sexual morality, but at the protection of minors against influences harmful to their character development. Thus, it is not concerned with society's sexual decency, but with dangers to its members. Where the legislature believes that such dangers have not been sufficiently proven, as in the case of most pornography used by mature individuals, it has refrained from regulation. As a result, existing pornography regulation leaves adult citizens by and large alone.

Second, even where the legislature considers such dangers to be substantial enough, as in the case of minors or extreme hardcore pornography, it is not primarily concerned with sexual morality alone. For example, the special legislation for the protection of minors prohibits not only sexually explicit materials, but also materials depicting extreme violence, instigating racial hatred, or glorifying war. Moreover, the criminal law outside of the provisions addressing pornography reflects the greater breadth of this legislative concern. The 1974 criminal law reform not only liberalized pornography regulation, it also introduced a new article 131 into the Penal Code. This provision makes it a crime to produce, distribute, publish, or make available to a minor materials that "depict acts of violence against humans in a cruel or otherwise inhumane manner and which thus glorify or present as harmless such acts of violence, or which instigate racial hatred."93 Like Penal Code article 184, this article aims in part at the protection of minors, but it also seeks to prevent violence by suppressing advertisement for it.94 The regulation of pornography—as far as it reaches—must be understood in this context. The verdict on pornography is closely related to the verdict on

^{92.} Prior decisions concerning the GjS strongly suggest this result. See supra note 39. It is highly unlikely that the Court would consider this system to be censorship in the constitutional sense. The restrictions apply only with respect to minors, whom the constitution recognizes as deserving special protection. GG art. 5, § 2. Movies intended only for adults do not have to be submitted for release.

^{93.} StGB art. 131.

^{94.} A. Schönke & H. Schröder, supra note 60, at 1/131; E. Dreher & H. Tröndle, Strafgesetzbuch und Nebengesetze (42d ed. 1985) [hereinafter E. Dreher & H. Tröndle, at marginal note/StGB article].

depictions or promotions of acts of inhumanity threatening respect for that highest constitutional value, human dignity.⁹⁵ The struggle for a definition of pornography in West Germany brings this concern for human dignity sharply into focus.

II. THE DEFINITION OF PORNOGRAPHY—COMPARING STANDARDS

Despite the significant differences between the regulation of pornography in the United States and Germany, both countries share the fundamental problem of how to distinguish pornography from nonpornography. The significance of this distinction differs, however, because of varying approaches to free speech regulation under the first amendment and the German Basic Law. Under the first amendment's more rigid approach, classification of the material as pornographic or not automatically determines the availability of any constitutional protection: The first amendment protects nonpornography for most purposes, but pornography is subject to virtually any degree of regulation. 97

In Germany, the peculiar interpretation of Basic Law article 5 prevents such all or nothing results⁹⁸ and leads to more flexibility. Article 5, section 1, entitles works that could be prohibited in the United States as pornography to some protection, and article 5, section 2, authorizes the regulation even of nonpornographic materials. In other words, governmental power to regulate sexually explicit materials does not, as it does in the

^{95.} See also StGB art. 130, which has provided that "[a]nybody who, in a manner tending to breach the peace, attacks the human dignity of others by:

^{1.} incitement to hatred against parts of the population,

^{2.} provocations to acts of violence and despotism, or

^{3.} insulting, maliciously ridiculing or defaming them, shall be punished by a term of imprisonment of not less than three months and up to five years."

^{96.} See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (invalidating as overbroad an ordinance that prohibited drive-in theatres from showing films containing nudity visible from public streets or places); cf. New York v. Ferber, 458 U.S. 747 (1982) (permitting the prohibition of the dissemination of material showing children engaged in sexual conduct whether or not material was obscene under the Miller standard). Pornography is, of course, still subject to time, place, and manner regulations. See City of Renton v. Playtime Theatres, 475 U.S. 41 (1986); Young v. American Mini Theatres, 427 U.S. 50 (1976).

^{97.} See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). But cf. Stanley v. Georgia, 394 U.S. 557 (1969) (holding that private possession of obscene material is protected under the first and fourteenth amendments). The first, and hitherto only, state in which this is no longer true is Oregon. State v. Henry, 302 Or. 510, 732 P.2d 9 (1987). See supra note 67 and accompanying text.

^{98.} See supra notes 34-38 and accompanying text.

United States, depend on their classification as pornography. Consequently, the definition of pornography presents not a constitutional issue, but only a problem of statutory interpretation.

Nevertheless, German legislators, scholars, and courts have struggled to define pornography for many years. This struggle pits two competing approaches to pornography against each other. One approach is akin to, and in part derived from, the United States Supreme Court's definition of pornography as something that appeals to the prurient interest in sex; the other looks at pornography as a problem of human dignity. The development of the two views is best understood from a historical perspective.

Before 1974, German statutes did not use the terms "pornography" or "pornographic": instead, statutory language employed the term "indecent" (unzüchtig). The early definition of "indecent" by courts and, in the wake of their decisions, commentators, was broad and vague. Courts considered material indecent if it offended the average person's sense of propriety and sexual morality.99 This old definition closely resembled the American standards in Roth v. United States 100 and Miller v. California.101 It contained, first, a sexual component comparable to the "prurient interest" requirement and, second, referred to the judgment of an average person, which was roughly equivalent to the "community standards" component. The third prong of the Roth/Miller test— the lack of literary, political, artistic, or scientific value—was also included, though tacitly because the German definition must always be read to respect the exceptions required by Basic Law article 5, section 3.102

In 1969, the German Federal Supreme Court (Bundesgerichtshof) broke new ground by endorsing a definition of pornography that was suggested at the German Lawyers' Convention (Deutscher Juristentag) the year before.¹⁰³

^{99.} See Decision of Nov. 12, 1957, 11 BGHSt 66, 72; Decision of Feb. 16, 1954, 5 BGHSt 346, 347; Decision of Nov. 18, 1952, 3 BGHSt 295, 296.

^{100. 354} U.S. 476 (1957).

^{101. 413} U.S. 15 (1973). See infra note 112 and accompanying text.

^{102.} See supra note 28. As to the weight attributed to political speech, see supra notes 35-38 and accompanying text.

^{103.} See Hanack, Empfiehlt es sich, die Grenzen des Sexualstrafrechts neu zu Bestimmen?, Gutachten zum 47. Deutschen Juristentag A 1 (1968). Hanack's ideas of liberalizing pornography regulation were based on modern social scientific literature, according to which pornography could not be shown to have a significant impact on socially deviant behavior. See id. at A 234-35.

Only a few years after being scrutinized by the United States courts,104 the legality of John Cleland's infamous 1749 novel Fanny Hill came before the German judges. The District Court found the book "indecent" under the old Penal Code article 184. The Federal Supreme Court reversed. 105 It cited the relevant prior case law with approval and thus created the impression that it meant to endorse the established definition of indecency. It expressly acknowledged, however, that sexual morality had recently become more liberal. Responding to this trend, the Court provided a new, somewhat more precise, substantially more liberal standard. We will inquire into the essence of that standard more deeply in a moment. For present purposes, however, it suffices to note that to find a publication indecent, the Court required that it be so "obtrusively vulgarizing or instigating" that it "disturbs or seriously endangers the affairs of community."106

The Court found that the "unrealistic depiction of sexual acts" could indicate "indecency," particularly when presented "in an excessive and instigating manner without a meaningful connection with other aspects of life." Fanny Hill, however, could not be pronounced indecent under these standards. The decision stands as a milestone in German pornography law. It indicates a double shift in emphasis—away from concerns about the average person's notions of sexual decency and toward questions about dangers to the community, and away from a focus on explicitness and toward attention to the realism and meaningfulness of the depiction.

A year after the Fanny Hill decision, the legislative debates began that eventually led to the enactment of the new, more liberal, Penal Code article 184.¹⁰⁸ The legislature considered the West German Supreme Court's approach to pornography, but found it unsatisfactory. Legislators remained concerned that the criterion of "unrealistic depiction" of sexuality would cause great difficulties in respect to photographic pornography that could very well be realistic and yet merit prohibition. For this reason, the legislature deemed it indispensable to define pornography

^{104.} Attorney General v. "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 206 N.E.2d 403 (1965), rev'd, 383 U.S. 413 (1966).

^{105.} Decision of July 22, 1969, 23 BGHSt 40. Hanack provides a detailed analysis of the opinion in Zur verfassungsmässigen Bestimmtheit und strafrechtlichen Auslegung des Begriffs "unzüchtige Schrift." 25 JZ 41 (1970).

^{106.} Decision of July 22, 1969, 23 BGHSt 40, 43.

^{107.} Id. at 44.

^{108.} See supra notes 53-59 and accompanying text.

raphy along the lines of its stimulating effect on the viewer. Consequently, the Special Legislative Committee¹⁰⁹ favored the definition provided by the United States Supreme Court in its Fanny Hill decision, Memoirs v. Massachusetts,¹¹⁰ which endorsed the prurient interest approach set forth in Roth v. United States.¹¹¹ The Committee thus defined pornography, in a way very familiar to American constitutional lawyers, as materials that:

- 1. reveal that they, exclusively or predominantly, aim at the excitation of a sexual stimulation in the viewer and thereby
- 2. clearly transgress the limits of sexual decency defined according to the general social value judgments.¹¹²

Here we encounter, in clear form, the basic elements of the test developed in *Roth* and adopted by *Memoirs*: appeal to the prurient interest in sex, patent offensiveness to contemporary community standards, and lack of literary, scientific, artistic, or political value again tacitly included. The Special Committee's definition does not have the force of law, but it, of course, carries substantial authority as an expression of the lawgivers' intentions. The legislature, however, eventually made a conscious decision against adopting a statutory definition of pornography in order to leave the problem to the courts.¹¹³

A close analysis shows that the concepts of pornography underlying the German Fanny Hill decision and the German Special Legislative Committee's adoption of the Memoirs prurient interest criteria have a significantly different character. They represent the two distinct viewpoints that are the seeds for two competing schools of thought about pornography in West Germany. In order to understand the essence of these differences, we must look into the matter more deeply.

The existence of a German and an American decision about the pornographic nature of the same book makes a comparison of the two Fanny Hill decisions an appropriate starting point.

^{109.} See supra note 55.

^{110.} A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966); see Prot. VI, supra note 55, at 1906; Bericht VI, supra note 55, at 60. The Committee also assumed, quite incorrectly, as I will show, that there is no essential difference between the German and the American Supreme Court's approaches. See Prot. VI, supra note 55, at 60; Bericht VI, supra note 55, at 33.

^{111. 354} U.S. 476 (1957).

^{112.} PROT. VI, supra note 55, at 1932.

^{113.} BERICHT VI, supra note 55, at 60; PROT. VI, supra note 55, at 1930, 1932.

Because both courts reached the same result, and because the German Federal Supreme Court cited *Memoirs*, 114 it might appear that the decisions do not differ significantly. In fact, the courts reached the same result for completely different reasons.

In the American case, some evidence at the trial attested to the novel's literary value, but the trial court did not consider that this evidence, in light of other circumstances, was sufficiently strong to save the book from condemnation. The Massachusetts Supreme Judicial Court affirmed the decision, holding that a book does not have to be completely without literary value for a court to find it obscene. 115 The United States Supreme Court reversed. Justice Brennan, writing the plurality opinion, first endorsed the approach of Roth and created a three-prong test for pornography—(1) appeal to a prurient interest in sex. (2) offensiveness to contemporary community standards, and (3) utter lack of redeeming social value. 116 Justice Brennan then immediately proceeded to review the lower courts' interpretation of the third criterion, social value. He found that the Massachusetts court had misconstrued this criterion because "[a] book cannot be proscribed unless it is found to be utterly without redeeming social value."117 The third prong of the test thus saved the book. For this reason, the Court did not need to consider the other two prongs, appeal to prurient interest and patent offensiveness. Justice Brennan acknowledged the possibility that the book might satisfy these two parts of the Roth test, but he expressly refused to decide that question. 118 In sum, the Court's decision allows the publication of Fanny Hill in the United States because of its literary value, regardless of whether the book appeals to the prurient interest in sex or violates contemporary community standards.

The argument in the German Supreme Judicial Court's opinion proceeds exactly the other way. The Court closely analyzed the language and social message of the book to support its conclusion that *Fanny Hill* is not "indecent." The book was saved because the Court simply did not find its contents objectionable.¹¹⁹ Consequently, the Court did not need to decide whether

^{114.} Decision of July 22, 1969, 23 BGHSt 40, 42.

^{115.} Attorney General v. "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 73, 206 N.E.2d 403, 406 (1965), rev'd, 383 U.S. 413 (1966).

^{116.} A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 (1966) (Brennan, J., plurality opinion).

^{117.} Id. at 419 (emphasis in original).

^{118.} Id. at 418-19.

^{119.} Decision of July 22, 1969, 23 BGHSt 40. But cf. the approach in Jenkins v. Georgia, 418 U.S. 153 (1974), where Justice Rehnquist, writing for the Court, found that

to protect the book as a work of literary art, and the Court expressly refused to do so.¹²⁰

If we compare these opinions, the different rationales quickly become apparent: American readers can enjoy Fanny Hill even if it is sufficiently offensive because it still has some literary value. German readers, on the other hand, can buy the book because it is not sufficiently offensive, regardless of its literary value. In other words, Fanny Hill was potentially offensive enough under the American Court's test, 121 although the German decision clearly says that it is not.

Why did the German judges not simply follow the strategy of the *Memoirs* decision, which they had read, and protect the book as a work of literature under Basic Law article 5, section 3? Why would they choose the rougher course of showing that the book is not objectionable regardless of its literary value? The reason is that the Court wanted to establish a new test for offensiveness. The judges sought to formulate a more liberal test than used in prior cases. Yet their new approach also differed in its very essence from a prurient interest test that looks at the book's effect on the reader, his prurient interest in sex, or moral sensibilities.

Under the prurient interest approach in Roth and Memoirs, the government can regulate materials if the materials appeal to a prurient interest in sex and are patently offensive under contemporary community standards. Thus, the government can prohibit materials if they are more arousing than most people deem acceptable. The German Court's view differs subtly, but nevertheless fundamentally: The German judges pay scant attention to the arousing effects of Fanny Hill but rather look to the way in which the material portrays the sexual acts. To be sure, the description of sexual acts in the book is, as the Court openly recognizes, highly explicit. Sometimes, the book describes even perverse acts, and the description of sex dominates the

the movie Carnal Knowledge was not objectionable under the first two prongs Roth and Memoirs, as adapted by Miller v. California, 413 U.S. 15 (1973). Thus, he did not need to consider its artistic value, which might also have saved the film.

^{120.} Decision of July 22, 1969, 23 BGHSt 40, 46.

^{121.} It is not, of course, clear whether Justice Brennan would have found Fanny Hill to be obscene if he had had to decide the issue. Note, however, that under the current, stricter, standard as established by Miller v. California, 413 U.S. 15, 24 (1973), it is questionable whether the book could still be saved. Only "serious" literary value, and no longer marginal social value, suffices. The facts of Miller, however, suggest that the seriousness of the literary or other value of certain materials may be judged with respect to the author's intent. See id. at 26. From this perspective, Fanny Hill could still be considered "serious" literature. Memoirs v. Massachusetts, 383 U.S. at 425 (Douglas, J., concurring); see also infra text accompanying notes 122-24.

book. Yet the German Court remains unperturbed by this aspect because the book still presents sexuality as a part of life and in a meaningful context:

[The novel] is not an obtrusive presentation of sexuality reduced to itself and isolated from the context of other expressions of life. . . . Sexual deviancies and excesses are neither glorified nor presented as particularly desirable. In the deliberations of the heroine, the author even clearly hints at an evaluative distinction between purely physical sensuality and a true personal love relationship. 122

The novel, the Court writes, describes the story of an originally innocent and naive country girl who finds her way, through all kinds of more or less healthy sexual adventures, to fulfillment in true love. 123 Fanny experiences sex with feelings of naive curiosity, amusement, disgust, and, sometimes, love. The court emphasizes that the reader sees the sexual acts through a filter of the natural emotions of the heroine. In other words, the book describes sex as, and through, the experience and feelings of a human being with human emotions. The perspective on sex is a human, personal, one. 124

At this point, it becomes clear how the German Court's approach in Fanny Hill differs fundamentally from its American counterpart. The prurient interest test is subjective in the sense that its judgment about the material depends on the material's effect on the viewer (and on the intent of the producer as well). The German Fanny Hill approach is essentially objective in the sense that its judgment on the materials depends on how the materials portray sex as a human relationship and how

^{122.} Decision of July 22, 1969, 23 BGHSt 40, 44-45.

^{123.} The strong moral overtones of this reasoning are undeniable. The Court interprets the book to convey a message—pure sex is inferior to true love—that is, socially, fully acceptable. Accordingly, one can read the Fanny Hill decision to mean that even great explicitness, including perversion, can be tolerated if justified by a social message that accords with the prevailing majoritarian morality, i.e., a socially redeeming value beyond literature and art.

^{124.} The Court's message here is not the same as saying that the book has literary value. To be sure, a human perspective on life experience represents one of the possible attributes of such value, but the Court is not concerned with literary quality. It does not address the questions of whether the book is profound or shallow, skillfully or badly written, original or trivial in style. See also supra note 120 and accompanying text.

^{125.} Therefore, material can be, or cannot be, obscene depending on who looks at it and the purpose for which it was produced. Ginzburg v. United States, 383 U.S. 463 (1966); see also Mishkin v. New York, 383 U.S. 502 (1966).

they depict the persons involved in it. 126 The two approaches also have different goals. The Memoirs test basically purports. as the German Court put it, "to enforce the moral standard of the adult citizen in sexual matters."127 The German Court expressly refuses to enforce such a standard. 128 Instead, the German Court's approach rests on a broader notion of morality that looks at the question of how the material treats the characters and their sexuality. The Court essentially asks whether the material presents the characters truly as human beings with a value in and of themselves. If the material does, the Court will find the sexual explicitness acceptable because sex forms a natural part of life. If, on the other hand, the material basically employs its characters only as objects for other purposes, notably sexual stimulation, the Court will find the depiction of sex unacceptable because the work treats the characters not as humans, but only as objects. Such a work denies the characters their human individuality and personhood. The approach of the German Court thus concerns itself not with the viewer's prurient interest but—ultimately—with human dignity.129

The dichotomy between these two approaches has characterized the German debate on the definition of pornography ever since 1974. Some state supreme courts, scholarly commentators, and the Federal Commission for Publications Dangerous to Youths have subscribed to the Special Legislative Committee's adoption of the American standard defining pornography by its effect on the viewer's sexual stimulation. This approach can therefore be considered the offspring of Roth and Memoirs. A large group of courts and writers, however, have expanded the

^{126.} See infra note 181 and accompanying text; cf. infra notes 145-46 and accompanying text. To be sure, both approaches are subjective in the sense that they both depend on openly evaluative judgments that must be made by the factfinder.

^{127.} Decision of July 29, 1969, 23 BGHSt 40, 43.

¹²⁸ Id

^{129.} This approach is based on Kant's categorical imperative always to treat humanity as an end in itself, never as a means, as the philosopher develops it in the first and second chapters of I. Kant, Grundlegung zur Metaphysik der Sitten (1785). The Basic Law's concept of human dignity stands directly in this tradition. "It contradicts... the human dignity to make a human being a mere object in the state. The maxim, 'a human being must always remain an end in herself,' applies unconditionally in all areas of the law...." Decision of June 21, 1977, 45 BVerfGE 187, 228 (citation omitted).

^{130.} See, e.g., Decision of Mar. 28, 1974, OLG Düsseldorf, 27 NJW 1474 (1974) (with annotation by Möhrenschlager, id. at 1475); Decision of Feb. 1, 1979, OLG Koblenz, 32 NJW 1467 (1979); OLG Schleswig, 1976 Schleswig-Holsteinische Anzeigen 168.

^{131.} See, e.g., K. LACKNER, STRAFGESETZBUCH MIT ERLÄUTERUNGEN marginal note 2a to art. 184 (16th ed. 1985); Leipziger Kommentar, marginal notes 7-8 to art. 184 (10th ed. 1985); see also Laufhütte, supra note 54, at 47.

^{132.} See generally supra note 80 and accompanying text.

German Federal Supreme Court's Fanny Hill reasoning and have thereby created a tradition of looking at pornography as an undesirable way of portraying human beings and their sexuality.¹³⁸ The latter tradition¹³⁴ finds sexually explicit materials objectionable and thus pornographic where the materials present sexuality outside of the context of life and human relations,¹³⁵ or purely as an end in itself, so that the materials result in a "dehumanization of sexuality."¹³⁶ Where, instead, materials portray sexuality as part of the human experience of life, as, for example, in Nagisa Oshima's film, In the Realm of the Senses, this tradition does not consider even highly sexually explicit material to be pornographic.¹⁸⁷ Under this approach, the concern about pornography is that it depicts humans as "physiological stimu-

^{133.} The decision as to which side to take did not always turn on philosophical or sociological contemplations. Frequently, courts or commentators argued the practicality of the respective standards. Furthermore, some authorities have used both standards in combination. See, e.g., Decision of Mar. 28, 1974, OLG Düsseldorf, 27 NJW 1474 (1974).

^{134.} In addition to the authorities cited supra note 133, and infra notes 135-36, see OLG Hamm, Entscheidungen der Oberlandesgerichte zum Straf- und Strafverfahrensrecht, Art. 184 StGB, 61; Entscheidungen des Bayrischen Oberlandesgerichts in Strafsachen 1974, 175 at 181; see also Decision of Mar. 28, 1974, OLG Düsseldorf, 27 NJW 1474 (1974); Becker, Pornographische, supra note 54; Hanack, supra note 54; Hanack, supra note 103; cf. R. Maurach & H. Schröder, Lehrbuch des Strafrechts, Besonderer Teil, Teilband 1, 194 (6th ed. 1977); H. Schröder, Das Neue Sexualstrafrecht 65 (1975) (not clearly taking sides but leaning toward preference of the human dignity approach as well).

^{135.} See, e.g., Decision of May 16, 1974, OLG Karlsruhe, 27 NJW 2015, 2016 (1974); A. Schönke & H. Schröder, supra note 60, at 4/184.

^{136.} A. Schönke & H. Schröder, supra note 60, at 4/184; see also 2 H. Rudolphi, E. Horn & E. Samson, Systematischer Kommentar zum Strafgesetzbuch, marginal note 4 to art. 184 (1980 & Supp. 1987) [hereinafter H. Rudolphi, at marginal note/StGB article].

The Mar. 17, 1977, decision by the District Court of Berlin, reported in 86 Archiv für Urheber-, Film-, Funk- und Theaterrecht 204 (1980), affirmed by the Federal Supreme Judicial Court, id. at 203, is a direct descendent of the Fanny Hill decision and reasoned in the same spirit. Because the District Court did not find the movie to be pornographic in the first place, it did not need to ask whether the movie deserved special protection as a work of art under GG art. 5, § 3. The seizure of the movie by the prosecutor at the 1976 Berlinale, a prestigious international film festival, and shortly thereafter the seizure of Pasolini's Salo-The 120 Days of Sodom, later also released by the Federal Supreme Court, 86 Archiv für Urheber-, Film-, Funk- und Theaterrecht 208 (1980), had attracted considerable public attention as the first seizures of movies of some standing in several years. See Zensur: Die freigesprochene Sexualität, Der Spiegel, Feb. 13, 1978, at 180-89; Zimmer, Es Wird Gerichtet, Die Zeit, Mar. 25, 1977, at 37. The legal issues involved are discussed in more detail in Von Hartlieb, Strafrecht und Filmfreiheit. Zwei Filme jetzt vor der Entscheidung durch den Bundesgerichtshof, 1977 FILM UND RECHT 735; Von Hartlieb, Der Bundesgerichtshof zur Gewaltpornographie, 1978 FILM UND RECHT 308, 452; Ehlers, Gewaltdarstellung und Pornographie im Lichte jüngster Rechtsprechung, 1977 Film und Recht 736. Ever since the seizure of the Pasolini film, seizures of serious movies for their pornographic character have been almost nonexistent in West Germany.

lus-response creatures"¹³⁸ and thus as mere exchangeable objects of desire and instruments for sexual satisfaction. In short then, this approach views the essence of pornography as the treatment of people not as human beings, but as things.¹³⁹ Under German law, such treatment clearly constitutes a violation of human dignity.¹⁴⁰

If pornographic materials, or at least some of them, constitute a violation of human dignity, the question then becomes, of course, whether the state has an affirmative duty to prohibit them. Basic Law article 1, section 1,¹⁴¹ seems to indicate such a duty.¹⁴² To date, the legislature has not adopted this position. Others, however, have urged this position upon the courts—sometimes with success.

III. HUMAN DIGNITY AS FEMALE DIGNITY—TWO CASES

The view of pornography as a degradation of human beings is a broad and elusive idea. It rests on a nebulous concept of human dignity—a concept hard to grasp and harder yet to define. The idea does not, however, lack a practical meaning, particularly for women who may find themselves presented as sexual objects in all sorts of publications and contexts. The "dignity of man"—"die Würde des Menschen" as translated by the

^{138.} Decision of May 16, 1974, OLG Karlsruhe, 27 NJW 2015, 2016 (1974); see also H. Rudolphi, supra note 136, at 4/184.

^{139.} E. Dreher & H. Tröndle, supra note 94, at 7/184. Similar suggestions for the definition of pornography had already been made at the hearings of the Special Legislative Committee preceding the 1974 reform: "Pornography consists of depictions in which a woman is degraded to merchandise, to a pure object of lust"; "Pornography contains acts of machines the parts of which are exchangeable"; "Pornography is the isolation of sexuality from the humane, the human body is only a sexual object." See Prot. VI, supra note 55, at 1906-07.

^{140.} The Federal Constitutional Court and leading constitutional scholars have always agreed that the very essence of the protection of human dignity as the paramount constitutional principle in GG art. 1, § 1 is to prevent the degrading of human beings to dehumanized objects in any form whatsoever. See Decision of Apr. 24, 1986, BVerfG, 39 NJW 2241, 2242 (1986); Decision of June 21, 1977, 45 BVerfGE 187, 228; 1 T. Maunz & G. Dürig, supra note 18, at 17-45/1; G. Leibholz & H. Rinck, supra note 18, at 2/1; see also Decision of Aug. 17, 1956, 5 BVerfGE 85, 204-05. Most recently, the principle of human dignity has been invoked in order to curb experimentation in the area of human genetics. Vitzthum, Gentechnologie und Menschenwürdeargument, 20 Zeitschrift für Rechtspolitik 33 (1987).

^{141.} See supra note 38.

^{142.} See also Decision of Dec. 19, 1951, 1 BVerfGE 97, 104 (finding that the state must protect the individual against degradation).

quasi-official, English version of the Basic Law¹⁴³—in fact mostly denotes the dignity of women. In Germany, the awareness of this issue has not remained confined to the feminist literature, but has reached wider audiences¹⁴⁴ and, sometimes, the courts. Two cases from the last decade stand out and illustrate both the concerns about the degrading effect of commercial exploitation of sex on women and the debate about the proper reaction of state authority to it.

A. Attacking Cover Page Nudity

Strolling by just about any newspaper stand in West Germany can be quite an experience for an American. The front pages of many, if not most, weekly entertainment magazines display an amount and a degree of nudity that is, although certainly not pornographic, delightful to the sensualist and shocking to the puritan. Nude breasts and buttocks abound everywhere and full frontal nudity commonly appears. Such cover pages, of course, also appear in the United States, but they are limited to sex magazines and are not nearly as openly and massively displayed as in West Germany. Almost needless to say, virtually all covers depict women, not men. For better or worse, most people in West Germany—men and women alike—are far too used to this phenomenon to get upset about it.

In 1978, however, feminists launched an attack. Encouraged by a large number of letters from her readers, Alice Schwarzer, the editor of the most firmly established German feminist magazine, *Emma*, and widely considered the leader of German feminism, instituted a lawsuit with ten other women against the weekly magazine *Stern*.¹⁴⁷ They sought to enjoin the *Stern* and its editor from "insulting women through the presentation of

^{143.} The Basic Law, supra note 17, at 14. A more appropriate translation would be "the dignity of a human being" or "human dignity."

^{144.} See Frauen im Pornokino: Ekel, Angstlust, Zwang, Der Spiegel, Sept. 24, 1979, at 222-28.

^{145.} American and German courts agree that mere nudity is not pornography. See Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (one of the very few unanimous judgments of the United States Supreme Court on pornography); Decision of Feb. 16, 1954, 5 BGHSt 346.

^{146.} Most West German equivalents of magazines like *People*, *Life*, and so forth display cover page nudity on a regular basis, and millions of people, with no particular interest in sexual materials, buy them.

^{147.} With over four million copies sold per week, the Stern is the most widely read West German weekly magazine and enjoys the reputation of a, by and large, serious, liberal, and politically aggressive publication. Its prestige suffices to make its reading

women as mere sex objects on the front pages and thereby creating the impression in the male viewer that a man can avail himself of a woman at will and dominate her." The plaintiffs argued that such a presentation depersonalized and degraded women, making them appear as inferior beings and mere objects that are sexually usable at the will of males. This presentation, they claimed, violated the human rights and the human dignity of more than half of the population. The similarities to the American feminists' attack on sexually explicit materials are obvious. 149

From the legal perspective of the case, the plaintiffs lost. 150 This result came as no great surprise. Because German law does not have anything like a civil rights action in the American sense, the only avenue open to the plaintiffs was to claim that the nudity on the Stern's cover pages amounted to a criminally punishable, and thus civilly enjoinable, "insult"151 to all women as a group. This group libel strategy resembles the American feminists' equally unsuccessful attempts to defend the Indianapolis antipornography ordinance by relying on Beauharnais v. Illinois. 152 Despite the protection of human dignity under Basic Law article 1, section 1, German criminal law does not recognize large societal groups as potential victims of insult. Instead, the group must be so small and clearly defined that an insult aimed at the group amounts to an insult to its individual members. Although the issue had not previously been adjudicated with respect to the group of "all women," the case law and scholarly commentaries had taken a restrictive approach under which the plaintiffs could not prevail. 153 Accordingly, the District Court

acceptable among virtually all classes and social groups, including liberal-minded intellectuals.

^{148.} System Dahinter, DER SPIEGEL, July 3, 1978, at 75.

^{149.} See supra note 3 and accompanying text.

^{150.} Decision of July 26, 1978, Landgericht [LG] Hamburg (a district court of Hamburg), 33 NJW 56 (1980).

^{151. &}quot;Beleidigung." See StGB art. 185.

^{152. 343} U.S. 250 (1952) (deferring to state supreme court's criminal libel theory in order to uphold state's prosecution of individual who distributed racist leaflets); see supra note 4. In American Booksellers Ass'n v. Hudnut, the court rejected this argument. 771 F.2d 323, 331-32 n.3 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

^{153.} Groups recognized by the courts as sufficiently specified have included the police involved in a certain action or special police force units, the leading top banks, the German judges, patent lawyers, and physicians. See E. Dreher & H. Tröndle, supra note 94, at 22/185; A. Schönke & H. Schröder, supra note 60, at 7/185. Other groups that have not been considered sufficiently narrowly circumscribed have included members of the police force in general, Protestants, Catholics, and academics. See id. Decision of July 26, 1978, LG Hamburg, 33 NJW 56 (1980). The question of whether all Jews persecuted under the Third Reich, and now living in Germany, could be insulted collectively

(Landgericht) found the group of "all women" incapable of being insulted and consequently dismissed the claim. 154

In a sense, however, the plaintiffs achieved a partial victory. The court itself admitted that the reason for the plaintiffs' defeat was not the lack of demonstrable harm. Rather, the court noted that their claim simply could not be brought under legal rules about criminal insult, civil injunctions, and standing. The court did not even reach the true substantive issue of whether front-page nudity offended and degraded women. The judges did, however, express sympathy with the plaintiffs' concerns:

The senate does not overlook that it can be a legitimate goal to work toward a presentation of the female image in the public and especially in the media that is appropriate to the position of women in society. It must certainly be conceded to the plaintiffs that various front pages of the *Stern*—but by all means not only of the *Stern*—do not meet these standards.¹⁵⁵

Nevertheless, the court concluded that because the existing legal system did not provide a remedy and because it did not lie within the power of the courts to make such far-reaching innovations, the plaintiffs must take their complaint to the legislature.¹⁵⁶

The plaintiffs won more than the expression of regrets from the court. They succeeded in generating tremendous publicity and thus fulfilled, as they admitted, the true goal behind the

was hotly debated and was eventually answered in the affirmative. Decision of Apr. 21, 1961, 16 BGHSt 49, 57; Decision of Feb. 28, 1958, 11 BGHSt 207. The particular debt of the German people to the Jews certainly played a role in this decision. For an analysis of the latest development in German criminal law in this area, see Stein, History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies," 85 MICH. L. REV. 277 (1986). The plaintiffs in the Stern case attempted to analogize their situation to the protection of Jews, but the court found that women lacked the sense of collective experience of suffering that connected the Jews. The court pointed out that, as the plaintiffs admitted, many, if not most, women took no personal offense by the Stern title pages. Decision of July 26, 1978, LG Hamburg, 33 NJW 56, 58 (1980).

^{154.} Decision of July 26, 1978, LG Hamburg, 33 NJW 56 (1980).

^{155.} Id. at 57. Note that the Hudnut court was in accord. 771 F.2d at 328-31.

^{156.} A decision for plaintiffs would certainly have triggered review by the Federal Constitutional Court for violation of freedom of the press. Although even the freedom of the press is, under GG art. 5, § 2, limited by the laws protecting personal honor, see supra text accompanying notes 24-38, it is highly questionable that mere female nudity would have led the Federal Constitutional Court to sanction such a restriction of the press without a legislative basis. Hardly any West German judge would be activist enough to censor the press or protect women by such a daring step.

158. See, e.g., id.

lawsuit.¹⁵⁷ Even before the trial, the suit had triggered a lively public debate that the tumultuous trial itself reinvigorated.¹⁵⁸ Although most comments outside of the feminist press expressed concerns about censorship¹⁵⁹ or accused the plaintiffs of prudery, few dared to deny publicly that there was a true and legitimate concern behind the perhaps not-quite-serious legal attack. As a consciousness-raising campaign, the lawsuit was not entirely without success. Although no immediately tangible changes resulted because the average consumer cares little about these concerns and the magazines cater to his tastes, the litigation made the impact of commercial exploitation of female nudity on the role and dignity of women an issue that, at least for a while, society broadly debated.

B. The Woman in the Box—Outlawing Peep Shows

Three years after the Stern case, the increasing awareness of dignity issues involved in the commercial exploitation of sex bore fruit in the courts. This time, the stage was not set by feminists, but by the public authorities themselves. Moreover, the endorsement of human dignity as a powerful limitation on the exhibition of sex came not from a trial court, but from the Federal Supreme Administrative Court (Bundesverwaltungsgericht), which has the last word in all administrative lawsuits between the citizens and the state.

In the late 1970's, German entrepreneurs in the sex business, inspired by enterprises in New York City, began to set up live "peep shows" in several major German cities. 160 These peep shows do not feature pornographic movies, but rather nude (female) models on a small stage surrounded on all sides by individual, lockable viewing booths. In the booth, an automatic, coin-operated mechanism opens the view through a window toward the stage for a certain period of time, usually one minute. The patron can thus look at the nude woman, who is supposed to display herself in provocative positions. The woman on the stage, however, cannot see the viewer in the booth because the

^{157. &}quot;We have won the case no matter what result," Alice Schwarzer said, quoted in Von Münch, Henri Nannens "entscheidende Stellen," DIE ZETT, July 21, 1978, at 12.

^{159.} See, e.g., Augstein, Die Frauen Schlagen Zurück, Der Spiegel., July 3, 1978, at 76.

^{160.} The first peep show opened in Munich in 1976. Fenster zum Fleisch, DER SPIEGEL, Dec. 20, 1976, at 151.

window is mirrored on her side. The obvious purpose of the whole arrangement is to provide men with an undisturbed opportunity to masturbate while looking at a nude woman. These highly profitable businesses¹⁶¹ spread quickly and soon could be found in virtually all major West German cities.¹⁶²

Particularly in the earlier days, a good deal of resistance, from local government as well as parts of the population, accompanied these peep shows.¹⁶³ Eventually, when a businessman in Northrhine-Westphalia wanted to open yet another peep show and applied for the required license,¹⁶⁴ the municipal authorities denied the application because they found that the business would violate "good morals."¹⁶⁵ The Federal Supreme Administrative Court upheld the municipality's denial,¹⁶⁶ reversing the two courts below. The peep show would indeed, the Court found, violate good morals because it would violate human dignity:

Conduct that contradicts the values laid down in the Basic Law, violates good morals. Respect and protection for human dignity belong to the fundamental principles of the Basic Law. . . .

Article 1 section 1 of the Basic Law protects the characteristic personal value of a human being. Human dignity is violated if the individual person is degraded to an object. The offense violating the human dignity can—as in the present case—be committed by private persons. In consequence of its constitutional duty to protect, the state must, in such a case, exhaust the possibilities provided for by the law to ward off the violation. The mere exhibition of the nude female body does not violate human dignity, so that, at least from the perspective of violations of human dignity, there are no fundamental objections to the usual striptease performances. . . . The peep show differs fundamentally from the striptease performance. The striptease dancer—performing before an

^{161.} See Offene Tür, DER SPIEGEL, June 27, 1983, at 91.

^{162.} As of 1981, the date of the decision of the Supreme Administrative Court, there were about 40 peep shows in West Germany. They employed about 800 models, who were managed by agencies and migrated from city to city. Schlange Stehen, DER SPIEGEL, Aug. 31, 1981, at 97.

^{163.} See id.

^{164.} All commercial exhibitions of persons must be licensed by the local authorities according to art. 33(a) of the West German Trade Law (Gewerbeordnung) [GewO].

^{165. &}quot;Die guten Sitten." According to GewO art. 33(a), § 2, no. 2, a license must be denied if it is expected that the exhibition will violate good morals.

^{166.} Decision of Dec. 15, 1981, 64 Entscheidungen des Bundesverwaltungsgerichts (Decisions of the Federal Supreme Administrative Court) [BVerwG] 274.

audience realized by her . . . —acts in a context which belongs in the tradition of the customary stage- or danceshow and which leaves, in the normal case which is decisive here, the personal status of the performer as a subject unimpaired. In contrast, in the peep show the performing woman is assigned a degrading, object-like role: several circumstances of the performance operate in concert: occasioned by the method of payment, the atmosphere of a mechanized and automatized transaction, in which the view of the naked woman is purchased and sold like the merchandise in a vending machine; emphasized by the window-cover mechanism and the one-way view, the objectifying isolation of the woman as an object of lust before voyeurs remaining in the dark; obvious through the totality of this sequence of events, the particularly gross emphasis on the depersonalizing marketing of the woman; the isolation of the viewer in the cabin and the lack of social control connected therewith: the possibility of masturbation, consciously created through the system of the individual cabin, and its commercial exploitation. In their totality these circumstances bring about that the exhibited woman is presented by the operator [of the business] like an object for sexual stimulation 167

The Court chose to rest its decision entirely on this reasoning and expressly declined to consider whether the peep show would also violate "good morals" because it offended the community standards of sexual morality.¹⁶⁸

The practical impact of the decision has been quite limited, and peep shows have not disappeared in West Germany. 169 The

^{167.} Id. at 277, 278-79 (citations omitted).

^{168.} Id. at 280. In another decision, rendered one day later, however, the Court upheld the denial of a license for a live sex show (copulation of a married couple on stage) for exactly this latter reason, Decision of Dec. 16, 1981, 64 BVerwG 280, thus indicating that the human dignity standard does not replace, but supplements, the more traditional community morality test. The Swiss Federal Court has found peep shows to be a violation of community morality under a similar standard. It is interesting to note that the Swiss court also made a distinction between traditional striptease, which was deemed acceptable, and the peep show, which was not. Although that court did not expressly rely on a human dignity approach, the reasoning indicates that the court considered peep shows degrading. Decision of May 9, 1980, 106 Entscheidungen des Schweizerischen Bundesgerichts I(a) 267.

^{169.} As of 1983, there were approximately 50 peep shows remaining in West Germany, see Offene Tür, supra note 161, at 91, so that their number had actually increased by about 25% in the two years after the decision. The respective municipal authorities

reactions to the decision were mixed. Liberals found themselves torn between the competing goals of tolerance in matters of sexual morality and the abolition of sexism. 170 Some lower administrative courts have, demonstrating the absence of a doctrine of precedent in German law, openly rejected the Supreme Administrative Court's decision. These courts have found the Court's distinction between the striptease and the peep show unconvincing and reasoned that the relationship between the striptease dancer and the audience is hardly less dehumanizing than the one between the peep-show model and the client. Furthermore, the peep-show model was not required to perform sexually provocative acts and was better protected vis-a-vis the audience. Thus, these courts could not find a violation of the model's human dignity.¹⁷¹ Most recently, however, at least one state administrative supreme court has followed the Federal Supreme Administrative Court's example in result and reasoning. 172

The true problems with the opinion, however, lie beyond its distinction between striptease dancers and peep-show models. The major thrust of the court's argument—that live peep shows are the epitome of the degradation of women to sexual objects¹⁷³—does have some force and appeal. It contains, however, a fundamental problem, which became glaringly apparent in the

reacted differently to the decision. Although Frankfurt's Mayor had six peep shows closed down, and authorities in Hamburg were beginning to crack down on them as well, many cities wanted to await further legal developments and decisions, and tolerated the peep shows for the time being. Of course, feminists put pressure on local governments to take action in some cities. Considerable legal uncertainty existed then and still exists as to whether the Court's decision is limited to the denial of new licenses or whether it also empowers the authorities to revoke old ones. Under German administrative law, different standards apply in those two cases. Thus, several municipal governments decided to tolerate already established peep shows but not to issue any new licenses. See Dr. Mabuse Spricht, Der Spiegel, Mar. 15, 1982, at 114-15; Offene Tür, supra note 161, at 94.

^{170.} See Dr. Mabuse Spricht, DER SPIEGEL, Mar. 15, 1982, at 114.

^{171.} See Decision of Apr. 14, 1982, Verwaltungsgericht [VG] München (administrative court of Munich), 2 Neue Zeitschrift für Verwaltungsrecht 175 (1983); Decision of Mar. 3, 1982, VG Frankfurt, VII/-H 889/82 (unpublished); cf. Decision of June 11, 1982, VG Düsseldorf, 2 Neue Zeitschrift für Verwaltungsrecht 176 (1983) (holding that peep shows violate "good morals" and need not be tolerated by the public authorities). The problem has triggered a substantial scholarly debate. See Gern, Menschenwürde und gute Sitten, 36 NJW 1585 (1983); Gusy, Sittenwidrigkeit im Gewerberecht, 97 Deutsches Verwaltungsblatt 984 (1982); Höfling, Menschenwürde und gute Sitten, 36 NJW 1582 (1983); Von Olshausen, Menschenwürde im Grundgesetz: Wertabsolutismus oder Selbstbestimmung?, 35 NJW 2221 (1982).

^{172.} Decision of Dec. 30, 1987, Verwaltungsgerichtshof (appellate administrative court), Baden-Württemberg, No. 6 S 793/86, Badische Zeitung, Dec. 31, 1987, Landesumschau, at 7.

^{173. &}quot;For the time being, the ultimate extreme of a mentality of universal merchantability and automatization," Schorsch, Höchstrichterliche Männerphantasien, Der Spiegel, July 12, 1982, at 60.

spontaneous protest against the decision by the female peepshow models themselves. The protesting women saw their work simply as a comfortable and well-paid way of making a living¹⁷⁴ and viewed the Court's decision as an interference with their right to do the job they wanted to do. The High Court's lecture on human dignity had a hollow ring in the ears of these peepshow models, who faced the alternative of prostitution.¹⁷⁵

In a similar vein, the peep-show operator had argued before the Court that the peep show could not possibly violate anyone's dignity because all persons involved in the business, models as well as patrons, entered it voluntarily. The Court rejected this argument. Relying on various authorities, it held that a person cannot waive fundamental rights, particularly the right of human dignity. Some authority, though not very strong, supports the proposition that an individual cannot renounce human dignity. The Federal Supreme Administrative Court, however, took this argument to an extreme. It held not only that the individual cannot waive her dignity, but also that the state must enforce the protection of human dignity even against private parties and even against the will of the protected. 177

^{174.} See id.

^{175.} Within certain limits, prostitution is legal in West Germany. How the Court can reconcile allowing prostitution with protecting human dignity is, of course, a legitimate question. The Federal Supreme Court made some interesting remarks on this point in a 1976 decision denying a prostitute recovery in tort for lost income. This income, the Court held, is not protected because it would be generated by an activity that violates "good morals." "Good morals" are violated because prostitution is "degradation mainly of one's own person." The voluntariness of engaging in prostitution was not considered to make a difference because "personal dignity" is not renouncable. Decision of July 6, 1976, 67 Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the Federal Supreme Court in Civil Matters) [BGHZ] 119, 125.

^{176.} The opinion by the Federal Constitutional Court, cited in the case, provides only dictum. The Constitutional Court, in a decision holding life imprisonment constitutional, declared only that "human dignity is something that is indisposable," but the context makes it clear that the Court was thinking about disposition by the government, not the individual. Decision of June 21, 1977, 45 BVerfGE 187, 229. The Court also cites 1 T. MAUNZ & G. DÜRIG, supra note 18, generally recognized as the leading commentary on the Basic Law and thus a source of considerable influence. Its marginal note 22/1 opines that there can be no effective waiver of human dignity. The case envisaged here, however, is that of a waiver of protection from government action directed against the individual. The Court also cites another decision—the prostitution case in the Federal Supreme Court already mentioned, in note 175, and this case is more on point. Here the disposition in question was one by the woman herself vis-a-vis a private party. The Federal Supreme Court writes that there is the "indisposable dignity in which society has an interest also without respect to the will of its bearer." Decision of July 6, 1976, 67 BGHZ 119, 125. However, the Federal Supreme Court does not really rely on this argument in its decision.

^{177.} Decision of Dec. 15, 1981, 64 BVerwG 274, 279-80. Although there is no express, binding authority on this point, the Court's argument finds some support in the language

The Court's holding is, thus, troublesome for two reasons. First, it creates tremendous problems on a constitutional level. If the state really has the duty to enforce the protection of human dignity even against the will of the protected, then arguably the state, including the legislature, must take action to get rid of all threats to human dignity. If pornography, at least in some forms, amounts to such a threat, the legislature would then be under a constitutional duty to outlaw it. Obviously, this would deprive the legislature of virtually all its legislative discretion over the many possible threats to human dignity and subject the legislature to constant close scrutiny by the Federal Constitutional Court. Such a system would be close to unworkable and the Federal Supreme Administrative Court almost certainly did not intend this result.

Second, and more importantly, the "peep show" decision illustrates a problem not only in the present case but inherent in the human dignity approach itself. The simple answer that courts should always protect human dignity, even against the bearer's will, begs a much more complex and very fundamental questions. The peep-show models' protest points to the basic dilemma within the human dignity approach for which no easy solution can appear. First, the question of whether the state should protect its citizens' human dignity, even against their wishes, raises grave concerns about paternalism. To be sure, a serious question exists as to how free an individual's choice must be to demand respect in the first place, and particularly in the case of pornography models, there are reasons for concern. The models' choice to participate in the production of pornography may very well be voluntary in the sense of not being physically coerced.178 but other nonphysical factors can also impair free will.179

of the Basic Law itself. Article 1, § 1 clearly says that "to respect and protect [the dignity of man] shall be the duty of all state authority." Furthermore, art. 1, § 2 provides that "[t]he German people . . . acknowledge inviolable and inalienable human rights as the basis of every community." The protection of human dignity is therefore not merely a weapon of individuals against government authority but is also recognized as the highest good in the system of values in the German Constitution. In other words, it is also an objective element of the constitutional order. See 1 T. Maunz & G. Dürig, supra note 18, at 4/1.

^{178.} Some of the feminist literature convincingly alleges that such coercion occurs in many cases. See, e.g., L. LOVELACE, ORDEAL (1980); Pornography, Civil Rights, supra note 3, at 32-38.

^{179.} The Federal Supreme Administrative Court did not consider the question of whether the economic or personal situation of the models left them a meaningful choice. Choice, however, plays a crucial role in this context, as the following decision of the Federal Constitutional Court very well illustrates. The Court held the use of a lie detec-

Furthermore, regardless of the paternalism issue, the state cannot put the value of human dignity totally at the disposal of its individual bearers, for them to sell or otherwise do with it entirely as they please. The acts of the protected in waiving the protection can have outside effects, as the present context dramatically illustrates: The peep show or the pornography model contributes to the formation of men's image not only of herself, but of other, nonconsenting women as well. In a sense, one could argue that she is degrading her whole sex. Waiving her own dignity means impairing someone else's too, and she has no right to do that. Given these effects, the individual's choice of whether to insist on, or waive, her dignity can hardly be left unbridled.

Yet the state cannot simply take the choice concerning human dignity away from the individual bearers either. Human dignity, as modern Western culture understands the concept, has little value if it does not comprise the right to self-determination. Only on the basis of self-determination can the individual truly experience her dignity and enjoy "the right to the free development of [her] personality" that article 2, section 1 of the Basic Law guarantees.

The human dignity concept thus needs to strike a delicate balance. To respect self-determination, it must avoid the paternalism of which the Federal Supreme Administrative Court has been accused. Yet it must also impair self-determination if it wants to provide effective protection for those people who do not want to waive their dignity but are affected by others who do waive it. To strike the balance in an acceptable manner requires more effort than the Federal Supreme Administrative Court was willing to make. It demands open recognition of the tension inherent in the human dignity concept and a careful choice and ordering of values. The human dignity concept itself does not provide a solution because it cuts both ways. Yet it can enhance our perception of the problem.

tor unconstitutional even though the defendant had asked for it. The Court reasoned that, regardless of the question of whether the rights involved can be waived at all, they surely could not be waived in the case before it. The Court argued that a waiver would be possible, if at all, only where the individual had a choice, whereas the defendant facing the possibility of a severe prison sentence had none. Decision of August 18, 1981, BVerfG, 35 NJW 375 (1982).

^{180.} See Von Olshausen, supra note 171. To be sure, the danger of paternalism does not necessarily speak against the human dignity approach when compared with the prurient interest concept. The latter is heavily tainted by paternalism as well, albeit of a different sort: It is paternalistic vis-a-vis the members of society who are forbidden to read and see pornography, while the potential paternalism of the human dignity approach is primarily directed at the models in the pornography business.

IV. THE HUMAN DIGNITY APPROACH FROM AN AMERICAN PERSPECTIVE—COMPARATIVE OBSERVATIONS

German legislators, judges, and scholars have, to some extent, begun to think about pornography as an issue of human dignity, rather than as an issue of sexual morality alone. They have not really explored the precise meaning, limits, and problems of such a view, leaving the concept vague and fraught with unresolved questions. Nevertheless, the standard has been adopted to some degree in German law, in theory as well as in practice.

One should, however, not overestimate the direct impact of the human dignity perspective on legal practice in West Germany. The peep-show decision of the Federal Supreme Administrative Court remains quite unique in its express and decisive reliance on the human dignity concept and has limited representative value. Moreover, the purely practical differences between the human dignity standard and the prurient interest test are quite limited.

There is, first of all, no reason to believe that the human dignity standard can relieve the courts of any of the practical difficulties in the determination of what is pornographic and what is not. In particular, the human dignity standard does not offer any more precision than the vague prurient interest test. Secondly, even the practical results under both approaches will probably often be the same, albeit for different reasons. For example, one can condemn extreme hard-core pornography, prohibited in article 184, section 3, of the German Penal Code, 282 as appealing to the prurient interest in a patently offensive manner and as violating human dignity at the same time. One may say the same for material that depicts human beings, in practice

^{181.} One could argue that focusing on the material's portrayal of human beings and of sex results in greater predictability of results than looking to the degree to which the material is arousing. This argument assumes that it is easier for a court to agree on the nature of the material before it than on its appeal to the prurient interest of an essentially fictitious consumer and on the community standards. The argument is, however, built on illusion. The uncertainty involved in the adjudication of sexually explicit material lies in the very nature of the decision itself, which will always be based on the reaction of the factfinder, judge or jury, to the material. Neither standard can be more easily reduced to objective criteria than the other. The values implied in these standards are, of course, not identical, but nothing in their nature suggests that more agreement and clarity will exist about one than about the other.

^{182.} See supra notes 64-66 and accompanying text.

^{183.} Thus, one may say that pornography involving violence offends human dignity because violence, in its very essence, treats human beings as objects of physical aggression. Similarly, child pornography is arguably in direct conflict with human dignity because it victimizes those who lack the full appreciation of the consequences of their in-

mostly women, in an openly degrading manner by presenting them as objects of sexual pleasure without self-determination. A great percentage of the pornographic materials on the market falls into this category.¹⁸⁴ Thus, the two approaches would reach very similar conclusions in most cases.

In some instances, of course, looking at pornography as an issue of human dignity, rather than as an appeal to the prurient interest, can indeed change practical results. For example, the depiction of freely consenting adults in sexual intercourse in a nonviolent, nondegrading context will regularly appeal to the prurient interest in a manner offensive to many citizens, although it is harder to argue that this depiction violates human dignity (unless one subscribes to the premise that all depiction of sufficiently explicit sexual conduct is, in and of itself, degrading). The two approaches could also make a difference with respect to depictions of what the majority of our society regards as clearly deviant sexual behavior, such as sadomasochism. It requires the stretching of imagination, and of legal arguments, to find such material appealing to the prurient interest, to find such material appealing to the prurient interest, although it is more plausible to see in it a violation of human dignity.

In sum, in particular cases, the approach chosen can certainly affect the outcome, but these cases represent the exception more than the rule. Furthermore, there are no bright lines. The choice of rationale makes it harder or easier, i.e., more or less plausible, to reach certain conclusions about certain materials, but it does not strictly compel one result or the other. The outcomes turn much more on the particular manner and strictness of implementation than on the nature of the respective concepts. For the same reason, one cannot label one standard as inherently more permissive than the other.

volvement and the full capacity to consent. Finally, the depiction of sexual contacts of humans with animals also raises serious concerns about human dignity.

^{184.} See 1 Comm'n on Pornography, supra note 2, at 323-24, 331-32.

^{185.} With respect to women, much of the feminist literature on the subject takes this position. See supra note 3; see also 1 Comm'n on Pornography, supra note 2, at 331 n.47.

^{186.} Cf. Mishkin v. New York, 383 U.S. 502 (1966) (material designed for and appealing to members of sexually deviant group can meet "prurient interest" test even though it may not be appealing to average member of general public). In truth, such material appeals to the prurient interest of a few and is repulsive to the rest. To condemn it under the prurient interest test, the test must be cut in two halves. The appeal must be measured with reference to one group, the few who experience it; the community standards are determined in respect to the general populace that is left cold by the material. The difficulties with this approach, having one sort of people determine what a quite different sort of people find appealing, are obvious. The use of expert testimony at trial represents an attempt to glue the two inconsistent pieces of the test back together again.

The crucial difference between the two approaches lies not in what is finally and actually defined as pornography, but in the reasons that it is so defined. Even if certain material is found objectionable under both standards, a great discrepancy can still exist in exactly what makes the material objectionable. It is here that the prurient interest approach's objection to undue sexual arousal differs vastly from the human dignity view's concern about the degradation of human beings. The respective approaches send out different messages and have a significantly different symbolic value: a verdict on sexually stimulating effect on the one hand, and the condemnation of attacks on human dignity on the other hand.

The impact of these subtler differences is hard to assess. Quite obviously, however, the concern about human dignity rests on a significantly broader notion of morality than the objection to sexual stimulation. This broader notion of morality thus encourages inquiry into fundamental questions that have no place under the prurient interest approach. The inquiry can broaden our horizons in several ways.

First, the inquiry encouraged by the human dignity approach can enhance our thinking about the problem of what harm, if any, pornography really does to human beings. The prurient interest rationale, concerned not with harmful effects but rather with prevention of arousal, provides virtually no incentives to probe into this issue. Thinking about human dignity raises the question of whether there is perhaps more to protect than physical and mental integrity. I do not wish to take a position on this question. It is appropriate, however, to reflect on how we regard and value our self-image as human beings and how pornography affects this self-image.¹⁸⁷

Second, the human dignity approach can make us conscious of the fact that pornography affects both sexes. Much of the feminist literature, which usually focuses only on the degrading effect to women, overlooks this result. To be sure, women remain the primary victims of any potential violation of human dignity in pornography. The degradation that men experience is certainly more modest and less harmful to their role in a society that they still dominate. Yet their depiction as inexhaustible sex machines or as sexual predators driven by a ceaseless need for purely physical satisfaction results in more than just a view unflattering to men as humans. It encourages men and women

^{187.} Some interesting thoughts on this issue are provided by a psychiatrist in Gaylin, The Prickly Problem of Pornography (Book Review), 77 YALE L.J. 579 (1968).

alike to see men that way. In the end, pornography induces both sexes to view both sexual partners as exchangeable items in a quasi-robot relationship. Thinking about pornography in terms of how it presents human sexuality can make us more aware that the problem is one of the relationship between the sexes. The isolation of the peep-show model on her stage is the flipside of the man's loneliness in his cabin.

Third, the greater breadth of the human dignity approach to pornography could also lead us to pay more attention to hitherto largely neglected similarities that pornography may share with other objectionable depictions of human beings. A human dignity perspective makes it hard to accept that sexual explicitness should be more suspect and more, or less, easily subject to regulation than, for example, depictions of extreme violence. German law has recognized that in its youth protection legislation and treated both pornography and extreme violence alike. 188

Why is an explicitly brutal murder scene in a film less troublesome than an explicit scene depicting sexual intercourse? The answer can hardly be that murder disturbs society less than sex. Is it concern about the difference in effect? What is this difference and why is one effect (sexual arousal) more troublesome than the other (excitement about violence)? These are hard questions, but it is nevertheless important to tackle them if pornography regulation is to stand on a rational basis. The American prurient interest approach has no answers. This is no accident. By focusing on appeal to sexual desire only, the American test forecloses these questions without any opportunity to reflect upon them. Furthermore, the prurient interest concept avoids the issue raised in the German Stern case, 189 namely whether the explicit use of sex for sales promotion purposes is just as objectionable as the explicit depiction of sexual activity for its own sake.190

The human dignity approach does not, in and of itself, resolve any of these issues, nor does it provide a clear answer on where to draw the line between permissible and impermissible, or desirable and undesirable, sexually explicit materials. In particular,

^{188.} See supra Part I(B)(2) and (3). Some of these thoughts are touched upon in Loewy, Why the 1985 North Carolina Obscenity Law Is Fundamentally Wrong, 65 N.C.L. Rev. 793 (1987).

^{189.} See supra Part III(A).

^{190.} The German legal community has not yet seriously considered this issue either. The use of nudity completely unrelated to the product advertised is widespread and more explicit in West Germany than in the United States. This situation has caused considerable concern among feminists. See Augstein, supra note 159, at 76-78; Barth, "Ich bin doch kein Container," DER SPIEGEL, Apr. 7, 1986, at 230-33, 235.

this approach must not be misunderstood to lead necessarily to the regulation of publications other than pornography. Thinking about the issue of human dignity does, however, provide incentives to face these issues squarely. It requires us to think about pornography more broadly and contextually and to stop simply assuming that sexual explicitness represents a special case that justifies more regulation than other situations. The advantage of the human dignity concept over the prurient interest test is thus not that it provides better answers, but that it triggers the harder questions.

In the long run, reflecting upon and perhaps even answering these questions could have an impact even upon our thinking about pornography as a constitutional issue, because this reflection can affect our view of what pornography really is and what is troublesome about it.¹⁹¹ Outside of the feminist literature, precious little reasoning in present American judicial opinions and legal scholarship addresses these questions.¹⁹² We may, after all, still decide to categorically deny pornography first amendment protection, but we will hopefully have better articulated reasons for it.

These suggestions of new ways for thinking about an old problem must, however, not be mistaken as advocacy for the adoption of the German human dignity standard in American pornography law. We must never lose sight of the limits of the utility of the German ideas for the American debate. These limits are imposed by the substantial differences between the two countries' approaches to speech regulation. To assess these differences and the limits imposed by them, we must, once more, look at the American and the German approaches to pornography in the context of the constitutional theory and cultural background of the two countries.

In a very general sense, and particularly when contrasted with the German Basic Law, American constitutional law has traditionally focused mainly on procedural guarantees, but has been rather hesitant—even in the Bill of Rights—to openly endorse numerous substantive values.¹⁹³ The protection of free speech

^{191.} To be sure, the legal community alone cannot make this decision, nor can the decision be made on purely legal grounds. The meaning of pornography has to be left "to the majority." D. LAWRENCE, PORNOGRAPHY AND SO ON 12 (1st ed. 1936).

^{192.} A notable exception is Sunstein, supra note 10.

^{193.} This is not to say that American constitutional law is exclusively procedural; only that, when juxtaposed against the German approach, American discomfort with approaching constitutional rights from a substantive standpoint is remarkable. A comparison between the great emphasis on procedural guarantees in the Bill of Rights and the substantively oriented basic rights catalogued in the German constitution (GG arts. 1-17)

under the first amendment especially reflects this caution in committing to particular substantive values. Despite the fact that, historically, political and judicial practice has not always lived up to its standards, free speech doctrine in the United States has, by and large, refused to allow speech regulation based on the substantive values advocated by the speech in question. 194 Although the underlying rationales vary—ranging from Holmes's confidence in the "competition of the market" in which truth will always prevail¹⁹⁵ to the broader notion of a "tolerant society"196 — there is almost complete agreement that the first amendment should remain virtually indifferent to the message conveved by speech. Therefore, the first amendment even protects those who advocate the abolition of the basic tenets of the American system of government, such as democracy and fundamental rights, including freedom of speech itself. 197 Moreover, not only do cases and scholarly writings proclaim this freedom, but American society also exercises it in practice to a degree probably unknown in any other country in the world.

A look at the German Basic Law makes the differences immediately obvious. Reflecting the lessons of the past, the West German Constitution differs from its American counterpart in two significant ways. First, the experience of the abuse of individual rights and the inhumanity during the Nazi period convinced the drafters of the Basic Law that the state must commit itself to fundamental substantive values, such as the dignity of man, and

makes this discomfort immediately obvious. Admittedly, the current American debate over process- versus substance-based theories of constitutional rights evidences the controversial nature of summarily labelling all American constitutional law "procedural." For the argument that the United States Constitution is concerned with process above all else, see J. Ely, Democracy and Distrist (1980). For the substance advocates' response, see Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063 (1980). Professor Tribe asserts that the process theme is meaningless unless supplemented by substantive content, but even from his Realist viewpoint, he admits, "[T]houghtful judges and scholars continue to put forth process-perfecting theories as though such theories could banish divisive controversies over substantive values." Id. at 1064-65. It can be argued that the very existence of American reluctance to confront the substantive value-choosing taking place, acknowledged by even those who criticize this reluctance, proves my point, i.e., that Americans more often conceive of constitutionalism in procedural terms.

^{194.} See, e.g., Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684 (1959). See generally Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983).

^{195.} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

^{196.} L. Bollinger, The Tolerant Society (1986).

^{197.} See Brandenburg v. Ohio, 395 U.S. 444 (1969); see also the Skokie Nazi cases: Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978); and Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

to substantive basic rights. The Basic Law, in articles 1 through 17, now enshrines these fundamental values and rights. In other words, the German Constitution is, with respect to substantive values, far less neutral than the American one.

Second, the Weimar Republic's inability to defend its democracy against the onslaught of totalitarianism persuaded the drafters of the Basic Law to create a "militant constitution" that furnishes weapons to the government to defend the order created. 198 Accordingly, the Constitution provides "no freedom for the enemies of freedom."199 Freedom of speech can thus be limited where that is necessary to ensure respect for the "free democratic basic order" and its fundamental values. German free speech theory thus expresses distrust toward a "marketplace of ideas" concept of speech. It doubts the premise that truth will always prevail in the competition of the market,200 and is unwilling to accept as truth whatever survives that competition simply on the grounds of its survival.201 Historical experience is widely presumed to have shown that these beliefs amount to a "naive optimism"202 and result in the very error to which the Weimar Republic fell prey.203

The combination of the strong commitment to substantive values with the concept of a "fighting democracy" explains why the German government can restrict virtually all basic rights, including free speech, to protect other fundamental values. These restrictions sound more severe in theory than they actually are in practice, and freedom of expression is, by and large, given wide latitude and enjoys considerable protection in West Germany. The important point in the present context is, however, not the difference between the United States and West Germany

^{198.} This is well illustrated by article 18 of the Basic Law, which provides that whoever abuses certain basic rights "in order to combat the free democratic basic order, shall forfeit these basic rights." The Basic Law, supra note 17, at 21. The Federal Constitutional Court must pronounce this forfeiture, and the article has been applied very infrequently in the past. For a definition of "free democratic basic order," see Decision of Aug. 17, 1956, 5 BVerfGE 85; Decision of Oct. 23, 1952, 2 BVerfGE 1, 12-15; 2 T. Maunz & G. Dürig, supra note 18, at 46-57/18. See generally Kommers, The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany, 53 S. Cal. L. Rev. 657.

^{199. 2} T. Maunz & G. Dürig, supra note 18, at 6/18; see also Kommers, supra note 198, at 681.

 $^{200.\;}$ As did Mill. J. Mill, Utilitarianism, Liberty and Representative Government 89-95 (1910).

^{201.} See generally F. Schauer, Free Speech: A Philosophical Enquiry 15-34 (1982).

^{202.} H. Steinberger, Konzeption und Grenzen freiheitlicher Demokratie 596 (1974); see also Steinberger's insightful analysis, id. at 208-09, 243-68, 595-600.

^{203.} See 2 T. Maunz & G. Dürig, supra note 18, at 5/18.

in the degree of free speech protection, but rather the difference in motive: The first amendment allows almost no speech regulation on the basis of speech content; the German Basic Law allows some regulation. German law reflects this type of speech regulation in many ways. Provisions in the Penal Code sanction not only the sale to minors and publication of materials depicting extreme violence or the instigation of racial hatred,²⁰⁴ but also the dissemination of certain political messages.²⁰⁵ More importantly, the courts have also restricted speech out of concern for personal privacy and, particularly, for human dignity.²⁰⁶

Beneath these differences in the two countries' approaches to speech regulation lie the different choices that the respective societies have made in the fundamental conflict between protection of free speech and prevention of potential harm resulting from speech. American free speech doctrine reflects the decision that the unrestricted exchange of ideas, including harmful ones, is so valuable that it justifies, in most cases, the risk of harm from speech. German constitutional law rests on the opposite belief that substantive values, like human dignity, are too precious to be put at risk, so that their protection justifies some restriction of speech.

At this point, it becomes clear that regulating pornography out of concern for how it depicts human beings has a dramatically different meaning in West Germany and in the United States. Under American first amendment doctrine, the human dignity rationale is highly suspect because it regards certain materials as objectionable on the grounds of their message. This message—that human beings are, or deserve to be treated like, objects—may be abominable, but it is a message nevertheless. The first amendment entitles the content of the message to pro-

^{204.} See supra Parts I(B)(2) and (3).

^{205.} StGB art. 86 makes the distribution of certain anti-constitutional (and especially national socialist) propaganda a criminal offense. Likewise, article 86a makes illegal the use and display of anti-constitutional and particularly national socialist insignia, uniforms, flags, and so forth. Thus a march in Nazi uniforms, or the displaying of a swastika, is criminally punishable. Furthermore, it is a crime to "disparage" the Federal President, the state and its symbols, and the constitutional organs. See StGB arts. 90, 90a, 90b. But cf. New York Times v. Sullivan, 376 U.S. 254 (1964) (public officials and public figures entitled to less, rather than more, protection against public criticism). According to established constitutional doctrine, see supra notes 34-38 and accompanying text, these provisions must be implemented in the spirit of GG art. 5, § 1, i.e., in a spirit of tolerance. Nevertheless, they lead to restrictions that would clearly not be permissible under the first amendment to the United States Constitution. See also Kommers, supra note 198, at 681, 685-92.

^{206.} Decision of June 5, 1973, 35 BVerfGE 203, 221; Decision of Feb. 24, 1971, 30 BVerfGE 173, 193.

tection.²⁰⁷ In contrast, under the German Basic Law, the mere fact that a message is involved does not stand in the way of regulation. The content of the speech can and indeed should be taken into account. If the message presents sufficient harm to a high constitutional value, such as human dignity, this harm can justify, arguably even demand,²⁰⁸ the restriction of freedom of speech. In sum, in its German context, pornography regulation under a human dignity rationale represents a highly sensible protection of the paramount constitutional value. In an American context, however, it presents an unacceptable threat to freedom of speech, and its adoption as a constitutional standard is clearly not an option.

The two respective approaches to pornography must be understood not only in their constitutional contexts, but also against the backdrop of the cultural differences between the two societies. A discussion of these cultural differences inevitably suffers from overgeneralizations. Nevertheless, I wish to suggest some tentative cultural explanations for the difference in the views on pornography. First, American society is highly diverse. This diversity requires great tolerance of different views and a wide-open process of exchange of these views. At the same time, diversity frustrates any agreement about particular substantive values like human dignity. The intensity of the current pornography debate illustrates this point. Second, there is the persistent influence of America's puritan tradition that leads to relatively great public concern about sexual morality and thus to a view of pornography as primarily an issue of sexual decency.

In contrast, German society is essentially homogenous—racially and ethnically, as well as socially. This greater homogeneity makes it easier, particularly in light of historical experience, to agree on the importance of substantive values like human dignity. German society is also somewhat less insistent than American society about permitting the virtually unrestricted exchange of views. Furthermore, German society is considerably more tolerant in sexual matters than its American counterpart. This tolerance is reflected not only in German law, 200 but also in the widespread public display of nudity. 210

^{207.} See American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

^{208.} See supra note 177 and accompanying text.

^{209.} There are no longer any criminal provisions against adultery, homosexuality between consenting adults, and prostitution within certain limits. The statutory rape age is 16 if the man seduces the woman, 14 if she consents without seduction. See StGB arts. 175, 176, 182, 184a, 184b. Criminal sanctions for sex between unmarried partners, as they

These cultural differences can thus explain why pornography regulation seems destined to be a widely debated constitutional issue in the United States, but not in West Germany. In the United States, strong feelings exist about both free speech and pornography regulation, and these feelings tend to clash. In West Germany, however, people feel less strongly about both free speech and pornography. In other words, they accept more speech regulation, but also more sexual explicitness, so there is less room for conflict.

I do not wish to suggest that these differences are vast. The de facto availability of sexually explicit materials, for example, is quite similar in both countries, and sexual mores vary more greatly from one region to another within the countries than between them. Nevertheless, American judges and legislators, and perhaps the American people, seem more offended by strong appeals to the prurient interest than by threats to human dignity. In contrast, their German colleagues, and the German people, care less intensely for a sexually decent society but are, for historical reasons, more alert to guard the dignity of man. In comparing the German human dignity approach with the American prurient interest view, we must not forget that the approaches express different cultural preferences that the law must accommodate.

Yet the comparison of the two views on pornography in their constitutional and cultural contexts touches on much deeper issues. A broader perspective reveals the strange paradox of the situations in the two countries. American first amendment doctrine has strong roots in classical liberal theory²¹¹ and yet its approach to pornography regulation clashes with classical liberal notions of liberty. To be sure, American pornography regulation rests upon the claim that pornography is not speech, and, thus, the first amendment does not protect it.²¹² Whether we accept

exist in more than a dozen American states, are quite clearly beyond the comprehension of the vast majority of West Germans.

^{210.} Nude bathing is extremely common and in many places simply the rule. Munich's largest park, the Englischer Garten, in the middle of the city, is regularly populated by nude sunbathers.

^{211.} See J. MILL, supra note 200, at 78-113.

^{212.} This argument has been made with some force in Schauer, Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899 (1979), and in Shiner, Pornography and Freedom of Speech, 28 Archiv für Rechts- und Sozialphilosophie, Beiheft 13 (1985). It is, however, difficult to believe that the current Supreme Court test really rests on this rationale. Under a non-speech rationale, it is hard to understand how it can make any difference as it did for the Supreme Court in Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), whether the material in question advertises perversions or only normal and healthy sex-

this claim or not, we can take its accuracy for granted for present purposes and leave the first amendment aside. Under classical liberal theory, regulation would be legitimate only if it aimed to prevent dangers to the safety of society or its members.²¹³ It would arguably be possible to justify pornography regulation under this test because at least some sociological studies conclude that pornography fosters antisocial behavior.²¹⁴ The United States Supreme Court has not, however, so justified pornography regulation. Instead, the little justification supplied by the Court (beyond the mere statement that pornography is not speech and thus not covered by the first amendment) pertains to society's right to keep itself decent.²¹⁵ This rationale amounts to the majority's imposition of its moral views on the minority in flat contradiction to classical liberal theory.²¹⁶ What is interesting is that the German situation is exactly the other way around.

ual conduct. The non-speech rationale also causes conceptual difficulties with the distinction between different standards for access to sexually oriented materials for juveniles and adults under Ginsberg v. New York, 390 U.S. 629 (1968). It makes sense to consider access to such materials protected under the first amendment for adults but not for juveniles, but it does not make sense to consider the same material (protected) speech as to adults but (unprotected) non-speech as to minors, i.e., speech and non-speech at the same time; see Note, Restricting Adult Access to Material Obscene as to Juveniles, 85 Mich. L. Rev. 1681 (1987).

- 213. See J. Mill, supra note 200, at 72-73, 75, 131.
- 214. See 1 Comm'n on Pornography, supra note 2, at 322-35.
- 215. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (citing with approval Near v. Minnesota, 283 U.S. 697, 716 (1931)); 413 U.S. at 58 (relying on "the interest of the public in the quality of life and the total community environment"). Concerns of public safety are referred to only "possibly" as a relevant interest of the public. Id. at 58. The mere possibility of danger would not provide a sufficient ground for regulation under classical liberal theory. See J. Mill, supra note 200, at 137-49; see also Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting) (referring to "the right of the Nation and of the States to maintain a decent society"). For an argument that pornography is harmful because it has an adverse effect on society as a community, see Shiner, supra note 212, at 25-28.

216. It is, however, not entirely clear how Mill himself would have assessed the regulation of pornography if it were limited to the regulation of public display. See J. Mill, supra note 200, at 153. From a liberal perspective, the absence of a convincing reason for pornography regulation, where it goes beyond redressing direct threats to public safety, is particularly troublesome because the prurient interest approach is directly concerned with a matter generally considered to be of a highly private nature: the arousal of sexual interest. This is true even if pornography is not speech, but only stimulation of a physical reaction, see Schauer, supra note 212, at 921-25, because this physical reaction, and the choice whether or not to experience it, is a highly private one. From this point of view, the human dignity rationale is somewhat less embarrassing, because it is concerned with the effects of pornography on our image of humankind. This concern is a more easily justifiable public concern than sexual stimulation. Society's members can choose to stay away from stimulation they do not want, but they cannot stay away from (in fact, they must live with) how society's members view and respect each other. Related communitarian notions are developed, and their implications for liberal theory discussed, by Bellamy, Liberty, Morality, Community-A Comment on Shiner's "Non-Speech" ApGerman free speech theory generally does not fully endorse the tenets of classical liberalism because it allows (some) content regulation. Yet with respect to pornography regulation in particular, the German legislature has fully endorsed these tenets by refusing to regulate material that is not considered dangerous, but only immoral.

The comparison with this German approach makes it glaringly apparent how doubtful the extent to which American constitutional law truly rests on the premises of classical liberalism²¹⁷—a highly challenging question particularly in light of the Supreme Court's most recent developments.²¹⁸ Indeed, the comparison suggests that, despite the Basic Law's readiness to enforce certain substantive values at the cost of speech restriction, West Germany may present, at least in some respects, the more "liberal" society. An inquiry into these issues, however, must leave the narrow ground of pornography regulation and look beyond concerns about prurient interest in sex and violation of human dignity.

proach to Pornography, 28 Archiv für Rechts- und Sozialphilosophie, Beiheft 29 (1985).

^{217.} Doubts are, in particular, raised by cases like Doe v. Commonwealth's Attorney, 403 F. Supp 1199 (E.D. Va. 1975), summarily aff'd, 425 U.S. 901 (1976) (finding state criminal statute against homosexuality no violation of right to privacy, even though it also made homosexual acts between consenting adults performed in private criminally punishable); and Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (denying certiorari from a decision upholding the discharge of two employees of a public library for adulterous cohabitation even though there was no demonstrable impact of employees' private life on their job performance) (Marshall, J., dissenting).

^{218.} See Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state sodomy statute; constitutional right to privacy does not protect homosexual behavior).

