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The German Duality of State and Society

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There are at least two reasons why Americans might well consider the supplementation of our prevailing *property-based* negative rights regime with *citizenship-based* positive rights. The first is that negative rights ("liberties") provide people possibilities that, in our existing highly inegalitarian socioeconomic system, they are unable to fulfill meaningfully. Freedom from censorship, for example, is a valuable negative liberty that does little, if anything, to foster literacy. Freedom of association, another example, means little to those emarginated from society.

The second reason has to do with the immense and growing inequality in the ownership of productive property. Notwithstanding the legal renovations and additions of the Reconstruction, the New Deal, and the Civil Rights eras of equal protection and fundamental rights jurisprudence, inequality in productive property ownership has continued to grow and continues to impede the nation's democratic promise. The "new property," of which so much was expected in the 1970s and 1980s, has proven to be no substitute for "old property" and, consequently, a democratic society might be better off *uncoupling* rights from property and grounding them in something more universal and democratic, like citizenship.[1] To a certain extent, some European legal systems have moved in this direction over the past half-century.

Juxtaposed to America's Lockean constitutional conception of persons who are individualistic, self-regarding, and unencumbered, Germany offers a constitutionalism more deeply implicating community and duty which is rooted in a history that has included significant feudal and socialist impulses.[2] The current German

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[1] On the promise and demise of new-property type welfare rights thinking, *see* William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985). Any real transformation of the property regime would require amelioration of at least some of the conditions that make it impossible for citizens to use their constitutional rights. *See, e.g.*, Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 695-705 (1980).

[2] *See* FRANZ NEUMANN, THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY 179-285 (1986); DAVID ABRAHAM, THE COLLAPSE OF THE

Constitution, *Grundgesetz* ("Basic Law"), was adopted in 1949: in the wake of defeated Nazism, in an atmosphere of popular-front reformism, in the midst of a then still unresolved American/capitalist and Soviet/communist competition for German hearts and minds, and under the watchful eyes of both Anglo-Saxon and Gallic critics. West German society benefitted greatly from this particular conjuncture, and its Constitution writers were able to join the most serviceable elements of their own traditions with those of the negative liberty traditions.[3]

Whereas the centrality and strength of our negative liberties testify to our acute distrust of state power, in contrast, the current German Constitution (like some of its predecessors) underscores the social connections and commitments of individual citizens. As one German constitutional specialist has put it:

> One vision [the American] is partial to the city perceived as a private realm in which the individual is alone, isolated, and in competition with his fellows, while the other vision [the German] is partial to the city perceived as a public realm where individual and community are bound together in some degree of reciprocity. Thus the authority of the community, *as represented by the state*, finds a more congenial abode in German than in American constitutionalism.[4]

This different constitutional concept may be applied to the barrier encountered by the dissenters in *San Antonio Independent School District v. Rodriguez*, one of the leading cases demonstrating the absence of positive rights in American law.[5] The existence of former Justice Marshall's "nexus"[6] or former Justice Brennan's

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WEIMAR REPUBLIC 1-41 (2d ed. 1986). This feudal and socialist background is reflected in the duties which the German constitution connects to the ownership of property and the state's right to socialize landed and industrial property for the sake of the common weal. Article 14(2) of the *Grundgesetz* (Constitution) states simply that: "Property entails obligations. Its use should also serve the public interest," *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 111 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) [hereinafter CONSTITUTIONS].

[3] WEIMAR VERFASSUNG DES DEUTSCHEN REICHS (Constitution) arts. 119, 143, 145, 161, 163 (F.R.G.)(enumerating rights to family social supports, free education, national health and old-age insurance, and employment or unemployment compensation).

[4] Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 867 (1991)(emphasis added).

[5] 411 U.S. 1 (1973). For other pivotal American cases stressing our negative liberty tradition see *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989) and *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983).

[6] *See, e.g. Rodriguez*, 411 U.S. at 102-03 (Marshall, J., dissenting).

"effectuation"[7] requirement between constitutionally granted fundamental rights and an array of positive social rights, such as the right to education at issue in *Rodriguez*, is recognized in several ways in the *positive liberty welfare state* mandate of the Basic Law. To take the free press/literacy case, for example, a positive "value" accompanies the negative "right." Thus, in the German schema:

> A basic "right" is a negative right against the state, but this right also represents a "value," and as a value it imposes an obligation on the state to insure that it becomes an integral part of the general legal order. [For example,] the *right* to freedom of the press protects a newspaper against any [encroachment] of the state. . . but as an objective *value* applicable to the society as a whole, the state is duty-bound to create the conditions that make freedom of the press both possible and effective.[8]

Among the arguments Germans use in favor of state obligations are exactly those that the majority in the United States Supreme Court repeatedly rejected in cases like *Rodriguez*. First, contra the majority view of Justice Powell, German jurists frequently argue that effectuation-like values are required precisely "to facilitate political participation and representative government."[9] Second, contra Justice Stewart in his concurrence with the majority, they argue that the Basic Law's welfare-state perspective "requires the state[,] *inter alia* [,] to provide subsidies to persons and groups who would not otherwise be able to exercise their rights effectively."[10]

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7 *See, e.g., id.* at 68 (Brennan, J., dissenting).

8 Kommers, *supra* note 4, at 859. To be sure, within this example, it is not entirely certain that free-speech and free-press rights through their corresponding values mandate the provision or guarantee of some measure of literacy. *See* E.W. BOCHENFORDE, STATE, SOCIETY AND LIBERTY 175-98 (1991).

9 Kommers, *supra* note 4. In *Rodriguez*, Justice Powell wrote:

> [W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.
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> [T]he logical limitations on. . .[the] nexus theory are difficult to perceive. How, for instance, is education to be distinguished from. . . the basics of decent food and shelter? Empirical examination might well [confirm] that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.

411 U.S. at 36-37.

10 Kommers, *supra* note 4, at 873. In *Rodriguez*, Justice Stewart wrote that "the Equal Protection Clause confers no substantive rights and creates no substantive liberties. [Its] function. . .rather, is simply to measure the validity of *classifications* created by state laws." 411 U.S. at 59.

Thus, German legal ideology, like that of other welfare states less committed to public/private and state/society distinctions than the United States, contains a strain that tends to direct governments "to compensate for inequalities of wealth for which it was not responsible."[11] In the overlapping area of campaign financing and free speech, for example, the leading American cases are mired in the free speech/marketplace of ideas discourse: in the marketplace, money, however much one has of it, talks. In contrast, the West German constitutional court has invalidated the tax deductibility of campaign contributions on the grounds that they benefitted wealthy taxpayers more than others, and, hence, worked to the advantage of the more conservative parties.[12]

As another German constitutional scholar and Justice of the German Federal Constitutional Court has put it, "[t]he particular liberty enshrined in the basic right is qualified in a special way by relating all basic rights to values. As a result of this value dimension it is aimed at realizing and fulfilling the value expressed in and through such rights."[13] Crowning this hierarchy of values is something German jurists regularly call "the principle of human dignity." This principle requires rejection of both legal positivism and moral relativism, the very hallmarks of the American system of negative rights. One former President of the German Court (the equivalent of a U.S. Chief Justice) has gone so far as to say that the guiding values of the German Basic Law are "equality, social jus-

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11 David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 883 (1986). *See also* David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, SUP. CT. REV. 333 (1989).

12 The two leading German cases are, *Party Tax Deduction Cases*, 8 BVerGE (1958) and Party Finance Case, 20 BVerGE 56 (1966). In the not-unrelated area of television broadcasting, the German high court has held that the state must "ensure" that the diversity of existing opinions finds its greatest possible breadth and completeness through broadcasting. *The Third Television [Network]*, 57 BVerGE 295 (1989). *Cf.* Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373 (1993) (the American situation). The leading American cases are *Buckley v. Valeo*, 424 U.S. 1 (1976) (limitations on independent political expenditures struck down as limiting free speech); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (same, in the context of public referendum); *Cent. Hudson Gas v. Public Serv. Comm.*, 447 U.S. 537 (1980) (regulated public utility may advertise to promote usage even as state encourages conservation). *See also Miami Herald Publishing v. Tornillo*, 418 U.S. 241 (1974) (states may not compel newspapers to offer a right of reply); *Columbia Broadcasting Sys. v Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (anti-war campaign advertising need not be accepted for airing); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (as private entities, shopping centers may exclude leafletters and speakers).

13 BÖCHENFORDE, *supra* note 8, at 190-191.

tice, the welfare state, the rule of law, and militant democracy."[14] It is difficult to imagine such testimony at an American Supreme Court nomination hearing.

Because the German constitutional system explicitly recognizes positive as well as negative rights, it can commit the state to the effectuation or realization of guaranteed liberties. Hence, in addition to negative liberties, similar to the American's, that are intended to protect individual freedom and autonomy (vis-a-vis the state or other individuals), through its welfare-state *Sozialstaat* ("social state") commitment, the German constitution is committed programmatically to positive rights. A positive right, as Isaiah Berlin also understood it,[15] represents a claim that the individual may make on the state. As Kommers puts it, "[i]n the German understanding[,] positive rights embrace not only a right to certain social needs[,] but also a right to the *effective* realization of personal freedoms and autonomy."[16]

Limited by the overarching, if somewhat abstract, requirement of deference to human dignity and the common good, positive rights constitute and generate entitlements that individual citizens may claim from the state. Kommers sums it up (rather too innocently):

> [A]n individual . . . may need that state's help to enjoy a basic right effectively such as, for example, equality. In this respect, the notion of a right under the Basic Law is broader than the concept of a right under the United States Constitution. A right in the German constitutionalist view is not only the right to be left alone, free of state interference, but the right to some form of state assistance in the enjoyment of the right.[17]

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14 WOLFGANG ZEIDLER, GRUNDRECHTE UND GRUNDENTSCHEIDUNGEN DER VERFASSUNG IM WIDERSTREIT 4 (53 Deutschen Juristentages 1980), *cited in* Kommers, *supra* note 4, at 861, n.69. Even German law is double-edged, of course, and so it should be noted that this paramount "principle of human dignity," particularly in the aftermath of Nazi eugenics, was cited in 1975 to strike down a liberalized abortion statute 39BVerGE 1 (1975). *See* JOACHIM PERELS, GRUNDRECHTE ALS FUNDAMNET DER DEMOKRATIE 11, 40 (1979).

15 *See Isaiah Berlin, Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY 118, 121-31 (1979) ("negative freedom" and "positive freedom"). The standard criticism of this dichotomy is that a person must be free from constraints in order to do an action. *See* Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967); ALAN RYAN, PROPERTY AND POLITICAL THEORY (1984); ALAN RYAN, PROPERTY (1987); Charles Taylor, *What's Wrong With Negative Liberty, in* THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN 175 (Alan Ryan ed. 1979). America has simply not scaled the Isaiah Berlin Wall.

16 Kommers, *supra* note 4, at 861.

17 *Id.* at 862.

Needless to say, even under this sort of mixed capitalist-democracy regime, the degree of assistance people receive from the state to effectuate their rights is a matter of legislative, programmatic discretion. It is not set constitutionally, as it occasionally was in the former socialist countries of Eastern Europe.[18] Even so, for those who care about democracy and the welfare state, it is worth seeing and imagining a "discursive terrain" or "field of struggle" broadly different from America's.

Article 20(1) of the 1949 Basic Law describes the Federal Republic as a federal, democratic, and *social* state. This social commitment or *Sozialstaatlichkeit* adds to the formal, procedural equality of *Rechtstaatlichkeit* shared with the American constitutional conception. In other words, justice is commanded along with fairness.[19] Equality transcends its purely formal meaning because, unlike in the United States, it is linked to the dual principles of human dignity and the social welfare state. In addition, the privileging of political parties affords individuals, as well as interest groups, the opportunity to aggregate their interests along shared ideological and organizational lines, thereby mitigating disparities of income and wealth.[20]

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[18] *See, e.g.*, Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (1992). Besides the vague German "social state" commitment, one finds in the welfare capitalist democracies of western Europe, "programmatic" (not individually enforceable) constitutional statements like the Swedish:

> The personal, economic and cultural welfare of the individual shall be fundamental aims of the activities of the community. In particular, it shall be incumbent on the community to secure the right to work, to housing and to education and to promote social care and security as well as a favorable living environment.

THE SWEDISH INSTRUMENT OF GOVERNMENT art. 2 (entitled *The Basic Principles of the Constitution*), *quoted in* Mary Ann Glendon, *Rights and Responsibilities Viewed from Afar: The Case of Welfare Rights*, 4 RESPONSIVE COMMUNITY 33, 37 (1994).

[19] Of course, American and German legal systems do belong to the same larger "European" legal culture. As Franz Wieacker has put it:

> The same tension between property rights and contractual autonomy on the one hand, and the social restrictions on private rights and their exercise on the other is apparent in the private law of modern economic societies. Today, the resulting autonomy between liberal and social *Rechtsstaat* poses one of the fundamental constitutional problems .... But this tension only confirms the extent to which individual freedom and social duty (to use catchwords: individualism and socialism) are two sides of the same coin: a specifically Western personalism.

Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L., 22-23 (1990).

[20] The virtues and vices of the so-called *Parteinstaat* have been much debated. For introductions and summaries, *see* Michaela Richter, *The Basic Law and the Democratic Party State: Constitutional Theory and Political Practice, in* CORNERSTONE OF DEMOC-

Inevitably, the language of duties, also underdeveloped in American law,[21] joins the language of negative and positive rights. With that joinder, *communitarian* relations and pressures join the property based *contractarianism* that prevails in the American system. A number of West European countries have constitutionalized an individual's duties to others. The 1947 Italian Constitution, for example, imposes on citizens "the performance of unalterable duties of a political, economic, and social nature,"[22] directs that citizens undertake "an activity or a function contributing to the material and moral progress of society,"[23] and enumerates specific duties, including the support and education of one's children[24] and the duty to vote.[25] The post-Franco Spanish Constitution of 1978 speaks of "[t]he Rights and Duties of Citizens" and specifies, *inter alia*, the duty to work,[26] the duty to support one's children,[27] the duty to defend the country,[28] and a duty to create "an environment suitable to the development of the person."[29]

Real autonomy, real individual freedom, is seen as requiring much more than the ultimate, market based American virtue: *choice*.[30] Our own emphasis on individual autonomy — choice —

RACY: THE WEST GERMAN GRUNDGESETZ, 1949-89, at 37 (Detlef Junker et al. eds., 1995). *But see* Claus Offe & Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POL. POWER & SOC. THEORY 67 (1980) (asymmetry of politics and markets as respective arenas in which citizens and big business interests organize to achieve core demands).

21 *See, e.g.*, Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (seeking to establish bases for rescue and other duties).

22 ITALY CONST. art 2, *translated in* 9 CONSTITUTION OF THE COUNTRIES OF THE WORLD 47 (A. Blaustein & G. Flanz eds., 1987).

23 *Id.* art.4, *translated in* 9 CONSTITUTION OF THE COUNTRIES OF THE WORLD 47 (A. Blaustein & G. Flanz eds., 1987).

24 *Id.* pt. I, tit. IV, art. 48, *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 53 (A. Blaustein & G. Flanz eds., 1987).

25 *Id.* pt. I, tit. IV, art. 48, *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 58 (A. Blaustein & G. Flanz eds., 1987).

26 SPAIN CONST. tit. I, ch. II, Section 2, art. 35, *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 50 (A. Blaustein & G. Flanz eds., 1991).

27 *Id.* tit.I ch. III, art. 39, *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 51 (A. Blaustein & G. Flanz eds., 1991).

28 *Id.* tit.I, ch. II, Section 2, art.30, *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 49 (A. Blaustein & G. Flanz eds., 1991).

29 *Id.* tit. I, ch. III, art.45, *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 52 (A. Blaustein & G. Flanz eds., 1991).

30 *Roe v. Wade*, 410 U.S. 113 (1973); probably *faute de mieux*, represents the apotheosis of "choice." Indeed, defense of the principle enunciated there has become the "pro-choice" movement. Of course, in real material terms there is generally little "free" about the abortion choice. And *Roe* itself posits autonomous, isolated women, alone and unat-

makes collective action, whether as a family, a neighborhood, or a trade union, much more difficult than in Europe. We fear, disdain and avoid the *dependency* (and not just interdependency) that is necessarily intertwined with collective action. To stop with negative liberty and to rest content with *resource-based* choice by atomistic individuals is, in the German and other social-democratic regimes, to misunderstand and underestimate personhood.[31] The German Supreme Court has explicitly held that:

> The concept of man in the Basic Law [(German Constitution)] 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 the commitment to the community, without infringement upon a person's individual value.[32]

Thus, in some respects, society takes precedence to the individual and has legitimate claims over him. The relationship between self and society is constitutive, not merely instrumental. Public and private, state and society are (for better or worse) far less bifurcated than in the American system. Such a view necessarily rejects radical individualism, with its own attendant rejection of duties. That individualism characterizes not only ACLU-style liberals, but also liberal free marketers and post-modern radicalism, whose non-Heideggerian forms are themselves, in fact, forms of hyper-liberalism.

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tached to family or community (except insofar as family and community might impinge on the autonomy and free choice of the woman involved). There are no values that might transcend the woman's present interests because her interest is presumed to be private, *self*-realization.

On the (mis)uses of "choice" to undervalue constraint in several areas of American law and policy, *see* Martha Minow, *Choice and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093 (1992).

31 This social-democratic communitarian position goes at least as far back as Marx:

> [T]he so-called *rights of man* . . . are simply the rights . . . of egoistic man, of man separated from other men and from the community . . . None of the supposed rights of man, therefore, go beyond egoistic man, man as he is as a member of civil society; that is an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice . . . [S]pecies-life itself -society- appears as a system which is external to the individual and as a limitation of his original independence. The only bond between men is natural necessity, need and private interest, the preservation of their property and their egoistic persons.

KARL MARX, *On the Jewish Question, in* EARLY WRITINGS 24-26 (T. Bottomore & Maximilien Rubel eds., 1964).

32 4 BVerfGE 7, 15-16 (1954), *cited in* Kommers, *supra* note 4, at 873, n. 96.

As might be imagined, a system like Germany's can have difficulties with sub-communities or even multiculturalism. More generally, it is no accident that the most successful welfare states have been established in countries with substantial ethnic homogeneity: if I am to be my "brother's keeper," I might well prefer that my brother resemble me closely. Finally, it cannot be gainsaid that the constitutionalization of values and duties can put undesirable minorities at risk and that social solidarity can induce a conformity offensive to the libertarian impulse.