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Edward J. Eberle

Roger Williams University School of Law

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The German Idea of Freedom
Edward J. Eberle*

The modern German constitution (known as the Grundgesetz or Basic Law, GG)¹ posits a social order that has striking similarities with the constitution familiar to many in the western world: the United States Constitution. Both charters overlap in structural conception in that each contains a catalogue of basic, fundamental rights; a federalist structure of government divided between federal and state authority and a federal government separated into three coordinate branches;² a bicameral legislature representing the people in forms of republican democracy;³

*Distinguished Research Professor of Law, Roger Williams University School of Law.
Copyright by Edward J. Eberle, 2007. All rights reserved. I would like to thank Matt Costa and Ashley Taylor for their valuable research assistance. The title of this paper appears also as the title of Leonard Krieger's book, *The German Idea of Freedom* (1957), which provides helpful historical background on the origins of many of the ideas developed in this article. All translations are mine unless otherwise noted.

¹The constitution is known as the Basic Law because it was adopted, in 1949, when Germany was yet divided. Upon reunification in 1990, Germans kept the term Basic Law, instead of Constitution, to symbolize the success of the Basic Law in West Germany.

²The German federal government is divided between three coordinate branches of the legislature, executive and judiciary. Provision for independent judicial review by the Constitutional Court is explicitly laid out in the Basic Law, art. 93, 97. The German states or *Laender* also maintain their autonomy in affairs central to them, share concurrent legislative jurisdiction with the federal legislature, GG art. 72, 74 and share power in executing federal laws

and an independent judiciary with the power of judicial review that includes the ability to declare the concrete meaning of the higher law, notwithstanding democratic determinations to the contrary. On this last point, Germany and the United States are two of the leading experiments in having the judiciary determine ultimate fundamental law. These common traits place Germany and the United States firmly within western constitutional culture.

But more interesting than these similarities are the differences in the constitutional visions of the two countries. The American constitutional vision is centered around human liberty, which is secured through a focus on governmental structure grounded in separation of powers aimed both horizontally (dividing the federal government into three branches) and vertically (dividing government between federal and state governments) designed to limit authority and thereby empower people to live their lives largely as they determine, free from governmental restraint. Structural limitation of official power is complemented by guarantees of fundamental rights, empowering people to act as they like within the constructs of those rights and, thereby, check authority in a personal way. This is what I refer to as a “constitution of

and regulations.

³The German legislature consists of two houses, the *Bundestag*, which is the federal parliament elected by the people, and the *Bundesrat*, which consists of members appointed by the *Laender*. The German form of bicameralism is thus somewhat akin to the United States before the adoption of the seventeenth amendment, in 1913, which provided for the election of Senators. Prior to the seventeenth amendment, the States determined who would represent them in the Senate.

liberty.”⁴ Pursuant to this constitutional scheme, liberty means essentially the freedom to pursue one’s own vision in life, as one chooses. The American Constitution posits no particular normative order that government must realize or people must live within. We may thus refer to the American Constitution as being value-neutral. Accordingly, people are basically free to pursue their own interests. And many Americans have so done, interpreting this idea of freedom to mean free reign over their personal matters and free pursuit of their economic interests in a free market secured by law that induces stable party expectations. At its core, the American idea aims for freedom from government.

The German idea of freedom is different than the American, and it is this difference that is the subject of this article. In our global, often interdependent, world it is worthwhile to consider alternative ways of organizing a constitutional order in order to see different perspectives, compare it against native ways, and assess, which is better or more satisfying, in what ways, for better or worse, all main missions of comparative law. The act of comparing the law of one country to that of another leads to insight and, sometimes, illumination.

So, what is it about the German idea of freedom that is different than the American? And does the difference lead to more freedom, more fulfillment or more social harmony? First, and most fundamentally, the German constitution is anchored in the architectonic value of human dignity,⁵ meaning, at least, that each person is valuable per se as an end in himself, which

⁴Edward J. Eberle, *Dignity and Liberty: Constitutional Visions of Germany and the United States* (2002)[hereinafter “Dignity and Liberty”].

⁵Grundgesetz (GG), translated by Christian Tomuschat and David Currie and published

government and fellow citizens must give due respect to. The influence of the Kantian maxim—“Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”⁶—is clear (although it would be an overstatement to say the GG is simply Kantian), and this gives rise to a German “constitution of dignity,” as compared to the American constitution of liberty.⁷ One obvious difference is that the German constitution is value-ordered around the norm of dignity, whereas the American charter is value-neutral based on an idea of liberty rooted in personal choice.

Because dignity is the core animating principle of the constitution, it radiates throughout the constitutional order. The idea of dignity radiates prominently in the multitude of basic rights set forth in articles 2 to 19 of the GG. Of these, a notable difference from the American conception of rights is the article 2(1) guarantee “to the free development of . . . personality,” another Kantian inspiration, which parallels American autonomy rights over matters of basic human existence, such as abortion, human sexuality and family choice, but also operates as a reservoir of human freedom, a fail-safe, addressing elements of human freedom not captured by more specific basic rights. Personality rights center on development of human capacity and protection of a person’s interior life, made concrete through protections like control over information personal to an individual, such as inquiry into habits and activities and rightful

by the Press and Information Office of the Federal Republic of Germany, art.1(1) “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.”

⁶Immanuel Kant, *Foundations of the Metaphysics of Morals* 47 (trans. Lewis White Beck 1959) [hereinafter “Foundations”].

⁷Eberle, *Dignity and Liberty*, supra note , at .

portrayal, rightful quotation and rightful honor of a person. A central focus of German rights is preservation of the integrity and security of a person.

A third difference is that rights are coupled with duties, an obligation common in European constitutional orders but foreign to the American constitutional scheme.⁸ The idea of coupling rights with duties reflects, again, a value-ordered constitution, as compared to a value-neutral one.

The dignitarian value-ordering of the German constitution is also evident in the close interaction between public and private law. Since human dignity constitutes the architectonic principle of the German legal system, it radiates into and affects private law and, indeed, the whole legal system. Under this doctrine known as Third Party Effect (*Drittwirkung*), the norms of the GG enter into and influence the norms of private law, as the norms of private law can do the same with respect to constitutional law. The legal system as a whole operates in tandem.

There are also two important German ideas relating to government structure that are unique and worth examining. The first of these is the idea of a *Rechtstaat*, which is often taken to mean (and does mean) a state committed to the rule of law. But the idea of the *Rechtstaat* is more complicated than that; it means, among other things, a state committed to reason, rationality, neutrality, equality and fair notice of impending legal measures. We might think of the *Rechtstaat* as committing the state to an exterior, extrinsic system of reason, which constrains

⁸For example, the GG article 6(2) guarantee of child rearing states: “The care and upbringing of children shall be a natural right of and a duty primarily incumbent on the parents.” And while GG article 14 guarantees property and the rights of inheritance, “Property imposes duties. Its use should also serve the public weal.” GG art. 14(2).

and directs authority along a preestablished path of ideas.

The second structural idea is that of the Social State (*Sozialstaat*), which obligates the state to provide for the security of its citizens, including a minimal level of existence. The *Sozialstaat* is the anchoring principle of the social welfare principle, but also means much more. At its core, it means that the state must protect the general welfare of its citizens and the society.

So, by way of summary, we can identify these core traits of the German idea of freedom: human dignity, development of personality, rights coupled with duties, Third Party Effect, *Rechtstaat* and *Sozialstaat*. The article will proceed as follows: Part I examines the substance of these concepts in contemporary law and excavates their historical and cultural roots. We will see the different shades of meaning the concepts have taken on, historically through different milieus and today. Part II will then assemble the constituent parts of, and assess, the vision put forth by the German idea of freedom. Part III concludes by contrasting the German and American ideas of freedom.

I. The German Idea of Freedom: History and Components

There is a long history of constitutionalism in Germany, but it is of a variety different than the Anglo-American version. Starting at least with the German *Bund*, in 1815, Germans sought a way to enshrine certain fundamentals of a social order, limiting absolute authority and, in turn, empowering other elements of society, such as the aristocracy, the church and the burger class with authority to help govern society.⁹ The focus of German activity in the nineteenth

⁹Constitutional review appeared in a beginning form during the Holy Roman Empire with the establishment, in 1495, of the *Reichskammergericht*. The *Reichskammergericht* was created at the instigation of Maximilian I as a way to defuse tension between warring princes and

century was mainly on governmental structure and the different estates of society, reflecting the transition from European feudalism to premodern and, later, modern society. Decisive in this

achieve some peace and unity among the different principalities. In the seventeenth century, the Imperial Court, and other courts, enforced the rights of the Estates against princes. In modern form, constitutionalism emerged in the nineteenth century, again focusing on resolving governmental structural disputes. The German *Bund* of 1815 (a confederation of north German states) was an early example of providing means to resolve and define the respective rights of the sovereign states. This conception of constitutionalism continued through the Imperial Constitution of 1871, and the Weimar Constitution of 1919. Structural constitutional issues, of course, are also a main focus of the GG today. Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 5 (1989). *See also* David P. Currie, *The Constitution of the Federal Republic of Germany* 1-8 (1994). A notable accomplishment of the 1871 Imperial Constitution was the division of authority among the monarch, parliament and state authorities in order to prevent concentration of power in any one body. *Id.* at 4-5.

Professor Ewald observes that many people tend to view Germany of the eighteenth and nineteenth century as conservative and reactionary. Certainly there is some truth to this. However, we should recognize Germany's similarity to England of this time: both had a constitutional monarchy and a parliament where the Estates of the Realm were represented. Moreover, Germany had a "*Rechtstaat* with a flourishing diversity of political parties; indeed, in the closing years of the century the German Social Democrats set the European standard for democratic political reform." William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. Penn L. Rev. 1889, 1995, 2051-52 (1995).

shift was, of course, the 1789 French Revolution, which inspired calls to national liberty in Germany, and throughout Europe.

Kant, as others, was inspired by the French turn of events, and by Adam Smith, and this is decisive for the history of German constitutionalism, as Kant had a seminal influence in the German idea of freedom, as we have already observed and will continue so to do.¹⁰ Other thinkers had prominent roles in formulating the German idea of freedom as well, including Friedrich Karl von Savigny, Georg Friedrich Hegel, and Otto von Gierke. Yet, no figure is as important as Kant. Kant's influence is decisive in many of the concepts we have previously mentioned, including human dignity, human personality, rights coupled with duties and the *Rechtstaat*, to name a few. We will have more to say about Kant later. But for now we need to sketch the outlines of the history of German constitutionalism in order to appreciate better the roots of what has become the German idea of freedom.

Kant believed a constitutional monarchy was the best form of government, and this was a

¹⁰The ideas of Adam Smith were first introduced into Germany at the University of Hannover, leading to an “advocacy of economic liberty.” At the University of Koenigsberg, Kant with his friend Professor Christian Jacob Kraus “reflected the connection between an individualistic ethic with liberal political implications and an enthusiastic rendering of Adam Smith.” Koenigsberg became a leading center of liberalism, perhaps on account of its distance from the German heartland. Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition* 25-26 (1957). *Id.* at 87, 104, 111 (influence of Rousseau and French Revolution on Kant).

common view of the late eighteenth and nineteenth centuries.¹¹ A monarch was above the state and politics, beholden to no one, and thus was neutral. The excesses and terror of the French Revolution led to skepticism, if not fear, of the vagaries of democracy.¹² Likewise, there was fear of the excesses of economic capitalism brought about by early nineteenth century English *laissez faire*; Germans feared its appeal to base human motives of greed and arrogance and the inequality that would ensue.¹³ Germans sought a more secure and stable basis on which to erect society. In the period before the 1848 revolution (inspired by the French Revolution of 1848), most German thinkers desired a stable social structure, accepting the monarchy and aristocracy as the legacy of German tradition. Instead, their focus on freedom lie in the human spirit and inner dimension of personality, such as development of human capacity, human autonomy and human will. Protection of freedom was sought more through rule of law than form of government.

¹¹*Id.* at 121-23.

¹²Professor Ewald observes that Germans of this period distrusted democracy out of fear of rule by the tyranny of the majority, which would trammel individual liberty as much as absolutism. Many leading German thinkers, like Kant, viewed both as forms of despotism. Of course, these thoughts were shared by others, like Adam Smith and James Madison. Thus, the trick was how to preserve a liberalism of the person with limitation of state authority and a stable political field. Ewald, *supra* note, at 2053. This would lead to the German focus on protection of the individual and his faculties.

¹³James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* 234 (1990)[hereinafter “Roman Legacy”].

The constitutions of the southern states--Baden, Württemberg and Bavaria--echoed the tenor of the more liberal French Constitution of 1789, as these southern states posited a more western orientation than was common in German territory. The real movement for democracy took place in 1848 with the German revolution. Democrats met in Frankfurt, at St Paul's Church, and drafted a democratic constitution. But the democratic movement was squelched, and one of its leading proponents, Robert Blum, executed by Prussian authorities.¹⁴ Nevertheless, certain of the ideas of the 1849 St Paul's Church Constitution survive today, having been picked up by the 1919 Weimar Constitution and now the 1949 GG. German territory was formally united in 1871 under Bismarck, a late unification for Europe. The 1871 Constitution typically focused on government structure and consolidated the forces of society; it was not a democratic constitution.¹⁵ The imperial structure of Germany survived until the country's defeat in World War I. The aftermath of the war led to Germany's first democratic constitution governing the whole land, the 1919 Constitution of Weimar, which is famed for its careful thought and elegance. The Weimar Constitution ultimately failed, as we know, because of its complicated formula for forming a government, which Hitler was able to exploit amidst the despair of the Great Depression in the 1930s. It took the catastrophe of World War II to obliterate Hitler and the legacy of tradition, aristocracy and conservative authority, and provide Germans with an opportunity to refound society, as Hegel had predicted.¹⁶

¹⁴www.ohiou.edu/~Chastain/ac/blum.htm; http://en.wikipedia.org/wiki/Robert_Blum
(Visited Nov. 15, 2006).

¹⁵David P. Currie, *supra* note , at 4-5.

¹⁶Leonard Krieger, *supra* note , at 138. Of course, it would take the Hitler time to bust

The GG heralded a new vision for Germany, combining the historical focus on the inner development of man with the western idea of democracy. It is this unique combination of focus on man's moral autonomy and development with democratic self-determination that comprises the German idea of freedom that we must now investigate. To do this, we must examine carefully the central conceptions that comprise the idea—dignity, personality, rights and duties, Third Party Effect, *Rechtstaat* and *Sozialstaat*. We will examine their contemporaneous meaning in the GG, and then evaluate their origins and historical evolution to see how they have influenced modern versions of the concepts.

A. Dignity

Dignity has first place in the GG, as the refounding principle of post-World War II Germany, in article 1(1), which states the guiding principle as “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.” The influence of Kant here is obvious, as the Germans sought to anchor the social order to the universal and timeless ideal of human beings possessing intrinsic worth and, therefore, to be valued for who they are, as ends in themselves, and not for ulterior purposes.¹⁷ We might say the anchoring of

apart the German tradition of conservatism and authority and, in the wake of the Hitler catastrophe, a blank slate that provided an opportunity to refound German society.

¹⁷ Certainly constitutional law scholars of the 1950s, in the early years of the GG, were heavily influenced by Kant. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 Yale L.J. 1279, 1322, 1339 (2000)[hereinafter “Yale 2000”]. Perhaps this was out of a desire to put the Hitler past behind.

Perhaps we might date the phrase human dignity to the Italian Renaissance, specifically

the GG to dignity is simply its mooring in Kant’s ethical scheme—“Man . . . is not a thing, and thus not something to be used merely as a means; he must always be regarded in all his actions as an end in himself.”¹⁸ So viewed, Kantian dignitarian ethics forms a guiding principle of the GG, an ideal around which the whole legal order has been reconceived. Kant, in fact, would appear to be the dominant influence on German law, both public and private. And, in view of his influence, Kantian interpretation can be as varied as a chameleon. But it would be a mistake to view the GG as being only a Kantian influenced charter. Christian natural law, secular theories of autonomy and social democratic thought were also important influences, and these forces of interpretation, and others, are always in flux.¹⁹

1486, as Professor Ewald asserts. Ewald, *supra* note , at 1919. Restoring the “honor and dignity of Rome” was certainly a driving force of the German private law movement of the nineteenth century, influenced also by Kant. James Q. Whitman, *Roman Legacy*, *supra* note , at 215. Today, of course, the idea of human dignity is a commonplace of human rights documents. *See, e.g.*, United Nations Universal Declaration of Human Rights of 1948, which opens: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.”

¹⁸Kant, *Foundations*, *supra* note , at 47.

¹⁹Eberle, *Dignity and Liberty*, *supra* note , at 41-53; Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 *Utah L. Rev.* 963, 972 [hereinafter “Utah”]. Portions of this part appear in or are based upon Eberle, *Dignity and Liberty* and Eberle, *Utah*. *See also* Donald P. Kommers, *supra* note , at 36-37; Bodo Pieroth & Bernhard Schlink, *Grundrechte Staatsrecht II* 91-91 (10th ed. 1994). Dignity, of course, is an

We get some sense of the German commitment to dignity in a sampling of the work of the *Bundesverfassungsgericht* (B VfG or Constitutional Court). Because dignity is an abstract concept, it must take on concrete meaning through interpretation, as provided by the B VfG. A representative case is the *Life Imprisonment Case*, where the B VfG elaborated upon the centrality of human dignity:

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

.....

The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.²⁰

In this sampling of the B VfG’s work, we can discern the influence of both Kant (“each person must always be an end in himself”) and Christian natural law (“ the conception of man as a spiritual-moral being”).

extremely vague concept, and must lie within some philosophic tradition. *Id.* at 92; Whitman, Yale 2000, *supra* note , at 1284 (more skeptical of view that Kant primary influence on German law).

²⁰*Life Imprisonment Case*, 45 BVerfGE 187, 227-28 (1977)(translations by David Currie The Constitution of the Federal Republic of Germany 314 (1994); Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 312 (1989). *See also* Grundgesetz Kommentar 1-21 (Theodor Maunz et al. eds., 1993)[hereinafter “Maunz Kommentar] (man viewed as integrated whole: life-soul-body).

A Kantian influence is likewise evident in the concept of personhood set forth in the GG, investing a person with rationality and self-determination, but also with duties and moral bounds.²¹ These strands converge to form an integrated composite of a whole person. People are spiritual-moral beings who act freely, but their actions are bound by a sense of moral duty. Actions are to be guided by a sense of social solidarity, human and social need and personal responsibility.²²

There is a strong link in German law between the concept of personhood and the social community. The seminal case on artistic freedom, *Mephisto*, captured this thought well. The human person is “an autonomous being developing freely within the social community.”²³ A person is not to be “an isolated and self-regarding individual, ” but related to and bound by the community.”²⁴ The *Investment Aid Case* first gave content to this concept of the human as a community-bound person:

The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person’s dependence on and

²¹Maunz Kommentar, supra note, at 1-24-25.

²²Eberle, *Utah*, supra note , at 973; William Ewald, *Comparative Jurisprudence I: What Was It Like to Try a Rat?*, 143 U. Pa. L. Rev. 1889, 2000-03, 2059, 2063-64 (1995); Kommers, supra note , at 313.

²³*Mephisto*, 30 BVerfGE 173, 193 (1971), translated in Kommers, supra note , at 428 Book1.

²⁴*Life Imprisonment Case*, 45 BVerfGE at 227, translated in Kommers, supra note , at 316.

commitment to the community, without infringing upon a person's individual value.²⁵

Thus, the constitutional polity envisioned by the GG is one where a person's individuality and dignity are to be guaranteed and nourished, but with a sense of social solidarity and responsibility. Instead of a collection of atomistic individuals, people are to be connected to one another. Individual choice is bounded by community, civility norms and a sense of responsibility. In short, we can observe that the root of the German social vision lies in a moral social construct that both empowers and guides individuals.

The *Life Imprisonment Case* gives voice to these ideas:

This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather [that] of a person related to and bound by the community. In the light of this community-boundedness it cannot be "in principle unlimited." The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected. This means that [the state] must regard every individual within society with equal worth.²⁶

In refounding society on rational idealism, particularly the moral theory of Kant, it is obvious Germans sought to anchor the legal order to an overarching moral ideal that would obligate man and authority to act in accord with an ethical frame that included dignity, autonomy, responsibility, and community boundedness, and this ethical frame would help cabin

²⁵*Investment Aid Case*, 4 BVerfGE 7, 15-16 (1954) translated in Kommers, supra note , at 313.

²⁶*Life Imprisonment Case*, 45 BVerfGE at 227-28, translated in Kommers, supra note , at 316. Book 1. For elaboration, see Maunz *Kommentar* 4, 6-8, 11-12.

the proclivities of human nature. This was, of course, especially critical in the time just following the horrors of the Hitler era. It made sense to heed the famous advice of James Madison: “A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”²⁷ The Germans devised a moral frame as an auxiliary precaution.

We can also observe the presence of another influence of Kant and the German classical philosophic tradition: erection of an a priori system of reason beyond and outside experience and human nature designed to guide society according to ethical rules.²⁸ This tendency toward reason—rational, systematic, careful, comprehensive conception—is evident throughout the GG and comprises another trait of German legal theory and our topic, the German idea of freedom.²⁹

²⁷Federalist No. 51.

²⁸Kant, of course, was critical to German legal science, starting especially in the nineteenth century. The idea (known as *Begriffsjurisprudenz* or positivism) was to build a system of law on “self-contained, rational, deductive system of rules and norms . . . a science of law marked by its own internal standards of validity.” Donald P. Kommers, *supra* note, at 46. For careful explication of Kant’s influence on German law in this regard, see Ewald, *supra* note, at 1920-21, 1931, 1935, 1999, 2039, 2098. Maunz Kommentar, *supra* note, at 2-7 (*Verfassungsnorm* or core constitutional principles). For explanation of German legal science, see John H. Merryman, David S. Clark & John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* 976-503 (1994, reprinted 2000).

²⁹The tradition of thinking in comprehensive and systematic ways goes back long before Kant, including important figures like Philip Melancon, who worked with Martin Luther to

A good example of the German practice of systematization is the GG's catalogue of basic rights, which are conceived as concrete manifestations of human dignity. Each of the rights sets forth concrete realms of freedom so that each person may pursue and realize their vision, as self-legislating ends in themselves, to borrow another Kantianism. The follow up to GG article 1(1) makes this clear: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."³⁰ The catalogue of

refound German law along Roman law roots, Christian Wolf, and Samuel Pufendorf's system of natural law, which included the idea of morality as a bound on the state, although he set down no practical enforcement mechanism therefor. Leonard Krieger, *The German Idea of Freedom* 51-56 (1957). And, of course, inspired by Kant, Savigny's historical Pandektist (*Pandectae* means Justinian's Digest) reconception of Roman law in the 19th century was another notable example of legal system-building on abstractly conceived principles. Working within the Kantian rubric of moral freedom, Savigny's inspired private law project set out the basis of a German idea of freedom based upon human freedom, human autonomy, human will and human personality. Rights delineated spheres of freedom in which people could exercise free will, known as the theory of subjective rights. This architecture of private law became, in essence, a private constitution, freeing individuals from state control over private law matters such as contract, tort or property. The private law system building of the 19th century became, of course, the basis for the BGB, the German civil code, adopted in 1896 and coming into effect with the new century, in 1900. The BGB itself is a complete and elegant system of law, typical again of the German tendency to abstract and complete reasoning.

³⁰GG art. 1(2).

rights is systematically ordered, making up a central aspect of the objectively determined set of values that govern German society. In this respect, dignity and basic rights have a mutually nourishing effect on one another.³¹

Basic rights vest further concrete content into the abstract conception of dignity. The article 3(3) guarantee of equality, for example, entitles each person to respect and recognition of “equal worth.” The article 2(2) respect of physical integrity entitles people to respect and control over their selves and bodies. For example, in the *Spinal Tap Case*,³² the BVfG invalidated a court-ordered sampling of a defendant’s spinal column to test his involvement in a crime on the ground it violated his physical integrity.³³ Article 2 (2) further prohibits torture and corporal punishment and forbids punishment without fault in levying disproportionate penalties, norms the United States would have been well advised to follow in the war on terrorism. Dignity means also respect of intellectual and spiritual identity and integrity, points we will take up later in our discussion of personality rights. And dignity means guarantee of individual and social existence, which is tangibly manifested in article 2(2)’s right to life guarantee and in the *Sozialstaat* principle, a matter we will take up later. In short, human dignity, alone or in conjunction with the more specific basic rights, is a rich source of constitutional jurisprudence that provides form and substance to this driving force of German constitutionalism.

Why the Germans are committed to a constitution of dignity is an important question that is most likely due to the desire to refound German society on a moral basis following the Hitler

³¹Eberle, Utah, supra note , at 971-72.

³²16 BVerfGE 194 (1963).

³³Eberle, Utah, supra note , at 977.

horror, but one also with deep roots in German intellectual history. Looking at the issue from a different perspective, the horror of the Hitler time inspired the Germans to look deep into their past and identify and glean what was good and humane. That is the topic we will now explore, examining the historical infrastructure of the GG.

We have already spoken to the architectonic concept of human dignity around which the GG is based, and this seminal concept is attributable, in the main, to Kant's ethical theory, as developed notably in his *Foundations of the Metaphysics of Morals* (1785) and *The Metaphysics of Morals* (1797). The essence of Kant's ethical theory is that man is an autonomous moral agent who is to act in accordance with the Categorical Imperative: "Act only according to that maxim by which you can at the same time will that it should become a universal law."³⁴ "[E]very rational being must act as if he, by his maxims, were at all times a legislative member in the

³⁴Kant, *Foundations*, supra note , at 39. Stated a different way,

Always act according to that maxim whose universality as a law you can at the same time will. This is the only condition under which a will can never come into conflict with itself, and such an imperative is categorical. Because the validity of the will, as a universal law for possible actions, has an analogy with the universal connection of the existence of things under universal laws, which is the formal element of nature in general, the categorical imperative can also be expressed as follows: Act according to maxims which can at the same time have themselves as universal laws of nature as their objects. Such, then, is the formula of an absolutely good will.

Id. at 39-40.

universal realm of ends.”³⁵ At the base of this system of ethics is human autonomy: man is his own independent agent, and is to exercise his will, idealistically, in accord with moral maxims so as to realize moral freedom.³⁶ From these core ethical conceptions of human dignity endowing man with moral autonomy, we can deduce these Kantian cognates: human will, equality and respect as intrinsic worth. These conceptions radiate through the GG and the German Civil Code (the *Bürgerliches Gesetzbuch* or BGB).

Kant’s influence extended well beyond philosophy and ethics, and had a decisive influence on law. Kant himself viewed law as the unifying basis for his theory of ethics.³⁷ His

³⁵*Id.* at 57.

³⁶“We showed only through the development of the universally conceived concept of morals that autonomy of the will is unavoidably connected with it, or rather that it is its foundation.” *Id.* at 64. “The Kantian moral philosophy takes it to be a demand of reason that ethics—true ethics— be universally applicable. The moral law must be valid . . . for all rational creatures, everywhere, at all times.” Ewald, *supra* note , at 1998.

³⁷ Kant, *Foundations*, *supra* note , at 44. “Act externally in such a manner that the free exercise of your will can exist together with the freedom of everyone else according to a general law.” Ewald, *supra* note , at 2002 (quoting Kant). For Ewald, this statement is the “supreme principle of law.” *Id.* The Categorical Imperative is both legal (as applied to external actions) and ethical (as applied to internal motives for behavior). *Id.* Law is really applied morality. *Id.* at 2144.

“These fundamental principles originate entirely a priori and thereby obtain their commanding authority; they can expect nothing from the inclination of men but everything from

influence is most obvious, historically, in the nineteenth century Pandectist Roman law movement, led by Savigny, who inspired by Kant, erected an abstract, a priori set of principles based on human autonomy, human will and moral freedom as a basis to reconceive German private law.³⁸

Rooting law in moral freedom was also part of Kant's design, which the drafters of the GG took up. They followed the lessons of Kant carefully: erecting a system of a priori abstract reason based on moral premises.³⁹ Setting up a system of abstractly reasoned moral principles

the supremacy of the law and due respect for it." Leonard Krieger, *supra* note , at 47, 87.

³⁸The drafting of the BGB was influenced primarily by the ideas of Kant and his star pupil, Herder, and the ideas and efforts of Savigny, Thibaut, Windscheid and Gierke. Ewald, *supra* note, at 1897. For careful explication of this, *see id.* at 2045-55.

³⁹Kant, *Foundations*, *supra* note , at 43-44.

Here philosophy must show its purity as the absolute sustainer of its laws, and not of the herald of those which an implanted sense or who knows what tutelage nature whispers to it. Those may be better than no laws at all, but they can never afford fundamental principles, which reason alone dictates. These fundamental principles originate entirely a priori and thereby obtain their commanding authority; they can expect nothing from the inclination of men but everything from the supremacy of the law and due respect for it. Otherwise, they condemn man to self-contempt and inner abhorrence.

Thus everything empirical is not only wholly unworthy to be an ingredient in the principle of morality but is even highly prejudicial to the purity of moral

served a number of purposes central to Kant and the modern refounding of German society. First, abstract reason existed extrinsic to the state, obligating the state to carry out the logically deduced principles of the GG, thereby limiting state authority along those lines. After the Hitler time, this was an urgent matter. Core here, of course, is the obligation, in GG article 1(1), to treat man according to his due as possessing dignity, as an end in himself, as explained above. Based on this principle, the GG sets out a state order bound by reason, an independent moral structure extrinsic to authority and man.⁴⁰

The GG contains a number of such a priori principles, in addition to human dignity, that are designed to accomplish this purpose. We can observe this in article 20, which sets forth the basic principles of the social order. Article 20 (1) commits the Federal Republic to a “democratic

practices themselves.

L. Krieger, *supra* note , at 118 (“the rational constitution makes ‘freedom its principle—makes it indeed the condition of all compulsion.’” quoting Kant). “[T]he only principles according to which a state could be constituted” rationally: “1. The freedom of each member of society as a man. 2. The equality of each member with every other as a subject. 3. The autonomy of each member of a commonwealth as a citizen.” *Id.* at 114 (quoting Kant).

Most German thinkers drew upon the sturdy philosophic structure of Kant and Hegel. It was a way to insulate reason from politics. *Id.* at 86; Modern constitutional theory is still organized around the ideas of Kant and Otto von Gierke. Ewald, *supra* note, at 2096. Kant paid careful attention to the building of a system of reason. *Id.* at 2005, 2036-37.

⁴⁰L. Krieger, *supra* note , at 95 (Kant interested in separating as independent moral realm from experience).

and social federal state.”⁴¹ Article 20(3) binds the legislature “to the constitutional order,” as the executive and the judiciary “shall be bound by law and justice.” Article 20(4) commits the Federal Republic to a “militant democracy,” empowering people “with the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.”⁴² And then there is the famous article 79 (3), which holds as permanent, beyond amendment, the core principles of the constitutional order: human dignity, human rights and the values of a democratic and social federal state committed to law and justice just mentioned in article 20.⁴³ We can thus discern the marked application of an extrinsic system of reason that binds and channels authority along an arrangement of human freedom containing clearly delineated inviolable values.⁴⁴

The focus of the constitutional order centers around man and the practical realization of his moral freedom through the various radiations of human dignity laid out in the catalogue of

⁴¹L. Krieger, *supra* note , at 118 (Kant believed in popular sovereignty, which “can only belong to the united will of the people.” quoting Kant). The ruler is simply the agent of the people. *Id.* Here we can discern the influence of Rousseau.

⁴²The principle of militant democracy (*streitbare Demokratie*) obligates the state, and citizens, to resist any threats to the basic democratic order. *Klass Case*, 30 BVerfGE 1, 19-20 (1970).

⁴³GG art. 79(3) “Amendments of this Basic Law affecting the division of the Federation into Laender, the participation of the Laender in legislation, or the basic principles laid down in Articles 1 and 20 shall be inadmissible.”

⁴⁴L. Krieger, *supra* note , at 92.

basic rights, such as equality, development of personality or control over one's mind, to name a few. Each of these rights are realms for personal legislation, to follow Kantian language, according to universal laws. "[E]very rational being must act as if he, by his maxims, were at all times a legislative member in the universal realm of ends."⁴⁵ Now, of course, Kant's principles are idealistic, as he intended. And neither Kant nor the drafters of the GG necessarily envisioned that man would always be able to act in accord with such ideal, universal maxims. Kant's vision of human nature would seem to be based on an perfect ideal—something man should strive toward, although not necessarily be able to realize. His vision is certainly in contrast to the more practical, and base, view of human nature of Thomas Hobbes⁴⁶ or the skeptical but practical vision of James Madison.⁴⁷ And this more idealistic vision would seem to be the hypothesis of

⁴⁵I. Kant, *Foundations*, supra note , at 57. Ewald, supra note , at 2001-03; L. Krieger, supra note , at 101-02 (moral will, self-legislation), 116 (politics based on morals).

⁴⁶*Leviathan, or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (1651). Of course, Hobbes wrote in reaction to the 30 years war ravaging Europe and the English Civil War. Scarred by that experience, it would be natural to be skeptical of humankind. Hugo de Groot (1583-1645, Grotius) also experienced the horrors of the 30 years war, as well as exile from the then United Provinces that would later become the Netherlands. His experience motivated him to design a framework of extrinsic, moral principles outside of the experience of any country that would act to bind all states, thus forming the basis of international law. *De Jure Belli ac Pacis* (On the Law of War and Peace).

⁴⁷ *Federalist No. 55*: "As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which

the GG, at least in its statements of an objective moral order that animates the concept of human freedom. We will now turn to further examination of this idea of moral freedom.

B. Right to Development of Personality

Grounded in and compatible with human dignity and Kantian philosophy is the German constitutional focus on the free unfolding of personality, phrased in article 2 (1) as “Everyone shall have the right to the free development of his personality” The focus on human personality is designed to empower people to achieve and realize their talents and capabilities; in short, to develop who they are as a full, rounded person.⁴⁸ Article 1 human dignity and article 2 personality rights coalesce to put man in the center of the constitutional universe.

There are a number of dimensions to modern personality rights, which is appropriate because the rights mirror the multidimensions of human personality. A brief sketch will suffice. First, personality rights come into play, potentially, whenever an action is not protected by a more specific right. The BVfG captured the sense of this catch-all function of article 2(1) in the

Eppler Case

They complement as “undefined” freedom the special (“defined”) freedoms, like freedom of conscience or expression, equally constitutive elements of personality. Their function is, in the sense of the ultimate constitutional value, human dignity, to preserve the narrow personal life sphere and to maintain its conditions, that are not encompassed by traditional guarantees.⁴⁹

justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.”

⁴⁸For discussion of the Kantian roots of the idea of moral freedom embodied in GG article 2, see Ewald, *supra* note , at 2001, 2063, 2099.

⁴⁹*Eppler*, 54 BVerfGE 148, 153 (1980).

The catch all function of article 2 is another example of the German trait of thinking in complete, systematic terms. There must be some open clause available to capture unforeseen or new developments in society in order to allow a charter of freedom to adapt and function in modern conditions.⁵⁰

Personality rights are conceived in a complete sense to cover the different dimensions of the human person.⁵¹ Freedom of action is outward in focus, capturing those human activities that are performed externally, in the world. They include traveling abroad,⁵² engaging in the sport of falconry⁵³ or horse-riding in the woods,⁵⁴ to name some of the examples enumerated by the BVfG. Complementing the focus on outer freedom is a concentration on protection of inner freedom through erection of a personal sphere that delimits an essential core of privacy and repose within which a person can think, believe and deliberate so as to fundamentally determine who one is and how one should relate to the world, if at all. This focus on the interior sphere

⁵⁰In this respect, article 2 of the GG is similar to the open clauses of the BGB, such as, for example, article 138(1) (good morals, *guten Sitten*), and article 242, (good faith, *Treu und Glauben*) 826, which the private law courts have used as vessels to capture new developments in society and refashion law to adjust to changed circumstances.

⁵¹Maunz Kommentar, supra note , at 2-12 (captures full range of man's existence; not just spiritual and moral, but material, economic and ethical).

⁵²*Elfes*, 6 BVerfGE 32 (1957).

⁵³*Falconry Licensing Case*, 55 BVerfGE 159 (1980).

⁵⁴*Rider in Woods*, 80 BVerfGE 137 (1989).

reflects the underlying vision of man as a “spiritual-moral” being.⁵⁵

The BVfG has been quite active in delineating the circumference of this personal sphere. Confidentiality is protected against unreasonable incursion,⁵⁶ as is inquiry into personal matters that might yield a composite of one’s habit and predilections so as to gain access to the nature of one’s personality.⁵⁷ The novel concept of informational self-determination that developed jurisprudentially has resulted in personal control over such matters as how to present one self in society, including control over one’s words,⁵⁸ images, portraits,⁵⁹ reputation,⁶⁰ and, critically in the computer age, control over access to and use of personal information.⁶¹

The German focus on inner life and its protection of an interior citadel to human freedom has deep intellectual and cultural roots. First, cultural and artistic manifestation of the human spirit have traditionally been prized.⁶² The inward orientation toward freedom reflects, again, the

⁵⁵*Elfes*, 6 BVerfGE 32, 36 (1957).

⁵⁶*E.g.*, *Criminal Diary Case*, 80 BVerfGE 367 (1989); *Tape Recording Case*, 34 BVerfGE 238 (1973)(protection against taping of telephone conversations).

⁵⁷*Census Act Case*, 65 BVerfGE 1 (1983); *Microcensus*, 27 BVerfGE 1 (1969).

⁵⁸*Soraya*, 34 BVerfGE 269 (1973) (protection against false interviews).

⁵⁹*Lebach I*, 35 BVerfGE 202 (1973)(right to control how one is portrayed as one reenters society from prison).

⁶⁰*Böll*, 54 BVerfGE 208 (1980)(right not to be misquoted).

⁶¹*Census Act Case*, 65 BVerfGE 1 (1983); *Microcensus*, 27 BVerfGE 1 (1969).

⁶²Whitman, 2004 Yale, *supra* note , at 130 (“The paradigmatic free actor, for such German philosophers, was commonly the artist more than the consumer.”). Kant saw the arts and

influence of Kant, who focused on moral autonomy and freedom, including the obligation to realize and mold human capacity as an ethical duty, but also has roots in a deep German tradition of protecting inner life, including the work of such figures as Martin Luther, Pufendorf, and Christian Thomasius.⁶³

With the onset of the French Revolution of 1789 and the industrial revolution of the nineteenth century, concern for protection of the individual became paramount. German thinkers feared the irrationalities of human nature spurred on by uncontrolled popular sovereignty and the greed and baseness brought on by an unrestrained economic market operating pursuant to *laissez faire*. Germans were trying to adjust to these gale forces, leading them to intensify their focus on securing a citadel of individuality from these winds; they did so by concentrating on human free will--a freedom from determinism, not a freedom from government. This freedom was designed to facilitate each person's full development of their capacities and talents. Individual fulfillment could yield satisfaction and happiness in a way that mere economic acquisition could not.⁶⁴ The

sciences as "prepar[ing] man for a sovereignty in which reason alone shall have sway." L. Krieger, *supra* note , at 110 (quoting Kant).

⁶³L. Krieger, *supra* note , at 61. Martin Luther's famous two sword theory of the Christian state, for example, conceived of a division between a person's inner life and the outer jurisdiction of the state. *Id.* at 69. Christian Thomasius was a disciple of Pufendorf. Writing after the 30 years war, Pufendorf conceived of the state as a moral body, with people possessing "moral, self-limiting . . . sovereignty . . . of individual rights." *Id.* at 53. For fuller discussion, *see id.* at 51-56.

⁶⁴Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J.

focus of rights lay in the personal domain, and not just property, a position advocated most prominently by Otto von Gierke.⁶⁵

Concretely, this led to a focus on development of human personality. Wilhelm von Humboldt advocated development of man's intellect and spiritual capacity, which helped cement the idea of academic freedom, now guaranteed in GG article 5(3).⁶⁶ Johann Gottlieb Fichte,⁶⁷ Savigny⁶⁸ and others took up advocacy of personality rights in their nineteenth century work on Roman-rooted German private law. Most notably, Otto von Gierke advocated for a "general right of personality"⁶⁹ in the debates that surrounded adoption of the BGB.⁷⁰

101,129-30 (2004)[hereinafter "2004 Yale"]. *See also* Ewald, *supra* note , at 2053-54(Kant called "untrammled majority rule" a "form of despotism" *id* at 2053).

⁶⁵Otto von Gierke, 1 *Deutsches Privatrecht* 702, 706 (1895).

⁶⁶L. Krieger, *supra* note , at 166-70 (von Humboldt advocated "a spiritual sovereignty of the individual who realizes his highest values through intellectual and aesthetic contemplation,"*id.* at 167.).

⁶⁷*Id.* at 179-83 ("the primary right of man, the guarantor of human progress for which all other civil rights could be sacrificed, was freedom of thought, 'this celestial palladium of humanity.'" *id.* at 179 quoting Fichte).

⁶⁸Savigny envisioned universities and academic freedom as the true focus of freedom. Whitman, *Roman Legacy*, *supra* note , at 106, 109.

⁶⁹Otto von Gierke, 1 *Deutsches Privatrecht* 702 (1895).

⁷⁰Despite the call for general rights to personality, the BGB ultimately did not adopt them, although the 1907 Swiss civil code of around the same time period did. Harry D. Krause,

A second factor was the fact that freedom in political life was foreclosed for much of the nineteenth century, leaving the inner realm as the stage for freedom.⁷¹ This too was part of a long tradition of acceptance of the political status quo; revolution was not in the cards for figures like Luther, Pufendorf or Kant. Instead, the focus of freedom lay in the mind. Propelled by the intellectuals, the influence of Enlightenment values was put to use in erecting a moral, inner ideal of freedom, based upon dignity and human personality, an ideal that was to stand outside the control of the state and politics. The creation of this transcendental ideal of freedom was a main task of the nineteenth century.

James Whitman suggests another factor in the formation of personality rights. German thinkers of the nineteenth century went deep into Roman law and its privileging of norms of aristocratic honor, and then to the aristocratic law of insult, to remold concepts of personal honor that would comprise an important part of personality rights.⁷² A more controversial claim, advocated by Whitman, is that the Nazis transformed the law of honor from one available only to

The Right to Privacy in Germany—Pointers for American Legislation?, 1965 Duke L.J. 481, 485.

Some protections of personality were provided for. For example, BGB article 12 protects the right to one's name; BGB article 823 II protects an interest in reputation, especially against criminal defamation. *Id.* at 487. But the main development of personality rights occurred through the efforts of German private law courts. Eberle, Utah, *supra* note , at 1014-15.

⁷¹L. Krieger, *supra* note , at 41-42 (explaining how writers of the burger class, especially those of *Sturm und Drang*, advocated an inner freedom of the mind); Eberle, Utah, *supra* note , at 981.

⁷²Whitman, 2000 Yale, *supra* note , at 1285-1302, 1313-15, 1317.

people of privilege to one available to all citizens, not just the aristocracy. Honor was associated with high status. The Nazi movement, accordingly, “leveled up” claims to honor from what traditionally had only been the aristocracy to all citizens, including low-status citizens, as long as they were Aryan. Thus, all Aryan citizens, of whatever status, had a right to protection of their personality.⁷³ Nonaryans were, as we know, systematically excluded from equality under the law and, ultimately, from the law itself. We can thus see that there was a ready underlying intellectual platform on which to map out the inner dimension to human freedom.

The decisive development for modern personality law came in the post World War II movement by the courts of private law interpreting the principles of the BGB. The Federal Supreme Court (*Bundesgerichtshof* or *BGH*), the supreme interpreter of the BGB, had developed a jurisprudence of personality rights, derived from the influence of articles 1 and 2 of the GG, that carried over into private law so that everyone could enforce a certain privacy in their private legal relationships, illustrating again the doctrine of Third Party Effect. This development

⁷³Whitman, 2000 Yale, *supra* note , at 1321-30; Whitman, 2004 Yale, *supra* note , at 135-37.

The draft Nazi Civil Code, never enacted, was even more assertive in its insistence on a universal German right to protection of personality. The Nazis presented themselves as protecting honor to its fullest extent, in return for the sacrifices demanded of the German *Volk*. Of course the insistence on honor for *Germans* was paired with an insistence on the dishonor of others—of persons who were “sick or foreign.”

Whitman, 2004 Yale, *supra* note , at 136-37.

allowed people to enforce these personality rights against infringement—by individuals as well as the state—thereby providing comprehensive protection to personality.⁷⁴ These courts mapped out a series of personality rights, including control over distribution of one’s own writings, secrecy in medical records and rights to one’s spoken words.⁷⁵

In the next step of the development, in the famous *Herrenreiter Case*, the BGH interpreted articles 1 and 2 of the GG to command not only a respect for human dignity and

⁷⁴ The path-breaking case was *Schacht Letter*, 13 BGHZ 334 (1952), where an attorney, on behalf of his client, Dr. Hjalmar Schacht, a former economics minister under Hitler, had written a letter to a newspaper demanding that it correct statements it had previously published concerning Schacht. The newspaper published this letter, along with other correspondence, without replying to it or correcting its earlier publication. The attorney successfully complained that the publication of the letter falsely depicted him to the public as making a personal stand, when he actually was acting for his client. Breaking with precedent, the BGH found that a person’s letters were protected, even in the absence of copyright, one of the forms of intellectual property long advocated by German theorists as comprising part of the protection of inner freedom, on account of this new-found “general right of personality,” rooted in section 823 BGB, itself derived from GG articles 1 and 2. These developments are traced carefully in Eberle, *Utah*, supra note , at 1014-15 and Harry D. Krause, *The Right to Privacy in Germany—Pointers for American Legislation?*, 1965 *Duke L.J.* 481, 488.

⁷⁵Eberle, *Utah*, supra note , at 1014 and authorities cited in note 330. *See also* Krause, supra note , at 489, 495, 499-500. “The interests in life, body, health and freedom now find protection within the broad framework of the general right of personality.” *Id.* at 500.

personality, but also to provide affirmative protection of personality against incursion.⁷⁶

Applying by analogy BGB remedy provisions, which cover tangible property and physical health,⁷⁷ the BGH created a damage remedy to redress harm for intangible interests, such as personality; in essence, these were moral harms.⁷⁸ Thus, *Herrenreiter* represented a very bold step. Through these innovations, the BGH provided comprehensive protections for personality, in recognition of the core value of dignity.

In reliance on this work, the BVfG reversed the process, recasting the private law interests of reputation and privacy into the capacious language of human dignity and personality,

⁷⁶*Herrenreiter (Gentlemen Rider)*, 26 BGHZ 349 (1958). In *Herrenreiter*, a picture was taken of an amateur horseman shown jumping in a competition, and the picture was used to advertise a product reputed to improve sexual potency. In assessing money damages, the BGH reasoned that the conduct must be appropriately sanctioned to reflect the seriousness of the harm to personality. *Id.* at 356.

⁷⁷Section 847 BGB.

⁷⁸Needless to say, these were quite startling and controversial developments. *Soraya*, 34 BVerfGE at 275-76. The BGB expressly excludes damage liability for most injuries to intangible interests, except when authorized by statute. There was no statute here. Moreover, money damages are quite rare in Germany; standard German relief is specific performance, not damages. Traditionally, relief for injuries to personality were limited to injunction or, where appropriate, a right to reply based on the idea that awarding money for damages to honor cheapened oneself. “[A]nyone who would sell his honor for money had no honor.” Eberle, Utah, *supra* note , at 1014-15; Krause, *supra* note , at 511.

thereby constitutionalizing the doctrine. This certainly made for a more secure anchoring of the concepts in the legal order, and also demonstrates the seamless cross-flow of ideas between public and private law under the doctrine of Third Party Effect.⁷⁹

Fleshing out the impulse of this work, the BVfG created a demarcatable zone of personal inner freedom ascertainable as a personal sphere over which a person has dominion. As posited by the BVfG, there is a “private sphere or ultimate domain of inviolability in which a person is free to shape his life as he or she sees fit.”⁸⁰ This domain includes both the right to retreat from the world, as one likes, captured as the moral-spiritual essence of being, as well as the right to engage actively in the world, as covered by freedom of action. The intimate sphere is a critical part of the human vision that lies at the root of the GG, bestowing self-worth, social value, and respect. This shows, again, how concepts of dignity, humanity and community are interlinked in German law.

The net result of this theory is legal recognition of an ascertainable Inner Space (*Innenraum*): “in which to develop freely and self-responsibly their personalities, an Inner Space which they themselves possess and in which they can retreat, banning all entrance to the outer world, in which one can enjoy tranquility and a right to solitude.”⁸¹ In *Microcensus*, the BVfG sought to shield citizens from a census inquiry that sought a broad range of personal information,

⁷⁹*Soraya*, 34 BVerfGE at 282; Eberle, Utah, supra note , at 1015.

⁸⁰D. Kommers, supra note , at 328. See also Eberle, Utah, supra note , at 992, 994.

⁸¹*Microcensus*, 27 BVerfGE at 6. Maunz Kommentar, supra note , at 1-19, 1-68(state must respect intimate sphere); Piroth-Schlink, supra note , at 96-102(enumeration of Sphere theory that sets out core elements, in concentric order, of a person’s life).

including occupation, vacation practices, standard of living, marital status and the like. The BVfG was concerned that the inquiry would yield a portrait of a person that would be beyond his control, and up for grabs to the public and the state. Control over personal information should lay with a person, as a right, and not government or inquiring citizens.

These developments formed the basis for a right to information self-determination. Here the *Census Act Case* was decisive, where the BVfG curtailed the ability of government to survey the habits of the population.⁸² The BVfG's concern was that intrusive and comprehensive surveys of people would yield personality profiles which, especially with the aid of computing power, would facilitate the state's ability to access such information and use it as it saw fit.⁸³ Again, we can observe Kantian perspectives here: this might carry the danger of converting people into mere ends for state purposes of statistical survey, depersonalizing the personal element. From the standpoint of human autonomy, the BVfG feared that gathering, storing, and using personal information would threaten human liberty. The more that is known about a person, the easier the person is to control.⁸⁴

In carving out this private, intimate sphere of personal control, the BVfG produced distinct strands of personality law as a matter of doctrinal law, fleshing out the contours of a zone

⁸²65 BVerfGE 1 (1983).

⁸³*Id.* at 42 (This "information . . . can produce a . . . personality profile, which the person affected cannot control . . . and induces psychological pressure on behavior."). Eberle, *Dignity and Liberty*, *supra* note , at 89; Eberle, *Utah*, *supra* note , at 1001.

⁸⁴Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Information Self-Determination*, 37 *Am. J. Comp. L.* 675, 676 (1989).

of interiority. The elements of personality law involving protection of the inner sphere relate to control over matters of one's personality, as in the right to information self-determination discussed above. They include, for example, the right to control the portrayal of one's person, including rights to one's own image⁸⁵ and spoken word,⁸⁶ and rights, in some circumstances not

⁸⁵Decisive here is *Lebach I*, 35 BVerfGE 202 (1973), where the BVfG determined that a felon's personality rights in a healthy reentry into society, after serving his prison term, outweighed the showing of an accurate documentary depicting his and others role in the notorious crime. The BVfG's decision was grounded in the felon's personality right to control how he would like now to be portrayed so that he could have a healthy reentry into society. "The rights to the free development of personality and human dignity secure for everyone an autonomous sphere in which to shape one's private life by developing and protecting one's individuality." These values might be threatened by public reporting of the crime, which "publicizes [the felon's] misdeeds and conveys a negative image of his person in the eyes of the public." *Id.* at 220, 226, translated by Don Kommers, *supra* note , at 414-15, 416. Later, in *Lebach II*, BVerf, 1BvR 348/98, 1 BvR 755/98 (Nov. 25, 1999), a chamber of the BVfG determined that a television station could show a program depicting the crime because enough time had passed and, accordingly, the strength of the interest in personality rights had waned. At least 24 years had passed, thus reducing significantly the interest in a healthy reentry to society. In this situation, communication rights took precedence.

⁸⁶*Böll*, 54 BVerfGE 208 (1980), is a representative case. A television commentator criticized the Nobel-prize winning author, Heinrich Böll, for allegedly making statements that aided terrorism. In making his charge, the commentator misquoted Böll. Böll asserted that the

to have false interviews or statements attributed to you.⁸⁷ This focus on an ascertainable Inner

misquote invaded his sphere of personality, and the BVfG agreed:

A misquote impairs [a person's] constitutionally guaranteed general right to an intimate sphere. Among other things this right includes personal honor and the right to one's own words; it also protects the bearer of these rights against having statements attributed to him which he did not make and which impair his self-defined claim to social recognition. . . . The use of a direct quotation as proof of a critical evaluation is . . . a particularly sharp weapon in the battle of opinions and very effective in undermining the personality right of the person being criticized.

Id. at 217, *translated in* Donald Kommers, *supra* note, at 419.

⁸⁷The famous case here is *Soraya*, 34 BVerfGE 269 (1973), which involved the publication in a tabloid of a fictitious interview with the Princess of Iran, and former wife of the Shah. The interview fabricated intimate details of her private life. Personality rights entitle the person to be left alone, free from public or private actors, if so desired.

The personality and dignity of an individual, to be freely enjoyed and developed within a societal and communal framework stand at the very center of the value order reflected in the fundamental rights protected by the Constitution. Thus an individual's interest in his personality and dignity must be respected, and must be protected by all organs of the state [see articles 1 and 2 of the Constitution]. Such

Space undergirds and nourishes healthy development of personality, a clear priority of the German constitutional vision.

C. Rights and Duties

The idea of moral freedom to be achieved through commitment to human dignity and free unfolding of personality that lies at the root of the German constitutional vision is not a freedom to be exercised as one would like according to personal predilection, but rather a freedom to be exercised within moral bounds. The German constitutional order, historically and today, never viewed with favor unguided or self-interested personal choice out of fear it might result in excessive individualism, selfishness or caprice. This was one aim of the German philosophic tradition.⁸⁸ The excesses of the French Revolution were also a major factor, as mentioned. The

protection should be extended, above all, to a person's private sphere, i.e., the sphere in which he desires to be left alone, to make . . . his own decisions, and to remain free from outside interference. Within the area of private law such protection is provided . . . by the legal rules relating to the general right of personality.

Accordingly, the BVfG upheld an award of damages for the publication. *Id.* at 281.

For explanation of the wide ranging nature of personality rights, see Eberle, *Dignity and Liberty*, *supra* note , at 59-161.

⁸⁸Martin Luther and Christian Wolff, for example, working within Christian doctrine and trying to reconcile its meaning with a new scientific world, contended that the greater rights a person or authority had, the greater responsibility they bore. L. Krieger, *supra* note , at 69. *See*

unbridled individualism of the United States, with its focus on unrestrained market forces and more absolute personal freedom, uncabined by a moral structure, was a more contemporary lesson taken to heed.

So, instead, the German idea of freedom was to take place within a moral structure erected on ethical concepts that include human dignity and its multiple radiations, people acting within the bounds of a social community with its ensuing reciprocal obligations, and a *Sozialstaat*. We will now examine another piece of the underlying moral structure: the coupling of rights with duties rooted deeply in the culture and community.

The concept of coupling rights with duties is, once again, attributable to the inspiration of Kant and his moral theory, although this theory has deep roots in the German tradition, as we have seen. According to Kant, man possesses autonomy and human will, and he is to act upon such freedom according to universal law that would apply equally and wholly to all. Man has a duty so to act in accord with universality, viewed idealistically as was Kant's want.⁸⁹ And man

also Maunz Kommentar, *supra* note , at 1-24-25 (man seen as not just a free achiever, but bound by duties and social bounds; his rights limited by rights of others and moral law); Pieroth-Schlink, *supra* note , at 55 (rights often contain duties, especially in relation to others).

⁸⁹We can get some insight into this strand of Kant's thought from Kant himself:

This principle of humanity and of every rational
creature as an end in
itself is the supreme
limiting condition on

freedom of actions of
each man. It is not
borrowed from
experience, first,
because of its
universality, since it
applies to all rational
beings generally and
experience does not
suffice to determine
anything about them;
and, secondly,
because in experience
humanity is not
thought of
(subjectively) as the
end of men, i.e, as an
object which we of
ourselves really make
our end. Rather it is
thought of as the
objective end which

should constitute the
supreme limiting
condition of all
subjective ends,
whatever they may
be. Thus this
principle must arise
from pure reason.
Objectively the
ground of all practical
legislation lies
(according to the first
principle) in the rule
and in the form of
universality, which
makes it capable of
being a law (at most a
natural law);
subjectively, it lies in
the end. But the
subject of all ends is
every rational being

has a further duty to act to fulfill his moral freedom by realizing his capabilities, talents and skills. This is, of course, a different view of the GG core value of human dignity and personality.

The idea of coupling rights with duties has deep roots in German law, including in the 1849 St. Paul's Church Constitution and the 1919 Weimar Constitution;⁹⁰ however, the idea is

as an end in itself (by
the second principle);
from this there
follows the third
practical principle of
the will as the
supreme condition of
its harmony with
universal practical
reason, viz, the idea
of the will of every
rational being as
making universal law.

By this principle all maxims are rejected which are not consistent with the universal lawgiving of will.

Kant, Foundations, supra note , at 49.

⁹⁰Currie, supra note , at 285-86.

not only a German, but one with deep roots in European society. The 1789 French Declaration of the Rights of Man and the Citizen of August 26, 1789, for example, famously embodied these ideas.⁹¹ And most modern European constitutions follow this model,⁹² and those countries within the European orbit, such as Canada⁹³ and South Africa.⁹⁴

Linking rights with duties is alien to United States constitutional culture. There is no

⁹¹Affirmed in Preamble of French Constitution of 1946. Consider, for example, article 4 of the 1789 Declaration of Rights of Man: “Liberty consists in being free to do anything which does not harm others; thus, the exercise of the natural rights of any man has no other limits than those which guarantee to the other members of society the enjoyment of these same rights. These limits may be defined only by the Law.” Under this principle, the popular will of the people, operating through the Parliament, defines limits to freedom.

⁹²Constitution of the Portuguese Republic, 6th revision (2004), Part I, article 12, 1. principle of universality: “All citizens enjoy the rights and are subject to the same duties established in the Constitution.”

⁹³Canadian Charter of Rights and Freedoms (1982), Part I, article 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

⁹⁴South African Constitution, article 36(1): “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including. . . .”

enumeration of any duties circumscribing rights in the American constitution. Nor has the Supreme Court implied a sense of obligation in its interpretation of rights. Instead, the United States relies upon the democratic process to establish norms that comprise the values making up the social order. This is another example of the value-neutral character of the American Constitution.

The GG actually contains few express reservations of duties that cabin rights, especially in comparison to the Weimar Constitution.⁹⁵ One example is article 6(2) family rights that specify “The care and upbringing of children shall be a natural right of and a duty primarily incumbent on the parents. The state shall watch over in this regard.”⁹⁶ Another is the article 5 (3) guarantee of academic freedom: “Art and science, research and teaching shall be free. Freedom of teaching shall not release anybody from his allegiance to the constitution.”

The more important and substantial circumscription of rights occurs through the values that comprise the moral order, as enumerated by the BVfG. For example, article 2 personality rights are limited by “the rights of others . . . [offense] against the constitutional order or against morality.” Article 5(1) opinion rights are limited, in article 5(2), by “limitations in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor.” Some of these normative restraints are relatively straightforward. For example, limitation of personality rights to rights of others reflects the Kantian view that a

⁹⁵Currie, *supra* note , at 17 n. 95.

⁹⁶Related to this is the GG article 6(4) social duty that “Every mother shall be entitled to the protection and care of the community.”

person is free to act insofar as he does not violate the freedom of someone else;⁹⁷ the moral law circumscribes freedom.⁹⁸ Youth law limitation on opinion rights call for a legislatively determined framework for protection of youth in the development of their young personality from certain harmful forms of expression.⁹⁹ But many of the limiting terms are opaque, and call for deep and careful explanation as to their underlying structure. This task is well beyond the scope of this article, although some further explanation may be supplied.

The “constitutional order” limitation of article 2 personality rights, for example, means the value-order of the GG, to which all laws must conform. At the top of this order is, of course, human dignity, the ultimate constitutional value. And, of course, there are other core principles set down in article 20 of the GG, including the *Rechtstaat* and *Sozialstaat*, which we will have more to say about later. The import of a limiting norm like “constitutional order” is that the GG influences the nature of the legal order. Laws must conform to this value-order to be part of the “constitutional order.” “Constitutional order” is thereby rendered into a two-sided limitation. While the “constitutional order” can limit personality rights, this can only occur when law

⁹⁷An example would be the *Tobacco Atheist Case*, 12 BVerfGE 1 (1960), where the BVfG. determined that an atheist’s attempt to coerce a fellow prisoner to his nonbelieving view violated the religious and dignitarian rights of the fellow prisoner.

⁹⁸See Ewald, *supra* note , at 2063)(the “moral law” limitation of GG article 2 personality rights “comes straight from Kant.”).

⁹⁹Edward J. Eberle, *The View Outside: What Kind of Expression for Adolescents Outside the United States*, 2005 Mich. St. L. Rev. 879.

conforms to the German value-order.¹⁰⁰ We can see, again, the influence of an a priori system of moral logic extrinsic to man that grounds the GG. We can also see the presence of another trait that comprises the German idea of freedom; namely, the reciprocal influence of the GG on the legal system---what we call the doctrine of Reciprocal Effect, which we will discuss later.

Another example of the deep cultural and moral circumscription of rights is the limitation, in GG article 5 (2), of opinion rights by honor. James Whitman has masterfully traced how the German culture of civility and honor is rooted in the aristocratic and feudal past, including the law of insult and dueling, and that this class structure of civility and right to honor was “leveled up” equally to all citizens, no matter what rank, to the status of honor historically claimed by the aristocracy. The movement culminated in the twentieth century, in part notoriously by the Nazis during the Hitler time for all Aryans, but then fundamentally in the post World War II refounding of German society that we have been speaking to.¹⁰¹ In sum, we can see that the idea of linking rights with duties rests on a deep underlying moral structure characteristic, again, of the value-ordered nature of the GG, and on certain cultural and historical roots.

D. Third Party Effect

Another demonstration of the rooting of the constitutional vision in a moral order is the radiating effect of the core norms of the GG on private law through the doctrine of Third Party Effect. Under Third Party Effect, the values of the GG radiate out and influence interpretation of

¹⁰⁰Eberle, Utah, *supra* note , at 986. *See also* Maunz Kommentar, *supra* note , at 2-16-23 (discussing disputed nature of “constitutional order” limitation of GG article 2(1)).

¹⁰¹James Whitman, 2000 Yale, *supra*; 2004 Yale, *supra*.

private law. We have already seen manifestations of this overarching value-order in a number of the points discussed above, including discussion of the mutual effect of personality rights on the constitutional order and opinion rights on honor concepts. But a more detailed explanation of this component of the German idea of freedom is now in order.

A dramatic illustration of Third Party Effect is the cross fertilization of constitutional and general law through the doctrine of Reciprocal Effect (*Wechselwirkung*), by which the norms of the GG flow into and influence the norms of private law, and vice-versa. The decisive case is *Lüth*, which involved a communication rights dispute over the right of a film director formerly closely associated with the Nazis to show his new films at a Hamburg film festival.¹⁰² In overturning an injunction prohibiting Lüth from continuing his call for a boycott of the film, the BVfG delineated the value order of the GG. “This value-system, which centers upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private. . . . Thus, basic rights obviously influence civil law too.”¹⁰³

¹⁰²*Lüth*, 7 BVerfGE 198 (1958). Erich Lüth was the director of the Hamburg press office. He called upon film producers and distributors, and all Germans, not to attend the newly released film *Immortal-Lover* by Veit Harlan, who had worked closely with Josef Goebbels. *Id.* at 198-200. Suing in the civil courts, the producer and distributor of Harlan’s film were able to obtain an injunction against Lüth that prohibited him from continuing the call for a boycott of the film on the theory that caused injury to their business interests under section 826 of the BGB, one of the famous general clauses of the Code. *Id.* at 200-02.

¹⁰³*Id.* at 205.

By interpreting basic rights as establishing an “objective” ordering of values, the BVfG was stating that those values are so important that they must exist “objectively”—as an independent force, separate from their specific manifestation in a concrete legal relationship.¹⁰⁴ So conceived, objective rights form part of the legal order, the *orde public*, and thereby possess significance for all legal relationships.¹⁰⁵

¹⁰⁴Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 Case W. Res. L. Rev. 797, 811-12(1997)[hereinafter “Case Western”]. See also Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 Md. L. Rev. 247, 261 (1989).

¹⁰⁵They might even be viewed as “permanent ends of the state. . . [that] cannot be

Since basic rights form part of the “objective” legal order, they must apply generally in society—against both state and private actors that would act to curtail them.¹⁰⁶ Thus, basic rights must also affect private individuals insofar as they seek enforcement of their claims and interests

changed, even by constitutional amendment. Quint, *supra* note , at 261 (noting art. 79 GG).

¹⁰⁶*Luth*, 7 BVerfGE at 261-62.

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

Eberle, *Case Western*, *supra* note , at 811-12.

through the rule of private law.

Indisputably, we can see that the GG influences private law, given its place as the supreme statement of values in the German legal system. In *Lüth*, the BVfG went on to clarify exactly the nature of this influence, deciding that the GG should apply “indirectly” to private law. By “indirectly,” the BVfG meant that constitutional norms should “influence” rather than govern private law norms. “A certain intellectual content ‘flows’ or ‘radiates’ from the constitutional law into the civil law and affects the interpretation of existing civil laws.”¹⁰⁷

In the context of article 5(1) claims, ordinary courts must view the “general law” textual constraint not as a one-sided limitation on communication freedoms. Rather, article 5 freedoms and general law norms have a mutual effect on one another. It is as much the case that article 5 can influence interpretation of the general law as the opposite. Under the theory of objective values, general laws “must be interpreted in light of the value-establishing significance of the basic right in a free democratic state, and so any limiting effect on the basic right must itself be restricted.”¹⁰⁸ Under the Reciprocal Effect Theory, the BVfG must assure that ordinary courts take adequately into account the objective order of values.¹⁰⁹

The idea of the Reciprocal Effect Theory reflects, again, the German approach to

¹⁰⁷Quint, *supra* note , at 263. *See also Luth*, 7 BVerfGE at 205 (from the GG “flows a certain constitutional content.”). *See also Eberle*, *Case Western*, *supra* note , at 815.

¹⁰⁸*Luth*, 7 BVerfGE at 209.

¹⁰⁹*Id.* at 208-09 (“The Constitutional Court must test to see whether the ordinary courts have adequately taken into account the scope and impact of basic rights on the civil law.”).

systematic, complete rational thought.¹¹⁰ Public and private law fit together smoothly as part of an integrated system of law, breaking down the historical dichotomy between public and private law.¹¹¹ There are positive consequences for private law here. As part of a whole legal system, private law is vested with integrity and durability, especially through the influence of the objective value order.¹¹² Private law thereby is not disenfranchised.

The theory of Third Party Effect addresses another element to the German idea of freedom that, up to now, we have just alluded to. Now the idea merits a more extended discussion. This is the idea of the state proactively securing and promoting personal freedom within the value-ordered structure of the German constitutional scheme. The state does this in a number of ways.

One way is the state's obligation to promote the objective value order at the heart of the GG. A brief discussion of the concept of basic rights is necessary to illustrate this part of the doctrine. In our foregoing discussion of German basic rights, we have mainly described what we call the negative dimension to rights, which most westerners are familiar with. Negative rights limit state power and carve out a zone of personal freedom empowering people so to act within that preserve. Freedoms of speech, religion and equal protection are familiar examples of negative freedoms, both in the German and United States scheme.

But there is another dimension to rights intrinsic to the German scheme, but unfamiliar to the American scheme, and this is the positive or objective dimension to rights. The objective

¹¹⁰Maunz Kommentar, supra note , at 1-51(part of dogmatic, complete relation of law).

¹¹¹Von Gierke foresaw this consequence as an effect of his Social State theory. Ewald, supra note , at 2095.

¹¹²Maunz Kommentar, supra note, at 1-67.

dimension affirmatively obligates the state to create the conditions by which people can realize the set of rights they possess.¹¹³ We saw the presence of this idea in our foregoing discussion of the Third Party Effect theory. The objective dimension of rights obligates the state to carry out and maintain the objective order of values set out in the GG, values we have previously discussed such as human dignity, human personality, the social, democratic state and the obligation to adhere to the rule of law. These state obligations are part of its constitutional duties, forming part of the *Sozialstaat* principle we will discuss shortly.¹¹⁴

The theory of Third Party Effect reflects a third impulse as well. The binding of private actors to the objective value structure of the constitutional order is recognition that the threats to individuals and their rights can come as likely from private forces in society, such as corporations, labor unions, nongovernmental organizations or other entities, as official authority. Accordingly, it is necessary to conceive and erect a comprehensive set of personal rights that have broad effect, against both public and private threats to freedom.¹¹⁵ It is necessary to be on guard against any threat to personal rights. For some, the greater threat may come from government; for others, from private actors. But strategies must be in place to safeguard the rights of each person. Each person must be given the same chance and opportunity.¹¹⁶ In this respect, Third Party Effect

¹¹³Still, in doing so the BVerfG has exercised considerable restraint, deferring broadly to the political branches. Currie, *supra* note , at 16-17.

¹¹⁴Currie, *supra* note, at 16.

¹¹⁵Pieroth-Schlink, *supra* note , at 50-51.

¹¹⁶*Id.* at 52.

protects the integrity and unity of the moral value order that lies at the heart of the GG.¹¹⁷ Rights are founts of values that effect and influence all dimensions of life. The radiating effect of rights on the whole legal system helps preserve freedom and equality for all. In this way, the influence of rights offers an extra layer of security, helping insulate people from the pressures of the modern post-industrial globalized world. This idea of an ethical value order serving as the basis of law forms another aspect of the German idea of freedom.

E. *Rechtstaat*

Up to now, we have focused on the personal dimension to the German idea of freedom, assessing how that personal dimension effects and empowers individuals within the German constitutional system to be respected and realize their human dignity, talent and capabilities, and to do so within a morally situated community. In this last part of our examination of the ingredients of the German idea, we need to examine the second major dimension to the idea: that of the role of the state in promoting and empowering individual freedom. The state plays a seminal part in securing and promoting personal freedom within the value-ordered structure of the German constitutional scheme, and does so in a number of ways. We will now concentrate on two important concepts crucial to this active state role: the ideas of the *Rechtstaat* and the *Sozialstaat*.

We have already seen how the idea of the *Rechtstaat* constitutes one of the core norms of the modern constitution and so, appropriately, is anchored in article 20 of the GG. In simple and conventional terms, the idea of the *Rechtstaat* means a state committed to the rule of law.¹¹⁸ In

¹¹⁷Maunz Kommentar, supra note , at 1-67.

¹¹⁸L. Krieger, supra note , at 351 (Karl Twesten viewed *Rechtstaat* as “objective legal

that idea, there is a certain resonance with Anglo-American ideas of binding a state to the rule of law.¹¹⁹ But the German idea of the *Rechtstaat* has a number of other important meanings. For one thing, the German word *Recht* means both law and justice, and the term *Rechtstaat* can be as illusive as that double meaning. Justice can mean appeal to unwritten norms of natural or moral law, which the courts often feel free to invoke.¹²⁰

Fundamentally, the *Rechtstaat* means a state based on reason, the roots of which also lie in Kant, who saw law as the synthesis of morality and nature; the *Rechtstaat* was a practical

order”).

¹¹⁹Hamden v. Rumsfeld, 548 U.S. (2006)(“But in undertaking to try Hamden and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”).

¹²⁰A famous example is in *Soraya*, 34 BVerfGE at 286-87: “Statutes [*Gesetz*] and laws [*Recht*] . . . are not necessarily always identical. . . .Law is not synonymous with the totality of written statutes.” Law (*Recht*) can, under some circumstances, include additional norms, derived from “the constitutional order as a whole,” and “functioning as a corrective to the written law.” Thus, rather than being “bound by the strict letter of the law, the role of the judge is to realize in case law. . . the values immanent in the constitutional order, [even if] not written or clearly expressed in written law.” Judges should so fill statutory gaps based on “practical reason” and “well-founded general community concepts of justice.” Eberle, *Utah*, supra note, at 1017; Currie, supra note, at 117. With these ideas, we can discern again the influence of Kant and Savigny, who detested the inflexibility of stare decisiis and written law and preferred overarching principles of justice and morality that could better capture the organic nature of law.

manifestation of these abstract ideas into practical choice and realization of moral freedom.¹²¹

Concretely, today this means that the state in its execution of power is to act rationally; neutrally and equally, meaning at least that actions must apply generally to all and not single out particular people; that state actions and legal measures must have a legal basis and discernible content and provide fair notice; and that these actions must also be proportional to the

¹²¹L. Krieger, *supra* note, at 245 (“Kant has sought to establish law (*Recht*) as the synthesis in experience of the separate worlds of morality and nature. . .”). Kant envisioned government as an arrangement of freedom. *Id.* at 92. Politics must be based on morals, and the judicial state needs a moral basis so that it can become an instrument for moral freedom. *Id.* at 116, 124. *Accord*, Ewald, *supra* note, at 2098 (classical model of private law and idea of *Rechtstaat* grow up together, as they had common source in Kant and his universal moral judgement). Kant theorized that the state should be a state of reason (*Staat der Vernunft*), grounded in “the rational autonomy of the individual” so that it could “serve the interests of free, equal, and self-determining individuals.” *Id.* at 2049. Accordingly, the King (in a constitutional monarch) was obligated to rule in accordance with principles of freedom, dignity and equality. *Id.* at 2051. Kant himself never actually used the term *Rechtstaat*. *Id.* at 2048. Those in his wake picked up the term, emphasizing ordered, formal rules and precise bureaucratic procedures, but not majority rule. *Id.* at 2099. The idea was to secure the state and its impartiality, and protect personal freedom, through abstract, neutral principles. *Id.* at 2054. *See also* Whitman, *Roman Legacy*, *supra* note, at 126 (Savigny and Historical School sought state based on rule of law, not rule of men). The idea was to develop an ideal of reason outside, and binding, on the state.

ends they seek.¹²² This last idea is known as the Proportionality Principle and calls for a close nexus between means employed to accomplish ends sought. The level of scrutiny applied is strong, falling somewhere between intermediate and strict scrutiny in American law, but not the deferential form of rational basis review.¹²³ The Proportionality Principle is an important part of German law as well as European law.¹²⁴ The *Rechtstaat* also places limits on retroactivity.¹²⁵ Through these ideas, the *Rechtstaat* places discernible limits on state restriction of human liberty.

An example of how the idea of the *Rechtstaat* manifests in German law can be gleaned from the *Falconry Licensing Case*, where the BVfG explained the *Rechtstaat* as follows:

The concept of *Rechtstaat* demands, when viewed in conjunction with the presumptive zone of freedom Article 2 bestows, that citizens are protected against unnecessary curtailment of their freedoms by official actions. For legal measures to be indispensable, they must use means to establish a legal end that are suitable and that do not excessively burden an individual.¹²⁶

Applying the Proportionality Principle of the *Rechtstaat*, the BVfG invalidated a federal hunting

¹²²Eberle, Utah, supra note, at 967.

¹²³Restrictions “must be adapted (“*geeignet*”) to the attainment of a legitimate purpose; it must be necessary (“*erforderlich*”) to that end; and the burden it imposes must not be excessive (“*unzumutbar*”).” Currie, supra note , at 20. The origins of the Proportionality Principle lie with Frederick the Great. *Id.* See also Pieroth-Schlink, supra note , at 74-77.

¹²⁴See, e.g., Olsson v. Sweden, Judgement of 24 March 1988 (No. 130, 11 E.C.H.R. 259 (“the notion of necessity implies that the interference corresponds to a pressing need and, in particular, that it is proportionate to the legitimate aim pursued. . . .”).

¹²⁵Currie, supra note , at 19.

¹²⁶55 BVerfGE at 165.

law that required weapon proficiency as a prerequisite to engaging in the sport of falconry. Since guns are not used in falconry, the requirement made no sense to the BVfG.¹²⁷

The ingredients of the *Rechtstaat*—legal measures must have a discernible legal content and basis, be transparent, provide fair notice and be neutral and proportional to the ends they seek—bind the state to specified principles of reason and, therefore, limit state power and, additionally, further the goal of securing and preserving individual freedom. We can think of the *Rechtstaat* as a structural component of the German idea of freedom, binding the state to certain fundamental principles that delimit state power and emancipate individuals to pursue their lives. The *Rechtstaat* serves to limit authority more by reason than form of government; it is a rule by reason, not by men. An extrinsic system of reason, it was thought, would help circumscribe authority better than the proclivities of human nature through, for example, the checking and balancing of factions as advocated by James Madison. An important structural component of the idea of the *Rechtstaat* is the professional civil service, which is to act fairly and neutrally, an active legal administration independent of the state, acting as a buffer between the state and

¹²⁷Weapon proficiency is incongruous with the legislative goal . . . [of] protection of wildlife and prevention of abuse of hunting birds. [Such goals could be accomplished] through more precisely drawn measures. [The problem here was that] the requirement of weapon proficiency had nothing to do with the maintenance . . . of hunting. . . It is a violation of proportionality when weapon proficiency is demanded . . . that has no relation to the planned activity.

Id. at 165-66.

citizens.¹²⁸

The origins of the *Rechtstaat* lie in southern Germany, in the states of Baden, Bavaria and Württemberg, as much of early modern German constitutionalism, and then the idea migrated north to Prussia.¹²⁹ Adam Mueller¹³⁰ is associated with the first usage of the word, in his Berlin

¹²⁸The idea of an impartial bureaucracy grew out of Kant too. Ewald, *supra* note , at 2055. *See also* Donald Kommers, *supra* note , at 40; Leonard Krieger, *supra* note , at 20.

¹²⁹L. Krieger, *supra* note , at 230. The center of *Rechtstaat* thought were the southern states, and there the new constitutionalism of the nineteenth century unfolded. Under the program of the *Rechtstaat*, officials were to be considered as servants of the state, not the prince. The state was to be built around independent officials trained in corporate ethics and law. An independent judiciary was to work alongside the independent civil service. Whitman, *Roman Legacy*, *supra* note , at 132-33. “[T]he *Rechtstaat* was conceived as a legal structure independent of any particular government or political system.” Donald Kommers, *supra* note , at 42. It was designed as a third way, between absolutism and popular sovereignty. Whitman, *Roman Legacy*, *supra* note , at 95-96. More practically, the idea reconciled the new liberalism with traditional authority. Leonard Krieger, *supra* note , at 252.

The idea of legal limitations of authority go back at least to the twelfth century and, later, in the writings of German medieval constitutionalists. Ewald, *supra* note , at 2047.

¹³⁰L. Krieger, *supra* note , at 253(Mueller was a reactionary figure). Karl Theodor Welcher also used the word *Rechtstaat*, in his 1813 book *The Foundations of Law, State, and Penalty*, which was part of the German reform movement. *Accord*, Whitman, *Roman Legacy*, *supra* note , at 101.

lectures in 1808, but Robert von Mohl developed the contours of the concept in the late 1820s and 1830s, heavily influenced by Kant, Rousseau and Montesquieu.¹³¹ Von Mohl transformed the idea to doctrine, and helped popularize the doctrine.¹³²

The transformation to doctrine of a state rooted in reason and morality would appear to be an important part of the rethinking of society, influenced in part by the 1789 French Revolution. Characteristic of this period, the Germans focused more on intellectual and moral freedom, and less on democratic sovereignty, as ways to reconceive state authority. Robert von Mohl, for example, posited that a strong and independent state was necessary for the realization of individual rights and the defense of individual and general welfare.¹³³ The philosophy of law, justice and state seemed to be the main focus of the nineteenth century. This entailed a concept of the state as an active force in the realization of human freedom.

The idea of the *Rechtstaat* became a battleground for German scholars and lawyers through the course of the nineteenth century. Among other things, the *Rechtstaat* means or has meant a state committed to: the rule of law, *laissez faire*, or justice. For example, in the time period 1815-1830, the concept was vested with an obligation to promote social welfare as well as promote moral freedom. With the rise of industrialism, *Rechtstaat* was associated by many with

¹³¹L. Krieger, *supra* note , at 253, 256. Von Mohl first elaborated the idea of the *Rechtstaat* in his first treatise on the constitutional law of Wuerttemberg, in 1829, *Staatsrecht des Koenigreichs Wuerttemberg*. *Id.* at 256. Frederick the Great used the idea. *Id.* at 23. For further discussion, *see id.* at 253-60.

¹³²*Id.* at 256.

¹³³*Id.* at 260.

advocacy of *laissez faire*. But with the downfall of liberalism, especially after the failed 1848 democratic revolution and the consolidation of conservatism in its aftermath, the idea of the *Rechtstaat* came to mean more protection of the state than protection of the individual.¹³⁴ Today, we can see that the *Rechtstaat* comprises most of the ideas that circulated in the more liberal period, before the Bismarckian Imperial Germany of 1871: reason, fairness, neutrality, proportionality and securing of personal freedom, all tangible manifestations of binding the state to reason and morality.

F. *Sozialstaat*

The final component of the German idea of freedom that we need to address is that of the *Sozialstaat*, which obligates the state to enact measures guaranteeing a minimal level of material existence so that people will have a baseline of personal security so that they may live a dignified existence. Like the *Rechtstaat*, the *Sozialstaat* is a core principle of the German constitutional order and, accordingly, is rooted in GG article 20(1), and made impervious to change in article GG 79(3). The idea of the *Sozialstaat* reinforces the objective value order of the GG.¹³⁵

From an American perspective, we tend to see the *Sozialstaat* principle as the guarantee of the social welfare state, and this is true. German commentators theorize that the placement of the *Sozialstaat* principle serves as a constitutional barrier to any cessation of the social welfare state.¹³⁶ Germans anchor this idea in the constitution, whereas Americans vest it through

¹³⁴*Id.* at 252-253, 261, 460-61. *See also* Ewald, *supra* note , at 2047-51 (Kant too was interpreted widely and differently by various groups).

¹³⁵Currie, *supra* note , at 16.

¹³⁶Currie, *supra* note , at 24 (authorities collected).

legislation, initiated by the New Deal. But the *Sozialstaat* is more complicated than just that. Fundamentally, the *Sozialstaat* obligates the state to act on behalf of its citizens to secure their dignity, welfare and freedom.¹³⁷ Certainly the obligation to enact social welfare measures is part of this. But so is the idea that the state has a moral duty to act on behalf of its citizens over a wide range of measures, such as education, protection of human life, human security, and achievement of social justice. Further, the state is to respect and guarantee individual freedom and protect against violation of personal rights.¹³⁸ The proactive duties associated with the state reflect a vision of man as not just an isolated, sovereign individual, but a person bound to, and defined within, a community. The idea of *Sozialstaat* obligates the state to create and maintain necessary social conditions so that man can thrive.¹³⁹ In these respects, we can see that the German idea of freedom involves a concept of freedom that relies upon government. We might call this is a freedom with government, not a freedom from government, as is more typical of the American scheme of freedom.

These social ideas were very influential following the despair of the post World War I era, and made manifest in the 1919 Weimar Constitution, relying significantly on the theories of the 1849 Frankfurt Constitution. Under Weimar, the idea of the state as provider of the social and economic conditions necessary to achieve the conditions of freedom reached its zenith. This social idea was a reaction against the economic liberalism of the nineteenth century, where faith

¹³⁷Maunz Kommentar, supra note , at 1-22-25 (dignity guarantees man a certain minimal existence, but not necessarily specific material conditions).

¹³⁸Pieroth-Schlink, supra note , at 25-26.

¹³⁹Maunz Kommentar, supra note , at 1-25-26.

in the markets, it was thought, would provide all necessary elements of individual freedom and security; that experiment did not work. Under the Weimar idea, the constitution obligated the state to create the conditions so that individuals could realize their freedom; but the Weimar Republic promised more than it could deliver.¹⁴⁰

In view of these experiences of both economic liberalism and socialism, the GG took a more measured approach. Social guarantees are only noted sparingly, as in the article 20(1) provision of a “democratic and social federal state” and the similar guarantee in article 28(1) of “Laender . . . conform[ing] to the principles of the republican, democratic and social state under the *Rechtstaat*.” Likewise, the GG contains few explicit state duties, also unlike the Weimar Constitution. The GG provides in article 5(3) that academic and scientific freedom “shall not release anybody from his allegiance to the constitution;” in article 6(1) “that “Marriage and family shall enjoy the special protection of the state; in article 6(4) that “Every mother shall be entitled to the protection and care of the community;” in article 6(5) that “Illegitimate children shall be provided by legislation with the same opportunities for their physical and mental development and for their place in society as are enjoyed by legitimate children;” in article 7(1) that the state shall supervise the school system; in article 14(2) that “Property imposes duties. Its use should also serve the public weal;” and the social provision of article 15 that “Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of collective enterprise for the public benefit by a statute regulating the nature and extent of compensation.” All of these constitutional provisions provide clear textual authorization for the BVfG to protect the values there embodied.

¹⁴⁰Pieroth-Schlink, *supra* note , at 24

Unlike the principle of the *Rechtstaat*, however, the *Sozialstaat* principle has not generally been employed as its own base by the BVfG to invalidate legislation. However, the BVfG has often made use of the *Sozialstaat* principle in its analysis, and the idea has exerted a powerful influence in its interpretation.¹⁴¹ For example, as David Currie observes, the BVfG drew upon the *Sozialstaat* principle, and the civil procedure code, to fill in a gap in the law to provide for a court-appointed attorney; to rule out poverty as a barrier to a party asserting rights; to sustain price control regulations against the argument that it impaired freedom of contract; to heighten scrutiny of measures that provided inequalities in eligibility for aid to the blind; to confirm that human dignity required restrictive use of life imprisonment; and to strengthen participatory rights in constitutional provisions stated simply as defenses against the state.¹⁴²

The proactive state duties associated with the *Sozialstaat* can carry over into interpretation of different rights provisions. For example, affirmative obligations of the state have influenced broadcasting freedom, in article 5(1), where the BVfG required that the state must “establish a legal framework in which all significant interests can make themselves heard and the provision of Article 7(4) protecting the right to establish private schools has been found to require in some cases that they be subsidized by the state.”¹⁴³

The most controversial judicial implication of positive state obligations concerns that of protecting life, rooted in GG article 2(2): “Everyone shall have the right to life. . . .” The BVfG has interpreted this duty comprehensively, requiring the state to take measures to protect the life

¹⁴¹Currie, *supra* note , at 23-24.

¹⁴²*Id.* (authorities collected).

¹⁴³Currie, *supra* note , at 14.

of a fetus as well as an adult; in the penal system, there can be no life imprisonment except in the face of pressing public safety¹⁴⁴ nor any death penalty.¹⁴⁵ The duty to protect life has its origins, as so many provisions, in the article 1 commitment to human dignity. Article 2(2) is another tangible manifestation of dignity.

Protection of fetal life arose as an act of judicial interpretation by the BVfG, which translated the right to life clause into a positive command of the state to set out measures to protect developing life. There was certainly no plain meaning within the text of article 2(2) authorizing such an approach. According to the BVfG, the duty to protect life is all encompassing. “The duty to protect the unborn is owed each individual, not just to human life in general.”¹⁴⁶ Because the duty is imposed on all levels of state authority, including the legislature, “the legal order must guarantee the appropriate legal foundation for the development of the

¹⁴⁴*Life Imprisonment Case*, 45 BVerfGE 187 (1977). Life imprisonment may be imposed as a penalty only in the event of an especially heinous crime, such as a horrible murder, and a corresponding need to protect the public. Email from Professor Winfried Brugger to Edward J. Eberle (November 28, 2006). In other words, the right to preserve existing human life takes precedence over rehabilitation of the murderer. An example is the November 2006 sentencing to life imprisonment of Stephan Letter, “a nurse described as Germany’s worst serial killer since World War II, [who] was convicted of killing 28 patients at a hospital in southern Sonthofen in 2003 and 2004 . . . injecting them with a mixture of drugs.” “Germany: Nurse Guilty of Killing 28 Patients, New York Times, at A 14 (November 21, 2006).

¹⁴⁵ GG art. 102.

¹⁴⁶*Abortion II*, 88 BVerfGE 203, 252 (1993).

unborn in relation to its own right to life.”¹⁴⁷ Accordingly, government has a duty to intervene against forces or people who would terminate life, and to create the proper social and economic conditions for life to thrive.¹⁴⁸

But, of course, nothing is so simple as it seems. The right to fetal life does not, in fact, always take precedence. In juxtaposition to fetal rights are a woman’s right to choose, grounded in article 2(1) personality rights. How to untangle the collision between these rights is a tricky and complicated business worked out by the BVfG in two long and complicated decisions over abortion.¹⁴⁹

¹⁴⁷*Id.* at 203. How to do this is a matter of legislative discretion. However, the BVfG directed that the *Bundestag* must declare all abortions illegal, and must require the woman to carry the unborn to term unless there is a compelling reason to terminate the pregnancy.

¹⁴⁸*See id.* at 203, 253 (“The fundamental prohibition of abortion and the fundamental duty to carry a child to term are two indispensable, inseparable elements of the constitutionally commanded protection.”). See Eberle, Utah, *supra* note , at 1035-47. Outside of abortion, the BVfG has not invoked article 1 to impose duties on government. *See Chemical Weapons Case*, 77 BVerfGE 170 (1987)(rejecting any constitutional claim that storage and transportation of chemical weapons violated GG); *Schleyer Kidnaping Case*, 46 BVerfGE 160 (1977)(imposing no duty on state to prevent and solve kidnaping cases).

¹⁴⁹*Abortion II*, 88 BVerfGE 203 (1993); *Abortion I*, 39 BVerfGE 1 (1973). For extended discussion of the two abortion decisions, see Eberle, Utah, *supra* note , at 1034-48; Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 Am. J. Comp. L. 273 (1995).

The origins of the *Sozialstaat* go back to feudal time, and the duty of the Prince to take care of his subjects. The relationship between Prince and subjects entailed reciprocal obligations. The Prince guaranteed protection and certain individual and social welfare guarantees; in return, the subjects owed allegiance to the Prince and paid taxes.¹⁵⁰ This Princely relationship was

¹⁵⁰Conversation with Professor Winfried Brugger, Universitaet Heidelberg, April 2006, Heidelberg, Germany. Benjamin Arnold, *Princes and Territories in Medieval Germany* 72 (1991).

For example, a charter issued by Margrave Otto of Meissen, in 1186, set out some of what was expected of princes:

Since we possess the government of the March not only to crush the rebellions and insolent temerities of criminals but also to show ourselves prompt and ready to all who expect peace and justice from us, we act by right of our governing power and by God's help, so that all who attend us in whatever difficulties shall find solace and refuge according to the tenor of justice, just as they expect of us.

Id. at 186.

Further, princes and the aristocracy were “interested in preserving equilibrium between communal methods [of agriculture and land ownership] based functionally upon the village which made tillage possible, and lordly rights based institutionally upon the manor which ensured their income.” *Id.* at 154. In short, “the structural balance certainly tilted in favour of the village and the communal rather than the manor and the seignorial,” and this led to “agrarian expansion from

different in kind from that of England, where general allegiance was demanded on pain of force, with little reciprocal obligation of the Prince to take care of his subjects.¹⁵¹

This essential idea that the ruler must provide for its citizens has survived through today, although it has taken on added meaning through time. The nineteenth century theoretical battle over the direction of law was decisive here as well. The movement toward moral freedom, as compared to political freedom, helped form the conception of the state and the *Sozialstaatsprincip*. Attention focused on the role of the state in securing personal freedom, as the state came to be viewed as a moral force, above politics.¹⁵² Hegel viewed the state as an

the later eleventh century.” *Id.* at 154, 156. *See also* Kommers, *supra* note, at 41 (roots of the idea lie deep in the Lutheran tradition).

¹⁵¹Email of Robert Webster (English Barrister) to Edward J. Eberle (October 18, 2006).

¹⁵²L. Krieger, *supra* note, at 43-44, 125-33; Maunz Kommentar, *supra* note, at 2-43 (state must guarantee a minimal level of existence; although this not mean that state to guarantee all material elements of life.). The *Sozialstaatsprincip* has a long lineage. Frederick the Great considered the ruler to be the first servant of the people; accordingly, the ruler had a social pact with citizens. *Id.* at 23-24.

The idea of the state providing for the common welfare has roots outside of German culture as well. Montesquieu, for example, advocated that the state must promote the public weal. The United States Constitution’s preamble (“In order. . . to promote the general welfare. . .”) captures some of this sentiment. Currie, *supra* note, at 21. The 1791 French Constitution imposed social duties on the state, such as over education and support of the poor.

organism—a dynamic living thing that formed a greater good within which individuals would find and fulfill their freedom—a concept wholly different than the Anglo-American primary focus on the state as a framework for government.¹⁵³ Individuality was subsumed within the state.¹⁵⁴ Today, this idea has come to mean that man is not to be socially isolated, but defined as a part of the community. He is socially bounded, not alone.¹⁵⁵

With this view, Germans looked to the state to perform essential duties in guaranteeing individual liberty and the security of social conditions. The state became the focus for the fount of freedom, in comparison to the American idea that the state is the object against which freedom is directed: limiting state power to empower individual liberty. The German movement is wholly different: look to the state as a force for freedom, not as its enemy.¹⁵⁶ So the state came to be looked to as the source for moral authority.¹⁵⁷

The heated nineteenth century debate over legal theory had further important

¹⁵³L. Krieger, *supra* note , at 55, 125, 310. The idea of the state as organism has a long lineage in Germany. Many thinkers worked within this rubric. *Id.* at 258 (noting that Poelitz and Jordan, for example, used the idea of the organic state as a unifying formula for their political theories).

¹⁵⁴L. Krieger, *supra* note , at 55.

¹⁵⁵*Investment Aid Case*, 4 BVerfGE 7, 15-16 (1954); *Life Imprisonment Case*, 45 BVerfGE 227, 187 (1977). *See also* Jarass & Bodo Pieroth, *supra* note , at.14; Maunz Kommentar, *supra* note , at 23-25.

¹⁵⁶L. Krieger, *supra* note , at 43-44.

¹⁵⁷*Id.* at 64-65 (tracing idea of state as cultural—*Kulturstaat*--and moral--*Rechtstaat*).

consequences for the *Sozialstaat*. Under the Savigny inspired Pandektist movement, as it adjusted to the rise of industrialization, the *Rechtstaat* was conceived in essentially classical economic liberalism terms, along the lines of the English ideas of *laissez faire* developed by Adam Smith. But in the last part of the nineteenth century, beginning during the 1880s and during the crucial time of German codification, Otto von Gierke posed an alternative view: the state as a socially bounded community with obligations to its citizens. Von Gierke disliked social contract theory; for him, the state was a group, not a social contract.¹⁵⁸ He theorized that one should look to state power to facilitate personal freedom.¹⁵⁹ This was the genesis of the modern *Sozialstaat*, which

¹⁵⁸Ewald, *supra* note, at 2057-59.

¹⁵⁹Von Gierke was critical of individualism and its liberal orientation of the *Rechtstaat*. He didn't view this idea of the *Rechtstaat* as neutral but, rather, under the guise of neutrality, a competition among individuals was unleashed which served to empower the powerful over the powerless. The *laissez faire* concept of the *Rechtstaat* favored the wealthy at the expense of those less well off. Von Gierke decried this, because he saw it as breaking down the sense of community. Von Gierke decried freedom of contract for the same reason. His model, instead, was the medieval feudalistic structure, which he saw as preserving a sense of community. The medieval sense of community was the ideal he looked to in formulating his theories. Ewald, *supra* note, at 2056-57. *See, e.g.,* Otto von Gierke, *Das Deutsche Genossenschaftsrecht* (1881)(evaluating all “legally recognized forms of human groups.”). *Id.*

Kant had an important role here too. Kant did not emphasize private property. Instead, his focus was moral freedom: freedom, equality and independence. Theorists thus argued in Kantian terms in setting up the model of the social welfare state. *Id.* at 2059. Von Humboldt

proved influential in the transition from the nineteenth to twentieth century, gaining ascendancy in the twentieth. It is this idea that is now embodied in the GG. Following this idea, the state provided social insurance protections over retirement, injury and unemployment, reforms started in the Bismarck era.

Von Gierke conceived his idea of the *Sozialstaat* as a compromise between classical liberalism and the latter nineteenth century advocacy of collectivism, especially along communist designs, led by Marx, himself trained in Savignyian Pandektism.¹⁶⁰ The communal dimension to the *Sozialstaat* came out of von Gierke's work on groups and organizations. He felt that an individual could not be considered as possessing an identity apart from a group.¹⁶¹ Von Gierke was seminal in furthering the communalization of German law.¹⁶² Von Gierke also took issue with Lockean theory. Unlike Locke, he did not believe that the individual was the foundation for the state. Nor did he believe that property was anterior to the state and, accordingly, a purpose of government was to protect property. Rather, von Gierke theorized that the ultimate foundation of the state is not individuals but community, reflecting again his communal orientation.¹⁶³ Property

played a role here as well. Leonard Krieger, *supra* note, at 167-71.

¹⁶⁰ Maunz Kommentar, *supra* note, at 24(duty of state to protect dignity).

¹⁶¹ Ewald, *supra* note, at 2076.

¹⁶² Whitman, Roman Legacy, *supra* note, at 231 n. 9. "The beginnings of the new emphasis on communal existence among the Germanists dated to 1831, the date of Wilda's *Das Gildenwesen im Mittelalter*." *Id.*

¹⁶³ Ewald, *supra* note, at 2060.

is created by the state and held in common to serve the public good.¹⁶⁴ “[O]nly *after* the state has been established does the institution of property arise. . . .[A]ny gross inequality in wealth demands a special justification.”¹⁶⁵

Working within the tradition of the *Rechtstaat*, von Gierke sought to preserve its virtues “while freeing it from the bourgeois-liberal construction that had been placed upon it.”¹⁶⁶ He believed that the free-for-all unleashed by *laissez faire* had undermined social cohesion, leading to the domination of the strong over the weak. His *Sozialstaat* idea was designed to protect the vulnerable by placing affirmative duties on the state to protect the general welfare of people. He based the *Sozialstaat* on a moral ideal of freedom rooted in Kant, but with practical attention to the problems caused by capitalism.¹⁶⁷

Von Gierke’s idea of a state obligated to proactively secure individual freedom, welfare and security is, of course, the theoretical basis for the social welfare state now in place in Europe, Canada and other countries. It is also one of the most dramatic contrasts with the American idea of freedom. We only have to consider the Supreme Court’s absolute rejection of any state constitutional duty to protect its citizens in the infamous *Deshaney v. Winnebago County Dept. Of*

¹⁶⁴We see von Gierke’s influence in GG article 14(2): “Property imposes duties. Its use should also serve the public weal.”

¹⁶⁵Ewald, *supra* note , at 2060.

¹⁶⁶Ewald, *supra* note , at 2060.

¹⁶⁷Ewald, *supra* note , at 2060. Von Gierke looked to the ideals of social cohesion present in feudalistic Middle Age institutions, like family, congregations, towns and guilds.

Social Services,¹⁶⁸ where the Court failed to hold responsible social service officials for failing to protect a young boy from his father's beatings. A more recent case is *Castle Rock v. Gonzales*,¹⁶⁹ where the Court refused to hold a municipality liable for its police officers' failure to enforce a domestic abuse restraining order, ultimately resulting in the death of her children by her abusive husband, who then killed himself.

II. German Constitutional Vision

Assembling the elements of the German idea of freedom, we can observe that they coalesce to form a constitutional vision that is centered around man qua man. Man is valuable per se, as a human being, and this is the central principle around which the constitutional order is constructed. Accordingly, the constitutional design is structured to secure, fortify and nourish man as a complete and whole person. A second theme is the social conception of man. Man is not viewed as an isolated individual self-sovereigning as he pleases. Instead, man is situated within a community that is constructed along fundamental moral principles like dignity, equality and responsibility that comprise an objective value order; this community calls for participation and connectedness to others. A third theme is, in fact, the fundamental moral principles that comprise the objective moral value order, designed to promote and secure the welfare of man. The welfare of man is guarded, strategically, against both actions of the state, through the GG, and actions of private actors, through the doctrine of Third Party Effect. A final important theme

¹⁶⁸489 U.S. 189 (1989).

¹⁶⁹125 S. Ct. 2796 , 2803 (2005)(“[T]he so-called ‘substantive’ component of the Due Process Clause does not ‘requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors.’”*citing DeShaney*, 489 U.S. at 195).

is the nature and role of government. Authority is limited by the principles of the *Rechtstaat*, which place a discernible border around state power based on specific principles of reason, in the way that the objective value order cabins all sources of power, public or private. In these respects, the *Rechtstaat* limits state power. By contrast, the *Sozialstaatsprinzip* empowers the state to act in service of securing man's freedom and welfare. Thus, the *Rechtstaat* and the *Sozialstaat* operate in opposite ways toward the same goal of securing and facilitating man's freedom and welfare. We need to assess further the content of the German constitutional vision, starting with its parts and then turning to its overall scope.

Turning first to the vision of man, the rooting of the GG in the architectonic principle of human dignity is designed to serve human needs. Man is the star of the constitutional universe, and the system is built around him. There are a number of components to the focus on man. First, human life is considered sacred as is its security and nourishment. The BVfG's constitutionally imposed duty on the state to preserve life, even developing life in its embryonic phase, in the *Abortion Cases*,¹⁷⁰ and the GG's prohibition of the death penalty¹⁷¹ establish a consistent and defensible position on the value of life. Human life is valuable per se, in whatever form, whether developing or formed, good or evil.

Second, because man is valuable per se, as a bearer of human dignity, he must be respected and treated as a person, not as an object. Torture, corporal punishment, unconsented

¹⁷⁰*Abortion II*, 88 BVerfGE 203 (1993); *Abortion I*, 39 BVerfGE 1 (1973).

¹⁷¹GG article 102. The consistency of the German position on the value of human life contrasts with those who decry abortion but yet support the death penalty; and those who favor abortion rights, but oppose the death penalty.

bodily invasion, or like acts are contrary to the notion of human dignity and, therefore, prohibited. Man must be respected in all of his components, physical as well as spiritual and intellectual.

A third aspect of this view of man is consideration of him as a complete person, with multiple dimensions. An integral part of this human composite is, of course, the endowing of woman with a panoply of rights. The German catalogue of rights is particularly comprehensive, including rights over equality, religion, communication, marriage and family, education, privacy, freedom of movement, property and occupation, to name part of its scope. These rights serve as spheres of freedom so that a person can form and act in her own stead to further her destiny, as is common in much of western constitutional culture. The most noticeable aspect of this human composite concerns the broad range of article 2 personality rights, which cover both outer and inner dimensions to human life. The outer dimension addresses woman's actions in the world, much like the rights noted above. This is the exterior dimension to human being whereby a person has the capability to function and live completely and well in society within the zone mapped out by the catalogue of rights. The inner dimension address the sphere of interiority, a preserve of freedom protecting traits of the mind, like intellect, spirit, emotions or fancy; the place in which people can "develop freely and self-responsibly their personalities."¹⁷² German constitutionalism vests each person with control over this inner citadel of freedom, a preserve beyond the scope of the outer world, unless justified by a compelling need. Thus, for example, each person can control incursion into their Inner Space, over such matters as personal information, confidentiality, reputation, honor, and portrayal of his self to the outside world. This comprehensive constitutional chartering of man's personality is designed to secure his existence

¹⁷²*Microcensus*, 27 BVerfGE 1 (1969).

amidst the challenges of modern society so that he can act with free will, autonomy and on an equal basis. The plan is for woman to be in charge, not government or social forces. In these respects, the inviolability of human personhood is a final check on power and authority.

The second major component of the German idea concerns man's place in society. Here the German idea diverges from Anglo-American social contract theory, which hypothesizes that man comes from the state of nature and then forms a social contract involving a trade of his complete freedom in return for a more reduced claim to freedom and protection from the perils of life in the wilderness. Under the social contract rubric, man is the fount of freedom, and the ultimate arbitrator of his fate, subject to the bounds of government that he has consented to.

The German idea certainly does not ignore claims of individuality and social contract theory. We have seen how the GG embodies popular sovereignty and free will. But what makes the German idea unique is that it does not exclusively rely upon a social contract foundation for a view of man as the founding element of society. In addition, the German idea hypothesizes that groups or the community can be constituent founts as well. Accordingly, man is not a separate alone figure, dependent on relations with others based on consent. Rather, man is conceived as a social animal who is part of a community. He defines his existence within the construct of a social community. As the BVfG put it, "the human person is an autonomous being developing freely within the social community."¹⁷³ There are both individual and communal components to man in the German view.

The community within which the person operates is constructed according to a specific moral content that includes, of course, the polity's commitment to human dignity, equal worth,

¹⁷³*Mephisto*, 30 BVerfGE 173, 193 (1971).

social solidarity, responsibility and participation. The concept of woman and her free will, accordingly, is to unfold within this form of morally packed social community involving connections to others. And, appropriately, woman can look to the community for aid, support, security and nurture, ideas manifested in the ideas of the *Rechtstaat* and *Sozialstaat*. Woman is not simply a lone ranger, left to her own devices for protection and satisfaction. The communal dimension to human existence plays a central role in personal development. One dimension to this idea of community is the concept that a person has both rights and duties as a member of the community. The bounds of this concept of a community constrain personal freedom. The community is designed as an auxiliary precaution to mediate human passions.

Beyond vesting the content of morality with principles like dignity, equality and responsibility, the community is obligated to carry out this particular moral vision through a number of strategies, including commitment to the objective value order, Third Party Effect and the proactive role of government embodied in the *Rechtstaat* and *Sozialstaat* principles. The objective value order represents the core set of moral values described above that fuse together into a transcendental ideal of first order principles. As such, the objective value order exists as an independent force that applies outside any specific concrete legal relationship. As an independent force, the objective value order applies to all legal relationships, public or private, as an element of the community's commitment to principles of morality based on reason. The doctrine of Third Party Effect and its subset, the Reciprocal Effect Theory, form the mechanisms by which this transcendental moral idea can be carried out. Third Party Effect makes for an integrated, unified legal system. Committing government to extrinsic principles of reason through the *Rechtstaat* and social welfare obligations through the *Sozialstaat* form complementary strategies to Third Party

Effect. These strategies serve as constraints on the proclivities of human passions. Mediation of the human condition occurs both through republican notions of governmental structure, like popular sovereignty, representative government and separation of powers, and through principles of reason, like Third Party Effect, the *Rechtstaat* and *Sozialstaat*. In short, structure and reason are twin founts by which to secure the polity. Reliance on reason is an important characteristic of the German idea.

The ideas of the *Rechtstaat* and *Sozialstaat* constitute the final notable traits of the German idea: the role of government. These ideas embody a certain vision of government; the *Rechtstaat* limits government by binding it to certain neutral principles of reason and morality, as described above; the *Sozialstaat* empowers government to act in accord with specific duties which it must carry out. This means, essentially, that government must act fairly in commensurate with principles of justice and must, further, secure individual and social welfare. As concerns citizens, the ideas mean that people should, and can, look to government for security, support and nurture. Stated a different way, individuals have auxiliary support mechanisms beyond their own ingenuity. These include the social community, the objective value order and a government vested with the *Rechtstaat* and *Sozialstaat*. These auxiliary supports serve to aid and further personal welfare and freedom in the manner consistent with the German idea.

So, in sum, we can observe that the German constitutional vision posits a polity that centers on man and woman, treating them as human beings meriting respect and acknowledgment as free actors, but that their actions and capabilities are to unfold within a social community that binds them as fellow citizens, cognizant of and responsible to others. Claims to personal freedom and free development of one's personality are important, but so are participation, social solidarity,

social need and acting in accord with moral obligations. Human needs, in short, in all their dimensions—rights, personality, respect, fulfillment, equality, security, welfare--would seem to be the focus of this vision of the polity.

Given this conception of the polity, what consequences does it have for personal existence, presently and in the future, especially given the challenges of the global economy? We can observe, first, that material (through the social welfare state) and immaterial (through the guarantee of rights, especially personality rights safeguarding mental and emotional tranquility) are secured, at least at a certain base level, and this has the effect of providing peace of mind and mental security, forming a stronger base and greater confidence to withstand the vicissitudes of modern life. Social security over matters like education, health care, employment, accidents and retirement remove a significant cause of worry and discord and provide a base level of equality for all members of society. Protecting the many dimensions of human personality, through anchoring in fundamental rights, provides a human composite constituted from constitutional culture that is relatively complete and integrated and, therefore, can more easily lead to human fulfillment and satisfaction.

Commitment to human dignity focuses attention on the value of man, and this means that human life is valued highly so that, for example, life has value and protection at its conception, as in the *Abortion Cases*,¹⁷⁴ and cannot be extinguished even if the person has committed a heinous act in violation of the social order, as in the prohibition of the death penalty. Likewise, there can be no life imprisonment because it is contrary to the human condition to completely rule out hope,

¹⁷⁴*Abortion II*, 88 BVerfGE 203 (1993); *Abortion I*, 39 BVerfGE 1 (1973).

unless these concerns are outweighed by the pressing need to protect public safety.¹⁷⁵ Human capacity is such that there may yet be possibilities for good, no matter how dim things may look based on past acts or present circumstance. Concern for human welfare is so strong that rehabilitating and smoothing the reentry into society of felons can take precedence over other core constitutional values, like freedom of expression.¹⁷⁶ And prison inmates can exercise claims on par with free citizens. For example, prison inmates “have brought prosecutions against guards who addressed them disrespectfully,” within the German “culture of respect.”¹⁷⁷ The point, simply, is that man is valued *per se*, *qua* man and, therefore, it is the object and duty of the polity to secure his welfare and act to create the conditions so that he can realize his capabilities and this is to be done no matter what state man is in, at any particular time in his growth.

A further important consequence of the German idea is its ability to handle the rise of new technologies and the forces for empowerment or truncation of humankind they may pose. Most notable for us, in recent time, is the rise of the computer, which has led to the revolution of the information age, dramatically affecting our world, for better or worse. Let us use the computer as an example as to how the polity responds. Naturally, the computer can be a force for betterment

¹⁷⁵*Life Imprisonment Case*, 45 BVerfGE 187, 227-28 (1977).

¹⁷⁶*See, e.g., Lebach*, 35 BVerfGE 202 (1973).

¹⁷⁷Whitman, 2000 Yale, *supra* note , at 1306. Kant had an important role here too, with respect to the culture of respect. As James Whitman quotes Kant: “To show disrespect for others (*contemnere*), i.e., to deny them the respect [*Achtung*] we owe to each human being as such, is always a violation of our moral duty: For they are human beings.” *Id. citing* Immanuel Kant, *Metaphysik der Sitten*, reprinted in 8 Immanuel Kant: Werkausgabe 601 (1993)(1797).

of life, providing readily accessible information over anything, anywhere in the world and leading to efficiency and care in ordering a person's affairs. But the computer world can severely threaten human personality as well, for essentially the same reasons: its ability to gather, canvas and access information personal to a man or woman. The more that is known about a person, the easier the person is to control. Control can lead to manipulation and truncation of free will and self-determination, undercutting the prime means by which a person forms her identity and stands as a individual in society. Accordingly, the key question is who controls access to personal information.

In the German scheme, the answer is the person through the doctrine of information self-determination, which as determined by the BVfG means that it is "the authority of the individual to decide fundamentally for herself, when and within what limits personal data may be disclosed."¹⁷⁸ Intimate information reflects human personality because it is an important component of both the inner person and the public persona. Accordingly, control over personal information is a personal right, a shield against a prying government or public, and a means by which a person may maintain the integrity of his or her identity. Based on this reasoning, the BVfG has extended degrees of protection over personal data,¹⁷⁹ honor,¹⁸⁰ rights to one's good name,¹⁸¹ portrayal of self,¹⁸² image and spoken words,¹⁸³ matters we have previously observed.

¹⁷⁸*Census Act*, 65 BVerfGE 1, 42 (1983).

¹⁷⁹*Id.*

¹⁸⁰*Mephisto*, 30 BVerfGE 173 (1973).

¹⁸¹*Soraya*, 34 BVerfGE 269 (1973).

¹⁸²*Lebach*, 35 BVerfGE 202 (1973).

The private law courts have fleshed out a person's private sphere even more, protecting against secret photographing, surveillance by microphone or camera, telephone tapping, persistent telephone harassment and telephone advertisement, unauthorized opening of letters or peeking in personal diaries or unconsented analysis of blood or gene samples, to name some illustrations.¹⁸⁴

German and European law more generally are broadly protective of privacy and personal information in a wide variety of contexts, such as consumer data, credit reporting and workplace privacy, among other matters.¹⁸⁵ Financial privacy is prized. German privacy rights contrast dramatically with the American approach, where personal information is not treated as a right but as a commodity to be freely gathered, accessed, exchanged and bought and sold on the idea that it is in consumers' best interests as a matter of economic efficiency and satisfying consumer preference. The split in views between Europe and the United States developed into a major trade dispute over the United States' refusal to comply with the European Union consumer privacy directive in the 1990s.¹⁸⁶ Only in 2000 was the dispute resolved, uncomfortably and roughly, with a safe harbor agreement.¹⁸⁷ The difference in approach is, at bottom, grounded in a

¹⁸³*Boll*, 54 BVerfGE 208 (1980).

¹⁸⁴Huw Beverley-Smith et. al, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* 115 (2005)(authorities collected).

¹⁸⁵Whitman, 2004 Yale, at 104 (authorities collected).

¹⁸⁶The fight was over Council Directive 95/46 of 24 October 1995 on the Protection of Individuals with Regard to Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

¹⁸⁷Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed.

difference in world view; Germans prize dignity, even over money; Americans prize money. For Germans, the image of a person revealed by personal data is decisive; accordingly, that is something the person should control. For Americans, faith in markets is considered sufficient; people trust markets to determine appropriate use of personal information.

In sum, we end up where we started: the German idea of freedom has transformed into a constitution of dignity, whereas the United States idea of freedom was conceived as and remains a constitution of liberty. A constitution of dignity centers around man—his worth, his needs and the fulfillment of his destiny within a morally ordered way that enlists outside forces, like government and community, to help facilitate individual self-realization. A constitution of liberty centers around liberty, as a condition to be desired and realized. Endowed with liberty, woman is free to pursue her destiny, as she desires on her own, without outside support except as determined by the democratic process. She is in charge of self-realization, which she strives to realize as best as she can. Our last example over use of personal information brings the difference into clear view. Germans can rely on the constitution and government to help secure their interests and needs against the onslaught of outside forces, like others' use of personal data in the computer world. Americans cannot rely upon the constitution and can rely upon government only to the extent they can influence its complexion through the political process to do the same. On the whole, Americans stand alone, to fend for themselves. Perhaps Americans live in an updated version of the state of nature.

III. Conclusion

Reg. 45,666 (July 24, 2000). For discussion of the dispute, see Daniel J. Solove & Marc Rotenberg, *Information Privacy Law* 743-54 (2003).

The German idea of freedom posits a vision of man where man is the ultimate value qua man, meaning that human values are the center of the constitutional universe. Rooted in deep philosophical, intellectual, and legal scientific traditions of speculation and discourse, and cultural norms, the German idea today constitutes a “constitution of dignity.” As such, the idea vests man with essential control over his fate and realization of his capacity within society. The dignity of man is, in all cases, inviolable, the core animating principle of the social order.

Because the German idea is centered around man and his dignity, the design of the constitution is oriented around this objective, which is pursued in a number of ways. First, of course, is the focus of man qua man, which is carried out by a detailed catalogue of human rights designed to account for the multiple dimensions (inward and outward) of the human condition in modern society. Prime attention is given to the realization of man’s moral autonomy and this is to be realized with attention to both man’s autonomy and morality. Autonomy is secured through the anchoring of self-determination and free will in the panoply of fundamental rights that serve as realms of freedom. Morality is secured by situating man in a specific social and moral setting designed to guide the impulses of human nature according to a higher moral law. The higher law is comprised of an objective value order that operates both to empower and constrain human action. The objective value order of dignity includes the coupling of rights with responsibilities, personal actions measured in accord with obligations to others, and a legal system integrating both public and private law under the first order principle of dignity. In this way, the higher moral law of dignity both empowers and constrains human freedom. Stated a different way, freedom does not mean the ability to do whatever a person wants. Rather, freedom means self-determination of one’s talents, capacities, skills and traits in a way that is true to oneself, outside

the influence of social forces as is possible, and in a way that does not interfere or harm the ability of others to do the same. That is the meaning of the higher law of moral autonomy.

The German idea also consists of important strategies designed to realize and secure the constitution of dignity. These strategies can be grouped around two constructs, community and government. Moral autonomy does not unfold in a field of contest pitting one person against another, leaving to competitive forces realization of autonomy. Rather, moral autonomy is to unfold within a social community that binds man's autonomy to the objective value order. Man is community bounded, not wholly atomistic. Human character is a composite of both personal and social forces. He is neither wholly separate nor wholly communal, but a mix of both. The community has a decisive role in forming human identity, as does individual self-determination. We might think of this social dimension as a version of communitarianism, combining personal autonomy with its realization within a social setting.

In addition to the community, the German idea looks to the state for aid in realizing the constitution of dignity. The German idea entails a freedom with, not from, government. Accordingly, the state is obligated to act on behalf of the human person to secure freedom and fulfill requirements of human dignity. Decisive here, of course, are the ideas of the *Rechtstaat* and *Sozialstaat*, which obligate the state to secure and realize justice, freedom and security in accord with the vision of a constitution of dignity.

The German constitution of dignity contrasts notably with the constitution of liberty characteristic of the United States. Summarily stated, the United States constitution of liberty is fundamentally a freedom from government. Shielded from government, people are free to pursue their interests as they choose. In contrast to the objective value order of the German constitution

of dignity, the United States constitution of liberty contains no overarching moral order and, thus, people are free to act on the values they choose in the way they desire. This constitutional design places great faith on the ability of the individual to choose and realize choice. Not surprisingly, therefore, the mantra of the United States scheme might be concisely captured as free markets and free speech. Free markets are for the pursuit of economic interests. Free speech is for the pursuit identity, voice, participation or governing. Free markets are regulated judiciously, when they must, but otherwise left to function on the faith that they will self-correct. Likewise, free speech is regulated only in narrow, carefully justified instances, and is otherwise left as a preserve of personal freedom of a range unlike any other American fundamental right. This quintessence of the United States constitution of liberty is perhaps best captured by Justice Holmes:

[T]he 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. That at any rate is the theory of our Construction. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.¹⁸⁸

None of this is to say that the German or the United States idea of freedom is better or worse; they are just different. Each is, as Justice Holmes stated, “an experiment,” and it is up to the citizens of a country to determine for themselves what constitutional vision they want to realize, for what reasons and to what purposes. That is an act of democratic self-governance, qualities present in both Germany and the United States. The point of this article, simply, is to lay out an alternative constitutional vision than one perhaps many of us are accustomed to. That is why the article is an exercise in comparative law: seeking knowledge and perhaps illumination

¹⁸⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting).

through examination of other patterns of legal order.

