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# GENETIC TESTING AND THE RIGHT OF SELF-DETERMINATION: THE EXPERIENCE IN THE FEDERAL REPUBLIC OF GERMANY

*Bernd R. Beier\**

The nature of the German legal system<sup>1</sup> has forced the German legislature to come to grips with many controversial issues earlier than its American counterpart. One such issue presently under consideration is the impact of new genetic technologies on the emerging German constitutional right of "self-determination."<sup>2</sup> This Article examines the conflict between the right of self-determination and the German concept of freedom of contract — a conflict which results from the increased availability of genetic testing.

## I. AN OVERVIEW OF THE GERMAN LEGAL SYSTEM

As a practical matter, a court in West Germany cannot ordina-

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1. See *infra* notes 3-13 and accompanying text (discussing the aspects of the German legal system relevant to the genetic testing controversy); see also P. BLAIR, *FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY* (1981); *GERMAN CONSTITUTIONAL DOCUMENTS SINCE 1871: SELECTED TEXTS AND COMMENTARY* (L. Holborn, G. Carter & J. Herz eds. 1970) [hereinafter *GERMAN CONSTITUTIONAL DOCUMENTS*]; N. HORN, H. KÖTZ & H. LESER, *GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION* (T. Weir trans. 1982); *POLITICS AND GOVERNMENT IN THE FEDERAL REPUBLIC OF GERMANY: BASIC DOCUMENTS* (C.C. Schweitzer, D. Karsten, R. Spencer, R.T. Cole, D.P. Kommers & A.J. Nicholls eds. 1984) [hereinafter *POLITICS AND GOVERNMENT*]. See generally J. MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985) (discussing the history and basic principles of the civil law); M. PLANIOL, *TREATISE ON THE CIVIL LAW* (Louisiana State Law Institute trans. 12th ed. 1959) (comprehensively describing the underlying principles and development of the civil law).

2. A parliamentary commission has been created by the German legislature to study the issues presented by recent developments in genetic technology. See *Enquete-Kommission-Gentechnologie* 12 (1987) (parliamentary publication).

rily decide a legal issue without referring to a statute.<sup>3</sup> The court must interpret existing statutes, apply them to new situations, and not overextend the law.<sup>4</sup> The civil law system presupposes that a new statute will be created to deal with any problem which is not covered by the current law. The creation of such a statute is considered to be an affirmative obligation of the legislature, and is not usually considered to be a political issue. Instead, the development of the statute is often assigned to a highly skilled advisory committee, which solicits viewpoints from various parties.<sup>5</sup> The committee recommends the new statute to the *Bundestag*, and after debate, voting, and adoption, the legislation is presented to the *Bundesrat* for consent.<sup>6</sup> With a few exceptions, political input in the process is limited to the advice given the advisory committee as to what should be included in the legislation. The legislature normally restricts the debate on new statutes to the form the legislation should take.

By contrast, under American common law principles, courts can decide questions of fundamental right without reference to statute. While the German system allows for more direct input by academic

3. See N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 58-60; Kommers, *The Judiciary*, in *POLITICS AND GOVERNMENT*, *supra* note 1, at 80, 81. The primacy of legislation, expressed in the maxim "[e]verything the legislator lays down is law, and nothing else is," resulted largely from the rise of positivism in the nineteenth century. N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 59; Kommers, *The Judiciary*, in *POLITICS AND GOVERNMENT*, *supra* note 1, at 81. The role of the judge under the positivist view has thus been likened to "a slot machine, where one feeds in the facts and legal rules like so many coins in an automat and gets the results delivered below." N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 59; see also Kommers, *The Judiciary*, in *POLITICS AND GOVERNMENT*, *supra* note 1, at 81 (stating that "the function of courts . . . is to administer the law as written, requiring on the part of the judge a posture of absolute neutrality, insulated from and unmoved by forces, ideas, or even notions of justice located outside the formal structure of law."). The dangers of a purely positivistic approach to law were recognized after the experience of the Second World War, see N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 60, and post-war German legal thinking therefore tempers the positive law with a view of legislation in relation to the natural law. See *id.* (citing *NATURRECHT ODER RECHTSPOSITIVISMUS?* (B. Maihofer ed. 1962)); see also *infra* note 11 and accompanying text (discussing the decline of a purely positivistic approach and the movement toward an increased recognition of natural law principles).

4. See Kommers, *The Judiciary*, in *POLITICS AND GOVERNMENT*, *supra* note 1, at 81. This restraint is grounded in the Enlightenment conception of a civil code as a complete body of law which governs all cases, including those which have not yet arisen. See N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 60.

5. See *supra* note 2 (referring to such a committee set up to examine the issues presented by biotechnology).

6. Because of its federal structure, Germany has a bicameral legislative system. The *Bundestag* is the lower house, elected by popular vote; the *Bundesrat* is the upper house, consisting of representatives of the *Länder* (states) who are selected by the *Länd* governments. GERMAN CONSTITUTIONAL DOCUMENTS, *supra* note 1, at 76-77; see also N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 16-20 (describing the legislative process).

commentators and non-legal thinkers,<sup>7</sup> the perceived need to conform with preexisting legal structures may constrict these inputs more than the American system.

Since German statutes go through the process of investigation, rationalization, and codification before enactment, there is a great effort to find facts and clarify ambiguities. Moreover, because these statutes have to be broad enough to cover all cases,<sup>8</sup> they tend to be the product of extensive legal analysis. As a result, German statutes are often more finely detailed than their American counterparts, leaving less to administrative interpretation.

The legislature's recognition of its obligation to act and the courts' refusal to act in the absence of a statute normally translate into quick agreement on the need for a legal response.<sup>9</sup> This conception of an affirmative obligation to act is the product of a shared political consensus about the nature of society. After the experience of the Third Reich, German legal philosophy has rejected the notion of law as the expression of the will of the people administered through their current government. Instead, law (*Recht*) is thought of as the expression of an underlying set of legal principles which constrains the legislature's ability to enact statutes (*Gesetz*).<sup>10</sup> This con-

7. P. BLAIR, *supra* note 1, at 14-15 (stating that "in a legal system which is not characterized by such principles as *stare decisis* the weight of academic opinions on points of law . . . takes on an importance as a criterion of judicial decision which is unknown in common law systems."); *see also* N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 64 & n.23 (citing the Fowl-Pest Case, Bundesgerichtshof, W. Ger., 51 Bundesgerichtshof in Zivilsachen [BGHZ] 91, and the Gentleman Rider Case, Bundesgerichtshof, W. Ger., 26 BGHZ 349, as examples of the interplay between courts and legal scholars).

8. *See supra* note 4.

9. The legislation on data protection which was inspired by the development of computer data banks provides one example of quick legislative action. *See* Bundesdatenschutzgesetz (Federal Data Protection Law), 1977 Bundesgesetzblatt, Teil I [BGBl.I] 201 (W. Ger.); *see also infra* notes 39-41 and accompanying text (discussing the Data Protection Law). The German Federal Data Protection Law generally precludes storage of personal data in the absence of legal justification. *See* 1971 BGBl.I 201 (W. Ger.). The statute applies to data banks maintained by both private and public entities. *See id.* In accordance with German principles of federalism, the *Länder* have also enacted data protection legislation. The development of genetic testing should provide the impetus for federal legislative action in much the same manner as the development of computer data banks.

10. This emphasis on underlying legal principles is grounded in "[t]he conviction that there are superior principles of right, or common laws to which the ordinary civil rules made by man must conform and which necessarily place limits on the operation of such rules . . ." C.G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 3 (1930). This theory of natural law "is one of the most persistent ideas in the evolution of legal thought." *Id.* Nineteenth century German legal philosophers, however, rejected natural law (*Naturrecht*) and other higher law theories in favor of positivism. *Id.* at 246-48. In the early twentieth century, German legal philosophers once again embraced natural law concepts, *id.* at 248, and in post-war Germany,

straint is embodied in the litany of Basic Rights (*Grundrechte*) contained in the first chapter of the German Constitution, known as the "Basic Law" (*Grundgesetz*).<sup>11</sup> The *Grundgesetz* specifically provides that these rights "shall bind the legislature, the executive and the judiciary as directly enforceable law."<sup>12</sup>

As a result, legal principles rather than transient political judgments dominate the structure of the law.<sup>13</sup> While theoretically a legislature can make any determination it pleases, it is not customary to overturn settled legal principles simply because of a change in government. To put it in common law terms, it is as if the legislature felt an obligation to respect precedent.

The greatest problem occurs when a core legal concept such as freedom of contract<sup>14</sup> directly collides with an accepted right such as the right of self-determination,<sup>15</sup> a problem which may arise because of developments in technology. This Article examines such a conflict

the purely positivistic approach to law began to be tempered by notions of natural law, N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 60.

11. See N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 21-22; R. WIETHÖLTER, RECHT (Law) (1987); Kommers, *Basic Rights and Constitutional Review*, in POLITICS AND GOVERNMENT, *supra* note 1, at 113, 113-14. The Basic Law expressly protects such rights as life, bodily integrity, and free development of personality, GRUNDGESETZ [GG] art. 2 (W. Ger.), equality before the law, GG art. 3 (W. Ger.), freedom of faith, conscience, creed, and religious exercise, GG art. 4 (W. Ger.), and freedom of expression, GG art. 5 (W. Ger.). See GG arts. 1-9, 12, 14, 17, 19 (W. Ger.) (setting forth the Basic Rights in chapter one of the *Grundgesetz* which may not be infringed upon by law). Other Basic Rights may be found in other articles of the Basic Law, such as the prohibition of capital punishment, GG art. 102 (W. Ger.), and the freedom from punishment under a retroactive law and from double punishment for a single act, GG art. 103 (W. Ger.).

12. GG art. 1, para. 3 (W. Ger.). This has led German commentators to conclude that: However great the majority in parliament . . . the legislature may not enact any law that conflicts with these basic rights; nor may the courts affect them by the form of their proceedings or the substance of their decisions; and the executive is bound to respect these basic rights both in imposing burdens on individuals and in distributing benefits.).

N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 22; see Kommers, *Basic Rights and Constitutional Review*, in POLITICS AND GOVERNMENT, *supra* note 1, at 113 (stating that unlike the earlier Weimar Constitution, the *Grundgesetz* ensures that the Basic Rights cannot be substantively amended). In addition to the *Ueberstaatliche Grundrechte* (fundamental human rights) which are not subject to change, the *Grundgesetz* recognizes various *Bürgerrechte* (ordinary civil rights) which are subject to constitutional change. See, e.g., GG art. 10 (W. Ger.) (privacy of telecommunications); GG art. 11 (W. Ger.) (freedom of movement).

13. See N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 60.

14. See *infra* notes 26-33 and accompanying text (discussing the German concept of freedom of contract).

15. See *infra* notes 16-25 and accompanying text (discussing the emerging constitutional right of self-determination); see also *infra* notes 34-41 and accompanying text (discussing the right of self-determination as applied to informational technologies).

— should private parties such as employers and insurance companies be permitted to use truthful information, such as genetic testing results, under a concept of freedom of contract, or is the use of genetic testing a violation of the right of personal self-determination as defined in the German Constitution? In more practical terms, the question is which characteristics of an individual should be deemed acceptable as a basis for discrimination by public and private law. The development of genetic testing thus poses new questions regarding the relationship of the individual to society.

## II. THE RIGHT OF SELF-DETERMINATION

The right of personal self-determination was one of the most important precepts included in the *Grundgesetz* after the Second World War.<sup>16</sup> It is a positive right,<sup>17</sup> and encompasses the protection of personal integrity<sup>18</sup> and the freedom of self-development.<sup>19</sup> Underlying the right of self-determination is the basic principle that each individual is a free person with all rights to develop his or her own personality in order to become a healthy and satisfied person. The right is considered so vital that in an unprecedented decision, the German Constitutional Court<sup>20</sup> decided that this fundamental liberty

16. The Weimar Constitution of 1919, the predecessor of the present (Bonn) Constitution of 1949, expressly protected personal freedom but did not protect the inviolability of the person nor the right to the free development of one's personality. See VERFASSUNG DES DEUTSCHEN REICHES art. 114 (Weimar Republic Ger. 1919), reprinted in GERMAN CONSTITUTIONAL DOCUMENTS, *supra* note 1, at 156.

17. See Judgment of Dec. 15, 1983, Bundesverfassungsgericht, W. Ger., 1984 Neue Juristische Wochenschrift (New Laws of the Week) [NJW] 419, discussed *infra* notes 34-38 and accompanying text.

18. See GG art. 2, para. 2 (W. Ger.) (stating that "[e]veryone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law.>").

19. See GG art. 2, para. 1 (W. Ger.) (stating that "[e]veryone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.>"). This *Personlichkeitsrecht* (Personality right) was implicated in the debate over informational self-determination, discussed *infra* notes 34-41. See H. MEISTER, DATENSCHUTZ IM ZIVILRECHT (Data Protection in the Civil Law) (1977).

20. The Federal Constitutional Court (*Bundesverfassungsgericht*) "serves as a principal guardian of constitutional rights in the Federal Republic." Kommers, *Basic Rights and Constitutional Review*, in POLITICS AND GOVERNMENT, *supra* note 1, at 115. The *Bundesverfassungsgericht* is the first German court to possess full powers of judicial review. P. BLAIR, *supra* note 1, at 10. The Court has exclusive jurisdiction to adjudicate constitutional questions arising under the Basic Law, and its jurisdiction is limited to such matters. *Id.* at 11; see Bundesverfassungsgerichtsgesetz (Federal Constitutional Court Act) art. 13, 1968 BGBl.I 949 (W. Ger.). A constitutional complaint (*Verfassungsbeschwerde*) may be filed with the Court by any individual who believes that one of his or her Basic Rights has been violated by the

overrides statutes to the contrary.<sup>21</sup> It is clear, however, that there are some limitations on personal autonomy, especially when its exercise infringes on the rights of others.<sup>22</sup>

Moreover, Germany is a social welfare state<sup>23</sup> in which the societal responsibility for the well-being of individual members is manifested in an affirmative governmental obligation to provide welfare sufficient for a dignified life.<sup>24</sup> While there may be debate as to the

state. See N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 22-26 (discussing the jurisdictional bases and procedure for filing a *Verfassungsbeschwerde*). A constitutional claim may also be brought by the federal or *Länder* governments in appropriate circumstances. See P. BLAIR, *supra* note 1, at 10-11 (discussing the jurisdiction of the Constitutional Court with regard to questions of federalism).

21. See Judgment of Dec. 15, 1983, Bundesverfassungsgericht, W. Ger., 1984 NJW 419 (invalidating *Volkszählungsgesetz* (Census Law) (W. Ger.)), discussed *infra* notes 34-38 and accompanying text.

22. See GG art. 2, para. 1 (W. Ger.) (providing for the exercise of the right to the free development of one's personality so long as the exercise "does not violate the rights of others or offend against the constitutional order or the moral code."). The decision of the Federal Constitutional Court regarding the abortion controversy is illustrative of the limitations on the right of self-determination. See *The Abortion Case*, Bundesverfassungsgericht, W. Ger., 39 Bundesverfassungsgericht [BVerfGE] 1. In declaring the Abortion Reform Act of 1974 invalid, the Court balanced the woman's right of self-determination against the embryo's constitutionally protected right to life. See *id.* Specifically, the Court ruled that "[t]he protection of the life of the embryo takes, as a matter of principle, precedence over the right of self-determination of the pregnant woman." *Id.* The Court further stated that:

The right of a woman to the free development of her personality, which has as its content the freedom of behaviour in a comprehensive sense and accordingly embraces the personal responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can . . . demand recognition and protection. This right, however, is not guaranteed without limits — the rights of others, the constitutional order, and the moral law limit.

*Id.*; cf. *The Lüth-Harlan Case*, Bundesverfassungsgericht, W. Ger., 7 BVerfGE 198 (finding that the right of free speech must yield if its exercise would impair another individual's legally protected interest of a higher rank).

23. See GG art. 20, para. 1 (W. Ger.) (stating that "[t]he Federal Republic of Germany is a democratic and social federal state."); GG art. 28, para. 1 (W. Ger.) (stating that "[t]he constitutional order in the *Länder* must conform to the principles of republican, democratic and social government . . ."). Although these provisions are not well-defined and are open to interpretation, see P. BLAIR, *supra* note 1, at 34, Germany is clearly a "social welfare economy" that provides specific welfare measures, see Karsten, *Economic and Social Policy*, in *POLITICS AND GOVERNMENT*, *supra* note 1, at 261, 261; *infra* note 24. The principle of a "social state" is known in Germany as *Sozialstaatsprinzip*.

24. See GG art. 1, para. 1 (W. Ger.) (stating that to respect and protect human dignity "is the duty of all state authority."). *Soziale Grundrechte* (the fundamental right of social help) is the obligation of government to provide for the social welfare of the people. This social obligation is illustrated in the *Bundessozialhilfegesetz* (Federal Social Help Law), BGBl. I (W. Ger.). The legal right to social help in Germany (*Rechtsanspruch auf Sozialhilfe*) includes medical care, family planning, theater tickets, drug treatment centers, television and telephone fees, and job training, and is therefore much broader than that commonly recognized in the United States. The concept goes beyond welfare for the unemployed and destitute — parents

precise form which the benefits flowing from this obligation should take, there is a firm legal consensus that such benefits are required by the fundamental law.<sup>25</sup>

### III. FREEDOM OF CONTRACT

Freedom of contract<sup>26</sup> was expressly protected in the Weimar Constitution.<sup>27</sup> Although the concept is not explicitly mentioned in the current German Constitution, commentators have concluded that freedom of contract is implicit in article two since the Constitution was established against a background of widely accepted legal principles including the freedom of contract.<sup>28</sup>

The German concept of freedom of contract had its origin in the development of nineteenth century liberal thinking.<sup>29</sup> Nineteenth century Germany was an autocracy with little protection of individual rights. The individual did not have the influence on the legislative process that was common in nineteenth century America.<sup>30</sup> When the emerging middle class (*Bürgers*) demanded protection of its economic situation, protection came not in the form of laws in which the individual had a voice, but rather in the government's promise to avoid interference in individuals' private dealings.<sup>31</sup> Unquestionably, the freedom to contract represented a fundamental political agreement in which the *Bürgers* gained protection of their private dealings without gaining political rights.

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receive a payment of 600 dm per month per child (approximately \$350) for at least one year. Erziehungsgeldgesetz (Child-Raising Money Law), 1986 BGBl.I 2154 (W. Ger.); Bundeskindergeldgesetz (Money for Children Law), 1975 BGBl.I 223 (W. Ger.).

25. See *supra* notes 23-24.

26. See generally Raiser, *Vertragsfunktion und Vertragsfreiheit*, in 1 Festschrift Hundert Jahre Deutscher Juristentage 101 (1960); Reinhardt, *Die Vereinigung subjektiver und objektiver Gestaltungskräfte im Verträge*, in Festschrift Schmidt-Rimpler 115 (1957).

27. Verfassung des Deutschen Reiches art. 152 (Weimar Republic Ger. 1919), reprinted in German Constitutional Documents, *supra* note 1, at 164.

28. See, e.g., N. Horn, H. Kötz & H. Leser, *supra* note 1, at 84; Karsten, *Economic and Social Policy*, in Politics and Government, *supra* note 1, at 263.

29. N. Horn, H. Kötz & H. Leser, *supra* note 1, at 85 (stating that freedom of contract is a "late product of Enlightenment and Liberalism").

30. See Kommers, *The Judiciary*, in Politics and Government, *supra* note 1, at 81 (stating that the German concept of *Rechtsstaat* (a state based on law) did not historically translate into traditional Anglo-American notions of constitutionalism, since it did not, for example, presuppose parliamentary democracy).

31. See Bürgerliches Gesetzbuch [BGB] (W. Ger.) (embodying this concept of protected private dealings). The BGB, promulgated in 1896, is the most important of the German civil codes, regulating the relations between private parties. For a discussion of the history and characteristics of the BGB, see N. Horn, H. Kötz & H. Leser, *supra* note 1, at 64-70.



Freedom of contract is therefore a much more fundamental concept in Germany than in the United States.<sup>32</sup> A person's right to make legally binding agreements is considered part of his or her civil rights, with each individual's contract equal before the law.<sup>33</sup> The responsibility conferred on each individual by the ability to contract freely is viewed as promoting human dignity, and this transforms the nature of the contract argument from an argument focusing merely on economic issues to an argument regarding human dignity. The most likely analogy in the United States is therefore to civil rights, not to contract rights. Under German Law, freedom of contract is thus a core doctrine which must be accommodated in the development of other legislation.

As a result, German legal scholars do not generally endorse interference with the freedom to contract. This may explain why many social reforms, such as a minimum wage, industrial safety, and avoidance of unfair business dealings are accomplished through private contracts rather than through the regulatory process.

This reliance on freedom of contract to protect what would be considered "civil rights" in American society gives rise to the problem that persons who are not yet party to the contract, such as applicants for employment or medical insurance, are not adequately protected. The conflict arises because employers and insurance companies are free under the doctrine of freedom of contract to refuse to hire or insure an individual who will not provide genetic testing results, or to charge individuals with the added costs reflected by this data. In other words, employers and insurers have no *obligation* to deal with applicants.

Since such an exercise of the freedom of contract would conflict with the applicant's right of self-determination, the development of genetic technology will demand readjustment of these principles in accordance with the needs of the individual and society. While such conflicts between the individual and society are not uncommon, only a few have arisen specifically as a result of the development of a new technology.

#### IV. INFORMATIONAL SELF-DETERMINATION

The best analogy to the problem presented by biotechnology is

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32. See N. HORN, H. KÖTZ & H. LESER, *supra* note 1, at 84 (arguing that "[n]o feature of private law is more important [than freedom of contract] for the autonomy of the individual or his power of self-development").

33. See *id.* at 64.

the conflict which resulted after the development of computerized data banks.<sup>34</sup> The tension that existed between the right of the individual to control the storage of personal data and the right of the owner of the data bank to be free of regulation was resolved by the German Constitutional Court in 1983.<sup>35</sup> In a broad decision invalidating the German Census Law,<sup>36</sup> the Court determined that the right of informational self-determination was of sufficient importance to establish it as a constitutional principle.<sup>37</sup> The Constitutional Court found that the individual has a fundamental right to decide what personal information may be kept in various data banks.<sup>38</sup> In other words, an individual's right to determine which informational personality may be created about him overrides the right of any business or government to keep such data, except as specifically permitted by law. The personal right outweighs any claim of business autonomy by the owner of the data bank.

The "Census decision" thus gave added support to the Federal Data Protection Law<sup>39</sup> by elevating its protections to a constitutional requirement. The Law provides that the storage or use of the information must be consistent with the dignity of the person and that the information must be truthful.<sup>40</sup> The Government, not the individual or the data bank owner, decides what data may be kept without consent, in accordance with the dictates of the Constitution.<sup>41</sup> Although the Law's limitations on the storage and use of personal data may have undesirable consequences, these limitations are acceptable costs in the process of protecting the right of self-determination and enhancing individual autonomy.

## V. THE PROBLEM OF GENETIC TESTING

The threat presented to personal privacy from computer data banks is similar to the threat presented by genetic testing. The development of computerized data banks, however, did not involve the

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34. See generally H. MEISTER, DATENSCHUTZ IM ZIVILRECHT (Data Protection in the Civil Law) (1977).

35. See Judgment of Dec. 15, 1983, Bundesverfassungsgericht, W. Ger., 1984 NJW 419.

36. Volkszählungsgesetz (Census Law) (W. Ger.).

37. See Judgment of Dec. 15, 1983, Bundesverfassungsgericht, W. Ger., 1984 NJW 419.

38. *Id.*

39. Bundesdatenschutzgesetz (Federal Data Protection Law), 1977 BGBl.I 201 (W. Ger.).

40. *Id.*

41. See *id.*

direct conflict between self-determination and freedom of contract. It is therefore not automatically clear that the conflict will be resolved in the same manner.

### A. *The Information Involved*

In order to properly analyze the conflict, the precise nature of the genetic information involved should be clarified. Genetic testing may reveal that an individual: (1) will develop a specific disease, such as Huntington's disease;<sup>42</sup> (2) has conditions which will cause a disease, such as phenylketonuria,<sup>43</sup> unless treated; (3) has a trait which increases his or her probability of disease; (4) has an increased probability of disease if exposed to specific environmental factors; and (5) carries a heritable trait, such as Tay-Sachs,<sup>44</sup> which can be passed to offspring.<sup>45</sup>

The most important characteristics of genetic disease are that: (1) it is inherited; (2) it is caused by no fault of the individual; (3) the handicap, if any, does not always appear immediately; (4) the individual may be compensated for the handicap by medical or other assistance; and (5) the effect can be avoided in some cases by environmental change. Clearly, these factors involve a combination of choice and fate. The question is one of social policy — How should we deal with the problem of inherited medical conditions?

### B. *Methods for Resolution of the Conflict*

Assuming that the state has an obligation to help individuals overcome genetic handicaps, two primary options are available. The first approach involves prohibiting discrimination in private contracts.<sup>46</sup> However, this option directly conflicts with the freedom of

42. Huntington's Disease is an autosomal dominant disorder in which the individual undergoes neurological deterioration over a 10-15 year period, eventually culminating in death. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SCREENING AND COUNSELING FOR GENETIC CONDITIONS 38 & n.86 (1983) [hereinafter GENETIC SCREENING].

43. Phenylketonuria (PKU) is an autosomal recessive disease that results in severe mental retardation and other physical disorders. *Id.* at 12. Since the manifestations of PKU can be avoided by placing the infant on a low phenylalanine diet, genetic screening of newborns is customary. *Id.*

44. Tay-Sachs is a fatal autosomal recessive genetic disease which occurs primarily in children of Eastern European Jewish descent. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, TECHNOLOGIES FOR DETECTING HERITABLE MUTATIONS IN HUMAN BEINGS xii (1986); see also GENETIC SCREENING, *supra* note 42, at 18-20.

45. The particular heritable trait carried by the individual may, of course, be any one of the four previously discussed.

46. For the purpose of this analysis, it is assumed that the state can limit irrational

contract. It is also possible to prohibit discrimination indirectly by preventing the *acquisition* of data on the prohibited characteristic. Such an indirect prohibition of discrimination is the approach of the Federal Data Protection Law.<sup>47</sup>

The second approach involves taking positive steps to reduce the private incentive for discrimination by socially compensating for the handicapped. This would involve socializing the additional cost of medical care and reimbursing employers for the special costs of employing these individuals. Alternatively, employers or insurers could be assessed a special tax if they failed to contract with an appropriate number of "genetically handicapped" persons. The use of this approach to encourage firms to hire the physically handicapped is presently being debated. The sensitivity to the doctrine of freedom of contract is obvious. No one is forced to hire the handicapped — they are simply given the choice of hiring or paying a heavy tax.

Whichever approach may be chosen, it is clear that the underlying question is whether the state has an *affirmative responsibility* to help the individual overcome the genetic handicap, or whether this is simply one of the misfortunes of life. If government has such an obligation, the question becomes whether the individual can be required to avoid risk factors, or possibly to avoid bearing children who will carry the trait, as a means of assisting the government in the discharge of its obligation. On the other hand, the conclusion that each individual is responsible for his or her own condition brings to mind the famous comment that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."<sup>48</sup> At a bare minimum, this conclusion would, however, place individuals who have preventable or treatable conditions in the position of avoiding harm at the risk of their jobs and economic well-being.

### C. *Discrimination Based on Other Heritable Characteristics*

One of the most important developments of nineteenth century liberal thinking was the recognition that in order to safeguard equality of opportunity, society rather than the individual must bear the

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discrimination, i.e. discrimination which is not based on accurate information. The issue is whether *rational* discrimination should be prohibited.

47. Bundesdatenschutzgesetz (Federal Data Protection Law), 1977 BGBl.I 201 (W. Ger.), discussed *supra* notes 39-41 and accompanying text.

48. Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (quoting Anatole France, *quoted in* J. COURNOIS, A MODERN PLUTARCH 35 (1928)).

burden of compensating for individual characteristics. Free schools, universal health care, and social welfare all arise from this recognition. In Germany, however, this societal burden has not been clearly extended to inborn genetic characteristics, despite their constitutional protection. The treatment of race, sex, and age illustrates the level of protection afforded inborn genetic characteristics under German law.

1. Race.— Under the Basic Law, all races are equal before the law.<sup>49</sup> This provision does not, however, specifically prohibit racial discrimination by private parties.<sup>50</sup> Nevertheless, most commentators agree that racial classifications are not used as a criteria for employment because of the difficulty of classification and the special sensitivity to questions of a racial nature in Germany after the Second World War.<sup>51</sup>

2. Gender.— Similarly, the Basic Law provides for equality of the sexes before the law.<sup>52</sup> Nonetheless, individuals are expected to bear the burden of the actuarially accurate consequences of their gender. A number of commentators have argued that the state should be required to enact laws to prevent sexual discrimination in order to effectuate the constitutional mandate of equality before the law.<sup>53</sup>

3. Age.— Age discrimination is not prohibited by statute nor by the Basic Law. Perhaps this is because age discrimination may be distinguished from other forms of discrimination by the fact that every individual passes through all ages in his or her lifetime. On the other hand, at any given time, the law does allow private parties to discriminate against individuals of a certain age, a matter over which they have no control.

Thus, the use of heritable characteristics is not categorically

49. GG art. 3, paras. 1, 3 (W. Ger.). Specifically, article 3 provides as follows:

*Article 3 (Equality before the law)*

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights.

(3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.

GG art. 3.

50. See GG art. 3, paras. 1, 3 (W. Ger.).

51. See, e.g., Sezhner, *Ideologie und Recht Positivismus*, in *IDEOLOGIE & RECHT* 97 (B. Maihofer ed. 1969).

52. GG art. 3 (W. Ger.), set forth *supra* note 49.

53. See, e.g., O. MODEL & C. CREIFELDS, *Drittwirkung der Grundrechte* (Extended Power of Human Rights), in *STAATSBURGERTASHENBUCH* 94 (1987).

prohibited in West Germany. Arguments in favor of such a prohibition would require powerful justifications.

#### D. *Resolution of the Conflict*

Since a prohibition of discrimination based on genetic test results cannot be justified merely by classifying the trait as a heritable characteristic, resolution of the conflict will require a balancing of the two concepts of human dignity — freedom of contract and the right of self-determination.

As previously noted, freedom of contract was historically used to protect the individual in an environment in which he had no control over the legislative apparatus.<sup>54</sup> A democratic pluralistic society, however, does not need to defer to such legal forms created as a protection against autocracy. Law is no longer a separate part of society charged with the orderly regulation of daily life. Instead, law is now part of the social agreement, incorporating the socio-political consent to develop human society based on natural rights. Freedom of contract is therefore merely a reflection of the political realities of the nineteenth century, not a fundamental legal principle needed to protect human integrity.

German legal scholars have often decried the legal positivism that allowed lawyers to enforce the racist Nuremberg laws merely because they had been properly enacted by the legislature.<sup>55</sup> The renewed post-war emphasis on a set of legal principles underlying the statutes was a reaction *against* pure positivism designed to protect individual rights.<sup>56</sup> The suggestion that freedom of contract should dominate legal developments simply because it is well-established is nothing more than a new face on positivism exalting legal structures over the needs of the human condition.

Consequently, the doctrine of freedom of contract should yield to the individual's right to develop his or her own personality. That right, which rests upon fundamental notions of human dignity, supports the proposition that in a modern society, heritable characteristics should have a limited role in determining the fate of an individ-

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54. See *supra* notes 26-33 and accompanying text.

55. See, e.g., *Vas ist Juristische Positivismus?*, in *JURISTEN ZEITUNG* 465 (H. Kelsen ed. 1965).

56. See *supra* note 11 and accompanying text (discussing the decline of a purely positivistic approach and the movement toward an increased recognition of natural law principles); see also *supra* note 3 (discussing the positive law approach and the post-war recognition of its dangers).

ual. The right of individual self-determination should preclude the doctrine of freedom of contract from justifying genetic testing, thereby preserving for each individual an equal chance to develop his own individuality.

## VI. CONCLUSION

The development of genetic testing will demand reevaluation of existing legal doctrines in accordance with the needs of society and the individual. An appreciation of human dignity demands that restrictions be placed on the use of genetic information. Of course, such restrictions will not come without cost. There will be limitation on the exercise of freedom of contract, but this restriction is essential to fulfill the concept of self-determination as enshrined in the German Constitution.