

## Taking “Rechts” Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany

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### A. Introduction

Over the past 60 years the German Basic Law has become one of the most influential constitutional systems in the world.<sup>1</sup> According to some commentators, the German model rivals even U.S. constitutionalism as the preeminent legal system in the world.<sup>2</sup> This state of affairs is apparent in the dozens of states across Europe and Latin America that have adopted the German model.<sup>3</sup>

Because of the importance of both the U.S. and German models, studies of the similarities and differences among them have sparked the interest of many scholars.<sup>4</sup> Likewise, theories about constitutional law by legal philosophers from

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<sup>1</sup> Juliane Kokott, *From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization-With Particular Reference to the German Basic Law*, in CONSTITUTIONALISM, UNIVERSALISM, AND DEMOCRACY-A COMPARATIVE ANALYSIS 71-134 (Christian Starck ed., 1999).

<sup>2</sup> See, e.g., DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 161 (1997); Markus Dubber, 40 AM. J. LEGAL HIST. 107 (1996) (reviewing David P. Currie, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (1994)); Peter Quint, *What is a Twentieth-Century Constitution?* 67 MD. L. REV. 238 (2007); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

<sup>3</sup> See Kokott, *supra* note 1, at 71.

<sup>4</sup> See, generally, Donald Kommers, *Germany: Balancing Rights and Duties*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 161-214 (Jeffrey Goldsworthy ed., 2006.); EDWARD EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* 29 (2002); Peter Quint, “*The Most Extraordinarily Powerful Court Of Law The World Has Ever Known?*”—*Judicial Review In The United States And Germany*, 65 MD. L. REV. 152 (2007). On civil liberties generally, see Shawn Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison on the Impact on Civil Liberties in the Federal Republic of Germany and the United States*, 11 TULSA J. INT’L. & COMP. L. 111 (2003). On privacy, see Edward Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 Utah L. Rev. 963 (1997). On freedom of expression, see Ronald Krotoszynski, *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 Tul. L. Rev. 1549 (2004). On free exercise, see Robert Kahn, *The Headscarf as Threat: A Comparison of U.S. and German Legal Discourses*, 40 VAND. J. TRANSNAT’L L. 417 (2007). On tort law, see

one of the systems may provide insight into the other system. In the 20<sup>th</sup> century, few legal philosophers have dominated the jurisprudential field in the U.S. like Ronald Dworkin.<sup>5</sup> Many find Dworkin's theory about constitutional law and interpretation to be uniquely American.<sup>6</sup> Nonetheless, this paper argues that elements of Dworkin's theory can help explain the jurisprudence of Germany's highest court, the Federal Constitutional Court ("FCC").

From the outset, it must be acknowledged that Dworkin and the FCC come to starkly different conclusions about exactly what the substantive contours of law should be, with respect to individual rights like privacy, freedom of expression, and free exercise. The substantive outcomes of Dworkin's theory or the jurisprudential method of the FCC are not the subject of this paper. Rather, the present project is much narrower; the sections that follow seek to demonstrate similarities merely in the *analytical method* that both Dworkin and the FCC employ.

In order to illustrate these similarities, this paper will examine the FCC's freedom of expression<sup>7</sup> jurisprudence in light of Dworkin's theory. Section B will provide a short synopsis of Dworkin's legal philosophy. Next, Section C will examine Dworkin's conceptual framework and seek to apply it to the jurisprudence of the FCC. Section D will discuss the Court's use of this framework in its method of constitutional interpretation. Finally, Section E will compare the most controversial

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Hannes Rösler, *Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT'L L. 153 (2008). On abortion, see Donald Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 CONT. J. HEALTH L. & POL'Y 1 (1993). On the exclusionary rule, see Kuk Cho, "Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality, 15 TEMP. INT'L & COMP. L.J. 1 (2001). On property, see Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733 (2003). On consular rights, see Carsten Hoppe, *Implementation of Lagrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EUR J. INT'L L. 317 (2007).

<sup>5</sup> See, e.g., Amy Gutmann, *Preface*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); FERNANDO ATRIA AND D. NEIL MACCORMICK, *Introduction*, in *LAW AND LEGAL INTERPRETATION* (2003).

<sup>6</sup> Indeed, Dworkin himself has stated that "interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong." See RONALD DWORKIN, *LAW'S EMPIRE* 226 (1986).

<sup>7</sup> Constitutional provisions relating to the freedom of expression include Article 5 ("(1) Everyone shall have the right to freely express and disseminate his opinion by speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship. (2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor. (3) Arts and science, research and teaching shall not absolve from loyalty to the Constitution") and Article 18. See GRUNDGESETZ [GG] [Basic Law or Constitution] art. 5 and 18.

contributions of Dworkin's and the FCC's jurisprudential thought: Dworkin's "one right answer" thesis and the FCC's "objective order of values." The paper will conclude that, because Dworkin's theory and the FCC's jurisprudence are both fundamentally grounded in an objective aspect of the law, their interpretive methods will be similar even if their substantive outcomes may differ.

## B. The Legal Philosophy of Ronald Dworkin

Few legal philosophers have impacted modern American jurisprudence more than Ronald Dworkin.<sup>8</sup> Dworkin's influence began with his early work in which he offered a compelling critique of positivism.<sup>9</sup> His critique is founded upon an interpretivist approach to law that finds applicable law by reference to the political morality of a particular community.

In his initial project Dworkin discounted traditional positivism<sup>10</sup> as theorized by Hart,<sup>11</sup> Austin,<sup>12</sup> Kelsen,<sup>13</sup> and others.<sup>14</sup> Positivists assert that law is a special set of rules that can be identified by special tests that have more to do with pedigree than with substance. If the formalities of these tests are satisfied, then the law is "valid."<sup>15</sup> Validity, however, exists independent of morality. The validity of these rules can be traced to a political act which defines the validity test.<sup>16</sup> This political act is the master rule, which Hart calls the "rule of recognition."<sup>17</sup> A court's job, then, is to determine whether a law is valid, and if so, apply it.

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<sup>8</sup> See, e.g., Marshall Cohen, *He'd Rather Have Rights*, THE NEW YORK REVIEW OF BOOKS (1977) (reviewing RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977)); Associated Press, *American Ronald Dworkin Wins Norway's Holberg Prize for Theory of Morality in Law*, INT'L HERALD TRIBUNE, Sept. 18, 2007; ARTHUR RIPSTEIN, *RONALD DWORIN* (2007).

<sup>9</sup> See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* Chapters I-IV (2002) (1977).

<sup>10</sup> *Id.* at 22.

<sup>11</sup> H.L.A. HART, *THE CONCEPT OF LAW* (1994) (1961).

<sup>12</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE* (1998).

<sup>13</sup> HANS KELSEN, *A PURE THEORY OF LAW* (1997).

<sup>14</sup> DWORIN, *supra* note 9, at xi-xii.

<sup>15</sup> HART, *supra* note 11, at 103; JOSEPH RAZ, *THE AUTHORITY OF LAW* 146 (1979).

<sup>16</sup> HART, *supra* note 11, at 103.

<sup>17</sup> *Id.* at Chapter V.

Dworkin directly confronted this positivist notion of law with his thesis that individuals can have rights against the state which exist *prior to* the rights created by explicit legislation.<sup>18</sup> Dworkin suggests that courts must constantly determine more than just the validity of law.<sup>19</sup> For example, law encompasses ambiguous requirements of “reasonableness” or murky prohibitions of “cruel and unusual punishment.”<sup>20</sup> Interpretation of such ambiguous terms requires more than just an analysis of the law’s validity.

This ambiguity, which positivists call “open texture,”<sup>21</sup> must be resolved by judges. Dworkin claims that judges resolve ambiguous questions by relying on underlying principles.<sup>22</sup> These principles can be discerned from the morality of society.<sup>23</sup> Rights, in turn, flow from these principles.<sup>24</sup> In other words, an individual subjectively relies upon a principle to give him or her a right to a particular action or property.<sup>25</sup> Therefore, a judge decides a case by discerning the rights of the parties, with reference to the underlying principles at play. The following section will explore these concepts more deeply within the context of the FCC’s jurisprudence.

### C. The Conceptual Framework of Dworkin’s Theory and the Federal Constitutional Court

An analysis of the Federal Constitutional Court’s jurisprudence from a Dworkinian perspective must begin with the fundamental concept of the “principle.” Principles are standards that are to be observed not because they will advance or secure an economic, political, or social situation deemed desirable, but rather, because justice,

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<sup>18</sup> DWORKIN, *supra* note 9, at xi.

<sup>19</sup> See *id.* at 7 (“[The positivists] ignored the crucial fact that jurisprudential issues are at their core issues of moral principle, not legal fact or strategy.”).

<sup>20</sup> *Id.* at 28.

<sup>21</sup> HART, *supra* note 11, 121-32.

<sup>22</sup> DWORKIN, *supra* note 9, at 22.

<sup>23</sup> *Id.*

<sup>24</sup> Ronald Dworkin is by no means the origin of the notion that rights flow from moral principles in German jurisprudential thought. From the Weimar period, see RUDOLPH SMEND, CONSTITUTION AND CONSTITUTIONAL LAW (1928). See also PETER CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW 142 (1997).

<sup>25</sup> DWORKIN, *supra* note 9, at 105-10.

fairness, or some other dimension of morality requires them.<sup>26</sup> The most important aspect of Dworkin's concept of the "principle" is its moral content.<sup>27</sup>

The notion that the law has a moral component is important because it contrasts with one of the fundamental tenets of traditional positivism, that is, that law is amoral.<sup>28</sup> Proponents of traditional positivism argue that a law can only be valid or invalid, according to the criteria by which it is created.<sup>29</sup> For Dworkin, however, law is permeated with morality because judges must unceasingly make judgments about which underlying moral principles to apply in ambiguous cases. For example, deciding whether a tabloid constitutes "speech" requires a judge to make a moral judgment about what is valuable or important about speech.<sup>30</sup> In order to decide such a question, a judge must take account of the moral principles that undergird the protection of speech. These moral principles may be constitutional norms themselves, or they may act to inform the interpretation and weight of constitutional norms.<sup>31</sup>

### *I. Constitutional Norms as Moral Principles*

If this paper is to demonstrate that elements of Dworkin's theory are evident in FCC jurisprudence, the use of the "principle" must be found in FCC case law. Principles exist in two ways within the FCC's jurisprudence.

First, the constitutional provisions of the Basic Law can be considered principles in themselves. Article 20 of the Basic Law explicitly refers to four structural principles of the German state: democracy, social federalism, republicanism, and the rule of law.<sup>32</sup> But the Basic Law also contains principles of a moral character as well.<sup>33</sup>

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<sup>26</sup> *Id.* at 22.

<sup>27</sup> The origins of the morality of rights, and how that morality might be derived, are explored in further detail below. For now it is simply important to note that FCC jurisprudence, by its terms, does not appear to accept the positivist claim that law is value-neutral.

<sup>28</sup> DWORKIN, *supra* note 9, at 48.

<sup>29</sup> HART, *supra* note 11.

<sup>30</sup> Caroline von Monaco II, BverfGE 101, 361 (1999).

<sup>31</sup> DWORKIN, *supra* note 9, at 27.

<sup>32</sup> Article 20 states:

[Basic institutional principles; defense of the constitutional order]

Thus, the FCC's opinions expose the moral content of the individual rights contained in the Basic Law.<sup>34</sup> For example, in the *Abortion Reform Law* case, the Court stated:

The Basic Law contains principles [. . .] which can only be explained by the historical experience and by the moral-ethical recollection of the past system of National Socialism. The almighty totalitarian state demanded limitless authority over all aspects of social life and, in pursuing its goals, had no regard for individual life. In contrast to this, the Basic Law established a value-oriented order which puts the individual and his dignity into the very center of all its provisions<sup>35</sup>

Likewise, in its seminal *Lüth* decision, the FCC stated that “the Basic Law is not value neutral,”<sup>36</sup> and in *Mephisto* the Court announced that it would resolve cases “according to the value order established in the Basic Law and the unity of its fundamental system of values.”<sup>37</sup> By conceiving of laws as values, the Court demonstrates that Basic Law provisions are moral principles that should be fulfilled.

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(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available. GRUNDGESETZ [GG] [Basic Law or Constitution] art. 20.

<sup>33</sup> See EBERLE *supra* note 4, at 19 (“Thus, we can conceive of the Basic law as a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality, that are designed to restore the centrality of humanity to the social order and thereby secure a stable democratic society on this basis. These values are not to be sacrificed for the exigencies of the day, as they had been during the Nazi time. Thus the Basic law provides a new avenue of substantive moral vision to check human passion and self-interest.”).

<sup>34</sup> KOMMERS, *supra* note 2, at 1 (“German Constitution makers gave up the old positivist idea that law and morality are separate domains. Constitutional morality would not govern both law and politics.”). Compare Robert Alexy, who says that the only moral content of the basic values is that they are to be optimized (as enacted by the positive law), and so are values in a non-axiological sense. See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 67 (2002).

<sup>35</sup> *Abortion I*, BVerfGE 39, 1 (1975).

<sup>36</sup> *Lüth*, BVerfGE 7, 198 (1958) (translation from KOMMERS, *supra* note 2, at 363).

<sup>37</sup> *Mephisto*, BVerfGE 30, 173 (1971) (translation from KOMMERS, *supra* note 2, at 302).

However, the moral content of the Basic Law pre-dates decisions by the FCC interpreting it as a moral instrument: "German constitution makers gave up the old positivist idea that law and morality are separate domains."<sup>38</sup> In a post-World War II Germany, "constitutional morality would...govern both law and politics."<sup>39</sup> Thus, although the Basic Law's provisions are crafted in declarative forms, by simply shifting the sentence structure from declarative to normative, we can understand the norms as principles in the moral sense that Dworkin describes. For example, the declarative command "Everyone shall have the right to freely express and disseminate his opinion by speech" can be restated as the normative moral principle that "Individuals should not be inhibited in their freedom of speech."<sup>40</sup> Seen in this light, the Basic Law's provisions are more than a legal code; they are an affirmative statement about what moral principles should govern the state.

## *II. Constitutional Norms as Principles Which Are Informed By Other Principles*

If the norms of the Basic Law were merely amoral, the FCC would be limited to deciding cases solely upon the *validity* of laws. Validity differs from morality in that it concerns the fulfillment of a formal procedural test, which does not hinge upon normative questions. For example, an addition to the Basic Law may either be valid or invalid, depending on whether it was adopted according to the procedural requirements of the Basic Law itself.<sup>41</sup> But cases rarely hinge upon the *validity* of laws. Rather, it is their *applicability* that must be assessed.<sup>42</sup> The applicability of such norms as the freedom of expression depends upon the principles that undergird them.<sup>43</sup> Thus, the second way that principles operate within the FCC's jurisprudence is by informing the interpretation and weight of a particular constitutional norm in order to determine its applicability.

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<sup>38</sup> KOMMERS, *supra* note 2, at 1.

<sup>39</sup> This decision to leave pure positivism behind was evident from the initial drafts of the Basic Law, the first article of which read, "The dignity of man is founded upon eternal rights with which every person is endowed by nature." *Id.* at 301.

<sup>40</sup> Alexy calls these "deontic statements" because they express what should be. However, Alexy's theory differs from Dworkin's in that Alexy's does not presuppose moral content to such statements. See ALEXY, *supra* note 34, Chapter II.

<sup>41</sup> KOMMERS, *supra* note 2, at 96-98.

<sup>42</sup> DWORKIN, *supra* note 9, at 107-09.

<sup>43</sup> See *id.* at 108.

For example, in the *Lebach* judgment, the Court weighed the two constitutional provisions of freedom of speech and the right to personality.<sup>44</sup> At issue was whether a television station could broadcast a documentary about a crime committed several years earlier by a man about to be released from prison. In balancing among the two constitutional provisions, the FCC first examined the moral principles that underlay the provisions, and weighed them. On the personality-side of this balancing exercise the Court found that the rebroadcast would constitute a “severe intrusion into his intimate sphere” because it would “publicize [the defendant’s] misdeeds and convey a negative image of his person in the eyes of the public.”<sup>45</sup> Thus, the Court evaluated two principles that underlay the right to personality. First, the Court examined the principle that a criminal, having served his sentence, should not be subject to additional harm, and second, that a criminal should be allowed to be reintegrated into society.<sup>46</sup>

On the side of free expression, the Court examined the weight of the principle that the public should be able to receive information about current events, the commission of crimes, and the identity of the accused.<sup>47</sup>

Thus, in order to decide the case before it, the Court evaluated moral principles in order to give content to the constitutional rights in tension in the case. For my purposes it is not important *how* the Court weighed these principles or *why* the principle that the convict should be able to reintegrate in society was found to take priority over free expression principles. These matters will be addressed below in the section that discusses the interpretive function of the courts.<sup>48</sup> Instead, it is important to simply note that constitutional provisions are principles in themselves, as evidenced by the moral, values-oriented consideration given by the

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<sup>44</sup> *Lebach*, BVerfGE 35, 202 (1973) (translation from KOMMERS, *supra* note 2, at 417).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 418-19 (“The decisive criterion is whether the report in question is likely to inflict upon the criminal new or additional harm compared with information that is already available”; “The criminal’s vital interest in being reintegrated into society and the interest of the community in restoring him to his social position must generally have precedence over the public’s interest in a further discussion of the crime.”).

<sup>47</sup> *Id.* at 418 (“On the other hand weighty considerations suggest that the public should be fully informed of the commission of crimes, including the identity of the accused and the events which led to the act.”).

<sup>48</sup> *Infra*, Section D.

Court to norms at stake in the case. Ultimately, these principles informed the weight of the constitutional provisions.<sup>49</sup>

### III. Rights

The constitutional system is composed of more than just principles. Dworkin's second important concept is that of the "right." For Dworkin, rights flow from principles.<sup>50</sup> Rights are related to principles in the sense that principles inform the judiciary of the rights of the parties to litigation.

In ordinary civil litigation, for example, one individual may have a right to a certain Volkswagen if she can demonstrate that she has title to the automobile. This right would be founded upon basic principles of property, such as the normative notion that an individual in possession of property should remain in possession of that property.<sup>51</sup> However, if a second individual with a competing claim, such as a creditor, can demonstrate a stronger right, the first individual may be dispossessed of the Volkswagen. The second individual's right could be grounded, for example, on the principle that debts should be repaid.<sup>52</sup>

In constitutional cases, judges must confront much greater ambiguity than in cases for which the law is relatively precisely established by statute or common law.<sup>53</sup> Therefore, the role of principles becomes even more important. However, the nature of rights and principles changes slightly because, in Dworkin's scheme, constitutional rights are uniquely asserted against the state.<sup>54</sup> In these cases of state

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<sup>49</sup> In particular, the communitarian principle of *Sozialstaat* (the social state), explicitly mentioned in Article 20 of the Basic Law, colored the Court's opinion. See Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, *supra* note 4 at 1021.

<sup>50</sup> DWORKIN, *supra* note 9, at 94-96. See also SMEND, *supra* note 24.

<sup>51</sup> Put differently, a property owner has a "right to exclude" others from the use and enjoyment of his or her property. See Harold Demsetz, *Toward a Theory of Property Rights*, in PROPERTY 35 (Jesse Dukeminier ed., 2006).

<sup>52</sup> In practice, the role of principles is undoubtedly more important in civil litigation under the common law than under the civil law. Common law judges who must interpret judicial practice over time are more likely to find principles on which to base their decisions than civil law judges who must interpret statutes which are often written with precision. See KOMMERS, *supra* note 2, at 207; Richard Cappalli, *At the Point of Decision: The Common Law's Advantage Over The Civil Law*, 12 TEMP INT'L & COMP. L.J. 87, 90 (1998).

<sup>53</sup> See, e.g., DWORKIN, *supra* note 9, at Chapter 5; Erwin Chemersky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B. U. L. REV. 1069, 1071 (2006).

<sup>54</sup> The complications posed by the horizontal application of the German Basic Law are not so serious as they might at first seem, as discussed *infra* this section.

action, the judge need not determine the rights of the government because the state does not have “rights” in the sense that Dworkin uses.<sup>55</sup> Instead, a state can only render arguments of policy, which may be weighed against the right of the individual.<sup>56</sup> But, according to Dworkin, arguments of policy may only override certain types of rights.<sup>57</sup> Thus, an individual’s right against the government can exist in two senses.

First, in a weak sense, an individual has a right when government must muster *some* evidence, in the form of a policy for the collective good, in order to restrain a particular liberty. Second, in its strongest sense, a right exists where it would be *morally wrong* for the government to prevent an individual from a certain action in order to promote the general welfare.<sup>58</sup> In this stronger sense, the principles underlying the right are so strong that the government cannot justify abrogating those principles by reference to collective goals.<sup>59</sup> In such a case, collective goals of utility cannot trump an individual’s right.

But this theory of rights cannot fully account for the types of constitutional rights claims asserted under the provisions of the Basic law. The FCC, through the concept of “*Drittwirkung*” enforces the constitutional rights of one party directly against another party, without the requirement of state action.<sup>60</sup> The structure of Dworkin’s argument reveals much about his American pedigree; U.S. Courts, unlike the FCC, require state executive or legislative action before constitutional rights can be asserted by the parties.<sup>61</sup>

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<sup>55</sup> See DWORKIN, *supra*, note 9, at 90 (emphasizing that while individuals have “rights” governments have “goals”) and DWORKIN, *supra*, note 9, at 100 (applying these concepts to criminal cases).

<sup>56</sup> *Id.* at 84-85.

<sup>57</sup> *Id.* at 191.

<sup>58</sup> *Id.* at 188.

<sup>59</sup> *Id.* at 92 (“Suppose for example some man says he recognizes the right of free speech, but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of collective welfare, and only such distribution of liberty of speech as that collective goal recommends in particular circumstances. His political position is exhausted by the collective goal; the putative right adds nothing and there is no point in recognizing it as a right at all.”).

<sup>60</sup> Kokott, *supra* note 1, at 92.

<sup>61</sup> G. Sidney Buchanan, Note, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997).

Nonetheless, despite Dworkin's focus on the U.S. "state action" model of constitutional adjudication, his theory is still useful as applied to the FCC.<sup>62</sup> Even in *Drittwirkung* litigation, where the parties to litigation before the FCC are private, the FCC has recognized that judicial determinations are equivalent to what the U.S. Supreme Court calls "state action."<sup>63</sup> *Drittwirkung* litigation is not so different after all. The FCC must still determine whether one of the parties has a right so strong such that the FCC would be committing a moral wrong were it not to enforce it. Therefore, although *Lüth*,<sup>64</sup> *Lebach*,<sup>65</sup> and *Schmid-Spiegel*<sup>66</sup> involved private litigants, Dworkin's concepts of "strong rights" and "weak rights" remain important. In *Drittwirkung* litigation, an individual has a strong right against her opponent if (1) she asserts an individual right and (2) her opponent's claim is based upon collective goals or policies, and not individual rights.

This concept of rights may help to describe the FCC's free expression jurisprudence. For example, in *Lüth*, the FCC was confronted with a conflict between an individual's right to freedom of expression under Article 5(1) and a generally applicable libel law. Despite the guarantee of freedom of expression under Article 5(1), Article 5(2) allows this freedom to be limited by the "general laws."<sup>67</sup> The Court reasoned that the right to freedom of expression would be meaningless if it could be limited by *any* general law. The Court held that judges are required to "weigh the importance of the basic right [freedom of expression] against the value of the interest protected by the 'general laws' to the person allegedly injured by the [expression]."<sup>68</sup> Thus, the Court held that the right to freedom of expression could not be trumped by a rule of general law. Instead, it held that courts must examine the "interest protected" by the competing law in order to determine which had the greater weight. The Court's reference to "interest protected" here may be construed as Dworkin's "principle";<sup>69</sup> mere arguments for

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<sup>62</sup> Note, also, that Dworkin agrees that it would be contradictory for a constitution to prohibit censorship by the government but then allow private citizens to physically prevent others from speaking. See Ronald Dworkin, *Two Concepts of Liberty*, in *LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY* 887, 895 (David Drydenhaus and Arthur Ripstein eds., 2001).

<sup>63</sup> See *Lüth*, BVerfGE 7, 198 (1958) (translation from KOMMERS, *supra* note 2, at 363).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Schmid-Spiegel*, BVerfGE 12, 113 (1961) (translation from KOMMERS, *supra* note 2, at 370).

<sup>67</sup> See GRUNDGESETZ [GG] [Basic Law or Constitution] art. 5.

<sup>68</sup> *Lüth*, BVerfGE 7, 198 (1958) (translation from KOMMERS, *supra* note 2, at 363).

<sup>69</sup> See DWORKIN, *supra* note 9, at 85.

the collective good would not be sufficient to overcome the right to freedom of expression. Had the Court considered freedom of expression to be a weak right, there would have been no reason to qualify the meaning of “general laws” because any law regarding a collective goal or policy would have been sufficient to limit freedom of expression. As a result, applying Dworkin’s theory to the *Lüth* case reveals that the FCC considers freedom of expression to be a strong right.

But, what would be the result if two strong rights were to collide in *Drittwirkung* litigation? In such a case, although it would be wrong for the government to deny either right if it were claimed in isolation, another party’s competing strong right complicates the usual analysis. Dworkin, because of his focus upon state action and the U.S. context, does not directly address this dilemma.<sup>70</sup> Nonetheless, it is probably fair to assume that when two strong rights are asserted, the Court must balance among them with respect to the principles they represent. In this manner, when two strong rights are asserted, the balance among them should essentially function as in ordinary civil litigation in which no strong rights have been asserted, since neither right enjoys *prima facie* priority.

The FCC’s decision in *Lebach* may help to illustrate how this situation might be resolved. In *Lebach*,<sup>71</sup> the Court balanced the released criminal’s right to free development of his personality and to be free from further punishment against the general public’s right to information about criminal activity within the nation. In this case, the criminal had a strong rights-based claim against the government that it protect his personality and prevent the broadcast of the documentary about his crimes. But the broadcaster undoubtedly had a strong free expression right to broadcast the program. Put differently, absent *Lebach*’s petition, if the state had sought to block the broadcast, the broadcaster’s strong right to freedom of expression would likely have prevailed.

Faced with the assertion of these two strong rights, the Court examined the principles underlying both.<sup>72</sup> On the one hand, the Court found that the broadcaster’s right to freedom of press was founded upon the principle that the public should have access to information.<sup>73</sup> But the Court found that the salience of

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<sup>70</sup> Although Dworkin does not describe the situation of horizontal application of the constitution, he does argue that rights may be limited by each other. See DWORKIN, *supra* note 9, at 200.

<sup>71</sup> *Lebach*, BVerfGE 35, 202 (1973) (translation from KOMMERS, *supra* note 2, at 417).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 231.

this principle diminished as the events to be broadcast faded into history.<sup>74</sup> On the other hand, the Court found that Lebach had a strong right to personality, grounded in the communitarian principle that an ex-convict should have the opportunity to reintegrate into society.<sup>75</sup> In the end, the Court found the latter principle weightier.<sup>76</sup> Therefore, with two strong rights at stake, the Court balanced among them.

It should come as no surprise that the individualized principle that a convict should be able to reintegrate into society superseded the collectivized goal that the public should have access to information; because strong rights are those which cannot be overcome by arguments of policy, principles will be weightier when they relate to arguments about the value of the individual, not the collective. Dworkin states this concept in this way:

The test we must use is this. Someone has a competing right to protection, which must be weighed against an individual right to act, if that person would be entitled to demand that protection from his government on his own title, as an individual, without regard to whether a majority of his fellow citizens joined in the demand.<sup>77</sup>

It is in this sense that Dworkin’s theory explains how collective justifications cannot serve as strong rights within FCC jurisprudence.

#### D. The Interpretive Function of the Courts

How, then, does this conceptual framework function in adjudication? Dworkin addressed the interpretation of rights and principles in his 1986 treatise *Law’s Empire*.<sup>78</sup> There, Dworkin described his theory of “law as integrity,” which asserts that the judge must not be merely conventionalist (looking toward the past and precedent) nor merely instrumentalist (looking toward the future and utility).<sup>79</sup>

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<sup>74</sup> *Id.* at 234.

<sup>75</sup> *Id.* at 233, 235.

<sup>76</sup> *Id.* at 208-09.

<sup>77</sup> DWORKIN, *supra* note 9, at 194.

<sup>78</sup> DWORKIN, *supra* note 6.

<sup>79</sup> *Id.* Chapters 4 and 5.

Instead, legal practice should be understood as an unfolding narrative in which the judge adds a new chapter each time he or she writes a decision.<sup>80</sup> In doing so, Dworkin argued, the judge must take into account all of the principles at play in the present case and weigh them according to their value in the past and their prospective value in the future.<sup>81</sup>

Looking backward, a judge's decision must take account of precedent, and *justify* that precedent with a present decision.<sup>82</sup> The precedent must be interpreted in a way that upholds the underlying principles of the precedent such that the present outcome is worthy.<sup>83</sup> When discerning which principles to apply, the judge must take account of the essence of the community he or she serves. In particular, the judge must remain conscious of the community's history<sup>84</sup> and its morality.<sup>85</sup> Thus, according to Dworkin, the content of the moral value of principles does not come from government.<sup>86</sup> Rather, the "origin of [...] legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time."<sup>87</sup> In developing this narrative of political morality, judges must always be conscious of its evolutive quality.<sup>88</sup>

An attempt to peer into the minds of the FCC justices to determine whether they embrace this sort of interpretivism would be a foolish project. But, with a bit more humility and focus it may be possible to search for evidence of Dworkin's theory of constructive interpretation among the decisions of the FCC.<sup>89</sup>

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<sup>80</sup> *Id.* at 226.

<sup>81</sup> *Id.* at 228.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 227.

<sup>85</sup> DWORKIN, *supra* note 9, at 126.

<sup>86</sup> At least not directly. However, government may play an important role in the discourse of morality.

<sup>87</sup> DWORKIN, *supra* note 9, at 40.

<sup>88</sup> *Id.*

<sup>89</sup> Constructive interpretation is not new to Germany. Pieces of it were evident in the early 19<sup>th</sup> century in the work of the German philosopher Friedrich Carl von Savigny, who declared that each "people" had its own individual character or national soul. See J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* (1992).

### *I. The Evolutive Nature of Principles*

A central theme in Dworkin's narrative theory of interpretation is the evolutive nature of principles and morality.<sup>90</sup> Morality and principles evolve just as society's sense of appropriateness changes over time. Thus, says Dworkin of principles, "their continued power depends upon [this sense of appropriateness] being sustained."<sup>91</sup>

Consequently, if Dworkin's theory of evolving morality can be applied across constitutional systems, we should be able to find evidence of evolving morality in the FCC's jurisprudence since 1949. As the underlying morality of society changes, so should the weight of the principles which govern judicial decisions. It is unsurprising, then, to discover that, with respect to the morality of a boycott as a method of freedom of expression, the FCC has stated that "good morals are not unchangeable principles of morality."<sup>92</sup> Other features of FCC jurisprudence confirm how its jurisprudence may evolve with shifting notions of societal morality. For example, again in the area of free expression, the FCC has slowly shifted the moral weight of freedom of speech when that principle is confronted with the principle of the right to free development of the personality under Article 2 of the Basic Law.<sup>93</sup> These practices indicate the FCC's view that morality, and the principles which govern society, evolve as Dworkin suggests they should.<sup>94</sup>

### *II. The Foundational Principles of a Political Community*

While morality evolves, some principles of society are foundational. Dworkin suggests that the present political morality of a given society can be traced to such foundational principles.<sup>95</sup> For example, for the United States, Dworkin asserts that equality and human dignity are the founding principles of the U.S. constitutional order.<sup>96</sup> Therefore, judges should consider equality and human dignity in any

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<sup>90</sup> DWORKIN, *supra* note 9 at 40.

<sup>91</sup> *Id.*

<sup>92</sup> Lüth, BVerfGE 7, 198 (1958) (translation from KOMMERS, *supra* note 2, at 363).

<sup>93</sup> KOMMERS, *supra* note 2, at 377-78.

<sup>94</sup> See also William Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1505 (1987).

<sup>95</sup> See DWORKIN, *supra* note 9, at 272.

<sup>96</sup> See *id.* (I presume that we all accept the following postulates of political morality. Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with

decision they make. By using Dworkin's interpretive tools, we can trace these values to the foundation of the nation.<sup>97</sup> Likewise, if it is possible to speculate about the foundational principles of German political morality, whatever they may be, these principles also should be evident in the jurisprudence of the FCC.

Although Dworkin focuses on human dignity and equality as the foundational principles of the United States, Dworkin's theory does not foreclose the possibility that other constitutional systems could be based on different foundational principles, or that these same principles could be interpreted differently in different political contexts. Nonetheless, it is likely that Germany's political morality is also founded on human dignity and equality. There is a good deal of textual support for this position. For example, the first principle of the Basic Law is clearly that human dignity should be promoted and protected. The predominance of human dignity over other values is clear from its position as the first article of the Basic law, as well as from a reading of FCC jurisprudence on the subject. Likewise, equality plays an essential role within the constitutional system and German society.<sup>98</sup> But both of these principles will acquire a distinctively German flavor in their interpretation, because of their place within the German, and not the U.S., political community.

For example, in Germany a constructive interpretation of the principle of equality necessitates special recognition of the narrative of post-war Germany and the role of the Holocaust in the foundation of the Federal Republic. When West Germany adopted the Basic Law in 1949, it adopted a fresh start after the horrors and drastic *inequality* of World War II. The Holocaust colors the FCC's notion of equality because of that event's central importance in defining moral behavior within Germany.<sup>99</sup> Likewise, U.S. Supreme Court decisions on affirmative action can be

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concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern."'). However, these postulates are not immediately clear from the text and original intent of the U.S. Constitution. For further analysis, see, e.g., Sanford Levinson, *Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery*, in RONALD DWORKIN 136-168 (Arthur Ripstein ed., 2007).

<sup>97</sup> Though space constraints prohibit such a discussion here, it is important to note that Dworkin's theory of interpretation takes into account that mistakes, sometimes very large ones (such as slavery) will be made; it is the judge's duty to find these mistakes and keep a society consistent in its values. See DWORKIN *supra* note 9, at 118-123; Levinson, *supra* note 96.

<sup>98</sup> See, e.g., Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329 (1999).

<sup>99</sup> See EBERLE, *supra* note 4 at 19.

understood in the same light.<sup>100</sup> Just as the memory of slavery will deeply affect the U.S. jurisprudential interpretation of the meaning of equality,<sup>101</sup> so the Holocaust will play a fundamental role in the political morality of equality in FCC judgments.<sup>102</sup>

For example, in *Lüth*, the Court upheld the right of the complainant to call for a boycott of an anti-Semitic filmmaker. In holding for the complainant, the Court declared,

Nothing has damaged the German reputation as much as the cruel Nazi persecution of the Jews...Because of his especially close relationship to all that concerned the German-Jewish relationship, the complainant was within his rights to state his view in public.<sup>103</sup>

Implicit in the Court's holding is the notion that the drastic inequality of Germany's Nazi past requires affirmative protection of Jews, in order to ensure their equality in modern German society.

Moreover, the Court has explicitly stated that the interpretation of the basic values requires an evaluation of the political morality of the society: "In order to determine what is required by social norms such as these, one has to consider first the ensemble of value concepts that a nation has developed at a certain point in its intellectual and cultural history and laid down in its constitution."<sup>104</sup> Thus, only by looking to principles, as informed by intellectual and cultural history, can the Court properly interpret its laws. Says the Court, "where the written law fails, the judge's

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<sup>100</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (in upholding affirmative action in state-supported universities the Supreme Court stated "Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

<sup>101</sup> See Natasha L. Minsker, "I Have a Dream—Never Forget": *When Rhetoric Becomes Law, a Comparison of Race in Germany and the United States*, 14 HARV. BLACK LETTER L.J. 113 (1998).

<sup>102</sup> See Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, *supra* note 4, at 967 ("Seeking distance from the horrors of Naziism, the Basic Law made a sharp break from this immediate past, instead drawing deeply upon German tradition to found the legal order on moral and rational idealism, particularly that of Kant.").

<sup>103</sup> *Lüth*, BVerfGE 7, 198 (1958) (translation from KOMMERS, *supra* note 2, at 363).

<sup>104</sup> *Princess Soraya*, BVerfGE 34, 269 (1973). The social norms to which the Court was referring were captured by the term "good morals" found in Article 826 of the Civil Code.

decision fills the existing gap by using common sense and *general concepts of justice established by the community*.”<sup>105</sup>

Finally, FCC jurisprudence on hate speech succinctly demonstrates the German view of equality through the lens of the Holocaust. Anti-Semitic speech is strictly limited by the FCC.<sup>106</sup> Thus, although insults to groups are generally protected, the FCC in the *Holocaust Denial Case* found that a speech denying the existence of the Holocaust would qualify as an insult to Jews *as a group*.<sup>107</sup> Despite the apparent existence of a rule that would allow the speech, the FCC examined the political history of the Republic and found that the political morality of the nation required otherwise:

The historical fact itself, that human beings were singled out according to the criteria of the so-called “Nuremberg Laws” and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis á vis their fellow citizens.<sup>108</sup>

By recognizing that deciding the case required an examination of moral principles, grounded in the history of the nation, the FCC affirmed a theory of constructive interpretation. While by no means conclusive, this combination of evidence lends substantial support to the hypothesis that Dworkin’s interpretive theory can be found in the jurisprudence of the FCC.

### *III. The Role of Human Dignity in Constitutional Interpretation*

For both Dworkin and the FCC, human dignity will often prove the most significant right. As discussed above,<sup>109</sup> any notion of rights must be founded upon human dignity, because it is foundational for all of political morality.<sup>110</sup> In this sense, when human dignity or equality is at stake, it may act as a trump over other competing liberties or collective policies.

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<sup>105</sup> *Id.* (emphasis supplied).

<sup>106</sup> See Krotoszynski, *supra* note 4, at 1589.

<sup>107</sup> The Holocaust Denial, BVerfGE 90, 241 (translation from Kommers, *supra* note 2, at 382).

<sup>108</sup> *Id.* (quoting the Federal Court of Justice).

<sup>109</sup> *Supra*, section D(II). See *supra* note 99.

<sup>110</sup> DWORKIN, *supra* note 9, at 198.

It is difficult to precisely define the concept of human dignity. Dworkin defines the concept as supposing that "there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community...such treatment is profoundly unjust."<sup>111</sup> For Dworkin, human dignity is a sanctified value unto itself;<sup>112</sup> it requires that humans be treated as ends, not means.<sup>113</sup>

Human dignity also commands the dominant position in the jurisprudence of the FCC. Constitutionally speaking, it is the highest value in the Basic Law.<sup>114</sup> Article 1(1) of the Basic Law declares:

The dignity of the human person is inviolable. To respect it shall be the duty of all public authority.

The FCC's concept of human dignity resembles that of Dworkin, although the contours of human dignity may differ in Germany and the United States.<sup>115</sup> According to the FCC, human dignity does not depend upon the social worth of the individual or on the individual's awareness of his or her own dignity.<sup>116</sup> Rather, human dignity adheres to mere human existence.<sup>117</sup>

Everybody possesses human dignity, regardless of his characteristics, achievements, or social status; those who cannot act in a meaningful way because of their physical or psychological condition also possess human dignity. It is not even forfeited for being

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<sup>111</sup> *Id.* at 198.

<sup>112</sup> RONALD DWORKIN, *LIFE'S DOMINION* 236 (1993).

<sup>113</sup> *Id.*

<sup>114</sup> Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, *supra* note 4 at 975.

<sup>115</sup> These different outcomes are the result of differing political moralities which will provide different substantive definitions of human dignity depending upon the political community in which they operate. See DWORKIN, *supra* note 112, at 236-37.

<sup>116</sup> SABINE MICHALOWSKI AND LORNA WOODS, *GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES* 99 (1999).

<sup>117</sup> *Id.* See also *Life Imprisonment*, BVerfGE 45, 187 (1977) ("[E]ach person must always be an end in himself.") (translation from Kommers, *supra* note 2, at 305). Dworkin also defines dignity such that it exists independent of desert, social condition, or the individual's assertion of it. See DWORKIN, *supra* note 112, at 238 ("Dignity ... means respecting the inherent value of our own lives.").

“undignified” behavior; it cannot be taken away from any human being.<sup>118</sup>

When government action intrudes upon this concept of the human being, that individual has a strong right to rebuke the government. The more difficult question, of course, is what types of action infringe upon human dignity. This question will be addressed in the following section.

#### *IV. The Limitation of Rights and the Concept of Human Rights*

When employing the interpretive model described above, a judge must balance among competing moral principles within society. Some of these principles constitute what Dworkin calls “strong rights.” As discussed above, these are rights the government cannot justify the abrogation of by involving only the general collective good. Dworkin cites three ways a judge might refuse to accede to an individual’s assertion of a strong right.

First, the judge might demonstrate that the principle upon which the supposed right is based is not really at issue;<sup>119</sup> she might say that the supposed “right” acts as a smokescreen for a principle that actually favors some type of activity which *differs* from the activity at issue. For example, the right to freedom of expression may be founded upon the principle that an individual should be able to contribute to the marketplace of ideas. But a judge might determine that the “speech” at issue is really “conduct,” which this principle does not support. Therefore, the individual’s right to freedom of expression would not be implicated by a restriction on her *conduct*.

The FCC uses this type of reasoning with respect to false speech.<sup>120</sup> The FCC does not protect false speech because incorrect information “contributes nothing to the constitutionally protected formation of opinion.”<sup>121</sup> Therefore, an individual who claims a strong right to express a false fact will be denied access to the right because “incorrect information does not constitute an interest worthy of protection.”<sup>122</sup>

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<sup>118</sup> Horror Film, BVerfGE 87, 209 (228) (1992).

<sup>119</sup> DWORKIN, *supra* note 9, at 200.

<sup>120</sup> See Princess Soraya, BVerfGE 34, 269 (1973).

<sup>121</sup> The Holocaust Denial, BVerfGE 90, 241 (translation from KOMMERS, *supra* note 2, at 382).

<sup>122</sup> *Id.*

Second, the judge might demonstrate that some competing strong right would be abridged if the asserted right were credited. As in *Lebach*, this analysis would necessarily involve balancing among strong rights held by individuals; arguments of utility or collective good would be insufficient.<sup>123</sup>

Third, the judge might conclude that if the right were granted, the cost to society would not be merely incremental, but would impose a burden of such a substantial degree so as to justify the infringement on the individual's dignity.<sup>124</sup> Thus, Dworkin allows for collective goals to override strong rights only when some grave threat to society is present.<sup>125</sup>

German "militant democracy" exemplifies the restriction of rights for the purpose of averting grave effects upon the community as a whole. Stung by mistakes of the Weimar Republic's constitutional democracy, the Basic Law's drafters sought to correct previous errors<sup>126</sup> by incorporating the power to restrict actions and speech which threaten the basic democratic order.<sup>127</sup> Thus, the freedom of association guaranteed in Article 9 does not extend to those associations "whose purposes or activities are directed against the constitutional order".<sup>128</sup>

It comes as no surprise, then, that in the *Socialist Reich Party Ban Case*, the FCC found that a political party that has a "fixed purpose constantly and resolutely to combat the free democratic basic order" can be banned from operation. The Court reasoned that the framers, "based on their concrete historical experiences" concluded that "the state could no longer afford to maintain an attitude of neutrality toward political parties."<sup>129</sup> The FCC's decision demonstrates its political

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<sup>123</sup> See *supra*, Section C(III).

<sup>124</sup> DWORKIN, *supra* note 9, at 200-01.

<sup>125</sup> Here, an important distinction can be discerned between Dworkin's concept of "grave harm" and the sort of collective justification that the FCC employs to override strong rights. Germany's heightened sense of communitarianism, as opposed to U.S. individualism, creates a lower threshold for the restriction of strong rights. See KOMMERS, *supra* note 2, at 32 (citing the communal guarantees of the Basic Law); Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, *supra* note 4 at 973-74.

<sup>126</sup> KOMMERS, *supra* note 2, at 165.

<sup>127</sup> Krotoszynski, *supra* note 4, at 1590. See also George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171, 178-79 (1984).

<sup>128</sup> GRUNDGESETZ [GG] [Basic Law or Constitution] art. 9.

<sup>129</sup> Socialist Reich Party Ban, BVerfGE 2, 1 (translation from KOMMERS, *supra* note 2, at 218). See also Krotoszynski, *supra* note 4, at 1591.

morality, as well as the potency of the threat it perceived from a totalitarian party. Given this threat, which Dworkin would call “not merely incremental,” the restriction of the strong rights of expression and association were justified.

### V. Human Rights

Nonetheless, some strong rights can never be restricted under any circumstances. Dworkin calls these rights “human rights” because no collective justification could justify their abrogation.<sup>130</sup> The FCC protects human rights, in the Dworkinian sense, using two distinct approaches. First, any assault upon human dignity itself is a human rights violation. This interpretation follows directly from the text of Article 1(1) of the Basic Law.<sup>131</sup> Because human dignity is inviolable, there is no collective justification that could justify an intrusion into its realm.

Second, any abrogation of the essential core of any of the basic rights (not just human dignity)<sup>132</sup> constitutes a human rights violation, because no collective goal can justify such action. This interpretation follows directly from Article 19(2) of the Basic Law, which states, “In no case may the essential content of a basic right be encroached upon.”<sup>133</sup>

In the context Article 5 of the Basic Law, the FCC does not generally consider freedom of expression to be a “human right” in the sense Dworkin describes. By the text of the Basic Law itself, expression can be limited in several ways, thus making the right susceptible to abrogation in order to serve the common good.<sup>134</sup> However, there may be some types of speech, such as opinions that do not attack the basic democratic order, that cannot be overridden by any collective justification.

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<sup>130</sup> DWORKIN, *supra* note 9, at 365 (“But many rights are universal, because arguments are available in favor of these rights against *any* collective justification in *any* circumstances reasonably likely to be found in political society. It is these that might plausibly be called human rights.”) (emphasis supplied).

<sup>131</sup> See, e.g., Microcensus, BVerfGE 27, 1 (1969); Life Imprisonment, BVerfGE 45, 187 (1977).

<sup>132</sup> See, e.g., Religious Oaths, BVerfGE 33, 23 (1972) (translation from Kommers, *supra* note 2, at 455 (“Nonetheless, the complainant’s overriding fundamental right to refuse to take an oath according to his understanding of his faith and his right not to be forced indirectly by means of a penalty to commit an act contrary to his understanding, is not subject to any limitation derived from the value system of the Basic Law itself.”) (emphasis supplied).

<sup>133</sup> See also Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, *supra* note 4 at 997.

<sup>134</sup> Article 5(3) allows the right to free expression to be limited by interests in the protection of youth, and personal honor. Article 18 allows expression to be limited when used to combat the basic democratic order. See GRUNDGESETZ [GG] [Basic Law or Constitution] arts. 5, 18.

The *Tucholsky* cases demonstrate this.<sup>135</sup> In those cases, individuals displayed bumper stickers and banners stating that “soldiers are murderers.” Despite overwhelming public protest, as well as the Court’s holding in *The Holocaust Denial Case*, which recognized group libel, the FCC upheld the individual’s right to post the sticker as an expression of opinion.<sup>136</sup> Thus, the expression of an opinion, so long as it is not an anti-Semitic opinion, might qualify as a human right within German constitutional law.

### E. “One Right Answer” and “The Objective Order of Values”

Finally, one of the most important and distinctive characteristics of FCC jurisprudence is its reliance upon an “objective order of values.” This concept was first announced in the *Lüth* decision:

[The Basic Law’s] section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law.<sup>137</sup>

Several questions might be posed about this concept of an objective order of values. First, to what does the adjective “objective” refer? For example, it could imply that the application of the basic rights does not depend upon the subjectivity of individual positions.<sup>138</sup> The value of the basic rights could exist independently of any concrete application. Alternatively, it could conceivably imply that the hierarchical order, in which the values are placed, is objective.

The first of these alternatives, that the application of basic rights does not depend upon the individual, is unlikely, or, at the very best, unhelpful. If constitutional

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<sup>135</sup> *Tucholsky I*, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 21 EuGRZ 463-465 (1994) (translation from KOMMERS, *supra* note 2, at 388); *Tucholsky II*, BVerfGE 93, 226 (1995) (translation from KOMMERS, *supra* note 2, at 393).

<sup>136</sup> *Id.*

<sup>137</sup> *Lüth*, BVerfGE 7, 198 (1958) (translation from KOMMERS, *supra* note 2, at 363).

<sup>138</sup> ALEXY, *supra* note 34, at 353.

rights exist objectively, without a connection to the individual whom they protect, then their operation in the legal system is merely abstract; once applied to a case, their “objectivity” vanishes.<sup>139</sup> Thus, the objectivity of the values would not aid the FCC when deciding concrete cases. Moreover, such a notion of the objective order of values is highly unlikely: the FCC often refers to the value order when adjudicating individual cases.

The second alternative would link the adjective “objective” to the order of the values.<sup>140</sup> In other words, the values could be ranked hierarchically according to their objective value.<sup>141</sup> However, this interpretation of the basic value order is suspect for two reasons. First, the FCC has never explicitly announced the substance of this hierarchy. If an objective order exists, it would seem prudent for the predictability of the law to expose such an order outright.

Nonetheless, a hierarchy of values might not foreclose balancing among the values.<sup>142</sup> For example, an ordinarily highly ranked value that was incidentally affected could conceivably be trumped by a lower value that was fundamentally affected.<sup>143</sup> If such were the case, it would not be prudent to positively identify some rights as higher than others, because the order could change depending on the factual context.

Lawyers can make judgments about the probable order (human dignity first, personality second, speech third, etc.). But these suppositions can only establish a *prima facie* order, because “balancing exercises” are still necessary depending on the degree to which the value is affected.<sup>144</sup> Therefore, the order of the values can only

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<sup>139</sup> *Id.*

<sup>140</sup> See the *Lüth* judgment, in which the FCC refers to the objective order of values as “ranked.” Lüth, BVerfGE 7, 198 (1958) (translation from KOMMERS, *supra* note 2, at 363). See also ALEXY, *supra* note 34, at 93. Alexy proposes that this problem be solved by giving the basic values “prima facie” preference, such that certain values would always be ahead of competing values unless a competing value was so affected that it should take precedence. See Robert Alexy, *Sistema Jurídico, Principios Jurídicos, y Razón Práctica*, IV JORNADAS INTERNACIONALES DE LÓGICA E INFORMACIÓN JURÍDICAS 139, 147 (1988), available at <http://www.cervantesvirtual.com/servlet/FichaTituloSerieDeObra?id=327&portal=0>.

<sup>141</sup> ALEXY, *supra* note 34, at 93 (citing *Lüth*).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 98-104.

<sup>144</sup> *Id.* at 93.

be determined with reference to specific facts that relate to the subjective right claimed by the individual.<sup>145</sup>

As a result, it is difficult to conceive of the value order as “objective” in the sense that some moral principles will always be ranked higher than others. However, more limited claims about ordered morality can be entertained. For example, the objective order of values may be analyzed as a statement about the objective values of Germany, as determined by its history, culture, and society.<sup>146</sup> These determinative factors might *require* a certain answer to constitutional problems, because, given a certain situation, one value *must* be preferred over another.

Dworkin’s theory about the origin of rights might explain this limited sense of an objective order of values. For Dworkin, only “one right answer” exists to any constitutional question.<sup>147</sup> He positively refutes the suggestion that hard cases are resolved by judgments that are only *more* right or *more* wrong, and denies that judges may choose among a range of acceptable judgments.<sup>148</sup> This conclusion follows directly from Dworkin’s argument that the rights of the parties, discerned through an evaluation of principles, can be definitively determined by reference to the political morality of the community. This morality necessarily yields only one judgment about which right should prevail.<sup>149</sup> Dworkin argues that the judiciary depends upon the notion that one right answer exists; otherwise, the quest to correctly resolve judicial questions would be meaningless.<sup>150</sup>

The “one right answer” thesis can be compared to the FCC’s objective order of values because both theories are rooted in the notion that judges do not have discretion to decide cases according to several appropriate solutions. Because the FCC relies upon the objectivity of the value order, it cannot decide cases other than as demanded by that order. In other words, the “objectivity” of the answer to a judicial question of rights and principles relies upon the notion that there is one right answer to that question.

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<sup>145</sup> *Id.* at 100-110.

<sup>146</sup> KOMMERS, *supra* note 2, at 180, fn 70.

<sup>147</sup> DWORKIN, *supra* note 9, at 279. Also, see *generally* Chapter XIII.

<sup>148</sup> *Id.* (rejecting the notion that there is “a set of answers and arguments that must be acknowledged to be from any objective or neutral standpoint, equally good.”).

<sup>149</sup> DWORKIN, *supra* note 9 at 280.

<sup>150</sup> *Id.* at 281-82.

But, as discussed above, the order of values cannot be considered a “hard” hierarchical order in the sense that certain rights will always trump other rights.<sup>151</sup> Rather, the order of values depends upon the factual context to which it is applied. For this reason, personality rights may trump free speech rights in some FCC cases, while the converse is true in other cases.<sup>152</sup>

Moreover, the “one right answer” thesis does not mandate certain types of decisions in certain situations. Instead, it asserts that judges must in fact *commit themselves* to the idea that one right answer exists in order to properly decide a case. The FCC’s assertion of the basic order of values can also be seen in this light; it is a statement of judicial integrity that the FCC does not perceive its duty as merely picking among several adequate decisions in hard cases. Unless the judges actually believe that moral principles better support one party’s claims to a right over an adverse party’s claim, they will be unable to honestly decide the case.<sup>153</sup> Therefore, good reasons exist to adjudicate according to an objective order of values or the belief that “one right answer” exists in every case, while there seems to be little reason not to support such a thesis.<sup>154</sup>

## F. Conclusion

This paper began by exploring the concepts of Ronald Dworkin’s jurisprudential theory and applying them to cases decided by the Federal Constitutional Court of Germany. Several of these concepts were found to exist in both Dworkin’s theory and the jurisprudence of the FCC. Moreover, these concepts were found to be applied in similar ways by both Dworkin and the FCC. Most importantly, both Dworkin and the FCC find law to be founded upon the notion that objectively right answers can be ascertained in the judicial process.

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<sup>151</sup> ALEXY, *supra* note 34, at 100-101.

<sup>152</sup> See, e.g., Lebach, BVerfGE 35, 202 (1973) (translation from KOMMERS, *supra* note 2, at 417); Tucholsky I, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], 21 EuGRZ 463-465 (1994) (translation from KOMMERS, *supra* note 2, at 388); Tucholsky II, BVerfGE 93, 226 (1995) (translation from KOMMERS, *supra* note 2, at 393).

<sup>153</sup> See DWORKIN, *supra* note 9, at 284-85, 332.

<sup>154</sup> See *id.* at 290 (“The ‘myth’ that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.”). Alexy asserts that when the objective order of values is conceived as “soft” (unranked) and not “hard” (ranked) the “tyranny of values” disappears, because there is room for factual contexts to shape decisions. Therefore, the threat that an “objective order of values” might have otherwise posed is “destroyed.” See ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION 98-99 (2002).

In conclusion, it is important to reiterate that Dworkin's substantive positions on issues such as freedom of speech differ greatly from those of the FCC. However, these differences do not undermine the hypothesis that Dworkin and the FCC employ similar methodology. Rather, the differences in substantive outcomes strengthen the position that the FCC uses an interpretive method akin to Dworkin's constructive, or narrative, theory. The differences can be explained by examining the political morality of each society and tracing the FCC decisions to fundamental principles within Germany. While Dworkin and the FCC both value the principles of human dignity and equality as foundational, the nature of these principles will depend upon the political morality of the society which embraces them.

