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The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany

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THE JURISPRUDENCE OF FREE SPEECH IN THE UNITED STATES AND THE FEDERAL REPUBLIC OF GERMANY

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This Article compares the constitutional thought of the United States Supreme Court and the West German Federal Constitutional Court in the area of free speech. The primary focus is on cases dealing with governmental restraints on speech arising out of concern for internal security[1] and commentary affecting the reputation of public figures.[2] These cases reflect major lines of German and American free speech thought. The objective of this Article is to compare the concepts of free speech that have evolved in the opinions of the two tribunals and to consider the significance of the separate doctrinal paths taken by each court.

Because comparative constitutional law is a beginning effort in a largely unplowed field, the Article opens with a discussion of some goals of comparative research.[3] This discussion is followed by a brief description of judicial review in the two countries,[4] particularly in Germany, before turning to the main body of the Article.

I. THE COMPARATIVE APPROACH

There are difficulties inherent in any effort to compare constitutional law across national boundaries. Probably the most serious problem in the study of comparative law is whether adequate comparability can be

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1. *See* text accompanying notes 41-62, 98-125 *infra*.
2. *See* text accompanying notes 63-75, 126-62 *infra*.
3. *See* Part I *infra*.
4. *See* text accompanying notes 6-35 *infra*.

achieved. One may choose to compare problems or branches of law in legal systems that are too different to yield significant conclusions. For example, if the starting point of comparative research is a particular issue, it is possible that variations in cultural values and political norms of two or more systems make those systems too dissimilar to regard the issue under study as a common problem. If the starting point is a branch of law (*e.g.*, constitutional law), good sense would dictate the selection of bodies of law that are approximately at the same level of development and complexity. But even here, variations in political, social, and economic values may diminish the strength of ensuing generalizations.

The way to avoid the worst of these pitfalls is to study similar bodies of law and social settings. West Germany and the United States seem to meet this standard. Both states are committed to constitutional government and individual rights; both are western democracies with secular political cultures; both are advanced technological and pluralistic societies; and both are troubled by similar problems of political order. At the same time, both societies and many of their values are changing. Some of these changes are convergent, some divergent, but all are unpredictable. The political and social options of these two countries are open, as one can expect in free societies, just as their high courts are open to new interpretations of old constitutional norms. These general conditions render the comparison of constitutional cases across national boundaries an intelligible and intellectually exciting enterprise.

A comparative approach to the study of constitutional law is useful for at least three reasons. First, curious scholars may want to explain similarities and differences in constitutional doctrine across national boundaries. Variations in modes of constitutional analysis, judicial decisionmaking procedures, and judicial structure (as well as differing social, religious, and cultural traditions) are likely to be relevant considerations. Second, at a more philosophical level, the comparative study of constitutional law can be a quest for higher principles of constitutional order and a more adequate public philosophy. Comparative study liberates persons from the ethnocentrism associated with the exclusive study of a single legal system and opens them to the wisdom contained in other traditions of constitutional democracy. As the author noted in a previous article:

> In a very real sense, they [constitutional courts] represent political man writ large and *thinking* about where to draw the troublesome line between liberty and order. . . . Thus, the study of comparative

> constitutional law can be a search for principles of justice and political obligation that transcend the culture-bound opinions and conventions of a particular political community. As such, it can lead men to the attainment of truth and a better understanding of man's political condition.[5]

Finally, the comparative study of constitutional law has implications for constitutional interpretation in the United States. Serious attention to foreign constitutional cases may contribute beneficially to the growth of American constitutional law by, for example, providing alternative standards for measuring the work of the Supreme Court. Such cases may also come to be regarded as important sources of constitutional interpretation along with judicial precedents, historical traditions, and the enlightened opinion of the community.

II. JUDICIAL REVIEW: STRUCTURES AND PROCEDURES

Because variations in judicial structures and procedures may account for differences in judicial decision making by constitutional courts, a brief description of the major institutional differences between the Federal Constitutional Court and the Supreme Court seems useful.

One major difference between these two courts is that the Federal Constitutional Court is a specialized tribunal with exclusive jurisdiction to decide constitutional questions under the Basic Law.[6] The Supreme Court, on the other hand, like final courts of appeal in other common law countries, is a court of general public law jurisdiction authorized to pass on all questions properly before it arising under federal law, including federal constitutional questions.[7] The organization of a specialized tribunal to hear constitutional cases is consistent with the general pattern of German court organization.[8]

A second important structural feature of the Federal Constitu-

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5. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MAR. J. PRAC. & PROC. 685, 692 (1976).

6. The West German Constitution is known as the Basic Law (Grundgesetz). The term "basic law" was intended originally to underscore the temporary nature of the constitution pending the reunification of Germany, an expectation that was very much alive in 1949 when the Basic Law was adopted.

7. *See* U.S. CONST. art. III, § 2, par. 1.

8. For example, there are in West Germany, apart from the courts of ordinary civil and criminal jurisdiction, separate systems of labor, finance, social, administrative, and constitutional courts. It also should be noted that whereas the United States has a dual system of state and federal courts, Germany has a unified judicial system in which all trial and intermediate courts of appeal are organized at the state level, while all final courts of appeal are federal tribunals. For a further discussion of German judicial structure, see W. HEYDE, THE ADMINISTRATION OF JUSTICE IN THE FEDERAL REPUBLIC OF GERMANY 41-98 (1971). For an excellent discussion of the struc-

tional Court is its division into two chambers, called senates, which have exclusive memberships and exclusive jurisdiction over certain constitutional cases. Each senate is composed of eight judges selected by Parliament for twelve year terms. Reelection is not permitted. The President of the Federal Constitutional Court presides over the First Senate, the Vice President over the Second Senate. The Plenum—the justices of both senates sitting en banc—meets only to deal with matters pertaining to the internal administration of the Federal Constitutional Court as a whole, to settle disputes arising out of the wish of one senate to depart from a formal ruling by the other, or to transfer jurisdiction from one senate to another. Generally, the First Senate is authorized to review judicial decisions and constitutional complaints arising out of individual claims to civil and political liberties guaranteed by the Basic Law. Free speech cases would accordingly fall within the competence of the First Senate. The Second Senate's jurisdiction generally includes cases involving the procedural rights of criminal defendants, election disputes, federal-state conflicts, controversies between "branches" of the federal government (*i.e.*, the two houses of Parliament (Federal Diet and Federal Council), Chancellor and Cabinet, and the President of the Federal Republic), and the constitutionality of political parties.[9] Thus, for all practical purposes, the Federal Constitutional Court is comprised of two independent constitutional tribunals.[10]

Nearly all of the court's jursidiction, covering fourteen categories of disputes,[11] is prescribed by the Basic Law. For the purposes of this Article, the most important of these categories are: (1) controversies

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ture of judicial review in common law and civil law systems, see M. CAPPELLETTI & W. COHEN, COMPARATIVE CONSTITUTIONAL LAW 73-112 (1979).

9. Given this distribution of jurisdiction, one would expect disputes regarding the constitutionality of political parties to be decided by the First Senate. This was indeed the case until 1957 when the Federal Diet, because of its dissatisfaction with the First Senate's handling of the Communist Party case, transferred jurisdiction over party cases to the Second Senate. *See* D. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY 190-91 (1976).

10. The organization, procedures, and processes for the filing and disposition of cases are regulated by statute. *See* Gesetz ueber das Bundesverfassungsgericht, Law of February 3, 1971, [1971] Bundesgesetzblatt [BGBl] I 105 (W. Ger.). The original act, which has been amended several times, was enacted in 1951. *See* Law of Mar. 12, 1951, [1951] Bundesgesetzblatt [BGBl] I 243 (W. Ger.). The court's internal administration (*i.e.*, formation of budget, administrative duties of judges, authority and procedures of the Plenum, selection and responsibilities of law clerks, judicial conference procedures, rules governing oral argument and preparation of written opinions) is regulated by the court's standing orders. *See* Geschaeftsordnung des Bundesverfassungsgerichts, Law of Sept. 2, 1975, [1975] Bundesgesetzblatt [BGBl] I 2515 (W. Ger.). The organization and internal administration of the court is treated at considerable length in D. KOMMERS, *supra* note 9, at 69-108.

11. *See* GRUNDGESETZ art. 13 (W. Ger. 1949, amended 1968) [hereinafter cited as GG].

arising under the court's abstract judicial review procedure (*abstrakte Normenkontrolle*);[12] (2) controversies arising under its concrete judicial review procedure (*konkrete Normenkontrolle*);[13] (3) governmental motions challenging the constitutionality of political parties;[14] and (4) the constitutional complaints of individual persons.[15] With the single exception of constitutional complaints, access to the court is limited to state and federal governments, courts, and parliamentary groups such as party factions and minorities in national and state legislatures.

In each of the above categories a procedure is followed that is substantially different from the process of judicial review in the Supreme Court. This difference is particularly noticeable in the first category—abstract judicial review proceedings. Whereas the United States Supreme Court requires that all constitutional issues be raised within the framework of ordinary litigation involving a real controversy and adverse parties,[16] the Federal Constitutional Court is empowered to decide "differences of opinion or doubts on the formal and material compatibility of federal or land law with the Basic Law or the compatibility of land law with other federal law."[17] Such a proceeding may be triggered at the request of the federal government, a state, or one-third of the members of the Federal Diet (Bundestag).[18] The relevant "parties" in such cases—the state and federal governments or counsel representing the majority and minority points of view in the Bundestag—are required to submit written briefs. Oral argument before the court may also be authorized in such cases.[19] In any event, the question of the law's validity is squarely before the court in such cases, and a decision against its validity renders the law null and void.[20]

12. *Id.* art. 2.
13. *Id.* art. 6.
14. *Id.* art. 8a.
15. *Id.* art. 11. The remaining ten categories are proceedings involving the forfeiture of basic rights (*id.* art. 18), conflicts between high federal organs (*id.* art. 93, § 1), federal-state conflicts (*id.* art. 92, § 13A, art. 84, § 4), public law disputes (*id.* art. 93, § 4), constitutional disputes within states (*id.* art. 99), international law disputes (*id.* art. 100, § 2), cases certified by state constitutional courts (*id.* art. 61), complaints against federal judges (*id.* art. 98, §§ 2, 5), and election disputes (*id.* art. 41, § 2). In addition, the Basic Law provides that "[t]he Federal Constitutional Court shall also act in such other cases as are assigned to it by federal legislation." For many years the court heard constitutional complaints, often reluctantly, pursuant to federal statutes, but in 1969 the Basic Law was amended to allow the filing of such complaints as a matter of constitutional right. *See id.* art. 93, § 4a (amended 1969).
16. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).
17. GG, *supra* note 11, art. 93, § 2.
18. *Id.* art. 82.
19. *Id.* arts. 22, 25.
20. *Id.* art. 31(2).

On the other hand, cases before the Federal Constitutional Court dealing with concrete judicial review arise out of real lawsuits. But the moving party in such cases is the trial or appellate tribunal, not the parties to the lawsuit. If the judge or judges (in collegial courts) conclude that a federal or state law under which a case has arisen is unconstitutional, they may not themselves decide the constitutional question; rather, they must, by majority vote, certify the question to the Federal Constitutional Court for decision pending the resolution of the case. Certification of such questions to the court does not depend upon the constitutional issue having been raised by one of the parties. The petition to the court is made solely at the discretion of the judges.[21]

The third category of disputes involves the legality of political parties. The Federal Constitutional Court is empowered under article 21 of the Basic Law to declare unconstitutional political parties which seek to impair or abolish the "free democratic basic order." Only the Bundestag, the Bundesrat, or the federal government (*i.e.*, the Chancellor and Cabinet) may initiate an article 21 action in the court. Like most other proceedings before the court, this jurisdiction is compulsory. Unless the moving party withdraws its petition, the court must eventually decide the case. The *Communist Party*[22] case of 1956, which articulates the basic principles of free speech as it relates to internal security in the Federal Republic, is one of two cases in which the court has declared political parties unconstitutional.[23]

Constitutional complaints, the last category of disputes, are the one exception to the practice of limiting access to the court to governmental agencies and constitutional institutions. Any person who claims that one of his basic rights or one of his rights under articles 20(4), 33, 38, 101, 103, or 104 has been violated by public authority may file a constitutional complaint with the court.[24] Ordinarily a person is required to exhaust all of his legal remedies before "appealing" to the

21. *See* G. LEIBHOLZ & R. RUPPRECHT, BUNDESVERFASSUNGSGERICHTSGESETZ: RECHTSPRECHUNGSKOMMENTAR 295 (1968).

22. Judgment of Aug. 17, 1956, Federal Constitutional Court (First Senate), [1956], 5 BVerfGE 85 (W. Ger.).

23. The neo-Nazi Socialist Reichs Party had been banned earlier in Judgment of Oct. 23, 1952, [1952], 2 BVerfGE 1 (W. Ger.).

24. GG, *supra* note 11, art. 90. The substantive rights of persons are listed in articles 1 through 17 of the Basic Law. These include the freedoms of speech, religion, assembly, movement, association, and equality under law. The other rights refer mainly to the rights of citizenship and to the rights of defendants in criminal cases. Local governments are also permitted to bring constitutional complaints on the ground that their right to self-government under article 28 of the Basic Law has been infringed. *See id.* art. 93, § 4b.

court. Constitutional complaints, most of which are lodged against judicial rulings, make up about ninety-six percent of all docketed cases and fifty-five percent of the court's published opinions.[25]

Finally, four general differences in the decisionmaking processes of the two tribunals should be mentioned. First, whereas the exercise of the Supreme Court's jurisdiction is largely discretionary,[26] the exercise of the Federal Constitutional Court's jurisdiction is obligatory. Although the Federal Constitutional Court has adopted several policies limiting the conditions under which certain categories of cases will be decided,[27] the general rule is that constitutional disputes properly before the court must be decided. No "political question" doctrine intrudes to absolve the Federal Constitutional Court from the responsibility of decision. Justices may grimace with personal disapproval and squirm with alarm, as some of them did in the *Communist Party* case,[28] when governments petition the court to decide politically sensitive cases. But it is the accepted view that motions in such cases are political judgments on the part of government. Once such political judgments are made, the court's only recourse is to decide the cases on the basis of legal principles. Nor can the court avoid decision in constitutional cases by retreating into a set of "Ashwander" type rules used by the Supreme Court to cabin its authority.[29] The Federal Constitutional

25. The disposition of constitutional complaints is described in detail in D. KOMMERS, *supra* note 9, at 167-75.

26. *See* SUP. CT. R. 19.

27. For example, in concrete judicial review cases the Federal Constitutional Court requires a showing by lower court judges that their reservations or doubts about the constitutionality of a statute are serious, compelling, or genuine. *See* G. LEIBHOLZ & R. RUPPRECHT, *supra* note 21, at 295. Until 1963, the court rejected constitutional complaints found to be "patently unfounded." But rejections on this ground had to be the result of a unanimous decision on the part of a three-judge committee authorized by a full senate to consider the admissibility of constitutional complaints. When the number of these complaints doubled, the procedure was revised to lighten the judicial burdeu. A new statutory rule broadened, but only slightly, the discretionary authority of three-judge committees to reject complaints. The Constitutional Court Organization Act now provides that a complaint may be refused "if it is inadmissible or for other reasons cannot be satisfactorily resolved." But a majority of the full senate may no longer reject a complaint that has survived committee consideration. A "rule of two," analogous to the Supreme Court's "rule of four" in the exercise of certiorari jurisdiction, *see* Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955), now obtains: If at least two justices "are of the opinion that a decision in the matter would clarify a constitutional question or a failure to decide would result in a heavy hardship for the complainant," the constitutioual complaint will be accepted and decided on the merits by the full senate. *See* GG, *supra* note 11, art. 93a(4).

28. Judgment of Aug. 17, 1956, Federal Constitutional Court (First Senate), [1956], 5 BVerfGE 85 (W. Ger.); *see* text accompanying notes 122-23 *infra*.

29. *See* Ashwander v. Teunessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

Court's primary role in the German legal system is to resolve constitutional disputes when they arise.

Second, in contrast to the Supreme Court, the Federal Constitutional Court is required to justify its rulings in written opinions.[30] Per curiam opinions or summary orders merely affirming or rejecting the decision below are not a common practice for the court. But, like the Supreme Court, the Federal Constitutional Court may issue extraordinary writs or temporary orders pending judgment.[31] The court's opinions are characteristically very formal in style and follow a rather precise order of presentation, beginning with a brief statement of the decision and a summary of the reasons supporting it, proceeding to a rather detailed restatement of the arguments presented in the briefs, and concluding with a fully reasoned opinion supported by citations to previous cases and other sources of constitutional interpretation.

A third difference between the modes of decisionmaking by these two courts is that Federal Constitutional Court cases are considered on the briefs of the parties. Unlike the Supreme Court, which requires oral argument in the cases it accepts, the Federal Constitutional Court rarely invites parties to appear before it in oral proceedings. Justices of the court tend to regard oral argument as superfluous,[32] perhaps reflecting the heavy doctrinal approach fostered by the submission of constitutional disputes in pure form.

Finally, the overwhelming majority of cases handed down by the Federal Constitutional Court are institutional opinions. Institutional opinions are usually signed by all justices participating in a case, including those who may have been in the minority. Personalized dissenting opinions were finally authorized by statute in 1970,[33] but there remains a strong institutional bias on the court against written dissents. Between February 25, 1975, and May 24, 1977, dissenting opinions were written in only 9 out of 154 cases decided with full opinion.[34] But some of the court's most notable and important dissenting opinions have been drafted in free speech cases.[35]

30. GG, *supra* note 11, art. 30(1).

31. *Id.* art. 32.

32. *See* D. KOMMERS, *supra* note 9, at 180.

33. *See* GG, *supra* note 11, art. 30(2); GOrdBVerfGE § 55.

34. *See* BVerfGE, vols. 39-46.

35. *See, e.g.*, Judgment of Mar. 2, 1977, [1977], Federal Constitutional Court (Second Senate), 44 BVerfGE 197, 205, 209 (W. Ger.); Judgment of May 11, 1976, [1976], Federal Constitutional Court (First Senate), 42 BVerfGE 143, 154, 162 (W. Ger.); Judgment of Apr. 25, 1972, [1972], Federal Constitutional Court (First Senate), 33 BVerfGE 52, 78 (W. Ger.); Judgment of

III. SPEECH IN THE UNITED STATES AND GERMANY

This section focuses on the manner in which the highest courts of judicial review in two major political democracies grapple with the problem of accommodating freedom of speech to their respective constitutional systems. Both systems rank free speech among the highest values of their respective constitutional orders. The tribunals of both countries are sensitive to free speech claims and have ardently defended such claims in their judicial opinions. Yet there are differences in the balance struck by the two courts between these claims and other social interests. These differences are rooted, as will become evident, in the specific language of the German and American constitutions and in different judicial images of social reality projected by the constitutional cases under study.

A. THE UNITED STATES

The law of free speech in the United States has evolved out of the first amendment's simple directive that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[36] Decades of judicial interpretation have underscored the critical importance of this freedom under the American governmental system. Freedom of speech and of the press, remarked the Supreme Court in *Gitlow v. New York*,[37] "are among the fundamental personal rights and 'liberties' protected by the [Constitution]."[38] A few years later, Justice Cardozo characterized freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom."[39] The one sentence from the Supreme Court's massive writings on speech that most aptly describes the predominant judicial attitude toward freedom of expression is the remark of Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

July 27, 1971, Federal Constitutional Court (Second Senate), 31 BVerfGE 314, 334, 337 (W. Ger.); Judgment of Feb. 24, 1971, [1971], Federal Constitutional Court (First Senate), 36 BVerfGE 173, 200, 218 (W. Ger.).

In the well-known *Spiegel Seizure* case, Judgment of Aug. 5, 1966, [1966], Federal Constitutional Court (First Senate), 20 BVerfGE 162 (W. Ger.), decided before public dissenting opinions were authorized, there was considerable press speculation about the lineup inside the court. As it turned out, the opinion clearly reflected the inability of the First Senate to break a four-to-four deadlock. The *Spiegel Seizure* case was in part responsible for the pressure to authorize dissenting opinions. For an account of the *Spiegel* case entanglements, see Kommers, *The* Spiegel *Affair: A Case Study in Judicial Politics*, in POLITICAL TRIALS 5-33 (T.L. Becker ed. 1971).

36. U.S. CONST. amend. I.

37. 268 U.S. 652 (1925).

38. *Id.* at 666.

39. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[40]

1. *Speech and Security: The Polity as a Neutral Forum*

The first amendment creates in the mind of the Supreme Court an open system of free expression in which government is barred from prescribing any orthodoxy or system of values. The prevailing judicial image of the American constitutional system draws its main strength from the well-known Holmesian metaphor of the market. Justice Holmes wrote:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[41]

Justice Holmes did not indicate precisely how ideas would be delivered to the market, or whether all ideas relevant to an issue under public discussion would get into the market.[42] Presumably, a regime based on free expression would automatically take care of such problems. Furthermore, a critic of the market analogy might suggest that unregulated markets tend to create monopolies, a result that Justice Holmes himself recognized when he remarked in *Gitlow* that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[43] Again the critic might suggest that this is no way ultimately to protect the integrity of a democratic system. Justice Holmes might well have responded that a laissez-faire system is the only way ultimately to safeguard both political democracy and individual freedom.

The free trade image of speech described by Justice Holmes was strongly reflected in the "clear and present danger" test for determining the legitimacy of governmental restraints on speech. This test was originally formulated by Justice Holmes in *Schenk v. United States*.[44] "The

40. Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

41. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes and Brandeis, JJ., dissenting).

42. *Id.* at 624-31 (Holmes and Brandeis, JJ., dissenting).

43. 268 U.S. at 673 (Holmes, J., dissenting).

44. 249 U.S. 47 (1919).

question in every case," Justice Holmes said, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[45] Justice Brandeis, in a related case, joined Justice Holmes in concluding that under this test only the "danger of immediate evil" could justify the suppression of speech.[46] In a concurring opinion upholding a conviction under California's Criminal Syndicalism Act,[47] Justice Brandeis, joined by Justice Holmes, wrote:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[48]

To Justice Brandeis, the function of free speech is "to free men from the bondage of irrational fears," and thus, the only fear that can justify the suppression of speech is the "fear that serious evil will [immediately] result if free speech is practiced."[49]

The "clear and present danger" test was wholly compatible with the emerging doctrine of "preferred freedoms." This doctrine held that

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45. *Id.* at 52. Writing for the majority, Justice Holmes sustained the conviction of a Socialist charged under the Espionage Act of 1917, Pub. L. No. 65-24, § 3, 40 Stat. 217, 219 (current version at 18 U.S.C. § 2388 (1976)), with obstructing the military draft. The conviction was upheld on the basis of clear evidence showing that the defendant had printed and mailed several thousand leaflets condemning the draft and encouraging drafted men to resist military induction. *Id.* at 48-53.

46. Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes and Brandeis, JJ., dissenting).

47. 1919 Cal. Stats. ch. 188, at 281 (current version at CAL. PENAL CODE §§ 11400-11402 (West 1970 & Cum. Supp. 1980)).

48. Whitney v. California, 274 U.S. 357, 377 (1927) (citation omitted) (Brandeis and Holmes, JJ., concurring).

49. *Id.* at 376. It should be noted that the "clear and present danger" approach to constitutional adjudication remained a minority view until 1937, when it was first used as a test for determining the validity of legislation restricting speech. *See* Herndon v. Lowry, 301 U.S. 242 (1937). Until 1937, the Supreme Court had followed the "bad tendency" test of Gitlow v. New York, 268 U.S. 652 (1925). Under the teaching of *Gitlow*, the state could permissibly punish speech and advocacy whose "natural tendency and probable effect [is] to bring about the substantive evil which the legislative body might prevent." *Id.* at 671 (citations omitted).

certain freedoms—such as the rights to free speech, free press, free association, and to vote—are so fundamental to the realization of an open political process that they require special protection under the United States Constitution.[50] Accordingly, there is a strong presumption against the constitutionality of any legislation that seeks to limit these freedoms. Although the contemporary Court makes little explicit reference to "preferred freedoms," the doctrine is still very much an implicit part of American free speech analysis.

Like the "preferred status" doctrine, the "clear and present danger" test has followed a somewhat meandering course over the years. It was radically revised, to the severe detriment of free speech claimants, during the 1950's when the nation was obsessed with communist "subversion,"[51] and again substantially modified, to the advantage of speech claimants, in the following two decades.

Brandenburg v. Ohio[52] fairly illustrates the contemporary approach of the Supreme Court. Brandenburg, a member of the Ku Klux Klan, was convicted under Ohio's Criminal Syndicalism Act[53] for uttering derogatory remarks about Negroes and Jews at a rally and cross-burning ceremony and for advocating a Klan assault on the President and Congress if the latter continued "to suppress the white, Caucasian race."[54] In a per curiam opinion, the Court invalidated the law because

50. The seed of the "preferred freedoms" doctrine was planted by Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 326-27 (1937), when he spoke of the fundamentality of freedom of thought and speech. One year later, Chief Justice Stone, in a famous footnote to United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), suggested the use of the strict scrutiny test in reviewing legislation imposing restraints on fundamental freedoms. The doctrine was finally accepted by a majority of the Court in Murdock v. Pennsylvania, 319 U.S. 105 (1943), and continued to prevail as an articulate principle of constitutional analysis, over the vigorous objection of Justice Frankfurter, throughout the 1940's. *See* Kovacs v. Cooper, 336 U.S. 77, 90-97 (1949) (Frankfurter, J., concurring).

51. During the 1950's, the Court came close to resurrecting the "bad tendency" test. The gloss put on "clear and present danger" restricted speech far beyond the Holmes-Brandeis understanding of the doctrine. Borrowing from the formula used by Judge Learned Hand, Chief Justice Vinson held in Dennis v. United States, 341 U.S. 494 (1951), that Congress could validly prohibit subversive speech if "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510 (citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (opinion of Hand, J.)). "It is the existence of the conspiracy which creates the danger," continued Vinson, "[i]f the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added." *Id.* at 511 (citations omitted). In Yates v. United States, 354 U.S. 298 (1957), however, the Court retreated from the broad implications of *Dennis*. There, the Court distinguished between advocacy of abstract doctrine and advocacy of action, holding that only the latter can be proscribed. *Id.* at 318-19.

52. 395 U.S. 444 (1969) (per curiam).

53. OHIO REV. CODE ANN. § 2923.13 (Page) (repealed 1974).

54. 395 U.S. at 446.

it failed to distinguish between mere advocacy and "incitement to imminent lawless action."[55] This "imminent lawless action" standard is the "clear and present danger" test under another guise. But Justices Douglas and Black, pointing to the flexible character of the test, urged its rejection as a standard of review. Their position was that the first amendment recognizes no line between advocacy of ideas and advocacy of action.[56]

Brandenburg has apparently survived the Court's recent personnel changes. In *Hess v. Indiana*,[57] for example, the Court held per curiam, over the dissent of Justices Relnquist, Burger, and Blackmun, that a virulent outdoor anti-Vietnam War speech sprinkled with obscene language and a general call to "take to the streets" could not validly be punished under Indiana's disorderly conduct statute even though the trial court had found that the speaker's statements were intended to incite further lawless action on the part of the crowd and were likely to produce such action.[58] Because "*imminent* disorder" did not appear likely, the judgment of the Indiana Supreme Court affirming the convictions was reversed.[59] Similarly, in *Bachellar v. Maryland*,[60] the Court reversed a state conviction for "disorderly conduct" involving anti-Vietnam War demonstrators who protested the war with placards and leaflets in front of a United States Army recruiting station. Finally, in 1970, at the height of the war effort, the Court upheld the right of an actor in a theatrical production to wear a military uniform even though his performance tended to discredit the armed forces.[61] Punishment for this, said the Court, would be an unconstitutional abridgement of an actor's right to free speech.[62]

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55. *Id.* at 449. Under the Ohio statute it was unlawful to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . or [to] voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." OHIO REV. CODE ANN. § 2923.13 (Page) (repealed 1974). Similar statutes have been upheld by the Federal Coustitutional Court.

56. *See* 395 U.S. at 449-50 (Black, J., concurring); *id.* at 450-57 (Douglas, J., concurring).

57. 414 U.S. 105 (1973) (per curiam).

58. *Id.* at 106-07.

59. *Id.* at 109. The dissenting Justices would have accepted the finding of the trial court concerning the imminence of the danger. *Id.* at 109-12 (Rehnquist, Burger, and Blackmun, JJ., dissenting).

60. 397 U.S. 564 (1970).

61. Schacht v. United States, 398 U.S. 58 (1970).

62. *Id.* at 63.

A genre of speech called "symbolic expression" also emerged from the Vietnam protests. A conviction for draft card burning was challenged on the ground that the act was protected, "symbolic speech" within the first amendment, or a "communication of ideas by conduct." Rejecting

As the above decisions clearly indicate, wide berth is accorded to political utterance in the United States, at least where domestic peace and internal security are concerned. The judicial image of the constitutional order tolerates no invasion by government of the realm of ideas. All political speech is permitted unless it immediately threatens public safety. Government may not prescribe a philosophy of the public good: it must maintain a safe distance from the minds of men, must not seek to regulate the marketplace of ideas, and may not legally take sides in ideological conflicts. The polity is a neutral forum for the expression of all points of view.

2. *Speech and Reputation: A Polity of Robust Speech*

Cases dealing with defamation law have in recent years constituted a seminal area of free speech jurisprudence in the United States. These cases pose the question of where to strike the balance between the individual's interest in his own reputation and the first amendment's interest in maintaining a regime of free speech. Here, the market analogy has also pointed the way to the evolution of constitutional doctrine, although, in the last three years, the Court seems to have forged a slightly different accommodation between the competing values of speech and reputation.

The leading case on defamation law is *New York Times Co. v. Sullivan*.[63] In *New York Times*, the Court broke new ground by imposing severe limitations on a state's power to award damages in a civil libel action brought by a public official against critics of his official conduct. The *New York Times* of March 30, 1960 printed a full page advertisement condemning "an unprecedented wave of terror" mounted by Montgomery, Alabama police officials against civil rights demonstrators seeking to exercise their constitutional rights. The advertisement,

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this contention, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968). Here, the government's interest in raising and supporting armies was sufficient to overcome the free speech objection. Compare, however, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), where the Court invalidated the dismissal of public high school students who were black armbands to school in violation of school policy to show their opposition to the war. Several years later, the court overturned a conviction of a person who had misused the flag as a protest to the invasion of Cambodia. Because the person involved had merely improperly displayed a privately owned flag on private property, causing no breach of the peace, his action was protected by the first amendment. Spence v. Washington, 418 U.S. 405 (1974). For an earlier case involving mutilation of the flag, see Street v. New York, 394 U.S. 576 (1969).

63. 376 U.S. 254 (1964).

signed by sixty-four widely known persons, carried what were later shown to be false accusations of grave misconduct against the police. Montgomery's Commissioner of Public Affairs, who was in charge of the Police Department, successfully sued the *New York Times* for damages under Alabama's civil libel statute. Reversing the decision of the Alabama Supreme Court affirming a damage award of $500,000, the Supreme Court announced that the law as applied would have to be rejected under first amendment standards.

The Court predicated its decision on the fundamental proposition that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[64] In such a regime, suggested the Court, erroneous statements are inevitable and "[w]hatever is added to the field of libel is taken from the field of free debate."[65] The Court rejected the common law defense of truth in civil libel actions as insufficient to protect free speech. The Court set forth the new rule in the following language:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[66]

Any other rule, the Court seemed to suggest, would cast a pall of fear and timidity over those who would give voice to public criticism.

Within a few years, the Court expanded the protection of these cases from defamation of "public officials" to defamation of "public figures." Finally, in *Rosenbloom v. Metromedia, Inc.*,[67] the Supreme Court abandoned the effort to tailor the *New York Times* standard to the status of the person defamed, thus obliterating the distinction between private and public persons in such cases. The plurality opinion,

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64. *Id.* at 270.

65. *Id.* at 272 (citing Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)).

66. *Id.* at 279-80. The "reckless falsehood" standard was defined with greater precision in St. Amant v. Thompson, 390 U.S. 727 (1968):

> [Our cases make] clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 731.

67. 403 U.S. 29 (1971). *See also* Time, Inc. v. Hill, 385 U.S. 374 (1967).

written by Justice Brennan, extended the protection of *New York Times* to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. Focusing on society's interest in learning about certain issues, Justice Brennan noted: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[68]

In *Gertz v. Robert Welch, Inc.*,[69] however, the Court rejected Brennan's "public issue-general interest" extension of *New York Times*. Speaking through Justice Powell, the Court announced that the protection of *New York Times* is not to be extended to defamation suits by private individuals even though the defamatory statements concern an issue of public or general interest.[70] In seeking to reconcile the law of defamation with the first amendment, the Court ruled that it would be impermissible for the state to impose liability without fault in such cases but that the state could define for itself the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood that caused injury to a private individual.[71]

Still another way of protecting public figures and citizens from defamatory statements would be to grant them a legal right of reply—a technique used in Germany. But in *Miami Herald Publishing Co. v. Tornillo*,[72] the Supreme Court struck down Florida's right of reply statute, asserting through Chief Justice Burger that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'."[73] To the objection that the public is not being properly informed because the market place of ideas today a monopoly controlled by the owners of the communication market, Chief

68. 403 U.S. at 43.

69. 418 U.S. 323 (1974).

70. *Id.* at 343.

71. *Id.* at 347. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court started to build a fence around the notion of "public figure" by declining to apply the *New York Times* standard to *Time*'s defamatory remark about a well-known socialite involved in a divorce proceeding. The Court refused to apply the standard even though the publisher was reporting on a judicial proceeding. Involvement in formal judicial proceedings, said the Court, does not automatically transform a private dispute into a public event. *Id.* at 455. Finally, in Herbert v. Lando, 441 U.S. 153 (1979), the Court, while preserving the essential teaching of *New York Times*, held that journalists do not have an absolute privilege to refuse to testify in a defamation suit that might lead to the discovery of evidence showing that damaging falsehoods had been published with malicious intent and total disregard for the truth.

72. 418 U.S. 241 (1974).

73. *Id.* at 257 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

Justice Burger replied that any governmental coercion in this area would bring about "a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[74] The Chief Justice concluded: "[P]ress responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[75]

B. West Germany

Any analysis of German free speech jurisprudence should begin with the text of the Basic Law itself. The brevity of the first amendment of the United States Constitution directive that "Congress shall make no law" is in sharp contrast to the multiplicity of constitutional provisions relating to freedom of expression in the Federal Republic. Article 5, section 1 of the Basic Law guarantees freedom of expression in these words: "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."[76]

This firm declaration against censorship in section 1 is so detailed in its language as to raise questions about the legitimacy of speech or forms of expression not falling within the definitions of "opinion," "inform," and "reporting." Thus, although the fundamentality of free speech is avowed with no less intensity in Germany than in the United States, these provisions in their own right burden speech with a number of limitations.

More clearly marking the boundaries of speech is section 2 of article 5 which declares that "[t]hese rights [of expression and reporting] are limited by the provisions of the general laws, the provisions of law for the protection of youth, and the right to inviolability of personal honor."[77] Standing alone, these provisions might seem to strike a balance between competing values not very different from the balance struck by judicial interpretation in the United States. But the meaning of free speech is not exhausted by the provisions of article 5. For a fuller appreciation of the extent and limits of speech in the Federal Republic it is necessary to consider article 5 in tandem with other fun-

74. *Id.* at 254.
75. *Id.* at 256.
76. GG, *supra* note 11, art. 5, § 1.
77. *Id.* § 2.

damental rights and within the context of the constitutional order created by the Basic Law.

1. *The Basic Law: An Ordering of Values*

The Federal Constitutional Court teaches that the Basic Law incorporates a given order of political and human values. According to this teaching, the Basic Law is not a value-free constitution. With respect to the polity, it creates a "militant democracy." With respect to human rights, which will occupy our attention here, it creates a value system based on the dignity of man.[78] The Basic Law's charter of fundamental rights begins with a ringing affirmation of human personhood. Article 1, the basis of all personal rights guaranteed by the constitution, declares: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."[79] This is no idle declaration. The Federal Constitutional Court has proclaimed the "dignity of man" as "the Basic Law's highest legal value" and has employed that concept, much as the United States Supreme Court has used the due process clauses of the fifth and fourteenth amendments, as an independent standard of value by which to measure the legitimacy of state actions.[80] As the Federal Constitutional Court wrote recently: "The Basic Law has erected a value-oriented order which places the individual human being and his dignity at the center of all its determinations . . . [and it is this] value judgment of the Constitution that informs the organization and interpretation of the entire legal order."[81]

At this point an American legal scholar might observe that the language of human dignity as used by the Federal Constitutional Court is really no different from the human rights language used in American constitutional law. He might suggest that German judges are talking about the same thing in different words. He might question whether

78. *See* Judgment of Jan. 15, 1958 [1958], Federal Constitutional Court (First Senate), 7 BVerfGE 198, 205 (W. Ger.); Judgment of Dec. 5, 1956 [1956], Federal Constitutional Court (Second Senate), 6 BVerfGE 20, 40 (W. Ger.); Judgment of Aug. 17, 1956 [1956], Federal Constitutional Court (First Senate), 5 BVerfGE 134 (W. Ger.); Judgment of Oct. 23, 1952 [1952], Federal Constitutional Court (First Senate), 2 BVerfGE 12 (W. Ger.).

79. GG, *supra* note 11, art. 1.

80. *See* Judgment of July 16, 1969 [1969], Federal Constitutional Court (First Senate), 27 BVerfGE 1, 6 (W. Ger.); Judgment of Dec. 20, 1960 [1960], Federal Constitutional Court (First Senate), 12 BVerfGE 53 (W. Ger.). For a discussion of the Federal Constitutional Court's "human dignity" jurisprudence, see G. LEIBHOLZ & H. RINCK, GRUNDGESETZ FUER DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR AN HAND DES BUNDESVERFASSUGGSGERICHTS 55-57 (4th ed. 1971).

81. Judgment of Feb. 25, 1975 [1975], Federal Constitutional Court (First Senate), 39 BVerfGE 1, 67 (W. Ger.).

the German idea of "human dignity" implies anything more than the American constitutional ideas of "life, liberty, and the pursuit of happiness;"[82] the idea of fundamental justice occasionally found by the Supreme Court to inhere in the notion of "due process;"[83] or the "human dignity" that Justice Brennan found in the meaning of the eighth amendment.[84] One finds no clear analytical definition of human dignity in the Federal Constitutional Court's jurisprudence. Yet out of that jurisprudence it is possible to cut a silhouette of man defined by his responsibilities as well as his rights. The Federal Constitutional Court envisions man as a rational being obligated to use his rights responsibly and with due regard for the nature of the political system created by the Basic Law. There is also a strong suggestion in the court's human dignity jurisprudence, as well as in the text of the Basic Law, that fundamental rights are not only based on human dignity but are also to be used to foster the growth of that dignity within the framework of the political and moral order sanctioned by the constitution. It is in this sense that the Basic Law may be said to create a "value-oriented" sociopolitical and legal order.[85]

To understand the value orientation of the West German legal system, it is helpful to realize that German constitutional jurisprudence distinguishes between basic rights as *subjective* rights and basic rights as *objective* value decisions of the constitutional order—a distinction relevant to the judicial image of man just mentioned. Subjective rights, often termed "defense" or "negative" rights, are claims that the individual has against the state. Under article 1, section 3, these rights "shall bind the legislature, the executive, and the judiciary as directly enforceable law."[86] In short, these rights define a sphere of personal freedom that government may not invade.

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82. UNITED STATES DECLARATION OF INDEPENDENCE, para. 2 (1776).

83. Furman v. Georgia, 408 U.S. 238, 257 n.1 (1972) (Brennan, J., concurring).

84. *Id.* at 270 *passim* (Brennan, J., concurring).

85. In addition to freedom of speech (art. 5), the fundamental rights of the Basic Law include the right to life and inviolability of person (art. 2, § 2); the right to the free development of personality (art. 2, § 1); freedom of religion (art. 4), assembly (art. 8), association (art. 9), privacy (arts. 10 and 13), and movement (art. 11); the right to property (art. 14); and the right to equality under law (art. 3). The German people acknowledge through article 1, § 2 that these fundamental liberties are "inviolable and inalienable human rights [and form the] basis of every human community, of peace and of justice in the world." The primacy of these rights in the constitutional order of the Federal Republic is underscored by article 19, § 2, which states that "in no case may the essential content of a basic right be encroached upon." In addition, the values of article 1 have been established in perpetuity, for under the terms of article 79, article 1—just as article 20 (defining the Federal Republic as a "democratic and social federal state")—is beyond the amendatory power of Parliament.

86. GG, *supra* note 11, art. 1, § 3.

The German Constitution does not, however, imply a state indifferent to the social context in which basic rights are exercised or to threats to basic freedoms originating in nonofficial sources. Basic rights as objective value decisions are viewed as charging the state, in the words of the President of the Federal Constitutional Court, "with an *affirmative duty* to implement programs to secure and protect these values."[87] They seem to oblige the state actively to create and safeguard a sociopolitical context that will be conducive to the vigorous exercise of subjective rights. The exercise of these subjective rights is in turn the principal means for realizing the values of the political system.[88]

While the state must provide a system in which subjective rights can be exercised, those rights must be exercised in conformity with certain principles of political obligation and ethical norms. Numerous examples of limitations on the exercise of fundamental freedoms, most notably speech, can be found in the text of the Basic Law. The personal honor clause of article 5 limiting expression has already been cited.[89] Freedom of "[a]rt and science, research and teaching" is also guaranteed, but "[f]reedom of teaching shall not absolve [the teacher] from loyalty to the Constitution."[90] Every person enjoys "the right to the free development of his personality, [but only] insofar as he does not . . . offend against the constitutional order or the moral code."[91] Germans "have the right to form associations and societies," but "[a]ssociations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding are prohibited."[92] Article 3, section 3, states that no person shall be "prejudiced or favoured because of his . . . political opinions,"[93] but article 33, dealing with the civil service, declares that the administration of the state is to be entrusted to civil servants "whose . . . loyalty [is] governed by public

87. Benda, *New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany*, 11 J. MAR. J. PRAC. & PROC. 1, 6 (1977).

88. The "objective value" interpretation of basic rights has been developed in the Abortion Case, Judgment of Feb. 25, 1975, Federal Constitutional Court (First Senate), 39 BVerfGE 1 (W. Ger.), and in the Numerus Clausus Case, Judgment of July 18, 1972, Federal Constitutional Court (First Senate), 33 BVerfGE 303 (W. Ger.). For a fuller discussion of the distinction between subjective and objective rights, see K. HESSE, GRUNDZUEGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 121-24 (5th ed. 1972).

89. GG, *supra* note 11, art. 5, § 2; *see* text accompanying note 76 *supra*.

90. GG, *supra* note 11, art. 5, § 3.

91. *Id.* art. 2, § 1.

92. *Id.* art. 9, § 2.

93. *Id.* art. 3, § 3.

law."[94]

In addition, article 21 declares that "political parties shall participate in the forming of the political will of the people" and that "[t]hey may be freely established," but "parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional."[95] Article 10 declares that the "privacy of posts and telecommunications shall be inviolable," but persons affected by legal restrictions on this right "shall not be informed of any such restriction if it serves to protect the free democratic basic order or the existence or security of the Federation or a Land."[96] Finally, article 18, potentially the most dangerous threat to freedom of speech, provides that whoever abuses freedom of expression (particularly of the press), assembly, association, privacy of posts and telecommunications, property, or asylum "in order to combat the free democratic basic order, shall forfeit these basic rights."[97] In short, the limits on the exercise of fundamental rights are captured by such constitutional concepts as "personal honor," "loyalty," "constitutional order," "moral code," "international understanding," and "free democratic basic order."

The Basic Law accordingly reflects a conscious ordering of individual freedoms and public interests. It resounds with the language of human freedom, but a freedom restrained by certain political values, community norms, and ethical principles. Its image of man is of a person rooted in and defined by a certain kind of human community. Yet in the German constitutionalist view the person is also a transcendant being far more important than any collectivity. Thus, there is a sense in which the Basic Law is both contractarian and communitarian in its foundation: contractarian in that the Constitution carves out an area of human freedom that neither government, private groups, nor individuals may touch; communitarian in the sense that every German citizen is under obligation to abide, at least in his overt behavior, by the values and principles of the moral and political order.

2. *Speech and Security: The Committed Polity*

The jurisprudence of speech in Germany seems clearly influenced by

94. *Id.* art. 33, § 4.
95. *Id.* art. 21.
96. *Id.* art. 10.
97. *Id.* art. 18.

the Federal Constitutional Court's image of the political system. That image is not fully portrayed in any one decision, but it clearly emerges from a number of constitutional cases. Article 20, as noted above, describes the Federal Republic as "a democratic and social federal state."[98] This decision in favor of democracy, wrote the court in an early decision, requires the "self-determination of the people."[99] Self-determination requires, above all, the formation and maturation of public opinion. This process begins in the social sphere where individuals, private groups, and the press operate—which is completely independent of the state; it continues with political parties giving shape to the collective will of the people; and it ends with the state's duty to translate that will into public policy and, by doing so, to clarify and deepen the common life of the community. As seen through the eyes of the Federal Constitutional Court, the political system is composed not of autonomous voters but of active and informed citizens involved in public affairs, striving for the creation of a socially cohesive and politically integrated "free democratic basic order."

In German constitutional theory there is a close relationship between the main free speech clause of article 5,[100] the freedom of association provisions of article 9,[101] and the provisions on political parties in article 21.[102] The dominant teaching with respect to article 5 is that freedom of expression is fundamentally an individual right. In this sense speech is a means of self-discovery and a necessary condition for personal truthseeking. But the social and political significance of speech is also heavily accented in the court's jurisprudence. Speech is a means of breathing life into democracy, where public opinion plays a critical role. But when the Court speaks of public opinion it is con-

98. *Id.* art. 20.

99. Judgment of Oct. 12, 1951 [1951], Federal Constitutional Court, 1 BVerfGE 14 (W. Ger.).

100. *See* text accompanying note 76 *supra*.

101. Article 9 reads in part: "(1) All Germans shall have the right to form associations and societies. (2) Associations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited."

102. Article 21 reads:

> (1) The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.
> (2) Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.
> (3) Details shall be regulated by federal laws.

cerned as much with defending a given context of communicative action as it is with defending the freedom of utterance itself.

The formation of public opinion, in the mind of the court, is a two-step process. The *preliminary* formation of public opinion is mainly the right and responsibility of individuals, associations, and the press. In their capacity as shapers of opinion, they are constituent elements of the political system and essential to the operation of democracy. Consequently, the state may not interfere with their essential tasks. But the conflicting and disparate opinions of individuals, private groups, and the media somehow need to be integrated into unified political programs if the state is to function reasonably and democratically. Here, political parties enter to complete the process of translating opinion into state policy. Article 21 authorizes political parties to "participate in forming the political will of the people"[103] and in this capacity, particularly during election campaigns, they assume the character of "constitutional organs" of the state. To this extent, article 21, in the court's view, has transformed the German political system into what the court has designated a "party state" (*Parteienstaat*), fully legitimating political opposition in the form of a multi-party system.[104]

The social function of speech can clearly be inferred from the language of article 5. Recall that it guarantees the right freely to express and disseminate "opinion" and to be informed "from generally accessible sources" among which "reporting" by the press is paramount. The court's jurisprudence underscores the "public functions" of the press, the most important of which are to clarify public opinion, to take positions on policy issues, and to guide public debate. The court considered the press' public role in great detail in the well-known *Spiegel Seizure*[105] case. Again we hear the language of subjective and objective rights. The court noted that the Basic Law confers a subjective right on persons and publishers to be free of all official restraints; on the objective side, the "free press" is a favored institution in the society and thus the state is obligated affirmatively to safeguard the press, *inter alia*, by ensuring access to the profession of journalism, by protecting private sources of information, and perhaps even by taking action

103. GG, *supra* note 11, art. 21.

104. For a discussion of the court's political party jurisprudence, see Kommers, *Politics and Jurisprudence in West Germany: State Financing of Political Parties*, 16 AM. J. JURIS. 215-41 (1971).

105. Judgment of Aug. 5, 1966 [1966], Federal Constitutional Court, 20 BVerfGE 162 (W. Ger.).

"against the development of monopolies of opinion."[106] Needless to say, the societies and associations whose freedom of organization is guaranteed under article 9 are also fully protected by the speech provisions of article 5.

The "free democratic basic order," of which the freedom of speech is such an essential element is the liberal democracy consciously created, promoted, and protected by express provisions of the Basic Law.[107] That order was defined in the first constitutional case declaring a political party unconstitutional, in part because of its advocacy of Nazi ideas. The Federal Constitutional Court wrote:

> [T]he free democratic basic order can be defined as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; popular sovereignty; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties.[108]

The Federal Constitutional Court has suggested that these principles are so intrinsic to the Basic Law that the court would invalidate even a constitutional amendment compromising or abrogating one of these principles.[109] According to the court's interpretation, the constituent assembly clearly opted for a "militant democracy" that would aggressively defend the constitutional order of which these principles are an inherent part. In the eyes of the court, the state has the right, if not the duty, to defend itself by surpressing anticonstitutional activities. The state is not helpless and need not constitutionally observe a stoical silence even in the face of verbal assaults on its constitutional structure. Thus, the Federal Constitutional Court has sanctioned a preemptive

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106. *Id.* at 175-76.

107. The term "free democratic basic order" appears in no fewer than six different sections of the Basic Law. *See* GG, *supra* note 11, arts. 10(2), 11(2), 18, 21, 87a, 91. The term "constitutional order," the meaning of which absorbs the notion of liberal democracy, appears in seven different sections. *See id.* art. 2(1), 9(2), 20(3), 20(4), 98(2), 28(1), 28(3).

108. Judgment of Oct. 23, 1952, [1952] Federal Constitutional Court (First Senate), 2 BVerfGE 1, 12-13 (W. Ger.). The translation is from W. MURPHY & J. TANENHAUS, COMPARATIVE CONSTITUTIONAL CASES 603 (1977).

109. *See* Judgment of Dec. 18, 1953 [1953], Federal Constitutional Court (First Senate), 3 BVerfGE 225 (W. Ger.).

democracy, the quintessential mark of which is that there shall be no freedom for the enemies of freedom.

In accordance with this spirit, the German Criminal Code includes comprehensive definitions of treason, betrayal, and other forms of anticonstitutional activity that in the United States would raise serious questions under the first amendment.[110] The most recent of these statutes is the Anticonstitutional Advocacy Act of 1976, which added section 88a to the internal security provisions of the code. Under this section, any person involved in the production, distribution, or public display of written material advocating or supporting criminal acts contravening the Basic Law or endangering the stability and security of the state may be punished with up to three years of imprisonment.[111]

Even if these statutes constitute "general laws" which can limit freedom of speech under the provisions of article 5, constitutional review is not at a close. Serious issues of free speech and press more often arise out of the manner in which such statutes are applied and enforced. It is customary for the court to ask whether the activities or decisions of enforcement officials reflect the fundamental values of the constitutional order and whether these officials have accorded proper weight to the value of free speech in their decisions. Any law, regulation, procedural ruling, or other action of government officials impinging on speech is also bound by the constitutional principles of *Rechtsstaatlichkeit* (rule of law) and *Verhaeltnismaessigkeit* (proportionality): The first requires clarity, precision, and generality in the articulation of all legal rules; the second requires a rational nexus between ends and means.

The *Civil Servant Loyalty*[112] case of 1975 illustrates the application of these principles of review as well as the role of the general substantive norms that have been discussed. Article 33(4), which recognizes the traditional and historic role of civil servants in the German political system, declares that "the exercise of state authority as a permanent function shall as a rule be entrusted to members of the public service whose status, service, and loyalty are governed by public law."[113] But article 33(2) also provides that "[e]very German shall be equally eligible for any public office according to his aptitude, qualifications, and

110. *See* Law of Jan. 2, 1975, [1975] Bundesgesetzblatt [BGBl] I (W. Ger.) §§ 80-104a.

111. *Id.* § 88a. The statute was partially a parliamentay reaction to the outbreak of terrorist violence in West Germany.

112. Judgment of May 22, 1975 [1975], Federal Constitutional Court (Second Senate), 39 BVerfGE 334 (W. Ger.).

113. GG, *supra* note 11, art. 33, § 4.

professional achievements."[114] The Federal Civil Service Act,[115] enacted pursuant to these provisions, seeks to ensure the loyalty of federal public servants by requiring, as a condition of their entry into the state bureaucracy, that they "defend at all times the free democratic basic order within the spirit of the Basic Law."[116] Federal guidelines for the organization of the civil service at the state level contain an identical provision.[117]

In January, 1972, against the backdrop of student demonstrations and political violence in the Federal Republic, the federal and state governments issued a decree incorporating additional guidelines for determining the loyalty of applicants for public service. Participation in anticonstitutional activities and membership in an organization pursuing anticonstitutional goals were regarded as sufficient reasons for doubting the loyalty of a public service applicant.[118] The constitutional case arose as a result of Lower Saxony's refusal to permit a law school graduate to embark upon his in-service training at the state level because of his statements and activities as a member of an anticonstitutional group while a student at Kiel University.

The Federal Constitutional Court was faced with the necessity of performing several "balancing acts" in this case. For example, the court had to balance article 33 with the basic right of all Germans "freely to choose their trade, occupation, or profession, under article 12. Furthermore, the court had to balance the loyalty clause of article 33 with not only the equality principle of article 3, which states that "no person may be prejudiced or favored because of his . . . political opinions," but also with the express rights to speech and association, all of which are *basic* rights the essential content of which may not be encroached upon according to article 19. Finally, a balance had to be struck between a broad construction of the loyalty clause and the inferred right of persons to join parties (*Parteienprivileg*) under article 21.

Other interpretive questions not directly addressed by the Federal Constitutional Court are equally compelling. For example, does "loyalty" fall within any reasonable definition of the "aptitude" constitutionally required of public servants? In light of the paramount value of speech and association, is the principle of proportionality offended by a

114. *Id.* § 2.
115. BBG § 7(1)2.
116. *Id.*
117. BRRG § 4(1)2.
118. For the text of the decree, see P. FRISCH, EXTREMISTEN BESCHLUSS 142 (1976).

rule that would exclude a person from the public service solely by reason of past membership in an anticonstitutional organization? Is the principle of *Rechtsstaatlichkeit* offended by a rule effectively prohibiting membership in an organization not formally declared unconstitutional by the court?

In its decision, the court adjusted these interests in such a way as to uphold the decree but to limit its application. Noting that the comments or actions of a young person during his student days, particularly after the lapse of time, do not warrant an inference of disloyalty, the court severely limited the discretion of state hiring authorities. The court stated that an adequate weighing of the values involved required that a finding of disloyalty be based upon ascertainable facts, and that certain procedural guarantees be observed.[119]

With regard to the "membership" provision of the decree, the court was divided in its interpretation of the balance between articles 33 and 21. The majority view is less congenial to the rights of speech and association. This view holds that the sanctions of the two articles are not directed at the same conduct, activity, or behavior. Active and militant opposition to liberal democracy is required to trigger a prohibition of a party under article 21, whereas article 33 requires action and militant *support* of the constitutional order. Thus, a political party could be permissible under article 21, but the members of that party could still be ineligible for civil service under article 33. On this reasoning, the purpose of article 33 requiring active support would be defeated if exclusion from the public service were only to be conditioned on membership in a formally declared unconstitutional party.[120]

The minority held that article 21 limits the scope of article 33, which requires "the public service [to be] regulated with due regard to the traditional principles of the professional civil service." Although loyalty to the state was a paramount value under traditional principles of public service, the Basic Law, unlike the constitutions of the Monarchy and Weimar, confers constitutional status on political parties, thus elevating the *Parteienstaat* to a core principle of the Basic Law. This principle, especially when considered in light of the Basic Law's free

119. Judgment of May 22, 1975 [1975], Federal Constitutional Court (Second Senate), 39 BVerfGE 334 (W. Ger.). These guarantees include: (1) adequate notice to the applicant of the evidence or information against him; (2) the opportunity to rebut such information orally or in writing and to present countervailing information; (3) the right of the applicant to be represented by counsel; (4) a statement of reasons for an applicant's rejection; and (5) the right to have the rejection reviewed by an administrative court.

120. *Id.* at 357-60.

speech and opinion clauses, incorporates a generous view of political expression and justifies a narrow construction of article 33. Thus, the minority concluded that only membership in a political party declared unconstitutional by the Federal Constitutional Court would warrant exclusion from public service.[121]

In conclusion, it should be noted that the unconstitutional party clause of article 21 is clearly in a state of tension with article 5. In 1956, in its longest opinion to date, the court declared the Communist Party of Germany (KPD) unconstitutional.[122] The court undertook its own examination of the KPD, independent of any possible criminality that might be found in the Criminal Code. After reviewing the history and goals of the KPD, analyzing Marxism-Leninism as practiced today, and scrutinizing the statements and writings of party leaders, the court concluded that the KPD rejected the highest values of the constitutional order. But that fact alone was not enough to warrant the party's dissolution; the party in question must also have taken a "fighting and aggressive" attitude toward the constitutional order and manifested an "intent" to overthrow and eliminate that order.[123] Over the KPD objection that only "immediate action" could validly be suppressed, the court held that the "intent" standard was met. By applying this standard, the court was not required to determine whether the state was, as a result of the party's activities, in proximate danger of being subverted.

The *Communist Party of Germany* case, like the *Civil Servant* case, raises the serious question of how far the state may go in gathering and publishing information about the activities of parties or groups that have not been declared unconstitutional. This was also the issue in a 1975 case involving the National Democratic Party of Germany (NPD).[124] The NPD, an extreme rightist party, challenged the publication of an official report of the Federal Ministry of the Interior that described the NPD as a "party engaged in anticonstitutional goals and activity," as "radical right and an enemy of freedom," and as "a danger to the free democratic basic order." A unanimous senate ruled that state agencies concerned with the protection of the Basic Law were constitutionally permitted, if not required, to make such findings, even

121. *Id.* at 375-91.

122. Judgment of Aug. 17, 1956 [1956], Federal Constitutional Court (First Senate), 5 BVerfGE 85 (W. Ger.).

123. *Id.* at 141-47.

124. Judgment of Oct. 29, 1975 [1975], Federal Constitutional Court (Second Senate), 40 BVerfGE 287 (W. Ger.).

without any formal declaration of the unconstitutionality of the political party under investigation.[125]

3. *Speech and Reputation: A Polity of Responsible Persons*

As asserted earlier, German constitutional theory regards free speech as inherent in the concept of "human dignity" and absolutely necessary to the fulfillment of each person's article 2 right "to the free development of his personality."[126] In Germany, as in the United States, speech is primarily an individual (subjective) right with which, as a general rule, the state may not interfere. The article 5 proviso limiting speech by "the provisions of the general laws, provisions of laws for the protection of youth, and by the right to inviolability of personal honor"[127] does not give the legislature a roving commission to decide which public interests or social values are to be protected at the expense of free speech. The Basic Law has already made those choices. General laws must protect what the Basic Law purports to protect. Therefore, even if such laws meet the standard of "general" within the meaning of article 5, they will ordinarily trigger careful judicial scrutiny before the Federal Constitutional Court. While such laws are not constitutionally suspect to the degree they are in the United States, the court is nevertheless required to determine whether in passing such laws the legislature has responded adequately to its duty under article 5, section 3, to enforce the objective rights or value decisions of the Basic Law, one of the most important of which is the freedom of speech and press.[128]

The German civil and penal codes include numerous provisions that incorporate the social ethics that inhere in the concept of "moral order" within the meaning of the Basic Law. For example, the Federal Criminal Code punishes speech or writings that revile religious institutions and their rites, advocate racial hatred and genocide, ridicule the state and its symbols, disparage constitutional organs, defame political personalities, mock the memory of the dead, or insult the Federal Presi-

125. *Id. See also* Judgment of Jan. 17, 1978 [1978], Federal Constitutional Court (Second Senate), 47 BVerfGE 130 (W. Ger.).

126. *See* Judgment of Jan. 25, 1961 [1961], Federal Constitutional Court (First Senate), 12 BVerfGE 113, 125 (W. Ger.); Judgment of Jan. 15, 1958 [1958], Federal Constitutional Court (First Senate), 7 BVerfGE 198, 208 (W. Ger.).

127. GG, *supra* note 11, art. 5 § 1.

128. For a general discussion of constitutional interpretation in the area of speech, see Glaeser, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, 97 ARCHIV DES OEFFENTLICHEN RECHTS 276-98 (1972).

dent.[129] While statements that might otherwise be regarded as malicious gossip are privileged if they are an appropriate means of protecting valid public or private interests, the person uttering such statements is nevertheless obligated by law to consider the legitimate interests of the person he "maligns," as well as the circumstances in which he makes such utterances.[130]

The remedies available to victims of defamatory statements and the sanctions applied to the maker of those statements illustrate the interrelationship between speech and the German view of the "basic order." For example, defamatory remarks about politicians are punished with greater severity than slanderous statements about private persons. "Defamatory" and "calumnious" remarks about persons "active in the political life of the nation" are punishable by up to five years of imprisonment if the statements are "directed at the public status of that person and tend greatly to hamper the exercise of his public functions."[131] As to remedies, the German Civil Code (*Buergerliches Gesetzbuch*) authorizes compensatory damages for the victims of slander.[132] Among the other civil remedies available to such victims is the publication by the defendant of the judicial ruling against him. A related provision of the civil code, which figures prominently in the *Luth* case[133] discussed below, forbids behavior that offends "good morals" or the "moral conscience of the German people."[134]

Although they appear facially consistent with the fundamental value choices of the Basic Law, these statutes actually pose potential threats to freedom of speech and press. Because the general lack of any judicial challenge to these statutes in concrete judicial review proceedings before the Federal Constitutional Court, constitutional problems involving claims to freedom of speech and press are more likely to arise out of constitutional complaints brought against judicial rulings pursuant to these and other general laws.[135] The three constitutional decisions involving such complaints which best illustrate the court's

129. *See* Federal Criminal Code, Law of Jan. 2, 1975, STGB arts. 166, 131, 902, 90b, 187a, 189, 90.

130. *Id.* art. 193.

131. *Id.* art. 187. The law of slander distinguishes between "insult" (*Beleidigung*), "defamation" (*ueble Nachrede*), and "calumny" (*Verleumdung*). *See id.* art. 185-187.

132. BÜRGERLICHES GESETZBUCH [BGB] art. 823-826 (W. Ger.).

133. Judgment of Jan. 5, 1958, [1958] Federal Constitutional Court (First Senate), 7 BVerfGE 198 (W. Ger.).

134. BURGERLICHES GESETZBUCH [BGB] art. 826 (W. Ger.).

135. For an explanation of the difference between the various forms of constitutional review, see text accompanying notes 11-27 *supra*.

approach to conflicts between speech and reputation are *Luth*,[136] *Mephisto*,[137] and *Lebach*.[138]

In *Luth*, Hamburg's director of public relations (Luth) called upon film distributors and theater owners to boycott "Immortal Lover," a movie produced by Veit Harlan, a film director who had produced notoriously anti-semitic movies under the Nazi regime. The company that produced the film procured an injunction against the proposed boycott, a ruling upheld by Hamburg's High Court of Appeals. The lower court ruled that Luth's call for a boycott, with its harsh attack on Harlan for his conduct during the Nazi era, was behavior contrary to "good morals" within the meaning of article 826 of the Civil Code.[139] Luth filed a constitutional complaint with the Federal Constitutional Court claiming that the injunction violated his right to free speech as guaranteed by article 5.

Luth, which overturned the injunction, represents a seminal case in free speech analysis. The case did not involve a direct encroachment by government on a fundamental right; rather, it was a civil dispute between private parties decided under the "good morals" clause of article 826. The Federal Constitutional Court had no problem with the validity of article 826, which it regarded as a valid "general law." The court's approach to the case was rather "to judge the 'radiating effect' of the basic rights on the civil law" and to determine whether the ordinary judge, in construing the civil law, had attached proper weight to the values of the Basic Law.[140] With regard to the interrelationship between the basic rights and the general laws the court stated:

> [That relationship] must . . . not be considered as a unilateral restriction on the effectiveness of the basic right by "general laws"; there rather exists reciprocal action in the sense that "general laws" set bounds to the basic right; but, in turn, those laws must be interpreted in light of the value-establishing significance of this basic right in a free democratic state, and so any limiting effect on the basic right must itself be restricted.[141]

136. Judgment of Jan. 15, 1958 [1958], Federal Constitutional Court (First Senate), 7 BVerfGE 198 (W. Ger.).

137. Judgment of Feb. 24, 1971 [1971], Federal Constitutional Court (First Senate), 30 BVerfGE 173 (W. Ger.). Several quotations from the *Luth* and *Mephisto* cases are from W. MURPHY & J. TANENHAUS, *supra* note 108, at 528-32, 538-46.

138. Judgment of June 5, 1973 [1973], Federal Constitutional Court (First Senate), 35 BVerfGE 202 (W. Ger.).

139. BÜRGERLICHES GESETZBUCH [BGB] art. 826 (W. Ger.).

140. 7 BVerfGE at 207.

141. *Id.* at 208-09.

Thus, even in the area of private relationships, the ordinary judge applying the general law is obligated to keep one eye focused on the basic rights. Once again the court reaffirmed the doctrine that the "dignity of the human personality" is at the core of the Basic Law's value system, "the most immediate expression [of which] is the basic right of free expression . . . as a constituent element of a free democratic order."[142]

The *Luth* case rested on a very careful analysis of the circumstances in which the challenged utterances were made. An interesting aspect of the case is the court's equally careful attention to the nature of Luth's utterances and to his motivation for calling for the boycott. The court noted, *inter alia*, that Luth's utterances were not motivated by economic interests or political opportunism; that he intended by his statements to influence the cultural life of the German people, an issue of extreme public importance in the light of the recent past; that as a person active in restoring German-Jewish relationships he was legitimately concerned with the impact on the public mind of Harlan's reappearance in the German film industry; that his statements were fair and substantially correct; and that Harlan, in the circumstances of this case, would not suffer irreparable injury as a filmmaker. The court's essential holding was that freedom of expression must prevail over reputational interests in this case because the speaker wanted "primarily to help form public opinion" and "to contribute to the intellectual battle of opinions on an issue substantially affecting the public."[143]

In a related case,[144] decided in 1969, the court strongly suggested that speech loses its character as "opinion" within the meaning of article 5 if it is designed to coerce public or private behavior rather than merely shape public opinion. In that case, the powerful Axel Springer newspaper house threatened to stop delivering its papers to newsdealers who sold a leftwing magazine advertising radio and television programs from East Germany. The magazine lost its case in lower courts on the ground that a judgment awarding civil damages would violate Springer's right to free speech. The Federal Constitutional Court reversed, holding that free speech does not include the spreading of one's views by means of such economic pressure.[145] Speech accompanied by such pressure, the court seemed to say, is beyond the realm of rational discourse and therefore outside the Basic Law's image of

142. *Id.* at 208.

143. *Id.* at 212.

144. Judgment of Feb. 26, 1969 [1969], Federal Constitutional Court (First Senate), 25 BVerfGE 256 (W. Ger.).

145. *Id.*

man as an autonomous person who develops freely within the social community.[146]

The second leading case on the relationship between speech and reputation involved the publication of a new edition of Klaus Mann's *Mephisto*,[147] a novel about a German actor who had attained fame and fortune during the Nazi period. Mann based his story on the life of a well-known Faustian actor, Gustaf Gruendgens, whom Hitler had befriended. The fictional character, wholly immoral and corrupt, was admittedly a pale image of the real actor who had died in 1963. In 1968, Gruendgen's adopted son secured a judicial ban on the book, the lower courts taking the view that it defamed the memory of his stepfather notwithstanding Mann's insistence that he had no particular person in mind when he wrote the book. In a 6-2 decision,[148] the First Senate upheld the ban, holding that Gruendgen's right to personal honor as guaranteed by article 2 of the Basic Law had been infringed.

The Federal Constitutional Court's analysis of this case begins with a clear recognition of the right to artistic expression which, under the terms of article 5, section 3, is not even subject to direct limitation by the general laws. Any limitation on artistic liberty, noted the court, must be found in the Basic Law itself, notably in the dignity of man clause of article 1, "which as the supreme value, governs the entire value system of the Basic Law."[149] The court observed that a conflict between the constitutional values of artistic freedom and personal dignity may arise whenever a writer, "using personal data about people in his environment," affects the "social rights [of others] to respect and esteem."[150] Thus, two rights of relatively equal value—artistic freedom and reputation—need to be balanced against one another. Such a balance requires careful judicial examination of the relevant literary product in order to determine the relationship between the "image" of the fictional figure and the "original." "If such a study," remarked the court, "reveals that the artist has given or wanted to give a 'portrait' of the 'original,' then the answer [to the conflict of rights problem] depends on the extent of artistic abstraction or the extent and importance

146. *See also* Tobacco-Atheist Case, Judgment of Nov. 8, 1960, [1960] Federal Constitutional Court (First Senate), 12 BVerfGE 1 (W. Ger.) (freedom of religion had been abused and the dignity of a prisoner invaded when a fellow prisoner sought by promises of certain material goods to convert the former prisoner from Christianity to atheism).

147. The novel was recently published in English. K. MANN, *Mephisto* (1977).

148. 30 BVerfGE 173.

149. *Id.*

150. *Id.* at 193.

of the 'falsification' of the reputation or memory of the person concerned."[151]

The court declined to apply this test itself; instead, it merely determined whether the courts below had properly weighed the conflicting rights of the parties and fully considered the value order established by the Basic Law. The court found that the courts below had determined that Gruendgen's sphere of personality had been invaded by the novel and had concluded that although the obligation to protect the personality sphere diminishes as the memory of the deceased person fades, the facts of the case warranted the protection of the human dignity clause. According to the majority of the court such action by the lower courts constituted a proper balance of the conflicting interests.

Powerful dissenting opinions argued, however, that the proper balancing had not been performed by the courts below because the judges failed to consider adequately the aesthetic values of *Mephisto* as a work of the imagination; instead, they had focused disproportionately on the social effects of *Mephisto* as biography and history. The minority was also of the view that the lower courts had overestimated the effects of the novel on the reputation of Gruendgen, in part because his name was by this time confined to the memory of a relatively small number of people whose minds the book was unlikely to change.[152]

The *Lebach* case, which bears some resemblance to *Time, Inc. v. Hill*[153] and *Cox Broadcasting Corp. v. Cohn*,[154] involved a television documentary about several vicious murders committed in 1969 by three men ideologically opposed to the existing society, whose subsequent trial the press followed in lavish detail. The "documentary" took the form of a drama reenacting the crime and delving into the psychological makeup and motivations of the criminals, who were also known to be homosexuals. One of the three criminals eligible for parole in 1973

151. *Id.* at 195.

152. *See id.* at 200-27 (Stein and Bruenneck, JJ., dissenting).

153. 385 U.S. 374 (1967). *Time* involved the publication of an article by *Life Magazine* about a play based on the widely reported experience of a family held prisoner in their home outside Philadelphia by three escaped convicts. But *Life* grossly exaggerated the family's "ordeal." The Supreme Court ruled that freedom of the press bars the application of a privacy statute to redress false reports on matters of public interest in the absence of proof that the report was published with knowledge of its falsity or in reckless disregard for the truth. *Id.* at 391-98.

154. 420 U.S. 469 (1975). In *Cox Broadcasting*, the name of a rape victim was identified in a television broadcast notwithstanding a state law barring the publication of the names of rape victims. The Supreme Court held that the first and fourteenth amendments barred civil damages for the invasion of privacy where the name of the rape victim was procured from official documents open to public inspection.

sought an injunction to prevent the showing of the teleplay, which identified him by name. He claimed that the film would hamper his rehabilitation as a responsible member of the community in violation of the personality development clause of article 2.[155] He also claimed that while the teleplay was truthful in its essential details, its exaggerations of his personal moral failings would undermine his dignity as a person. The lower courts denied the injunction on the grounds that his criminal behavior had cast him into the public forum. The Federal Constitutional Court, however, granted a preliminary injunction preventing the showing of the teleplay. The subsequent holding of oral argument by the Federal Constitutional Court and the filing of briefs by nearly every major media association in Germany underscored the importance of the case.[156]

Lebach reasserted with special force the governing principles to be applied in defamation cases. As in *Mephisto*, the Federal Constitutional Court insisted upon a proper weighing of the values of freedom of press and the right of an individual to his personality. The Court declared:

> The resolution of this conflict must proceed from the fact that both constitutional values are essential components of the free democratic order and of equal value under the Basic Law. The Basic Law's image of man and its corresponding conception of the political community require the acknowledgment of the independence of the individual personality as well as the existence of a climate of freedom which today would be unthinkable without a process of free communication.[157]

Ordinarily, the weighing process would favor freedom of press. But here, said the court, the passage of time had eroded the newsworthy character of the original crime, thus heightening the interest of the complainant in his reputation and privacy. The court took note of the complainant's desire and need for anonymity as well as society's interest in his full reintegration into the community. According to the court, the human dignity and personality clauses guarantee the right "to be let alone, . . . embracing the [further] right to one's possession of his own image and spoken words."[158] The court seemed impressed by the special impact of television on the public mind, suggesting that perhaps a printed account of the crime would have survived a test under article 5.

155. GG, *supra* note 11, art. 2, § 1.
156. *See* 35 BVerfGE 213-14.
157. *Id.* at 225.
158. *Id.* at 220.

An American scholar musing over *Lebach* will be struck not only by its contrast to *Time*,[159] and *Cox Broadcasting Co.*,[160] but also by *New York Times v. United States*.[161] *New York Times* forbade any prior restraint on publication of "state secrets" where the government had not met the burden of showing justification for the imposition of such a restraint. *Lebach* is a privacy case, whereas *New York Times* deals with internal security. Yet the *Lebach* and *New York Times* cases illustrate the different approaches of the two courts to prior restraint. In the United States, any prior restraint on speech bears a heavy presumption against its constitutional validity; in Germany, prior restraint on speech may be ordered in the light of the equally high value attached to the personality and dignity clauses of the Basic Law. Actually, the nomenclature of "prior restraint" is not used in German constitutional law.[162] But is is clear from *Lebach* that censorship can be imposed on speech that invades the "personality sphere" of the individual.

CONCLUSION

The German and American cases discussed herein are marked by a common core of doctrinal agreement. The constitutional law of both countries regards the fundamental freedoms of speech and press as liberties essential to personal development and political democracy. Both countries regard the freedom of press (including radio and television) as necessary to the formation and education of public opinion. Any form of advocacy or argument having political, literary, social, artistic, or scientific value is ardently defended by the constitutional tribunals of both countries; the protection of such expression does not depend on its popularity, utility, or quality. The freedoms of speech and press are not in any sense absolute rights, however, for they are subject to the general law of both countries. Yet a heavy burden of proof is required to impose any valid restraint on speech. In both the United States and Germany, only substantial security, privacy, or reputational interests justify legal restraints on speech or press, and all such restrictions automatically trigger careful judicial scrutiny of the circumstances involved in any given case.

159. 385 U.S. 374 (1967); *see* note 153 *supra*.

160. 420 U.S. 469 (1975); *see* note 154 *supra*.

161. 403 U.S. 713 (1971) (per curiam).

162. The Basic Law forbids only "censorship," which clearly protects all forms of political speech and the expression of other *public* opinion. *See* GG, *supra* note 11, art. 5, § 1; note 76 *supra*.

Nevertheless, notable differences appear in the doctrines and approaches of the two tribunals. For example, the critical line separating permissible from impermissible political speech is drawn by the Supreme Court between advocacy of ideas and advocacy inciting, and likely to produce, imminent lawless action; for the Federal Constitutional Court, that line is dictated not by the probability of imminent lawless action, but by whether the content of speech presents a potentially dangerous threat to the security of the "free democratie basic order." The Supreme Court demands a legal posture of neutrality toward *all* political ideas uttered in the public forum; the Federal Constitutional Court envisions a polity capable of legally defending those fundamental political values and principles of the Basic Law. The Supreme Court has protected false and erroneous statements about public officials and public figures from application of civil and criminal libel laws, provided such statements are not made with actual malicious intent. The Federal Constitutional Court, however, requires a higher standard of behavior and conduct on the part of both the press and private citizens, insisting upon a responsible press and a disciplined citizenry. In the Supreme Court's view, erroneous statements, no less than abusive, irresponsible, or even useless speech, must be allowed if the freedoms of expression are to have the "breathing space" they need to survive. The Federal Constitutional Court applies a higher standard of responsibility in determining whether "opinion" is constitutionally protected speech; for example, "personal honor" and "human dignity" are constitutional values found in the Basic Law itself and against which free speech claims must be weighed. Finally, the Supreme Court has held that the individual's interest in privacy fades when the information involved already appears on the public record;[163] the Federal Constitutional Court, however, will not extend constitutional protection to the dissemination of such information if it is no longer relevant to public affairs and impinges on the right of an individual to his personality and dignity.[164]

Numerous historical reasons could be cited to explain these differences in constitutional doctrine. For example, the German notion of "militant democracy" clearly emerges out of the memory of the Weimar experience with constitutional government and Nazi totalitarianism. The institutional, social, and ideological "determinants" of

163. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

164. *Lebach*, 35 BVerfGE 202. It might be noted, however, that Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and Time, Inc. v. Firestone, 424 U.S. 448 (1976), give signs that the Supreme Court may be turning in the direction of *Lebach*.

American and German constitutional doctrine could also be explored, but that would take us too far afield. Rather, this Article concludes, even at the risk of exaggerating the different outlooks of the two tribunals, by underscoring their competing visions of the role of free speech in a constitutional democracy.

In the free speech jurisprudence of Germany and the United States there is a considerable emphasis upon the autonomous individual and his freedom *from* authority. Yet the decisions of the Federal Constitutional Court reveal countervailing lines of thought that posit a more amiable relationship between freedom and authority than found in American speech cases. A residue of the classical German theory of liberty,[165] this view holds that as the corporate representative of the community and the ultimate protector of the community's basic values, the state should provide moral leadership in the use of freedom. In the German view, human dignity can exist only when persons are allowed to develop themselves as rational beings in community with others. The polity is the highest expression of community because, in the political arena, persons are conscious of their citizenship, the grand purpose of which is to act in concert with others for common ends. This essentially Aristotelian idea of polity views politics as a means of realizing in public life the highest values of the community. Thus, the political system as seen through the eyes of the Federal Constitutional Court is marked as indelibly by fraternity as by liberty and equality.[166]

By contrast, the American judicial conception of the polity places a heavier emphasis upon the individual. Politics is a means for the achievement of private ends, a means of securing personal and group goals. The jurisprudence of the Supreme Court does not bristle with the language of "community," "public good," and "moral order"; the pluralism it envisions in democratic society is less integral than that envisioned by the Federal Constitutional Court. In the American view, the community has no valid claim upon the individual person, particularly in the domain of mind and morals.[167] In the German view, the community does have some claim upon the mind and morals of the

165. *See* L. KRIEGER, THE GERMAN IDEA OF FREEDOM 86-138 (1957).

166. These views were strongly advanced by Federal Constitutional Court Justice Wilhelm Geiger in G. SHUSTER, FREEDOM AND AUTHORITY IN THE WEST 55-68 (1967). *See also* Kommers, *Authority and Freedom: Some Comparative Observations* in MENSCHENWUERDE UND FREIHEITLICHE RECHTSORDNUNG 357-76 (G. Leibholz ed. 1974); Benda, *New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany*, 11 J. MAR. J. PRAC. & PROC. 1, 5-9 (1977).

167. For a recent criticism of this American view, see J. TUSSMAN, GOVERNMENT AND THE MIND (1977).

individual to the extent that each person is constitutionally obligated to support the norms of the Basic Law and abide by the moral code of the community. While that individual possesses an inner core of dignity that the community (or state) may not touch, he is not the morally autonomous person of American constitutional law.

These competing images of the polity affect each tribunal's notion of the role of speech. The American doctrine of free speech implies an immense faith in the ability of the individual to discern the truth where he sees it. Authority may not legally guide men toward truth; rather the marketplace of ideas determines it. In American theory, "truths" may not be incorporated into public law in such a way as to forbid any person or group from attacking them verbally or changing them by political means. In Germany, however, speech is juridically valued for its capacity to create community. The German view holds that free speech requires the observance of certain traditions of civility; it requires persons participating in the forum of public discussion to speak the truth and to do so with respect for other persons' personal honor and dignity. In short, the purpose of political discourse in German theory is to create a tradition of civility and a polity of responsible citizens.