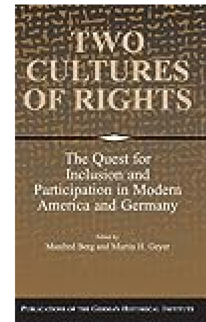

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Rights Talk across the Seas

Untold struggles for social, legal, and political inclusion and participation have taken place in modern Germany and America.[1] Some are fairly similar–ethnic, racial, religious, class-based; others are specific to each country. As the title of this volume suggests, the legal-cultural terrain on which such struggles are fought helps shape the contours of the struggles themselves and even affects the outcomes themselves. Editors Manfred Berg and Martin Geyer structure the contributions of this volume, based on a GHI conference, around the notion that there are "two cultures" of rights, one American, one German. The volume itself offers a dozen contributions, about a third each covering German, American, and comparative instances. The editors broach the issue of different rights cultures in their introduction, although only a few of the contributors go on to discuss this matter as a conceptual or comparative issue.

There are indeed some significant differences between German and American rights "cultures." Even if one confined one's self to the second half of the twentieth century, it would be challenge enough to identify and discuss these differences. Complicating matters further, however, some contributions to this volume go back even further: Ann Taylor Allen's discussion of feminist movements goes back to 1848, while Karl Schleunes's and portions of Martin Geyer's essays focus on the Nazi period, whose structure of *Volksgemeinschaft* rights is mostly incommensurable with the larger discussion. Likewise Roger Daniel's panoramic view of Asian Americans' rights struggles bridges fundamentally different rights regimes.

As is often the case in discussions of this sort, the editors begin with T.H. Marshall. The Marshallian triad of civil, political, and social rights has developed very differently in Germany than it has in the United States. In the United States, a weak social state and strong libertarian impulse hindered social rights while strengthening civil rights; in Germany strong feudal and socialist traditions inform a committed social state but one resting on a shakier foundation of civil and political rights. These are important differences, and it is worth taking a closer look at them.

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 and rooted in a history that has included significant feudal and socialist impulses.[2] The current German constitution (the "Basic Law," or *Grundgesetz*) 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/Soviet-communist competition for German hearts and minds, and under the watchful eyes of both Anglo-Saxon and Gallic critics. (West) German society benefited greatly from this particular conjuncture, and the authors of its constitution were able to join the most serviceable elements of their own traditions with those of the negative liberty traditions. They created a legal analogue to the political project of the "social market economy."

Whereas the centrality and strength of our negative liberties in the United States testify to Americans' acute distrust of state power, the current German constitution (like some of its predecessors) underscores the social connections and commitments of individual citizens. As Donald Kommers, a German constitutional specialist, has put it, "One [the American] vision 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 [current German] vision 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 American constitutionalism."[3] Even a "negative liberty," such as the right to a free press, is accompanied in the German rights system by a "positive value," such as literacy, that is not anticipated in the American rights regime. As Kommers again puts it, "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 society as a whole, the state is duty-bound to create the conditions that make freedom of the press both possible and effective."[4] Among the arguments Germans use in favor of state obligations are exactly those that a majority of the United States Supreme Court has repeatedly rejected. German jurists frequently argue that effectuation-like values are required precisely "to facilitate political participation and representative government"; and 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."[5]

Thus, German legal ideology, like that of other welfare states less committed to public/ private, 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."[6] 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 deductability of campaign contributions on the grounds that they benefited wealthy taxpayers more than others and hence worked to the advantage of the more conservative parties.[7] More explicitly, one former President (Chief Justice) of the German Court has gone so far as to say that the guiding values of the German Basic Law are "equality, social justice, the welfare state, the rule of law, and militant democracy."[8] It is difficult to imagine such testimony at an American Supreme Court nomination hearing.

Article 20(1) of the 1949 Basic Law describes the Federal Republic as a federal, democratic, and *social* state. This social commitment or *Sozialstaat-lichkeit* adds to the formal, procedural equality of *Rechtstaatlichkeit* shared with the American constitutional conception: in other words, *justice* is commanded along with *fairness.* 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, obviously, interest groups), the opportunity to aggregate their interests along shared ideological and organizational lines, thereby somewhat mitigating disparities of income and wealth.[9]

Real autonomy, real individual freedom is seen as requiring much more than the ultimate, market-based American virtue: *choice.*[10] The American emphasis on individual autonomy–choice–makes collective action, whether as a family, a neighborhood, or a trade union, much more difficult than in Europe. Americans fear, disdain, and avoid the dependency that is necessarily intertwined with collective action. To stop with negative liberty, to rest content with resource-based choice by atomistic individuals is, in the German and other social-democratic regimes, however, to misunderstand and underestimate personhood. The German Supreme Court

has explicitly held that "[t]he concept of man in the Basic Law [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."[11] Thus, in at least some respects, society is prior 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 our own system. Such a view necessarily rejects radical individualism, with its own attendant rejection of duties–an individualism that characterizes not only ACLU-style liberals but also liberal free-marketeers.

Needless to say, a system like the German one has difficulties with *sub*-communities or multiculturalism. It is not an accident, in fact, that the most successful welfare states have been established in countries of great ethnic homogeneity. Further, it cannot be disputed that the constitutionalization of values, communities, and duties can put undesirable minorities at risk and that "programmatic discretion" (Art. 49) and a "religious point of reference" (Art. 66) can offend the libertarian impulse while social solidarity can demand conformity and draw sharp us/them borders.

But "Rights Talk" has not fared well of late in either Germany or the United States. The Left impulse behind rights strategies, especially in the courts, has faded, and the Right has succeeded in underscoring the indeterminacy and malleability of rights (right to abortion vs. right to life; right to die vs. right to live; rights of persons vs. rights of property, etc.) As Eric Hobsbawm observed twenty years ago, wide-ranging rights claims "are not ends in themselves, but broad aspirations which can be realized only through complex and changing social strategies, on which they throw no specific light."[12] Those ends turn out to be the task of mass politics. And, indeed, for all the talk about rights and law, what almost all the contributors to this volume really offer is a history of political struggles for advantage undertaken by subordinate or subaltern groups in society.

The history of such sometimes-mass struggles is organized here in three parts: one each on race and immigration, civil and social rights, and gender and sex. The narrative strategies offered by the contributors nicely reflect the breadth of current offerings. Thus, Roger Daniels, doyen in the field, opens by offering a heroicist sketch of the rights denied and attained by those people now constructed as Asian Americans. Doubly disadvantaged as nonwhite and as unassimilable immigrants, Asian Americans used the dominant culture of rights to struggle for inclusion. By contrast, Manfred Berg's discussion of the NAACP's evolving voting rights strategies stresses the dialectics and contradictions of building specifically Black political and social power through a strategy focused on race-neutral voting rights. Hasia Diner tells a familiar tale of Jewish success in America, one centering effectively on the availability of a peculiarly American universalist rights talk that offered Jews the auspicious terrain of public/private and church/ state separation on which to pursue their interests. In sad juxtaposition to that essay, Karl Schleunes underscores the commitment and alacrity of the Nazi regime in both substituting *Volksgemeinschaft* for the rights structures of Weimar and negating Jewish rights and belonging so as to bring about civil death.

Objectively assigned rights rather than rights emanating from the whole are central today. And it is that commitment of both the German and American legal regimes that, according to Christian Joppke's contribution, makes the status of "alien" far less burdensome today than is often believed. Joppke rejects most of the transnational and post-national discourse of the past decade or two and, in my view, correctly stresses the role of liberal structures of law and politics, especially the courts and interest-group parties, in safeguarding and advancing the status of resident aliens in both Germany and the United States.

Compared to its discussion of race and immigration, the book's treatment of civil and social rights is not encouraging. Eileen Boris reminds readers that "social citizenship" in the United States died aborning and that the New Deal's potential commitment to equality has been transformed into the ideology of the level playing field. Martin Geyer offers a broader and more optimistic take on the New Deal's impact, arguing that although FDR's Second Bill of Rights might not have brought social democracy to America, it did spawn an international culture of "human rights" familiar to us all today. Looking to immediate postwar Germany, Michael Hughes argues that the growth and acceptance of "entitlements" owed much to the acceptance of *Lastenausgleiche*, which themselves owed much to the widely shared sense of sympathy and victimization within the defeated *Volksgemeinschaft*. By way of contrast, the United States since the 1960s has been suffering from a deficit of solidarity and *Gemeinschaftlichkeit*. According to Hugh Graham's very insightful contribution, America's culture wars, polar-

ized divided government, and emphasis on "difference" have undermined the social aspect of rights in a way that has not yet afflicted Germany. This section of the volume concludes with Margaret Dalton's thoughtful look at the new rights of and to information, from *Datenschutz* to intellectual property rights to class inequalities in the so-called information age.

The final portion of the volume is led off by Ann Taylor Allen's argument for emphasizing the similarities between German and American feminism. Allen rejects the difference/equality dichotomy for the two countries and argues that political contingency and opportunity operated very similarly in both countries to mold essentially strategic choices. Finally, Michael Dreyer makes the somewhat opposing argument that American federalism helped produce local and grassroots gay activism, whereas the centrality of Paragraph 175 of the national penal code in Germany tended to shift activism into a scientific and law reform discourse that was itself part of a putative commitment to Enlightenment and respectability.

In short, the editors and contributors have brought together concerns and empirical findings not ordinarily found in one volume. Although the quality of the essays varies, and one misses serious legal discussion, their consideration of rights and "rights talk" in two different legal and political cultures is an important undertaking–particularly as we may, on both sides of the Atlantic, be observing a considerable *Schrumpfung* of both rights talk and practice.

Notes

[1]. For another recent volume on this comparative theme, focusing alas mostly on defeats, see Larry E. Jones, ed., *Crossing Boundaries: The Exclusion and Inclusion of Minorities in Germany and the United States* (New York : Berghahn Books, 2001).

[2]. See Franz Neumann, *The Rule of Law* (New York: Harper, 1986), pp. 179-285; David Abraham, *The Collapse of the Weimar Republic*, 2nd ed. (New York : Holmes & Meier, 1986), pp. 1-41. 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 commonweal. Article 14(2) of the *Grundgesetz* states simply: "Property imposes duties. Its use should also serve the public weal."

[3]. Donald Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40 (1991): pp. 837, 867 (emphasis added).

[4]. Ibid., p. 859 and n. 63. 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. BÃ¶ckenforde, *State, Society, and Liberty* (New York: St Martin's, 1991), pp 175-198.

[5]. Kommers, "German Constitutionalism," p. 873.

[6]. David Currie, "Positive and Negative Constitutional Rights," _University of Chicago Law Review 53 (1986): pp. 4, 883.

[7]. 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 Televison [Network],* 57 BVerGE 295 (1989). Compare the American situation, as discussed in Stephen Gardbaum, "Broadcasting, Democracy and the Market," *Georgetown Law Journal* 82 (1993): p. 373.

[8]. Wolfgang Zeidler, "Grundrechte und Grundentscheidungen der Verfassung im Widerstreit" (53 Deutschen Juristentages 1980), p. 4; Kommers, "German Constitutionalism," p. 861. 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; 39 BVerfGE 1 (1975). See Joachim Perels, *Grundrechte als Fundament der Demokratie* (Frankfurt: Suhrkampf, 1979), pp. 11, 40.

[9]. The virtues and vices of the so-called *Parteienstaat* have been much debated. For an introduction, see Michaela Richter, "The Basic Law and the Democratic Party State: Constitutional Theory and Political Practice," in Detlef Junker et al., eds., *Cornerstone of Democracy: The West German 'Grundgesetz' 1949-89* (Washington: German Historical Institute, 1995). But see Claus Offe & Helmut Wiesenthal, "Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form," *Political Power & Social Theory* 1 (1980): p. 67 (asymmetry of politics and markets as respective arenas in which citizens and big business interests organize to achieve core demands).

[10]. *Roe v. Wade*, probably *faute de mieux*, represents

the apotheosis of "choice." Indeed, the movement organized in defense of the principle enunciated there has been termed 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 unattached 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.

[11]. BVerfGE 7, 15-16 (1954).

[12]. "Labour and Human Rights," *Workers: Worlds of Labor* (New York: Pantheon, 1984), p. 310. For more on the debate over rights and their meaning, see: Mark Tushnet, "An Essay on Rights," *Texas Law Review* 62 (1984): p. 1363; Morton Horwitz, "Rights," *Harvard Civil Rights-Civil Liberties Review* 23 (1988): p. 23; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); David Abraham, "Are Rights the Right Thing?" *Connecticut Law Review* 25 (1993): p. 947.

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