that tends to inhibit the free development of personality because of the psychological pressure of general public compliance.

(c) However, not every statistical survey requiring the disclosure of personal data violates the dignity of the individual or impinges upon the right to self-determination in the innermost private areas of life. As a member of society, every person is bound to respond to an official census and to answer certain questions about himself, because such information is necessary for government planning.

[One] can regard a statistical questionnaire as demeaning and as a threat to one's right of self-determination when it intrudes into that intimate realm of personal life which by its very nature is confidential in character. In a modern industrial society there are restrictions against such administrative depersonalization. On the other hand, where an official survey is concerned only with the relation of the person to the world around him, it does not generally intrude on personal privacy. This is true . . . when the information loses its personal character by virtue of its anonymity. The prerequisite for [this conclusion] is that anonymity be adequately preserved. In the present case [two factors] guarantee [anonymity]: a statutory prohibition against the publication of information obtained from individuals, as well as the fact that census takers are bound under penalty of law to maintain the confidentiality of the information. [The census taker] has no statutory duty to report data to internal revenue agencies; moreover, responsible officials may not convey any [census] information to their superiors in an official capacity if they have not been expressly given this power under the law.

(d) The collection of census data regarding vacations and recreational trips does not violate Article 1 (1) of the Basic Law. The questionnaire at issue does implicate the sphere of privacy, but it does not force the individual to reveal intimate details of his personal life. Nor does it allow the state to monitor individual relationships which are not otherwise accessible to the outside world and are consequently of a private nature. [The state] could have obtained data regarding the destination and length of vacation trips, lodging, and transportation without a census, although with much more difficulty. The information solicited does not, therefore, involve that most intimate realm into which the state may not intrude. [The state] may [therefore] use the questionnaire for statistical purposes without violating the individual's dignity or right to self-determination. . . .

[The *Census Act* case, reprinted below as case no. 7.6, is the sequel to *Microcensus*. *Census Act*, however, is more appropriately placed in the section on the right of personality.]

NOTE: THE BASIS AND ORIGIN OF HUMAN DIGNITY. "The dignity of man is founded upon eternal rights with which every person is endowed by nature," read the first draft of Article 1 produced by the Herrenchiemsee Conference. Later, in the Main Committee of the Parliamentary Council, Christian Democratic delegates sought to characterize these "eternal rights" as "God-given." Social Democrats and Free Democrats resisted the use of such language because of its implications for constitutional interpretation.[5] The result was a succinct and neutral formulation: "The dignity of man is inviolable." Except for the most dogmatic of legal positivists among the framers, the main party groups (Christian, Social, and Free Democrats) in the council were united in the proposition that human dignity, like other fundamental rights of personhood, is anterior to the state. Such rights belong to persons as persons, and in this sense they were regarded as transcendental. The framers were thus successful in refusing to identify the concept of human dignity with a particular philosophical or religious school of thought. The constitutional text seems fully consistent with a variety of philosophical perspectives, although the *Microcensus* case appears to adopt Kantian language in that persons are always to be treated as ends, and not as mere objects of manipulation. The term "language" is used here because the view that people are ends and not means is certainly shared by non-Kantians such as Christian natural-law theorists. Moreover, as the *Mephisto* case shows, the court's view of human dignity falls far short of any judicial glorification of the concept of personal autonomy. Kantian autonomy, in the court's eyes, includes a strong sense of the "morality of duty."

7.2 Mephisto Case (1971)
30 BVerfGE 173

[While in exile from Nazi Germany in the 1930s, Klaus Mann published *Mephisto*, a satirical novel based on the career of his brother-in-law, Gustaf Gründgens, a Faustian actor who had attained fame and fortune during the Third Reich by renouncing his former liberal views and currying the favor of Nazi leaders. Mann later admitted that for him Gründgens personified "the traitor par excellence, the macabre embodiment of corruption and cynicism . . . who prostitutes his talent for the sake of some tawdry fame and transitory wealth." The fictionalized character, Hendrik Höfgen, was a caricature of the model on which he was based. When *Mephisto* was about to be reissued by a West German publisher in 1964, Gründgens's adopted son secured from the Hamburg Court of Appeals an order banning its distribution. The judgment was affirmed by the High Court of Justice on the ground that the novel dishonored the good name and memory of the now-deceased actor. The publisher filed a constitutional complaint in the Federal Constitutional Court against both judgments on the ground that they contravened Article 5 (3) of the Basic Law, which guarantees the freedom of art and science. The court sought to balance the right to freedom of art against the personality and human dignity clauses of Article 1. The extracts below focus mainly on the balance between speech and dignity.]

Judgment of the First Senate. . . .

The constitutional complaint is rejected.

C. III. 4. . . . [We] must also reject the opinion that the constitutional order, the rights of others, and the moral code may restrict the freedom of the arts pursuant to Article 2 (1), second half of the sentence. This view is inconsistent with the subsidiary relationship of Article 2 (1) to the individual liberty rights specifically mentioned [in the Constitution]. The Federal Constitutional Court has consistently recognized [this relationship] in its case law.

[The sentences above show how the court uses the concept within the Basic Law's hierarchy of values. See the section in this chapter on the right to personality for a detailed explanation of the subsidiary character of the personality clause of Article 2 (1).]

5. On the other hand, the right of artistic liberty is not unlimited. Like all basic rights, the guarantee of liberty in Article 5 (3) [1] is based on the Basic Law's image of man as an autonomous person who develops freely within the social community. But the [fact that] this basic right contains no limiting proviso means that only the Constitution itself can determine limits on artistic freedom. Since freedom of the arts does not contain a provision entitling the legislature to limit [this basic right], it cannot be curtailed by [provisions of] the general legal system. [If] an indefinite clause that applies when goods necessary for the continued existence of the national community are endangered has no anchor in the Constitution and does not sufficiently [conform] to the principle of the rule of law, it may not limit this right. Rather, [we] must resolve conflict[s] relating to the guarantee of artistic freedom by interpreting the Constitution according to the value order established in the Basic Law and the unity of its fundamental system of values. As a part of the Basic Law's value system, freedom of the arts is closely related to the dignity of man guaranteed in Article 1, which, as the supreme value, governs the entire value system of the Basic Law. But the guarantee of freedom of the arts can conflict with the constitutionally protected sphere of personality because a work of art can also produce social effects.

Because a work of art acts not only as an aesthetic reality but also exists in the social world, an artist's use of personal data about people in his environment can affect their rights to societal respect and esteem. . . .

6. The courts [below] properly referred to Article 1 (1) in order to determine the late actor Gründgens's protected sphere of personality. It would be incompatible with the constitutional commandment that human dignity is inviolate—a commandment which acts as the foundation for all basic rights—if a person, possessed of human dignity by virtue of his personhood, could be degraded or debased . . . even after his death. Accordingly, the obligation that Article 1 (1) imposes on all state authority to afford the individual protection from attacks on his dignity does not end with death. . . .

7. The resolution of the conflict between the protection of one's personality and the right to artistic freedom must therefore take into account not only the effects of a work of art in the extra-artistic social sphere but also art-specific aspects. The guarantee of liberty in Article 5 (3) [1] leaves its mark on the image of man upon which Article 1 (1) is based, just as the value conception of Article 1 (1) in turn influences the guarantee [of artistic freedom]. The individual's right to societal respect and esteem does not have precedence over artistic freedom any more than the arts may disregard a person's general right to respect. . . .

Only after carefully weighing all the facts of individual cases can [one] decide whether an artistic presentation's use of personal data threatens such a grave encroachment upon the protected private sphere of the person it describes that it could preclude publication of the work of art. [One] must take into account whether and to what extent the "image" [of a particular person] appears so independent from the "original" because of the artistic shaping of the material and its incorporation into and subordination to the overall organism of the work of art that the individual, intimate aspects have become objective in the sense of a general, symbolic character of the "figure." If such a study . . . reveals that the artist has given or even wanted to give a "portrait" of the "original," then the [the resolution of this conflict] depends on the extent of artistic abstraction or the extent and importance of the "falsification" of the reputation or memory of the person concerned.

IV. 2. . . . [T]he Hamburg Appeals Court and the Federal High Court of Justice assumed that the protection of Gründgens's right to respect extends to the social sphere. In this regard the Federal High Court correctly considered that the need for protection—and accordingly the obligation to protect—diminishes as the memory of the deceased person fades. . . . On the other hand, the courts also assumed that Klaus Mann's novel constitutes a work of art within the meaning of Article 5 (3). . . . The courts tried to solve this conflict by weighing the conflicting interests against each other. . . .

[In sustaining the judgment against the complainant, the Constitutional Court stressed the narrow limits of its powers of review. "In particular," said the court, "the establishment and evaluation of facts and the interpretation of laws and their application to individual cases are the business of the regular courts and cannot be reviewed by the Federal Constitutional Court." The Constitutional Court sees its task as one of determining whether the court below did, in fact, properly weigh the conflicting rights of the parties under the Basic Law, and whether it attached the proper significance to the constitutional rights implicated in the case. The court found that the judgment below

was fully and adequately explained. It thus did not "demonstrate any incorrect conception of the essence of the basic right that was defeated."]

Finally, [complainant] cannot challenge the conclusion of the courts . . . by arguing that the ban on publication is disproportional to the encroachment on the late Gustaf Gründgens's right to respect. It is true that the Federal Constitutional Court has repeatedly emphasized that the principle of proportionality has constitutional rank and must therefore be considered whenever state authority encroaches on the citizen's sphere of liberty. But the instant case does not involve such an encroachment. The courts simply had to decide a claim based on private law made by one citizen against another; that is, to give concrete definition to a relationship of private law in an individual case. . . . The primary function of private law is to settle conflicts of interests between persons of equal legal status in a manner as appropriate as possible. . . .

[Chapter 8 includes extracts from *Mephisto* dealing with the free-speech aspects of the case as well as the dissenting opinions of Justices Stein and Rupp–von Brünneck (see no. 8.12).]

NOTE: HUMAN DIGNITY AND THE IMAGE OF MAN AND POLITY. The Constitutional Court's "dignitarian" jurisprudence contains numerous declarations about the nature of the human person and the polity. Indeed, this jurisprudence would be unintelligible without reference to the concepts of person and society on which it is based. In seeking to advance human dignity as a constitutional value, both court and commentators have relied on three politically significant sources of ethical theory in postwar Germany—Christian natural law, Kantian thought, and social democratic thought—present in the constitutional text as a whole. It is hardly surprising, therefore, on the natural-law side, to find the human person described in legal literature and in several constitutional cases as a "spiritual-moral being" entitled to rights found in a "preexisting supra-positive order of justice."[6] On the other hand, as G. P. Fletcher has pointed out,[7] emphasis in the case law on individual autonomy, moral duty, and human rationality manifests equally strong Kantian influences, just as the more socially oriented strands of constitutional thought may be said to reflect egalitarian theory. These orientations have converged in German constitutional case law to produce an integrated conception of the human person as an individual possessing spiritual autonomy, which—in a properly governed society—is to be guided by social discipline and practical reasonableness.[8]

A strong personalist and communitarian philosophy pervades this conception of the human person. *Mephisto* captures the essence of this philosophy when the opinion refers to "man as an autonomous person who develops freely *within the social community*" (emphasis added).[9] The *Investment Aid I* case (1954; no. 6.1) advanced the concept of man as a community-centered person for the first time:

"The image of man in the Basic Law," declared the court, "is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value."[10] The morality of duty and the principle of human solidarity implicit in this statement and reflected in parts of the Basic Law bear the clear imprint of Kantian moral theory.[11] Needless to say, however, this theory is also shared by other reputable philosophical traditions in Germany.

Mephisto articulates a vision of the polity which may remind Americans of Lincoln's elevated image of a fraternal democracy.[12] Society, the court affirmed, is more than an aggregation of isolated individuals motivated by self-interest and a desire to manipulate one another for purely personal ends. Neither did the court offer a blanket endorsement of the value of autonomy as against competing social goods. Indeed, the notion of a simple opposition between person and polity is alien to the court's jurisprudence and the political theory of the Basic Law itself. The court's vigilant defense of personal freedom is embodied in the larger context of common life. Human dignity resides not only in individuality but in sociality as well. Such dignity requires the protection of the personality and freedom of the individual, but must also promote the goods of relationship, family, participation, communication, and civility.[13] The Basic Law was framed not for individuals alone but for an organic association of persons expressing its will to live a common social, political, economic, and moral life grounded in the overwhelming ethical principle that human beings must always be treated as ends, never as means. *Mephisto* even goes so far as to include in its vision of community not only the living, but the dead as well. According to the court, the dead—particularly those in living memory—remain in communion with the living, and we, the living, owe them continuing honor and respect.

This highly personalistic conception of human dignity was the focal point of a more recent constitutional attack on the sentence of life imprisonment, even for the crime of murder. The *Life Imprisonment* case (1977) is the closest available analogy to the American death penalty cases, in which the notion of human dignity has also played a significant role in constitutional argument.[14] (Owing to the abolition of capital punishment under Article 102 of the Basic Law, no death penalty cases have arisen in West Germany.) In *Life Imprisonment* the Constitutional Court considered an extensive literature as well as expert testimony on the effects of life imprisonment on the prisoner's dignity and personality. The Kantian injunction that human beings are to be treated as ends, not means, applies as much to closed environments as it does to normal society. Even the use of the polygraph in a criminal proceeding has been invalidated by the court on the basis of human dignity. To elicit the truth by attaching a person to a machine, said the court, is to regard him as an object, and not as a human being capable of telling the truth through ordinary questioning.[15]