THE RIGHT TO PRIVACY IN GERMANY—POINTERS FOR AMERICAN LEGISLATION?

And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompence.†

HARRY D. KRAUSE*

MODERN MAN'S dependence on his fellow has increased proportionately with the improvement of his living standard, and contact between the members of our interdependent society has multiplied. This increasing contact has brought increasing conflict, and increasing conflict has resulted in compromise—compromise with voluntary choice, independence and freedom. Modern man is not apart from company or observation; he does not live in seclusion. According to the dictionary definition, he does not enjoy "privacy." A rapidly developing technology is furnishing ever more effective means of invading privacy, and the situation has been viewed with increasing alarm. Three recent books have brought the problem into popular view.¹ The argument that modern man does have some right to be let alone, some right to privacy, is gaining force, and the focus is on the law.

Consider the following: Your telephone is tapped by a neighbor, a police officer, your employer, a creditor or a newspaper reporter, and the information obtained is or is not used, repeated or published. The children next door buy a "Big Ear"² and use it on you. A private letter to or from a private citizen, a politician or a

† Ashby v. White, 2 Ld. Raym. 938, 955, 92 Eng. Rep. 126, 137 (K.B. 1703) (Holt, C.J.).

* B.A. 1954, J.D. 1958, University of Michigan. Assistant Professor of Law, University of Illinois.

¹ BRENTON, *THE PRIVACY INVADERS* (1964); ERNST & SCHWARTZ, *PRIVACY* (1962); PACKARD, *THE NAKED SOCIETY* (1964). A recent television documentary on the invasion of privacy in the United States constitutes further evidence of growing popular concern over the problem. ABC-TV News Special, May 21, 1964, "Big Brother Is Listening."

² "The Big Ear—Hear people talking a full block away—\$13.99 without battery." 1963-64 SEARS TOY BOOK 148.

well-known actor accidentally falls into the hands of a respected newspaper or a scandal magazine which publishes it. Your employer operates a camera in the washroom. Your telephone is rung by a telephone solicitor. Your name and address, as part of a list, are sold to an advertiser. Without your consent, your picture or name is used in a commercial endorsement. Your employer solicits your contribution to the "Political Party of Your Choice" or the "United Charitable Drive." Television advertising annoys you or affects your children. Your employer plays muzak at your place of work. A credit bureau asks your neighbors about your personal habits. Your government has you fingerprinted. The school surveys your children's views concerning you.

The list extends indefinitely; the multiplicity of modern privacy invasions has no end. But which of these invasions should be actionable and which must simply be borne? Is it true that

against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be[?]³

The answer is as complex as our society. Even if it be assumed that a person has a legally protectable interest in being let alone, his interest may be outweighed by other interests, such as freedom of contract, freedom of speech, or freedom of the press. Moreover, regulation of conduct can only go so far, if what started as a means of increasing freedom is not to end by stifling it. While many of the answers to the problem of invasion of privacy lie elsewhere,⁴ some answers may be found in the law of torts. There has been little legislation of significance in this area,⁵ although the courts and law

³ Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

⁴ See Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212. The right to privacy is protected in some respects by criminal law provisions. See, e.g., N.Y. PENAL LAW § 1423.6 (prohibition against wiretapping). Also see note 117 *infra*.

⁵ N.Y. CIVIL RIGHTS LAW §§ 50-52 provide:

"§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

"§ 51. Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for

reviews have debated the problem for years.⁶ Judicial reluctance to proceed without precedent has combined with skepticism as to the validity of the interest in privacy sought to be asserted, and the frequent conflict of that interest with established values has not helped. The result has been chaos.

There are four central problems: First, substantively, in what areas is the right to privacy to be protected? What type of conduct should be actionable and what should be privileged? Second, looking to the prospective defendant, what state of mind or degree of fault, if any, is to be required in order to occasion liability? Third, what sanctions are appropriate, and to what extent are damages to be awarded? Is mere distress to be compensable? Fourth, how is protection of the right to privacy to be implemented? Should it be left to the courts, or would a statute be more appropriate?

advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

[Section 52 prohibits televising, broadcasting or taking motion pictures of certain proceedings.]

The New York provisions, together with similar statutes in Oklahoma, Utah and Virginia, are discussed in Pound, *Right of Privacy*, 13 W. RES. L. REV. 34, 47-50 (1961). Very broad privacy legislation was rejected in Wisconsin in the early 1950's. The bill would have provided:

"The legal right of privacy is recognized in this state and an invasion thereof shall give rise to an equitable action to prevent and restrain such invasion as well as an action to recover damages for injuries sustained by reason thereof."

S. 215, Wis. Leg. (1952).

The measure is discussed in *Yoeckel v. Samonig*, 272 Wis. 430, 433, 75 N.W.2d 925, 926 (1956). Also see Note, *The Right of Privacy in Wisconsin*, 1961 Wis. L. Rev. 332, 335.

⁶ See note 78 *infra* and accompanying text.

These problems have recently been the subject of lively discussion in West Germany. In a "conscious departure from the past,"⁷ the West German courts have taken the initiative, creating a "right of personality" (Persönlichkeitsrecht) which is the rough equivalent of our "right to privacy."⁸ In the process, answers to some of the problems have been found, and some of the questions have been refined. Starting with the fourth problem referred to above (because it combines well with an introduction to substance), this article will review what Germany has done with these problems.⁹ First, however, the reader not familiar with German tort law will wish to turn to Appendix I, which is intended to provide the necessary background.

CASE OR CODE?

The obvious should be put on record at the outset: The German legal system is a code system, and statutory treatment of legal subject matter is natural. Judicial legislation is anomalous. The situation in our country, of course, is different, but fruitful comparison of the German and American systems is not impossible. The basic problem of whether the subject matter of the tort of invasion of privacy lends itself to abstract statement in the form of statutory provisions is the same. Since minute factual distinctions may make

⁷ Entwurf eines Gesetzes zur Neuordnung des zivilrechtlichen Persönlichkeits- und Ehrenschatzes, Begründung, Bundestagsdrucksache 1237 at 6 (Deutscher Bundestag, Aug. 18, 1959).

⁸ The German concept, as its name implies, is broader than our right to privacy. As subsequent discussion will show more fully, the German right includes the equivalent of our tort of defamation and even covers personal injuries. The views of certain American writers concerning the scope of the right to privacy are worth considering. See GREGORY & KALVEN, CASES ON TORTS 884 (1959) [hereinafter cited as GREGORY & KALVEN]: "Privacy is an important value in our society and is protected under other headings. Thus, the actions for trespass to property, or even for battery, can be viewed as aspects of the law's intention to protect personal privacy." Also see Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), who speak of the "right of the individual to be let alone," *id.* at 205, and who view the right to privacy as "a part of the more general right to the immunity of the person—the right to one's personality." *Id.* at 207. Generally speaking, the German right of personality and our right to privacy largely coincide with the right "to be let alone." This phrase, coined by Cooley, COOLEY, TORTS 29 (2d ed. 1888), has found its way into our law of privacy, although Cooley used it in a broader context and apparently did not have privacy in mind. *Cf. id.* at 420-23 (Cooley's views on private letters).

⁹ Comparative work in the English language is surprisingly rare in this area. An excellent article which is now out of date is Gutteridge, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 203 (1931). *Cf.* Weeks, *Comparative Law of Privacy*, 12 CLEV.-MAR. L. REV. 484, 499-500 (1963); Zuleeg, *Group Defamation in West Germany*, 13 CLEV.-MAR. L. REV. 52, 59-60 (1964).

the difference between the serious and the trivial, can an abstract statement of the right be formulated without overstatement? If a legal system with a great disposition in favor of codification encounters difficulty in this respect, this constitutes credible and interesting evidence bearing upon this question. This is in fact what has happened in West Germany, where, despite a strongly supported campaign in favor of codification, the law of privacy remains uncoded.

The First Fifty Years

The effort to obtain a comprehensive codification of the law of privacy in Germany was the culmination of a half-century of piecemeal protection in this area. Much as our right to privacy rests upon the foundation laid by Warren and Brandeis in 1890,¹⁰ the German right of personality derives from von Gierke, who first dealt with the problem in 1895.¹¹ Many German jurists who were contemporaries of Gierke supported his suggestion that the law should recognize a "general right of personality."¹² Thus, the right of personality met with early success in terms of theoretical acceptance, but it did not find a place in the German Civil Code (BGB) of 1896.¹³ Moreover, early attempts to obtain judicial protection of the right failed. In 1908, the Reichsgericht¹⁴ (RG) held that "a general . . . right of personality is a stranger to existing civil law."¹⁵ The case under consideration there involved relatives of Friedrich

¹⁰ Warren & Brandeis, *supra* note 8.

¹¹ VON GIERKE, 1 DEUTSCHES PRIVATRECHT 702 (1895). Gierke's significant contribution to the right of personality consisted in the fact that he emphasized its personal nature, abandoning the notion that it must have a proprietary basis. *Id.* at 706. It should be noted, however, that even today those interests in privacy that are comparable to property rights (right to control use of one's name and picture, for example) receive broader protection than other privacy interests.

Prior to Gierke, the German right of personality had no clear history. For a brief historical outline in the English language, see Gutteridge, *supra* note 9. For greater detail, see LEUZE, DIE ENTWICKLUNG DES PERSÖNLICHKEITSRECHTS IM 19. JAHRHUNDERT (1962), 163 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [hereinafter cited as A.C.P.] 89 (1963). See also HUBMANN, PERSÖNLICHKEITSRECHT 93 (1953).

¹² Bussmann, *Reichen die geltenden gesetzlichen Bestimmungen insbesondere im Hinblick auf die modernen Nachrichtenmittel aus, um das Privatleben gegen Indiskretionen zu schützen?*, 1 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES 1, 10-11 (1957) (citing Gareis, Kohler, and Lobe).

¹³ The Swiss codified a general right of personality in 1907, which is contained in article 28 of the Swiss Civil Code and article 49 of the Swiss Code of Obligations.

¹⁴ The Reichsgericht was the supreme court of Germany from 1879 until 1945. The Bundesgerichtshof is the supreme court of West Germany.

¹⁵ 69 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter cited as R.G.Z.] 401, 403 (1908); cf. 51 R.G.Z. 369, 373 (1902).

Nietzsche, who complained of the threatened posthumous publication of certain of his letters. Although the case was decided for the plaintiffs, it turned on copyright, not on any right of personality. Other cases met with similar fates.¹⁶

The lack of protection of the personality, however, was not complete.¹⁷ Often a plaintiff who failed on the personality ground succeeded on another, as in the *Nietzsche* case. Such results largely represented a "we-do-what-we-can" approach on the part of the courts. Furthermore, scattered statutes provided protection for certain, selected personality interests, with emphasis on those having a property flavor. Copyright protection, as demonstrated by the *Nietzsche* case, was well developed.¹⁸ In an extension of copyright theory, a person's picture was protected under the Law Relating to Artistic Copyright,¹⁹ and this was extended further to the description of a

¹⁶ See generally Smoschewer, *Das Persönlichkeitsrecht im allgemeinen und im Urheberrecht*, 3 ARCHIV FÜR URHEBER-FILM-FUNK-UND THEATERRECHT [hereinafter cited as U.F.I.T.A.] 119, 229, 349 (1930).

¹⁷ The status of the right of personality just before the "new look" (see text accompanying note 30 *infra*) is discussed in HUBMANN, *op. cit. supra* note 11; Neumann-Duesberg, *Der Persönlichkeitsrechtsschutz des Individuums im neuen Urheberrechtsgesetzentwurf*, 18 U.F.I.T.A. 277 (1954).

¹⁸ See discussion by the court in the *Nietzsche* case, 69 R.G.Z. at 404-05.

¹⁹ Articles 22 and 23 of the Gesetz btr. Das Urheberrecht an Werken der bildenden Künste und der Photographie v. 9.1.07 (KUG) provide:

"Article 22.

Pictures may be disseminated or publicly exhibited only with the consent of the person pictured. In doubtful cases consent is presumed to have been given if the person pictured was being paid for being pictured. For a period of ten years after the death of the person pictured the consent of his relatives is required. Relatives within the meaning of this act are the surviving spouse and children of the person pictured and, when there is no spouse or children, the parents of the person pictured.

"Article 23.

I. The following may be disseminated and exhibited without the consent required under Article 22:

1. Pictures relating to current events;
2. Pictures of a landscape or other locality in which the person pictured is only a secondary object;
3. Pictures of assemblies, processions and similar events in which the persons pictured have participated;
4. Pictures which were not made on order, if the dissemination or exhibition serves a higher interest of art.

II. This privilege does not, however, extend to a dissemination or exhibition, which injures a legitimate interest of the person pictured or, if he is deceased, of his relatives."

(Author's translation from SCHÖNFELDER, DEUTSCHE GESETZE, TEXTSAMMLUNG (1963).)

See also Hirsch Ballin, *Schutz von Bildnissen*, 19 U.F.I.T.A. 290 (1955); Werhahn, *Persön-*

person by an actor's representation in the theater or on film.²⁰ A person's name was protected by article 12 of the BGB,²¹ while reputational interests found protection in article 823 II,²² which made available a civil action for criminal defamation.²³ In addition, various statutes regulating the press should be mentioned. These statutes go back to legislation of 1874, and currently consist of a variety of federal and state laws of varying import and effect. Their primary contribution to the protection of the personality was creation of a right of reply to statements in the press, even if the publisher of the statement is convinced of the accuracy of his facts.²⁴

Important protection of a mixed code-case nature was available under article 826²⁵ of the civil code, which was judicially construed to cover intentional invasions of privacy violating "good morals."²⁶ One representative case involved a plaintiff who had been convicted of a crime in 1907, which fact the defendant detective agency, in reports for its clients, had disclosed some twenty years later.²⁷ The court compared the interest of the defendant's client in obtaining accurate and complete information with the plaintiff's interest in non-disclosure and concluded that article 826 would be violated if

lichkeitsrecht und Zeitgeschichte, Ein Beitrag zur Lehre vom Recht am eigenen Bild, 37 U.F.I.T.A. 22 (1962). Cf. Article 17, Draft Law for the Reform of the Protection of Personality and Honor in Civil (Private) Law [hereinafter cited as Draft Law], translated in text accompanying note 37 *infra*.

²⁰ See Hartlieb, *Persönlichkeitsschutz und Filmfreiheit*, 27 U.F.I.T.A. 145, 151-68 (1959); Schäffer, *Film und Persönlichkeitsschutz*, 27 U.F.I.T.A. 129 (1959).

²¹ Article 12 provides:

"If the right to the use of a name by a person entitled to it is disputed by another, or if the interest of the person entitled to the name is injured by another's use of the same name without authority, the person entitled to the name may demand of the other that the injury be abated. If further injuries are to be anticipated, he may sue for injunctive relief."

(Translation modified by author from WANG, GERMAN CIVIL CODE 3 (1907).

²² Article 823 II is translated in text accompanying note 156 *infra*.

²³ Applicable provisions of the penal code are translated in note 164 *infra*.

²⁴ See generally Bussmann, *supra* note 12 at 17-19; Greiff, *Erlaubt das Wesen des presserechtlichen Entgegnungsanspruches seine Verallgemeinerung?*, 14 Neue Juristische Wochenschrift [hereinafter cited as N.J.W.] 97 (1961); Löffler, *11. Arbeitstagung des Studienkreises für Presserecht und Pressefreiheit, Recht der Gegendarstellung*, 15 N.J.W. 904 (1962); cf. Article 20, Draft Law, translated in text accompanying note 37 *infra*.

²⁵ Article 826 is translated in text accompanying note 156 *infra*.

²⁶ See text accompanying note 172 *infra*.

²⁷ 115 R.G.Z. 416 (1927); cf. 76 R.G.Z. 110 (1911) in which the dissemination of old newspaper clippings relating to a competitor's criminal past was held not to violate article 826. If the dissemination had been purely malicious, however, another result might have been reached. *Id.* at 112.

information disclosed to the client went beyond what was necessary under the circumstances.²⁸

So much for the traditional German approach. It should be noted at this point that many of our own states which purport to recognize the right to privacy offer even less protection today.²⁹

The Last Ten Years

The decisive turn of events in Germany came in 1954, with a decision of the Bundesgerichtshof (BGH).³⁰ The case in question involved an attorney who, on behalf of his client, Dr. Hjalmar Schacht,³¹ had written a letter to the defendant weekly demanding that it correct certain statements it had published concerning Dr. Schacht. Without replying, the weekly printed a portion of the attorney's letter in its readers' column, along with other letters concerning the same subject. The attorney complained that the incomplete publication of his letter in the readers' column falsely represented him to the public as having taken a personal stand in the matter, whereas in truth he had acted only as attorney for his client. The court ordered the weekly to correct the misleading impression it had created.

Breaking with decades of judicial tradition, which of course included the *Nietzsche* case mentioned earlier, the BGH held that a person's letters were protected even in the absence of copyright. The court derived a "general right of personality" from the following provisions of the 1949 West German constitution:³²

²⁸ It was held that the client's interest justified the agency's disclosure of *general* information only, not including details of the crime and conviction. The court held that the agency's use of the following reference to the plaintiff's past was permissible: "In his youth, he permitted himself to be involved in dealings which brought him into conflict with the penal laws." 115 R.G.Z. at 416. (Author's translation.)

²⁹ See text accompanying notes 81-87 *infra*; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

³⁰ 13 Entscheidungen des Bundesgerichtshofes in Zivilsachen [hereinafter cited as B.G.H.Z.] 334 (1954).

³¹ Dr. Schacht was Economics Minister under Hitler.

³² Cf. *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931) (right to privacy derived from provisions of California constitution guaranteeing the right to pursue and obtain happiness). See Konvention des Europarates zum Schutze der Menschenrechte und Grundfreiheiten vom 4. Nov. 1950, BGBl 1952 II 685, 953; 1954 II 14, discussed in 27 B.G.H.Z. 284, 286 (1958), as providing additional support to the right of personality. This convention and the *International Declaration on Human Rights*, GEN. ASS. OFF. REC. 3d Sess. (I), Resolutions 71 (A/810) (1948), are drawn upon to support the right of personality in Nipperdey, 2 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES D9 (1959).

Article 1 (1)

The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

Article 1 (3)

The following basic rights shall be binding as directly valid law on legislation, administration and judiciary.

Article 2 (1)

Everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code.

This decision quickly was followed by others. The facts and holdings of the leading German cases in this area are summarized in Appendix II, which the reader may wish to survey at this time.

These decisions of the BGH found an immediate and generally favorable echo in legal literature.³³ The climate seemed ripe for full acceptance of the right of personality, and by 1957, matters had progressed to the extent that a meeting of German jurists concerned itself with the question.³⁴ While there remained considerable disagreement concerning details, few disputed the desirability, and even fewer the existence, of the new right of personality. The meeting unanimously called for legislative treatment of the subject in order to remove the stigma of judicial legislation and inform the public of the new protection accorded the individual.³⁵ Thus encouraged, the Federal Ministry of Justice prepared, in the form of an amendment to the civil code,³⁶ a draft codification of the "case law" that the BGH had created in reliance on the constitution. A translation of the draft (which, as noted above, has not become law) follows:

³³ See Larenz, *Das "allgemeine Persönlichkeitsrecht" im Recht der unerlaubten Handlungen*, 8 N.J.W. 521 (1955); von Gamm, *Zur praktischen Anwendung des allgemeinen Persönlichkeitsrechts*, 8 N.J.W. 1826 (1955).

³⁴ 1 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES (1957); 2 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES (1959). The proceedings are discussed briefly in 10 N.J.W. 1509, 1510 (1957).

³⁵ 2 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES D155 (1959).

³⁶ In its sixty years of life, the BGB has never been amended this broadly. See PALANDT, *BÜRGERLICHES GESETZBUCH, KURZKOMMENTAR* 2 (21st ed. 1962). This may have been a factor in the failure of the draft to become law.

Draft Law for the Reform of the Protection of Personality
and Honor in Civil (Private) Law³⁷

Parliament (Bundestag) has passed the following law:

Article 1

Amendment of the Civil Code (BGB):

The Civil Code is amended as follows:

1. Article 12 is replaced by the following Articles 12 to 20:

'Article 12

One who wrongfully injures another in his personality is obligated to abate the injury; this applies particularly in the cases of Articles 13 to 19. If further injuries are to be anticipated, the injured person also may sue for an injunction. Not considered here are frictions which reasonably are to be tolerated in everyday life.

If the injured person has died or if the injury is directed against a deceased person, his relatives are authorized to assert the right provided under the first paragraph, unless the deceased has designated another person to do so in which case this other person is so authorized. After the expiration of a period of 30 years beginning with the death of the injured person this right may no longer be asserted, unless it was recognized by contract or was pending in court prior to this time.

Relatives within the meaning of the second paragraph are the surviving spouse and the children, or if there is no spouse or children, the parents, or if there are no parents, the siblings and grandchildren of the deceased. If there are several relatives of the same rank, each one alone may assert the right provided under the first paragraph; consent removes wrongfulness only if all have consented.

'Article 13

It is a wrongful injury within the meaning of Article 12 if someone, without authority, injures the life, body, health or freedom of another.

'Article 14

It is a wrongful injury within the meaning of Article 12 if someone insults another by the publication of contempt or if someone makes before or disseminates to a third person a factual defamatory assertion concerning another the truth of which he is unable to prove.

³⁷ Deutscher Bundestag, 3. Wahlperiode, Drucksache 1237, 3502/59 III, Aug. 18, 1959. (Author's translation.)

The other cannot prohibit the statement if the statement serves the fulfillment of a legal duty or the reasonable observation of a legitimate public or private interest. Press, radio and film observe a legitimate interest if, within the framework of their public duty, they inform the public or exercise criticism. One who makes or disseminates a defamatory assertion of a factual nature knowing that it is untrue cannot claim that he is observing a legitimate interest. The injured person may demand the abatement of the injury as soon as one of the reasons disappears because of which, in accordance with the first sentence [of this paragraph], he could not prohibit the statement.

If in connection with a public event someone has made or disseminated a factual defamatory assertion concerning another that cannot be proved true, the latter cannot prohibit a truthful report concerning the matter if such a report serves the reasonable observation of a legitimate public or private interest. The second sentence of the second paragraph is applicable by analogy.

Subject to Article 15, a negative criticism concerning an accomplishment or the conduct of another and a demonstrably true factual defamatory assertion concerning another which someone makes before or disseminates to a third person is a wrongful injury within the meaning of Article 12 only if through form or circumstances the statement constitutes an insulting publication of contempt or if it injures the other in his personality in a manner which violates good morals.

'Article 15

It is a wrongful injury within the meaning of Article 12 if, without authority, someone publicly makes or disseminates assertions of a factual nature concerning the private or family life of another. The communication is permissible if it serves the reasonable observation of a legitimate public or private interest.

It is a wrongful injury within the meaning of Article 12 if someone, without authority, publishes the confidential contents of letters or notes of a personal nature. The publication is permissible if the author, and in the case of letters also the recipient, have consented thereto or where it serves the reasonable observation of a legitimate public or private interest.

The second sentence of the second paragraph of Article 14 is applicable by analogy.

'Article 16

It is a wrongful injury within the meaning of Article 12 if someone disputes another's right to the use of his (the other's) name, or if someone, without authority, uses the same name.

'Article 17

It is a wrongful injury within the meaning of Article 12 if someone publishes a picture of another without authority.

The publication is permissible if it involves

- (1) Pictures relating to current events;
- (2) Pictures of events or localities in which the person pictured is only a secondary object;
- (3) Pictures of assemblies, processions or similar public events;
- (4) Pictures which were not made on the order of the person pictured, if a serious interest of art or science justifies publication.

Even if the conditions of the second paragraph are met, publication is not permissible if it violates a legitimate interest of the person pictured.

Aside from the cases listed under (1) to (3) in the second paragraph, it is a wrongful injury within the meaning of Article 12 if someone makes a picture of another against the other's discernible will or, by making a picture, injures a legitimate interest of the person pictured.

'Article 18

It is a wrongful injury within the meaning of Article 12 if someone, without authority, records the spoken word of another by technical means or makes it publicly perceptible, whether directly or by technical means. The spoken word of another may be recorded or made publicly perceptible if the reporting of assemblies, processions or similar public events is involved. This is not applicable if a legitimate interest of the other is injured thereby.

'Article 19

It is a wrongful injury within the meaning of Article 12 if someone, without authority, by use of a listening device or in similar manner procures for himself knowledge of statements of another that are not intended for him or of facts or events from the private or family life of another.

'Article 20

One who publicly makes or disseminates an assertion of a factual nature which is apt to injure another in his personality is obligated, upon the other's demand, to publish the other's reply without delay in the same manner as he made or disseminated the assertion or, if this is not possible or practicable, in other appropriate manner. The reply must be limited to a description of relevant facts and must be reasonable with regard to content and

scope. One who comments on the reply at the time the reply is published must limit himself to statements of a factual nature.

This right does not exist

- (1) If the reply is obviously untrue or if for another reason there is no legitimate interest in its publication;
- (2) If the assertion was made or disseminated in a judicial proceeding;
- (3) If the statement of a member of a legislative body or a report concerning a session of a legislative body is involved and the statement or the report is privileged under a special regulation.

The person entitled to this right loses it if he does not demand the publication of the reply within one month after obtaining knowledge of the fact that the assertion was publicly made or disseminated, or in any event within three months after the public communication of the assertion.

The publication may be ordered by way of a preliminary injunction. The preliminary injunction shall not be issued without oral hearing, but it need not be established that the right is endangered. Article 926 of the Code of Civil Procedure is not applicable.

If the person who, under the first paragraph, is obligated to publish the reply, has published it, he may, without prejudice to other claims, demand that the other compensate him for the necessary expenditures incurred in connection with the publication, if the contents of the reply turn out to be substantially untrue. If the assertion was made or disseminated by press, radio or film, this right exists only if and to the extent special reasons make compensation for the expenditures appropriate, but (in any event) not in excess of the damage which the publication of the reply has caused the person obligated to publish it.'

2. After Article 252 the following Article 252a is inserted:

'Article 252a

If someone was injured in his personality by an assertion of the nature described in the first paragraph of Article 14 that is not demonstrably true and that was made or disseminated concerning him, it is presumed that such injury has caused pecuniary damage if, according to normal experience or under the special circumstances of the case, this seems probable.'

3. Article 823, first paragraph, is amended as follows:

'One who, intentionally or negligently, wrongfully injures another in his personality or who, intentionally or negligently,

wrongfully injures the property or any other right of another is obligated to compensate him for the damage resulting therefrom.'

4. Article 824 is amended as follows:

'Article 824

One who intentionally or negligently makes or disseminates an untrue assertion of a factual nature which is apt to endanger the credit of another or otherwise prejudice his livelihood or prosperity is obligated to compensate him for the damage arising therefrom.

This obligation to pay damages does not arise if the communication serves the reasonable observation of a legitimate private or public interest. The second sentence of the second paragraph of Article 14 is applicable by analogy. One who knows that the assertion is untrue cannot claim that he is observing a legitimate interest.'

5. Article 825 is repealed.

6. Article 847 is amended as follows:

'Article 847

One who is injured in his personality may demand reasonable compensation in money for non-pecuniary damage, including satisfaction for humiliation suffered. This is not applicable to the extent, within the meaning of Article 249, a return to the situation that existed prior to the injury is possible and adequate, or to the extent the injured person is given satisfaction by means other than money; furthermore, a minor injury is not contemplated here. The amount of compensation is determined in accordance with the circumstances of the case, particularly with regard to the gravity of injury and fault.

This right is not transferable and does not inure to the heirs, unless it has been recognized by contract or is pending in court.'

[Article 2 of the draft law, which contains a number of technical amendments and provisions, is omitted.]

It was said that the reception which the draft law received would "be a touchstone as to what 'will to fight' the individual and the community [could] still muster on behalf of the protection of the personality and its dignity."³⁸ The community did muster a will to fight! When an early draft of the law was made available to interested circles in 1958, an outcry was raised, and the draft quickly

³⁸ Erdsiek, *Umwelt und Recht*, 11 N.J.W. 1719, 1721 (1958). (Author's translation.)

was labelled a "muzzle for the press."³⁹ Soon it became impossible to tell whether reaction to the proposal stemmed from the public or from a special interest group, although some thought the answer was all too clear:

It must cause concern to observe how, with few exceptions, the German press has systematically misreported the contents of the draft law and has accused its sponsors of motives inimical to the press... just to attack the enemy thus created with declamations about freedom of the press.⁴⁰

In any event, the public ultimately equated the draft law with an unprecedented attack on free speech. Severe criticism was directed against the 1958 draft,⁴¹ and when the revised proposal reproduced above appeared on the scene in 1959, the atmosphere had been poisoned so completely that the crusade against the legislation scarcely took note of the fact that the new draft reflected changes responsive to the more poignant objections which had been directed against the earlier proposal.

Although the upper chamber (Bundesrat) of the legislature approved the new draft in July, 1959, making only minor revisions, no action was taken in the lower house (Bundestag). The West German government has no present plans to reintroduce the bill in this or any other form, since it believes that case law, especially that of the BGH, has solved most of the important problems with respect to protection of the personality, largely in accordance with the principles set out in the draft codification.⁴²

Considerably above the level of the polemical debate that destroyed the bill's chance of passage in the legislature, a more objective discussion developed.⁴³ The right of personality has tradition-

³⁹ Roeber, Book Review, 29 U.F.I.T.A. 134, 136 (1959).

⁴⁰ Weitnauer, *Persönlichkeitsschutz und Meinungsfreiheit*, 12 N.J.W. 313n.5 (1959). (Author's translation.)

⁴¹ For a discussion of the 1958 version, see generally Erdsiek, *supra* note 38, at 1720; Hartlieb, *supra* note 20, at 162-68; Löffler, *Persönlichkeitsschutz und Meinungsfreiheit*, 12 N.J.W. 1, 2 (1959); Schäffer, *supra* note 20, at 141-44; Weitnauer, *supra* note 40.

⁴² Letter from Oberregierungsrat B. Klingsporn, Bundesministerium der Justiz, Bonn, Germany, to H. D. Krause, April 29, 1964.

⁴³ See Erdsiek, *Der Regierungsentwurf zum Persönlichkeits- und Ehreenschutzgesetz*, 29 U.F.I.T.A. 1 (1959); Koebel, *Allgemeines Persönlichkeitsrecht und Gesetzgeber*, 14 Juristenzeitung [hereinafter cited as J.Z.] 276 (1959); Koebel, *Der Entwurf eines Gesetzes zur Neuordnung des zivilrechtlichen Persönlichkeits- und Ehreenschutzes*, 14 J.Z. 513 (1959); Löffler, *Die Bedenken gegen den Entwurf des Persönlichkeits- und Ehreenschutzgesetzes*, 30 U.F.I.T.A. 69 (1960); Neumann, *Zum Entwurf eines Gesetzes über den zivilrechtlichen Persönlichkeitsschutz*, 30 U.F.I.T.A. 82 (1960); Neumann-

ally been faced with the charge that it is incapable of definition and that any general recognition of the right inevitably would dilute the precision of the codified law. Thus,

for a long time, acceptance of the right of personality was opposed by the thought that the law really was not in a position to comprehend and protect the moral personality in its totality, since this phenomenon, 'accessible not even to the thinker,' would elude the law, 'the normal order of the average.'⁴⁴

Remnants of this attitude fed the battle over the draft law. For example, it became fashionable to cite the American psychologist Allport as having managed to distinguish fifty different definitions of the concept "personality."⁴⁵ Others sought to bridge the chasm, suggesting that the legal personality encompasses those values which are left when material interests are subtracted,⁴⁶ or, more simply, that the right of personality includes those interests of personality which the law will protect.⁴⁷

Specifically, opponents of codification argued that insufficient time had passed since the BGH's first decision recognizing a general right of personality. It was appropriately suggested that hasty codification might perpetuate extremes that continued judicial development of the new right would erode. Furthermore, early codification was considered unnecessary, since the BGH's case law assured adequate protection during the interim. It was argued that the draft law would encourage contentiousness, and criticism was levelled against the general manner in which the right was defined. Opponents pointed out that problems might result from equating negligent with intentional invasions of the personality.⁴⁸ Finally, it was maintained that the basic argument which had led the RG

Duesberg, *Kodifizierung des zivilrechtlichen Persönlichkeitsschutzes im BGB*, 16 J.Z. 252 (1961); Neumann-Duesberg, *Die Freiheit der Meinungsäußerung nach dem Persönlichkeitsrechtsentwurf*, 30 U.F.I.T.A. 66 (1960); Reinhardt, *Der Streit um den Persönlichkeitsschutz nach dem Referentenentwurf des Bundesjustizministeriums*, 14 J.Z. 41 (1959); Weitnauer, *Bedenken gegen den Entwurf des Persönlichkeits- und Ehrenschutzgesetzes? Eine Erwiderung*, 31 U.F.I.T.A. 219 (1960). See also articles cited in note 41 *supra*.

⁴⁴ Bussmann, *supra* note 12, at 58.

⁴⁵ Löffler, *supra* note 43, at 74; Roeber, *supra* note 39, at 137.

⁴⁶ Erdsiek, *supra* note 43, at 9.

⁴⁷ Neumann-Duesberg, *Abgrenzbarkeit des allgemeinen Persönlichkeitsrechts und sein Schutz nach § 823 Abs. 1 BGB*, 10 N.J.W. 1341, 1342 (1957); cf. Erdsiek, *Zur Entwicklung im allgemeinen Persönlichkeitsrecht*, 15 N.J.W. 622, 623 (1962).

⁴⁸ See proposed amendment to article 823 of the BGB, Draft Law, translated in text accompanying note 37 *supra*.

to reject the right of personality some fifty years before⁴⁹ had lost none of its force—that recognition of a general right of personality would leave the limits of article 823 completely insecure. In short, the draft was criticized as being too general to provide satisfactory guidance to the courts, too broad in protecting obscure personality interests against minor infractions, and too one-sided in that the draftsmen had not fairly considered the important constitutional interest in freedom of the press.

The protagonists of the bill, on the other hand, maintained that the proposal did little more than restate the law as it had been articulated in the cases, and that the experience of the German legal system with other “general clauses” had been most satisfactory (as had been the Swiss experience with their general clause protecting the personality). It was felt that the right of personality needed legislative assistance, since not all aspects of the right were being handled satisfactorily by the courts. Furthermore, it was argued that under a code system, the code should reflect the law.⁵⁰ It also was argued that the draft law in many respects was designed to *restrict* protection of the personality to desirable limits. Concerning the interest in freedom of the press, it was urged that that interest is less important where relations between individuals are concerned, and that the true function of the constitutional guarantee of freedom of the press, namely to protect the press against the state, was left untouched by the draft law.

The controversy simmers on.⁵¹ On balance, the soundest approach would seem to be to allow the judicially created right of personality to mature before crystallizing it in the code, especially since present protection of the interest would not be sacrificed thereby. Although proponents of the draft law have maintained that it merely restates existing protection, careful analysis of the cases reveals that the draft reflects a rather generous abstraction of the right from their facts. Furthermore, once removed from limiting facts, even careful abstractions tend to flow in uncharted directions.

⁴⁹ See 51 R.G.Z. 369, 373 (1902); see also text accompanying note 15 *supra*.

⁵⁰ “In a code system, codes and auxiliary statutes are ‘the law.’ In theory, the courts merely ‘apply’ and ‘interpret’ the law.... [J]udicial decisions...generally do not have binding force under such a system.” SCHLESINGER, *COMPARATIVE LAW* 287 (2d ed. 1959). See also PALANDT, *op. cit. supra* note 36, at 1707-08.

⁵¹ See Erdsiek, *supra* note 47.

Another problem may be that the draft fails to define privilege in clear and absolute terms, leaving a great deal to a case by case determination of "legitimate interests." In view of the complexity of the problem, some judicial discretion in the balancing process clearly is indispensable;⁵² on the other hand, the draft might well have gone further in spelling out legitimate interests on the defendant's side or providing more definite yardsticks for the measurement of such interests.⁵³ Most importantly, the problem of freedom of the press should give pause. It may well be that the present draft codification, as well as present case law, falls short of an ideal balance between the interests in privacy and freedom of the press.⁵⁴

In the long run it is likely that codification will come. Case law is not ideally suited to the task of providing legal certainty in a code system, at least not as a primary vehicle.⁵⁵ Meanwhile, the German draft codification would seem to be a major accomplishment, not only as a guide toward eventual codification, but also in terms of the future judicial development of the right of personality. The "soft-sell" formative influence on judicial developments that its mere presence undoubtedly will have would seem to be preferable to forcing into law a concept which as yet has only fluid outlines.⁵⁶

⁵² The BGH's approach to "balancing" is illustrated in 30 B.G.H.Z. 7, 11-12 (1959); 27 B.G.H.Z. 284, 289-90 (1959). Cf. Article 2(1) of the West German constitution, translated in text accompanying note 32, *supra*.

⁵³ But see Erdsiek, *Persönlichkeitsschutzgesetz und Generalklausel*, 12 N.J.W. 1768, 1769 (1959).

⁵⁴ See KÜSTER, *PERSÖNLICHKEITSSCHUTZ UND PRESSEFREIHEIT* (1960); Koebel, *Film und Fernsehen als Mittel und Gegenstand wertender Kritik*, 38 U.F.I.T.A. 1, 4-16 (1962); Neumann-Duesberg, *Ehrenrecht und Presserecht*, 13 N.J.W. 749 (1960); Weitnauer, *Ehrenrecht und Presserecht—Eine Entgegnung*, 13 N.J.W. 1142 (1960); Hirsch, Book Review, 33 U.F.I.T.A. 122 (1961); Koebel, Book Review, 18 J.Z. 188 (1963); Pfennig, Book Review, 35 U.F.I.T.A. 377 (1961); Roeber, *supra* note 39. Concerning the German concept of freedom of the press generally, see Mallaman, *Literatur zum Presserecht II*, 19 J.Z. 141 (1964); Reh binder, *Grenzen der Meinungs- und Pressefreiheit*, 15 N.J.W. 2140 (1962).

⁵⁵ The civil lawyer's failure to distinguish sharply between holding and dictum and the absence of formal binding force of precedent combine to prevent "civil-law case-law" from having the certainty and stability of "common-law case-law." "The use which the Reichsgericht makes of 'customary law' [in 123 R.G.Z. 102 (1928)] may appear rather startling to one who has been taught that there is no decisional law in civil law countries [L]eading German textbooks . . . frankly [recognize] that judicial decisions may create a rule of customary law [H]owever, it should be kept in mind that . . . the instances of such purely judge-made 'customary law' are few and far between." SCHLESINGER, *op. cit. supra* note 50, at 306. Cf. note 50 *supra*.

⁵⁶ While the draft has not become law, in the words of a neutral (Swiss) observer "the draft is the first modern attempt to provide compensive legal regulation in the area of the protection of the personality and must therefore be counted as the most significant step forward in half a century. This meaning would not even be lost if the

While no general conclusion can be drawn from the German experience to the effect that statutory treatment of the subject of privacy is impossible or undesirable, it is suggested that the problems which may result from too much detail in this area are preferable to those which follow from an overly general and abstract approach. In the field of privacy, more than in other areas of tort law, opposing interests often weigh so heavily and privacy interests so lightly on the scale of social policy that narrow and precise definition of the interests *on both sides* would seem to be essential.⁵⁷ (The Swiss success on the basis of a general clause does not prove otherwise, since it was made possible by the development of extensive and responsible case law which has provided the necessary specificity of definition.)⁵⁸

PROTECTED INTERESTS

The draft codification translated above represents as comprehensive a theoretical statement of the status of the right of personality in Germany as can be drawn from the cases. Practical aspects concerning protection of the right are illustrated in the leading BGH decisions summarized in Appendix II. The background provided in these two sources will support the following identification of the main personality interests that now find protection.⁵⁹

Article 12 of the BGB⁶⁰ continues to furnish primary protection of the name, chiefly against unauthorized abuse and appropriation. The development of the general right of personality has somewhat

draft should not become law. Legal literature and judicial decisions—even of foreign countries—henceforth shall have to orient themselves by this draft, even if—as we hope will not happen—the Bundestag, as legislative authority, should misjudge the importance of improving the protection of the personality.” Bucher, *Neues auf dem Gebiet des privatrechtlichen Persönlichkeitsschutzes*, 35 ANNUARIO DI DIRITTO COMPARATO E DI STUDI LEGISLATIVI 5, 35 (1961). (Author's translation.)

⁵⁷ Compare Wisconsin's unsuccessful attempt at very broad and unspecific privacy legislation with New York's very detailed and limited statute. The provisions are quoted in note 5 *supra*. Both approaches, it is suggested, go too far in opposite directions.

⁵⁸ Concerning the Swiss right of personality, see GUTACHTEN, MAX-PLANCK INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, DER ZIVILRECHTLICHE SCHUTZ DER PERSÖNLICHKEIT IN DER SCHWEIZ (1959). See also Gutteridge, *supra* note 9, at 211-15.

⁵⁹ See generally 1 ERMAN, HANDKOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 22, 25-31 (3d ed. 1962); Nipperdey, *Das allgemeine Persönlichkeitsrecht*, 30 U.F.I.T.A. 1, 9-20 (1960).

⁶⁰ Translated in note 21 *supra*.

extended the scope of this protection.⁶¹ The picture continues to be protected under the Law Relating to Artistic Copyright.⁶² Today, however, even the unauthorized *taking* of a picture may be actionable, whereas earlier protection had extended only to unauthorized publication.⁶³ Furthermore, the general right of personality has taken over, and has somewhat broadened, protection against unauthorized representation of a person on stage or in film.⁶⁴

The spoken word is protected against unauthorized reception and recording, and publication of information so obtained is not a necessary element in the cause of action.⁶⁵ It is permissible, however, to record simple business messages, even without the consent of the speaker. Since honor is now within the framework of the general right of personality, the protection of article 823 I is available with respect to it. In the past, protection in this area was limited to that provided under article 823 II in combination with provisions of the penal code.⁶⁶ This arrangement covered only invasions which met the terms of the penal provisions, including their requirement of "intent." Article 823 I, while leaving this pre-existing protection intact, now permits actions on the basis of negligent and other invasions which might not fall within the ambit of the penal provisions. Generally, defamation and the publication of insults are actionable; mere criticism usually is not. The protection of the business reputation is not properly a function of the right of personality.

Confidential information pertaining to private activities and family life is protected broadly. Included are letters, diaries and other sources of such information, and procurement as well as publication is prohibited. In a publication, the private nature of the information is the key; whether the information is defamatory is not relevant, and the truth of the information is not a defense.⁶⁷ The interests in life, body, health and freedom now find protection within the broad framework of the general right of personality.⁶⁸

⁶¹ 30 B.G.H.Z. 7 (1959) (summarized in text accompanying note 200 *infra*).

⁶² Translated in note 19 *supra*.

⁶³ 24 B.G.H.Z. 200 (1957) (summarized in text accompanying note 192 *infra*).

⁶⁴ See Schäffer, *supra* note 20.

⁶⁵ 27 B.G.H.Z. 284 (1958) (summarized in text accompanying note 197 *infra*).

⁶⁶ Applicable provisions of the penal code are translated in note 164 *infra*.

⁶⁷ 24 B.G.H.Z. 72 (1957) (summarized in text accompanying note 190 *infra*).

⁶⁸ See Article 13, Draft Law, translated in text accompanying note 37 *supra*.

Certain interests related to copyright are covered.⁶⁹ It also has been suggested that personal feelings find a measure of protection.⁷⁰

Looking toward the future, the right of personality is considered a "source-right" (Quellrecht); new rights may be derived from it as the need arises. For example, it has been suggested that an employer's use of questionnaires inquiring into the sex life of female candidates for employment (to determine the likelihood of pregnancy) may unduly invade privacy.⁷¹ It has also been asserted that the right of personality should include an illegitimate child's right to judicial determination of his parentage.⁷² Concern has been voiced about possible abuses that might result from the wide-spread practice of employers requiring candidates for employment to submit their handwriting to graphological character analysis.⁷³ Finally, the right to have a dog has been advanced as one of the interests of personality that justly deserves protection.⁷⁴

In the area of privacy, where serious injury often is only a shade removed from triviality, clear and satisfactory recognition of privileges is as important as the definition of the primary interest entitled to protection. In German law, as in our own, a body of exceptions to the right to privacy has developed. First, of course, are those instances in which the plaintiff has forfeited his right to privacy, or where the matter complained of is not within the protection of the right. The former will be true, generally, with respect to persons involved in public affairs, and the latter will be the case regarding activities in public, from showing one's face in the street to intimacies on the park bench. Furthermore, in any case in which the defendant's interests weigh more heavily than those

⁶⁹ 15 B.G.H.Z. 249 (1954) (summarized in text accompanying note 187 *infra*).

⁷⁰ Nipperdey, *supra* note 59, at 19.

⁷¹ Neumann-Duesberg, *Fragebogen als Persönlichkeitsrechtsverletzung und Lüge als Notwehr*, 36 U.F.I.T.A. 101 (1962).

⁷² Nipperdey, *supra* note 59, at 16.

⁷³ Erdsiek, *Schriftgutachten als Persönlichkeitsverletzung?*, 14 N.J.W. 257 (1961).

⁷⁴ "The judicial recognition of a general right of personality also has affected the controversial question of the *permissibility of keeping dogs in rental housing*. Indeed, it is indisputable that the possession of his dog is a material part of the content of an animal lover's life. The weight of this question should not be underestimated. In the cultural history of humanity the dog, since time immemorial, has conquered for himself his place as the companion of man." Erdsiek, *Persönlichkeitsschutz und Tierhaltung in Mietwohnungen*, 13 N.J.W. 1799, 1800 (1960). (Author's translation.) *But cf.* PROSSER, TORTS 641 (2d ed. 1955) [hereinafter cited as PROSSER]: "The right [to privacy] is a personal one and it does *not* extend to the plaintiff's dog." (Emphasis added).

of the plaintiff, the defendant's actions will be privileged. In addition to privileges based on the strength of his own interests, the defendant often is benefited by privileges resting on the public interest. The public interest involved usually is framed in terms of the constitutionally protected rights to free speech and press, and it carves out another large area of exceptions to the right to privacy. Thus, the protected interests outlined above must be viewed with these limitations in mind.⁷⁵

Turning to our own law, the Restatement of Torts summarizes the right to privacy as follows:

A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.⁷⁶

⁷⁵ The area of privilege merits treatment in a separate article. Suffice it to say that privilege has not been easy to define, either in this country or in Germany, and that not enough has been done toward defining it. Prosser's chief criticism of the right to privacy centers on the matter of privilege, and he cautions, "one cannot fail to be aware, in reading privacy cases, of the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored." Prosser, *supra* note 29, at 422. Prosser's article provides a full discussion of privilege in American privacy law. With respect to privilege in the German law of privacy, see Draft Law, translated in text accompanying note 37 *supra* (general statement); Neumann-Duesberg, *Bildberichterstattung über absolute and relative Personen der Zeitgeschichte*, 15 J.Z. 114 (1960). See also Rilling, *Grenzen des Schutzes der Intimsphäre bei Personen der Zeitgeschichte*, 40 U.F.I.T.A. 68 (1963). Concerning the absence of a right to privacy with respect to intimacies on the park bench, see Röttemann, *Die Intimsphäre in öffentlichen Anlagen*, 18 MONATSSCHRIFT FÜR DEUTSCHES RECHT [hereinafter cited as M.D.R.] 207 (1964); but cf. Erdsiek, *Notwehr bei Eingriff in die Intimsphäre*, 15 N.J.W. 2240, 2242 (1962).

⁷⁶ RESTATEMENT, TORTS § 867, at 398 (1939). The following illustrations are given in the Restatement:

"1. A, seeking to describe for the Sunday paper the habits of different kinds of people, follows B without B's knowledge, and publishes a statement of every act of B which A could observe for a period of a week. B has a cause of action against A.

"2. A, as an advertisement for a baby food, publishes a picture of B, a mother nursing her child, without B's consent. B has a cause of action against A.

"3. From a skylight in an operating room in a hospital, A takes moving pictures of an abdominal operation performed upon B, a woman. A shows these pictures publicly. B has a cause of action against A.

"4. A surreptitiously takes a photograph of B, a young woman, and publishes it as an advertisement for flour under the caption: 'The Flower of the Family.' B has a cause of action against A.

"5. A takes a photograph of a group of women who are crowding around the entrance of A's store at a time announced for bargains and who have no knowledge of A's act. Among these B is very prominent. A publishes the entire photograph under the caption: 'These women know bargains.' B has no cause of action against A.

"6. A takes a photograph of B, who is hideously deformed, publishing it without B's consent in a Sunday edition of a newspaper, to illustrate an article

Since Warren and Brandeis "discovered" the right to privacy in 1890,⁷⁷ more than 300 American cases concerning a variety of aspects of the right have been decided.⁷⁸ It has been estimated that, in one form or another, the right now is recognized in some twenty states, and the Warren-Brandeis article is considered an outstanding example of the influence of writers on the growth of the common law.⁷⁹

In his restatement of the law of privacy, Dean Prosser concludes that the right to privacy today has evolved into four torts which he describes roughly as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, as by invading his quarters or tapping his telephone.
2. Public disclosure of embarrassing private information about the plaintiff, such as the details of a humiliating illness, sordid incidents from his past, or the fact that he has not paid his debts.
3. Publicity which places the plaintiff in a false light in the public eye, as by signing his name to a public telegram or letter, attributing views to him that he does not hold.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness, using it, for example, in advertising.⁸⁰

These categories cover much of the same ground that is embraced by the German law summarized above. They are somewhat more limited, of course, as the right to privacy is narrower than the right of personality, and it must be emphasized that these categories describe and classify all privacy interests that have found protection anywhere in the United States. Few states would recognize them as an accurate indication of the status of their own law. In New York and other states protection of privacy remains limited to Prosser's fourth category,⁸¹ while as recently as 1956, the Wisconsin Supreme Court rejected the right to privacy.⁸² Furthermore, the great ma-

on the need for more physicians in rural communities, stating truthfully that B's condition resulted from inexpert treatment at birth. B has a cause of action against A." *Id.* at 401-02.

⁷⁷ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁷⁸ Prosser, *supra* note 29, at 388. The INDEX TO LEGAL PERIODICALS lists some 440 articles, comments and notes on the right to privacy during the period 1887-1964.

⁷⁹ GREGORY & KALVEN 883; PROSSER 635.

⁸⁰ See Prosser, *supra* note 29, at 389. Cf. 1 HARPER & JAMES, TORTS 681 (1956) [hereinafter cited as HARPER & JAMES].

⁸¹ See note 5 *supra*.

⁸² Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956). See Note, *The Right of Privacy in Wisconsin*, 1961 WIS. L. REV. 332.

jority of "privacy" cases in this country have involved some form of *publicity*.⁸³ In some cases the plaintiff is simply paid what amounts to a license fee for the use of his name or picture in advertising, rather than awarded damages for invasion of his right to be let alone.⁸⁴ Many other cases resemble defamation actions without the defense of truth.⁸⁵ When no more than the right to be let alone is involved, even publicity cases often go against the plaintiff.⁸⁶ A leading casebook on the law of torts, in a note at the very end of a section on privacy, tellingly says:

Occasionally the right of privacy is invoked totally outside the publicity field as, for example, in eavesdropping, wire tapping, fingerprinting, compulsory blood tests, and police photography.⁸⁷

Surface differences aside, it is an interesting comparative note that, on the whole, our law of privacy strikingly resembles article 826 of the German civil code, as is indicated in Prosser's summary of the tort:

Most courts now recognize the existence of a right of privacy, which will be protected against interferences which are serious and outrageous, or beyond the limits of common ideas of decent conduct.⁸⁸

FAULT ELEMENT-INTENT, NEGLIGENCE OR STRICT LIABILITY

The question of what fault criteria to apply in cases involving privacy invasions has not been faced squarely in German law. An answer has, however, crystallized in connection with the discussion that has concerned itself with the integration of the right of personality into the existing framework of German tort law.⁸⁹ The discussion has centered around whether or not the right of per-

⁸³ "As a separate tort heading, however, the right of privacy . . . concerns primarily—although not exclusively—freedom from publicity by mass communication." GREGORY & KALVEN 884.

⁸⁴ In other words, what is involved is a right of publicity rather than a right to privacy. Cf. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

⁸⁵ E.g., *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

⁸⁶ E.g., *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940).

⁸⁷ GREGORY & KALVEN 898.

⁸⁸ PROSSER 635. Of course, the absence of a rigid intent requirement makes our rule at least in theory more flexible than article 826 in that it permits intent to be weighed as one factor in determining the seriousness of the invasion while not categorically excluding serious negligent invasions. Article 826 is translated in text accompanying note 156 *infra*.

⁸⁹ See generally Larenz, *supra* note 33; Siebert, *Zur allgemeinen Problematik des Persönlichkeitsrechts*, 11 N.J.W. 1369, 1373-74 (1958).

sonality should be brought under article 823 I, the BGB's basic tort provision.⁹⁰ The most important consequence of doing this would be to render negligent as well as intentional invasions of the right actionable. It now appears that the approach which would use article 823 I as the vehicle for protection of the personality will prevail; it counts among its supporters both the BGH and the draft codification.⁹¹ The BGH established this course clearly in 1957, arguing that the constitutional provisions protecting the right of personality left no doubt that they were self-executing, and that "therefore the conclusion is irrefutable that the general right of personality must be considered as an 'other right' within the meaning of article 823 I, BGB."⁹² Considerable support for this position had developed even prior to this decision by the BGH,⁹³ and the real argument in its favor is that if the right were not protected under article 823 I, it would, as a practical matter, not be protected at all.⁹⁴

The opposition, although almost routed, remains well supplied with arguments. Foremost among these is the specter of a "boundless extension" of tort law.⁹⁵ The right of personality is considered to be so incapable of definition that only a "general clause" could protect it. Since a general right of personality is not comparable to the specific interests in life, body, health, freedom and property with which article 823 I is concerned, this provision is not regarded as an appropriate vehicle for protection of the personality.⁹⁶ The type

⁹⁰ Article 823 is translated in text accompanying note 156 *infra*.

⁹¹ See proposed amendment to article 823, Draft Law, translated in text accompanying note 37 *supra*.

⁹² 24 B.G.H.Z. 72, 77 (1957); see article 1 (3) of the West German constitution translated in text accompanying note 32 *supra*. Nipperdey argues that, in view of the constitutional provisions, property should not be protected more effectively than the personality and concludes that the right of personality therefore must be brought under article 823 I, i.e., must be protected at least as well as property. He would rely on article 123 of the West German constitution as having amended all BGB provisions standing in the way of full protection of the personality. Nipperdey, 2 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES D3, D13 (1959). The relevant part of article 123 provides: "Law existing before the assembly of the Bundestag shall remain in force, insofar as it does not conflict with the Basic Law."

⁹³ HUBMANN, PERSÖNLICHKEITSRECHT 106 (1953).

⁹⁴ Neumann-Duesberg, *supra* note 47, at 1344.

⁹⁵ This is an old argument. See Bussmann, *supra* note 12, at 33; cf. Gutteridge, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 203 (1931): "It is noteworthy that legal opinion in Germany has, for the most part, rejected the doctrine of a law of personality on the ground of its extravagance (Uferlosigkeit)." *Id.* at 217.

⁹⁶ Larenz, *Das "allgemeine Persönlichkeitsrecht" im Recht der unerlaubten Handlungen*, 8 N.J.W. 521, 523-24 (1955).

of limitation which the legislators considered indispensable when they regulated certain aspects of tort law by means of a general clause is believed to be illustrated by article 826, which is applicable only to intentional injuries that violate good morals.⁹⁷ Notwithstanding the constitution, it is argued that these general principles have retained their vitality, and that any new order of rights relating to the personality would have to be accommodated within the old scheme.

Those who would give some recognition to the new order would distinguish between the more and less clearly defined interests of personality, bringing the former under article 823 I and forcing the latter to climb the hurdle of article 826. Interests that now are protected under special statutes, such as the interests in one's picture⁹⁸ and honor,⁹⁹ would continue to receive protection under article 823 II. Enough flexibility would remain under this approach so that newly defined rights could be brought within the protection of article 823 I whenever legislative, judicial or academic developments indicate that such action is warranted.¹⁰⁰ Whatever its merits, it is clear that this attitude would move only slightly beyond the traditional view that largely left protection of the personality to article 826.

These opposition arguments seem generous when compared with the 1962 annotation to article 823 in one of the leading civil code commentaries. The commentator there bluntly stated:

A general right of personality is unknown to the written law. Moreover, the RG has always refused in its decisions to treat such a right as an equal of 'other rights' under Article 823 I. The prevailing opinion derives a right of personality from the constitutional recognition of the right of the individual to respect for his dignity and the development of his personality. . . . We have always pointed out in this commentary that nothing in the constitutional provisions supports treating the right of personality as an absolute right protected under Article 823 I. . . . Even the most eager propaganda for the right of personality cannot deceive us that the certainty of the law is in considerable danger by reason of

⁹⁷ Article 826 is translated in text accompanying note 156 *infra*.

⁹⁸ See Articles 22 and 23 of the KUG, translated in note 19 *supra*.

⁹⁹ See Articles 185-87 of the penal code, translated in note 164 *infra*. Also see text accompanying notes 163-70.

¹⁰⁰ Larenz, *supra* note 96, at 523, 525.

the decisions of the BGH concerning the right of personality. This serious danger does not seem to be fully appreciated everywhere.¹⁰¹

Although this commentator's opposition recently has weakened,¹⁰² some pockets of resistance remain.¹⁰³

Aside from dogmatic niceties, the heart of the opposition's case is the danger of a "boundless extension" of tort law. Here the proponents of protecting the personality under article 823 I refer to German experience with other general clauses and the Swiss experience with a general clause protecting the personality as illustrating the maturity with which the courts can function under general clauses.¹⁰⁴ Moreover, it is argued that while there is a general right of personality, actual protection is extended only to specific, definable personality interests.¹⁰⁵ Some limit thus would be placed on the right, but the problem of defining specific personality interests would remain. To alleviate this difficulty, a balancing of social and individual interests has been suggested,¹⁰⁶ but it is doubtful whether this would render a general clause more specific.

Lest we lose sight of it, the BGH *does* protect the right of personality against intentional and negligent injury with only the following major qualification:

The general right of personality does not offer the opportunity of limitless assertion of one's own interests. It is out of the question that claims for damages or rights to injunctions exist wherever someone sees himself hindered by another in his affairs and efforts. . . . [I]n each dispute there must be a limitation concerning which the principle of balancing interests must control.¹⁰⁷

Thus, the question whether the protection of article 823 I should be limited to *defined* personality interests or extended to *definable*

¹⁰¹ PALANDT, BÜRGERLICHES GESETZBUCH, KURZKOMMENTAR 690 (21st ed. 1962) (comment by Gramm). (Author's translation.)

¹⁰² Koebel, Book Review, 16 N.J.W. 1864, 1865 (1963).

¹⁰³ See Jauernig, *Zivilrechtslehrertagung 1961*, 17 J.Z. 259, 260-61 (1962).

¹⁰⁴ Jauernig, *supra* note 103, at 261; Nipperdey, *supra* note 92, at D14. Much of this discussion, of course, also figured in the struggle over the draft codification. Cf. text accompanying note 49 *supra*.

¹⁰⁵ Neumann-Duesberg, *supra* note 47, at 1343-44; Bundestagsdrucksache 1237, *supra* note 37, at 9-10 (Begründung); cf. Röttemann, Book Review, 163 A.C.P. 89, 90 (1963) (brief discussion and annotation of the concept of the *general* right of personality).

¹⁰⁶ See Bussmann, *supra* note 12, at 69; Larenz, *supra* note 96, at 523; Nipperdey, *supra* note 92, at D16-17; cf. Nipperdey, *Rechtswidrigkeit, Sozialadäquanz, Fahrlässigkeit, Schuld im Zivilrecht*, 10 N.J.W. 1777 (1957).

¹⁰⁷ 24 B.G.H.Z. 72, 79-80 (1957). (Author's translation.) The case is summarized in text accompanying note 190 *infra*.

interests as well has been answered in favor of the broader coverage.¹⁰⁸ The serious problems which would follow from making actionable any negligent invasion of only vaguely defined interests, however, seem to be obvious. For example, the social undesirability and hence the seriousness of certain invasions of personality lie precisely in their intentional quality. Moreover, practical difficulties will multiply if the courts must determine, in a given case, not only whether a right has been violated, but also whether it exists.

An "aware" approach to this policy question would seem to be of great importance. The great diversity of interests protected under the heading "personality" and the variety of purposes served in affording such protection would seem to make intelligent discrimination highly desirable. Thus, where the purpose of protection is to provide compensation for harm done, any invasion, negligent or intentional, should be actionable. Indeed a modified form of strict liability may be justified in such cases. This is the approach taken in our own law of defamation, where intent or negligence is required on the issue of publication but not with respect to the defamatory nature of the publication.¹⁰⁹ On the other hand, where the purpose of the protection is to prevent breaches of the peace,¹¹⁰ or where the compensation function is overshadowed by a penalty function,¹¹¹ only intentional invasions should be actionable. Where injunctive relief against continuing injury is sought, liability should be "strict."¹¹²

Our own law has not taken a clear stand with respect to this matter.¹¹³ It appears, however, that a selective approach has been adopted, perhaps as much by accident as by design. Cases involving the privacy interests concerned with reputation seem to follow the relaxed fault criteria of defamation actions,¹¹⁴ whereas cases dealing

¹⁰⁸ The concept of the "definable" interest is suggested in Neumann-Duesberg, *supra* note 47, at 1344.

¹⁰⁹ PROSSER 596.

¹¹⁰ Cf. the Southern "insult statutes," such as VA. CODE § 8-630 (1957) which provides: "All words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace shall be actionable." This provision and others are discussed in GREGORY & KALVEN 834-37.

¹¹¹ See note 125 *infra*.

¹¹² For a discussion of injunctive relief in this area in Germany, see note 120 *infra*. For the American view, see GREGORY & KALVEN 898.

¹¹³ GREGORY & KALVEN 892.

¹¹⁴ See *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 207, 127 P.2d 577 (1942). This case is discussed in GREGORY & KALVEN 892-93.

with the interest in solitude and freedom from emotional distress tend to compare with the stricter fault approach taken in actions involving *intentional* infliction of emotional distress.¹¹⁵ Prosser covers the rest of the question by saying that:

Punitive damages can be awarded upon the same basis as in other torts, where a wrongful motive or state of mind appears, but not in cases where the defendant has acted innocently, as for example in the belief that the plaintiff has given his consent.¹¹⁶

Protecting the right of personality under article 823 I would not permit these or similar distinctions to be made, whereas protection under a combination of articles 823 I and II and 826 would render a selective approach feasible. Developments favoring article 823 I as the sole vehicle for protection of the personality, however, seem to be beyond the point of no return.

SANCTIONS—MONEY FOR DISTRESS?

The question of sanctions, of course, transcends the law of torts. In many cases, the criminal law is better suited for the protection of privacy than the law of torts.¹¹⁷ In others, criminal and tort sanctions may operate concurrently. Often, however, the law of torts alone will be responsible for making the right to privacy effective, and a choice of tort sanctions must be made. Broadly speaking, the

¹¹⁵ Since the courts have not generally singled out the fault element in defining the action, there is no conclusive evidence. On the other hand, privacy cases that have resulted in holdings for the plaintiff and that were exclusively concerned with the interest in tranquillity generally have involved intentional intrusions. The relationship between this aspect of the right to privacy and the tort of intentional infliction of mental distress, of course, is very close. Prosser suggests that "when the 'new tort' of the intentional infliction of mental suffering becomes fully developed and receives general recognition, the great majority of the privacy cases may very possibly [sic] be absorbed into it." PROSSER 639.

¹¹⁶ Prosser, *Privacy*, 48 CALIF. L. REV. 383, 409 (1960). Cf. RESTATEMENT, TORTS § 867, comment *d*, at 401 (1939): "The damages, whether nominal, compensatory or punitive, can be awarded in the same way in which general damages are given for defamation."

¹¹⁷ Considerable research has been done in Germany concerning the function of the criminal law in the protection of the personality. See Henkel, *Der Strafschutz des Privatlebens gegen Indiskretion*, 2 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES D60-145 (1959); Vassalli, *Der strafrechtliche Schutz der Persönlichkeitssphäre im technischen Zeitalter*, 74 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 111 (1962) (comparison of Italian and German developments). Also see Kaufmann, *Dogmatische und rechtspolitische Grundlagen des § 253 BGB*, 162 A.G.P. 421 (1963), who says: "A proper (systemgerecht) treatment of injury of the personality can be had—aside from compensation for pecuniary harm—only in criminal law. The civil law has no place for it." *Id.* at 438. (Author's translation.)

choice is between injunctive relief and money damages. The latter may be broken down into four separate categories—compensation for pecuniary harm, compensation for non-pecuniary harm, punitive damages designed to punish malice, and nominal damages. Application of the normal criteria for granting injunctive relief will provide satisfactory results in the area of privacy. The same is true with respect to damages for pecuniary harm and punitive damages. Different problems, however, arise in connection with nominal damages and compensation for non-pecuniary harm.

Nominal damages must be handled with particular care. In many privacy situations the absence of actual damages makes it preferable that there be no actionable tort so as to prevent the judicial system from being burdened with trivial litigation. This and the function of compensation for non-pecuniary harm in the protection of privacy indicate that nominal damages and the right to privacy do not go well together. There is, however, one exception. Nominal damages may play a useful role in the area of privacy related to defamation and protection of reputational interests. In defamation cases our law does give nominal damages,¹¹⁸ and this approach has carried over to cases involving reputation-related privacy invasions.¹¹⁹ In German law, the same function is fulfilled by a court order calling on the defendant to publish a retraction. Both methods officially establish that the plaintiff is the party in the right.

The most interesting question with respect to sanctions, however, is whether an invasion of personality justifies the imposition of damages for non-pecuniary harm, such as "mental suffering" or "emotional distress." In Germany, having all but lost the battle over protection of the personality under article 823, the opponents of the right of personality resoundingly deny that such damages are appropriate. Thus, the real controversy concerning the German right of personality has shifted to this matter.

Traditionally, even under article 823 I, relief for injuries to the personality has been limited to the right to an injunction against the conduct complained of,¹²⁰ the right to a retraction or reply where

¹¹⁸ 1 HARPER & JAMES 468.

¹¹⁹ *Flake v. Greensboro News Co.*, 212 N.C. 780, 793, 195 S.E. 55, 64 (1938); RESTATEMENT, TORTS § 867, comment *d* (1939).

¹²⁰ Any invasion of an interest of personality, regardless of the defendant's good faith or whether "fault" is present, supports an action for abatement if the injury is

circumstances made this an appropriate remedy,¹²¹ and, in cases involving "fault," the right to compensation for material damage.¹²² Damages for intangible harm were unavailable in the absence of specific statutory provisions,¹²³ and such provisions were intentionally omitted in this area. During the discussions concerning the draft of the civil code, a proposal that would have permitted recovery of non-pecuniary damages for violations of honor was rejected.¹²⁴ Such compensation was regarded as a disguised penalty and therefore inappropriate as a civil remedy,¹²⁵ and it was felt that weighing honor in terms of money would lead to an undesirable cheapening of intangible values.¹²⁶ Essentially the argument was that anyone who would sell his honor for money had no honor. Articles 253 and 847 of the BGB resulted. Together, they provide that non-pecuniary harm is compensable *only* in the case of injury to the body, health or freedom.¹²⁷

a continuing one. Similarly, a threatened injury will support injunctive relief. These claims it should be noted, are strictly limited to restoring or maintaining the plaintiff's situation. 1 ERMAN, *HANDKOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH* 25 (3d ed. 1962) (comment by Weitnauer). See generally PALANDT, *op. cit. supra* note 101, at 684-86; Koebel, *Allgemeines Persönlichkeitsrecht und Unterlassungsanspruch*, 8 N.J.W. 1337 (1955).

¹²¹ ERMAN, *op. cit. supra* note 120, at 26. Also see authorities cited in note 24 *supra*.

¹²² Damages are recoverable in all cases falling under article 823 of the BGB, which applies to intentional and negligent torts. Article 823 is translated in text accompanying note 156 *infra*. See generally MOLITOR, *SCHULDRECHT* II 209 (1961). Remedies are discussed in Nipperdey, *Das allgemeine Persönlichkeitsrecht*, 30 U.F.I.T.A. 1, 22-29 (1960).

¹²³ See article 253 of the BGB, translated in note 127 *infra*.

¹²⁴ Kaufmann, *supra* note 117, at 435.

¹²⁵ For an interesting analysis which emphasizes the essentially punitive nature of compensation for non-pecuniary damage in cases of injuries to the personality, see *id.* at 436-39. Cf. Bötticher, *Die Einschränkung des Ersatzes immateriellen Schadens und der Genugtuungsanspruch wegen Persönlichkeitsminderung*, 17 M.D.R. 353, 359 (1963); Nipperdey, *supra* note 92, at D19.

¹²⁶ Bussmann, *Der Anspruch auf Ersatz des immateriellen Schadens bei Verletzung des Persönlichkeitsrechtes*, 37 U.F.I.T.A. 1, 3-4 (1962).

¹²⁷ Article 253 of the BGB provides:

"In respect of damage that is not property damage compensation in money may be claimed only in the cases specified by law."

Article 847 of the BGB provides:

"I. In the case of an injury to body or health and in a case involving a deprivation of liberty, the injured person may also claim a fair compensation in money for damage that is not property damage. This claim is not transferable and does not inure to the heirs, unless it has been recognized by contract or is pending in court."

"II. A like claim is available to a woman against whom an immoral crime or act is committed or who is induced to permit illegitimate cohabitation by fraud, threat or abuse of a relationship of dependence."

(Author's translation.)

Recognizing that most invasions of personality primarily involve intangible harm, and that a right of personality not permitting recovery for such harm would be illusory, the BGH has handled this problem quite courageously. It has held that damages for intangible harm may be recovered in cases involving injury to the personality. In 1956, the court specifically rejected a claim for non-pecuniary damages in a case of this type, but it required that a "license fee" be paid to the plaintiff for use of his name in an advertisement.¹²⁸ In a 1958 decision, however, the court reached the opposite result on both points.¹²⁹ In the earlier case the court had considered itself bound by article 253;¹³⁰ in the latter case it did not mention this provision, but since it could not ignore article 847, the decision was based precariously on a strained analogy of the right of personality to one of the rights protected by article 847, namely freedom. Ignoring ample authority suggesting that "freedom" as used in article 847 referred to physical freedom, and that indeed it was the close resemblance of such freedom to freedom from physical injury that accounted for its presence in article 847,¹³¹ the court held that an invasion of personality may be tantamount to a deprivation of freedom to the extent that it interferes with the plaintiff's freedom of will. In the case under consideration, for example, the invasion deprived the plaintiff of his freedom to decide whether to permit the use of his picture in advertising.¹³² Needless to say, this analogy becomes plausible only when considered in light of the limitations in the law and the court's desire to overcome them.

A sounder argument for the court's position was developed later, going to the constitutional basis of the right of personality. The court noted that since the BGB did not provide for protection of the right, it likewise did not cover the question of how to make its protection effective.¹³³ On this foundation the court held not only

¹²⁸ 20 B.G.H.Z. 345, 352 (1956) (summarized in text accompanying note 188 *infra*). The "license fee" was supported by the court on unjust enrichment grounds.

¹²⁹ 26 B.G.H.Z. 349, 355-58 (1958) (summarized in text accompanying note 196 *infra*). For an interesting discussion and comparison of amounts awarded for non-pecuniary damage in personality cases and damages for pain and suffering granted in physical injury cases, see Schneider, *Über Fehlbemessungen des Schmerzensgeldes*, 17 J.Z. 277 (1962).

¹³⁰ 20 B.G.H.Z. 345, 353 (1956).

¹³¹ See Bussman, *supra* note 126, at 17.

¹³² 26 B.G.H.Z. 349, 355-56 (1958).

¹³³ 35 B.G.H.Z. 363, 367 (1961) (summarized in text accompanying note 209 *infra*). The opposite view is defended in Kaufmann, *supra* note 117, at 422-23.

that article 253 was inapplicable in cases involving injury to the personality, but that the right to recover damages for intangible harm was conferred by the constitution.¹³⁴ The court said:

Precluding recovery for intangible damage in connection with the protection of the personality would mean that the dignity and honor of man remain without protection in the civil sector, although it is recognized that substantial values are violated and that the violator owes satisfaction to the victim for the injustice done to him. The legal order thus would renounce the most effective and often the only means that is apt to secure respect for the value of the person of the individual.¹³⁵

The court distinguished between the elements of satisfaction and compensation in the recovery of damages for intangible harm, considering satisfaction the primary purpose of such damages. This distinction led the court to the sound conclusion that recovery of such damages should not be permitted in cases involving only trivial infringements as indicated by the degree of fault *and* severity of injury involved.¹³⁶ Other cases and the draft codification have followed this approach,¹³⁷ and it has become the dominant view.¹³⁸

Today, then, we see a solid line of cases assuring the availability of compensation for intangible damage in connection with injuries to the personality. A cautionary note nevertheless might be appropriate: cases permitting such recovery usually have involved the unauthorized use of the plaintiff's name or picture in commercial

¹³⁴ 35 B.G.H.Z. 363, 367-68 (1961); cf. 7 B.Verf.G.E. 198, 205-06 (1958) (discussion by the Supreme Court for Constitutional Questions of the controlling influence of the new constitution on preexisting law, including the civil code).

¹³⁵ 35 B.G.H.Z. 363, 368 (1961). (Author's translation.)

¹³⁶ *Id.* at 369. The court also emphasized the defendant's commercial motive. *Id.* at 369-70. The availability of compensation for non-pecuniary harm would be further limited or excluded in cases where other remedies are adequate, as where a return to the situation existing prior to the injury is possible, or where damages for pecuniary harm are adequate. Bussman, *supra* note 126, at 22; Weitnauer, *Persönlichkeitsschutz und Meinungsfreiheit*, 12 N.J.W. 313, 317 (1959). For criticism of recent cases which have awarded non-pecuniary damages even though an alternative remedy might have been adequate, see 16 N.J.W. 404 (1963). The gravity of fault and severity of injury criterion is used in Swiss law. See article 49 of the Swiss Code of Obligations.

¹³⁷ 39 B.G.H.Z. 124 (1963) (summarized in text accompanying note 215 *infra*). Two other recent BGH decisions are reported in 16 N.J.W. 902, 904 (1963). Also see proposed amendment to article 847 of the BGB and proposed new article 252a, Draft Law, translated in text accompanying note 37 *supra*.

¹³⁸ But cf. Hartmann, *Persönlichkeitsrecht und Schmerzensgeld*, 15 N.J.W. 12 (1962), who concludes that the matter still is so much in dispute that "one hardly can speak of a dominant view." *Id.* at 13.

advertisements.¹³⁹ This point has not been lost on the opposition, which has argued that what really was involved in these cases was *monetary* damage, namely deprivation of the license fee for use of the plaintiff's name or picture.¹⁴⁰ We might note further that the line between compensation for non-pecuniary damage and imposition of a penalty has not been drawn as precisely as the common lawyer likes to see it done when he distinguishes between recovery for pain or mental distress and punitive damage.¹⁴¹

Vocal opposition with respect to this matter remains.¹⁴² Analysts have quarreled not so much with the result as with the method employed in reaching it,¹⁴³ which involves no less than explaining away articles 253 and 847. This has been considered an improper exercise of judicial power.¹⁴⁴ From outright rejection of damages for non-pecuniary harm as an appropriate civil sanction for non-physical injuries to the personality (going back to the fear of commercialized honor and bogus claims),¹⁴⁵ comments range to those that favor the policy underlying such damages but fight them on principle:

Considering the codified nature of our law, this type of conscious judicial preference of the principle of justice over that of certainty in the law by means of 'developing the law' which in truth approximates the 'free finding of law,' is a problematic undertaking. Decades ago, Baumbach labelled such tendencies as carious.

... Under present law, a recovery for ... intangible damage is not yet possible [in the area of protection of the personality].¹⁴⁶

Even the more favorable comments generally have scored the "liberty analogy,"¹⁴⁷ and other approaches also have received their share

¹³⁹ E.g., 35 B.G.H.Z. 363, 369-70 (1961). See Erdsiek, *Zur Entwicklung im allgemeinen Persönlichkeitsrecht*, 15 N.J.W. 622, 625 (1962).

¹⁴⁰ Bötticher, *supra* note 125. This approach has been discussed and rejected by the BGH. 26 B.G.H.Z. 349, 352-53 (1958).

¹⁴¹ See authorities cited in note 125 *supra*.

¹⁴² See Bötticher, *supra* note 125; Kaufmann, *supra* note 117.

¹⁴³ See, e.g., Larenz, 2 VERHANDLUNGEN DES 42. DEUTSCHEN JURISTENTAGES D25, D32, D36 (1959); Larenz, *Comment on BGHZ 26, 349 (1958)*, 11 N.J.W. 827, 829 (1958).

¹⁴⁴ The BGH is severely criticized for having transgressed the proper limits of judicial discretion in Löffler, *Die Grenzen richterlicher Rechtsfindung beim immateriellen Schadensersatz*, 15 N.J.W. 225 (1962).

¹⁴⁵ See Kaufmann, *supra* note 117, at 439.

¹⁴⁶ Hartmann, *supra* note 138, at 16. (Author's translation.)

¹⁴⁷ See, e.g., Münzel, *Schmerzensgeld für seelische Unlustgefühle*, 13 N.J.W. 2025, 2027 (1960).

of criticism.¹⁴⁸ No useful purpose would be served here by an exhaustive investigation of the difficulty. Suffice it to say that all approaches favoring a recovery of damages for non-pecuniary harm must rely on the constitution as having at least changed the meaning of articles 253 and 847, if it did not directly amend them. Comments diverge primarily on the "how"—on whether article 253 or article 847, or both, were changed.¹⁴⁹ It is clear that this debate and the one concerning protection of the personality under article 823 are related, and if it is questioned that the new constitution requires the right of personality to be protected under article 823, it is understandable how it may be doubted that the constitution has amended articles 253 and 847.

A persuasive, theoretically sound approach for permitting compensation for non-pecuniary damage in connection with injuries to the personality may be found in the accepted argument that where the existing legal order does not satisfy a pressing need, the courts may articulate law not yet crystallized in the code. Such a pressing need could be considered to exist in this area, and the constitution could be considered to have amended article 253 to the extent necessary to satisfy the need, that is so as to permit article 847 to be applied by analogy.¹⁵⁰ Legislative support nevertheless would be desirable.¹⁵¹

Much of the puristic analysis and criticism discussed above sounds strange to pragmatist common law ears. The common law, however, has had its own difficulties in this area on a more practical level. Today, many common law cases point to the conclusion that

¹⁴⁸ A detailed discussion of various approaches and objections is presented in Hartmann, *supra* note 138.

¹⁴⁹ See article 123 (1) of the West German constitution, translated in note 92 *supra*; Hartmann, *supra* note 138, at 14; Weitnauer, *supra* note 136, at 317.

¹⁵⁰ Bussmann, *supra* note 126, at 17; Coing, *Zur Entwicklung des zivilrechtlichen Persönlichkeitsschutzes*, 13 J.Z. 558, 560 (1958). *Contra*, Kaufmann, *supra* note 117, at 436-37. The somewhat unfortunate and, it would appear, unnecessary argument has been advanced that once article 847 is applied it must be applied all the way and that discrimination on the basis of severity of fault and injury (see text accompanying note 136 *supra*) would not be permissible. Hartmann, *supra* note 138, at 15.

¹⁵¹ A recent spokesman is Erdsiek, *supra* note 139, at 625. Since this article was written, the proceedings of the 1964 meeting of German jurists were published. One of the chief topics discussed at the meeting was the following: "Should a New Regulation of the Duty to Make Compensation for Non-Pecuniary Harm be Recommended?" Professor Dr. Hans Stoll presented to the meeting a very complete and excellent comparative analysis of the problem and recommended statutory treatment. See VERHANDLUNGEN DES 45. DEUTSCHEN JURISTENTAGES, BAND 1 (GUTACHTEN), TEIL 1 (1964).

damages for non-pecuniary harm may be recovered in actions involving violations of the right to privacy.¹⁵²

CONCLUSION

There is in Germany today a court-made right to privacy that has been defined quite generously in terms of coverage. It provides an action for negligent as well as intentional invasions and allows damages for all harm, including mental distress. This right probably will eventually be codified and take a legitimate place in German law. The discussion above makes it abundantly clear that privacy has found greater protection in Germany than we have been willing to accord it, but it is clear also that some of this protection has been made available at the expense of other interests which our legal system might be more inclined to favor over privacy interests. In short, while the interests involved are the same in Germany as they are in the United States, a different balance has been struck. This may in part be due to the fact that we have not yet attempted to achieve a considered balance, making our present situation largely accidental.

If a conscious balance were to be struck in this country, this writer's preference would be for precise legislative treatment of the right to privacy, perhaps beginning with a model statute singling out *specific* interests worthy of protection, with emphasis on protection against unwarranted intrusions which would disturb the emotional tranquillity and/or sense of decency of reasonable men. Along with protected interests, the rights of prospective defendants should be defined in no uncertain terms, with any doubts being resolved in favor of the defendant. Intentional privacy invasions should be discouraged to a far greater extent than negligent invasions, with liability for the latter perhaps being limited to situations in which the plaintiff can show tangible damage. "Gross negligence" or "recklessness" might rank close to intent, as is the case in other areas of the law of torts. Compensation for non-pecuniary harm should largely be limited to intentional invasions.

Reasonable men may differ on what approach should be taken, but it is imperative that we realize that comprehensive protection of

¹⁵² For a discussion of the remedies question, see 15 U. CHI. L. REV. 926, 932 (1948). For a suggestion that some caution may be in order on the damage question, see GREGORY & KALVEN 893-94.

privacy is a two-edged sword. Our interdependent society cannot afford to construct frosted glass houses around each individual without stifling initiative and movement. As the German experience illustrates with special force, the overlap between the right to privacy and freedom of speech can be considerable. Furthermore, as suggested, a useful definition of the right to privacy must focus on the interests of defendants as well as plaintiffs. Before we interdict a course of action, we must be certain that the defendant has no overriding interest in the action. Criteria such as intent or commercial motivation naturally lend themselves to sorting out those defendants whose privacy-invading conduct we can do without.

The obvious complexity of the task of protecting the right to privacy need not continue to evoke inaction. Today, means of invading privacy have multiplied far beyond all that Warren and Brandeis might have thought possible, and it is not enough to congratulate ourselves on the fact that three-quarters of a century after their discovery of the right, some twenty out of the fifty states accept it in one form or another. What is required is a new appraisal based on a realization that conditions and needs have changed and that, therefore, we need not be perplexed by the absence of middle-aged precedent. We should consider that effective progress may not be possible if we leave the task to the courts.¹⁵³

APPENDIX I

THE GERMAN SYSTEM OF TORT LAW

Our common law of torts consists of many disconnected, independent wrongs which sometimes have in common only the fact

¹⁵³ "[T]he beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). This optimism was not justified:

"We [the Wisconsin Supreme Court] agree with what was recently said by the Nebraska court . . .:

'Our research develops no Nebraska case holding that this court has in any form or manner adopted the doctrine of the right of privacy, and there is no precedent in this state establishing the doctrine. Nor has the Legislature of this state conferred such a right of action by statute. We submit that if such a right is deemed necessary or desirable, such right should be provided for by action of our Legislature and not by judicial legislation on the part of our courts. This is especially true in view of the nature of the right under discussion, under which right not even the truth of the allegations is a defense.'" *Yoeckel v. Samonig*, 272 Wis. 430, 434-35, 75 N.W.2d 925, 927 (1956).

that they do not fit into any other legal category. While not espousing such a definition, Dean Prosser says that:

It might be possible to define a tort by enumerating the things that it is not. It is not a crime, it is not breach of contract, it is not necessarily concerned with property rights or problems of government, but is the occupant of a large residuary field remaining if these are taken out of the law.¹⁵⁴

The opposite is true of tort law under Germany's code system. The field of torts comprises a special section in the law of obligations,¹⁵⁵ and tortious conduct is defined more by concept than fact. The basic tort provisions of the German civil code are as follows:

Article 823. I. One who, intentionally or negligently, wrongfully injures the life, body, health, freedom, property or any other right of another is obligated to compensate him for damage arising therefrom.

II. One who violates a provision of law intended to protect another incurs the same obligation. If the wording of the provision makes possible its violation without fault, liability for compensation arises only in the presence of fault.

Article 826. One who intentionally damages another in a manner violating good morals is obligated to compensate him for such damage.¹⁵⁶

Article 823 I protects absolute rights against wrongful damage inflicted intentionally or negligently. Definitions of intent and negligence roughly coincide with ours.¹⁵⁷ Absolute rights are those which are valid against all persons, as distinguished, for example, from contract rights. Such rights range from those specifically enumerated in article 823 I to "other rights," which include, for example, certain copyrights, rights to name, mortgages and liens.¹⁵⁸ Honor is *not* protected here, nor are mere claims, such as claims to property arising out of contract. Causation requirements, aside from

¹⁵⁴ PROSSER 2.

¹⁵⁵ See generally MOLITOR, *op. cit. supra* note 122, at 181-218; PALANDT, *op. cit. supra* note 101, at 681-761; REICHSGERICHTSRÄTE UND BUNDESRICHTER, DAS BÜRGERLICHE GESETZ-BUCH 1151-1577 (11th ed. 1960).

¹⁵⁶ Author's translation with reference to translation in WANG, GERMAN CIVIL CODE (1907). Cf. Article 1382 of the French Civil Code which abstracts even further: "Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage." Translation in VON MEHREN, THE CIVIL LAW SYSTEM 339 (1957).

¹⁵⁷ See PALANDT, *op. cit. supra* note 101, at 686-87.

¹⁵⁸ *Id.* at 688-90.

necessary causation in fact, are based upon the concept of "adequate cause," which is comparable to our "proximate cause."¹⁵⁹ Wrongfulness is present if no excuse appears; excuses include consent by the plaintiff and privileges, such as self-defense and necessity.¹⁶⁰ On the basis of the principle of comparative negligence, the plaintiff's contributory negligence does not defeat his action, but it does reduce his recovery.¹⁶¹ Omissions are actionable only if there was some special duty which demanded action.¹⁶²

Article 823 II permits the recovery of damages resulting from an infringement of a protective law (*Schutzgesetz*).¹⁶³ Protective laws include criminal provisions, such as the articles of the penal code which afford sanctions for injuries to honor,¹⁶⁴ and range from a provision protecting shareholders of corporations¹⁶⁵ to provisions of the Law Relating to Artistic Copyright which define and protect a person's right to prevent exhibition of his picture or other like-

¹⁵⁹ See *id.* at 196-97.

¹⁶⁰ See *id.* at 690-91.

¹⁶¹ Article 254, BGB.

¹⁶² See MOLITOR, *op. cit. supra* note 122, at 187-88; PALANDT, *op. cit. supra* note 101, at 199.

¹⁶³ See generally MOLITOR, *op. cit. supra* note 122, at 189-90; PALANDT, *op. cit. supra* note 101, at 692-94.

¹⁶⁴ Sections 185-87 of the penal code provide:

"§ 185. Insult

Insult is punishable by a fine or imprisonment for a term not to exceed one year and, if the insult has been committed by means of violence, by a fine or by imprisonment for a term not to exceed two years.

"§ 186. Damaging a Person's Reputation

Anybody who asserts or disseminates a fact concerning another, which is designed to disparage the other or to damage his reputation in the community, shall be punished for insult by a fine or by confinement in a jail or by imprisonment for a term not to exceed one year, if the fact alleged cannot be proved to be true. If the insult has been committed publicly or through the dissemination of writings, depictions or pictures, the punishment shall be a fine or imprisonment for a term not to exceed two years.

"§ 187. Defamation

1. Anybody who, while aware of the falsity thereof, asserts or disseminates a false assertion concerning another which is designed to disparage the other or to damage his reputation in the community or to impair his credit, shall be punished for defamation by imprisonment for a term not to exceed two years and, if the defamation has been committed publicly or through the dissemination of writings, depictions or pictures, by imprisonment for a term of not less than one month.

2. If extenuating circumstances are present, the punishment may be reduced to imprisonment for one day or a fine."

(Translation from MUELLER AND BUERGENTHAL, *THE GERMAN PENAL CODE OF 1871* (1961).)

¹⁶⁵ Article 83 II, BGB.

ness.¹⁶⁶ The concept of fault differs somewhat from that employed in article 823 I, in that under article 823 II only the violation of the protective law, not the resulting damage, need be intended or foreseeable.¹⁶⁷ Causation requirements are satisfied if it appears that observance of the protective law would have provided greater protection against the damage than its non-observance.¹⁶⁸ Even if the protective law has no fault requirement, fault must be shown in the tort action.¹⁶⁹ If only intentional conduct can violate the protective law, the intent requirement applies in the tort action.¹⁷⁰

Article 826 is a so-called "general clause;" it seeks to cover a variety of situations without specific factual definition.¹⁷¹ Article 826 serves as a catchall for serious injuries that do not fit into the specific categories defined in other sections. It provides relief for intentional injuries resulting from conduct infringing upon good morals. Good morals is a concept used throughout the civil code and is roughly the equivalent of the feeling of decency of right-thinking persons.¹⁷² Intent is present if the actor should have been aware of more than a remote risk that damage might result to *some* person.¹⁷³ Awareness of the facts that constitute a violation of good morals suffices, even if the actor was not conscious of the actual violation.¹⁷⁴ Severe negligence does *not* bring conduct under article 826.¹⁷⁵

Other provisions define specific torts, such as seduction under duress¹⁷⁶ and some types of defamation.¹⁷⁷ A form of vicarious

¹⁶⁶ Articles 22, 23, KUG, translated in note 19 *supra*.

¹⁶⁷ PALANDT, *op. cit. supra* note 101, at 686-87.

¹⁶⁸ *Id.* at 693.

¹⁶⁹ *Id.* at 692.

¹⁷⁰ *Ibid.*

¹⁷¹ "Through [the use of general clauses] . . . , the German Code, lacking a separate system of equity, achieves the 'Equity of a Statute' known to English law in the past. General clauses are designed to ensure 'broad-minded and equitable interpretation of statutory provisions against too formalistic interpretation,' and are concessions of positivism to the 'transjurisdictional social ethics of the legal community.'" Hay, *Frustration and Its Solution in German Law*, 10 AM. J. COMP. L. 345, 369 (1961).

¹⁷² PALANDT, *op. cit. supra* note 101, at 705; *cf.* Article 138, BGB; PALANDT, *op. cit. supra* note 101, at 101-08.

¹⁷³ *Id.* at 706.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Article 825, BGB.

¹⁷⁷ Article 824, BGB provides:

"I. One who makes or disseminates an untrue statement of fact which is apt to endanger the credit of another, or otherwise injure his livelihood or

liability is provided for in limited situations,¹⁷⁸ and a type of strict liability is imposed for certain dangerous conduct¹⁷⁹ and the keeping of wild animals.¹⁸⁰ Capacity is defined for purposes of the law of torts,¹⁸¹ and a general three year period of limitation is provided.¹⁸² Generally, damages are payable in money or by the return of something,¹⁸³ and injunctive relief may be available.¹⁸⁴ With few exceptions, non-pecuniary damage is compensable only in the following cases: physical injury, deprivation of freedom (roughly the equivalent of false imprisonment) and seduction of a female under duress.¹⁸⁵

APPENDIX II

REPRESENTATIVE LITIGATED FACT SITUATIONS INVOLVING THE RIGHT OF PERSONALITY (SUMMARY OF SIGNIFICANT ASPECTS OF LEADING BGH DECISIONS ON THE RIGHT OF PERSONALITY FROM 1954 TO 1963)

1. The cornerstone case, *Schacht*, is summarized in the text of this paper.¹⁸⁶

2. Prior to her death, Cosima Wagner (wife of the composer) gave her private diaries and letters to her daughter, Eva. Prior to her own death, Eva made arrangements for future publication of the papers. Cosima's heirs attacked these arrangements, claiming that the copyright in the documents had passed to them.¹⁸⁷ The court

prosperity, shall compensate the other for damage arising therefrom, even if he does not, but should, know that the statement is untrue.

"II. One who makes a communication, which he does not know to be untrue, does not thereby incur liability for compensation, if he or the recipient of the statement has a legitimate interest in it."

(Author's translation with reference to translation in WANG, *op. cit. supra* note 156, at 181.)

¹⁷⁸ Articles 831-33, BGB, translated in MOLITOR, *op. cit. supra* note 122, at 194-98; WANG, *op. cit. supra* note 156, at 182-83.

¹⁷⁹ MOLITOR, *op. cit. supra* note 122, at 200-08.

¹⁸⁰ Article 833, BGB, translated in MOLITOR, *op. cit. supra* note 122, at 198.

¹⁸¹ Articles 827-28, BGB, translated in PALANDT, *op. cit. supra* note 101, at 715-16; WANG, *op. cit. supra* note 156, at 181.

¹⁸² Article 852, BGB, translated in *id.* at 188-89. The period is extended to thirty years from the time of the injury if the injured party does not have knowledge of the injury and of the person who is responsible. Where the defendant has been unjustly enriched, no limitation applies as to recovery of the value of the enrichment.

¹⁸³ MOLITOR, *op. cit. supra* note 122, at 209-16.

¹⁸⁴ *Id.* at 216-18.

¹⁸⁵ Articles 253, 847, BGB, translated in note 127 *supra*.

¹⁸⁶ See text accompanying notes 30-32 *supra*.

¹⁸⁷ 15 B.G.H.Z. 249 (1954).

held that Cosima's gift had passed the copyright to her daughter, and that the only limitation on Eva's freedom to use the documents involved an "inalienable remainder" of the copyright protecting the author's personality. The court stated that although the author's heirs could assert their rights as remaindermen, only serious injuries, such as a distorted publication of the documents or a publication without mentioning the author, would be actionable, and the court found no such injury.

3. The plaintiff, a well known actor, permitted a press photographer to take his picture on a motor scooter. The photographer then sold the picture to the manufacturer of the vehicle for use in its advertising, falsely representing that he had obtained the plaintiff's consent to such use. When the picture appeared in one of the manufacturer's advertisements, the plaintiff sued both the photographer and the manufacturer.¹⁸⁸ Although the plaintiff was a person who was prominent in current events so that publication of his picture would normally have been privileged, the court, relying primarily on articles 22 and 23 of the KUG,¹⁸⁹ decided that the privilege did not extend to use of his picture in advertising products with which he did not wish to be connected. The court rejected the defendants' argument that the plaintiff had suffered no damage because the picture was of good quality, the wares above reproach and the manufacturer reputable, and it held that compensation for non-pecuniary harm could be recovered in an action for injury to the personality.

4. An insurance company disclosed to a third party certain confidential medical information involving the plaintiff, a physician. This information persuaded the third party that he had been victimized by the plaintiff and led him to institute criminal proceedings against which the plaintiff successfully defended himself. The plaintiff then brought an action against an employee of the insurance company and the third party for the damage that he had sustained as a result of the disclosure.¹⁹⁰ The court held for the defendants. While the right to non-disclosure of confidential medical information was found to be a part of the constitutionally guaranteed right of personality, the court held that the scope of the right must be determined in each case by balancing the values and interests in-

¹⁸⁸ 20 B.G.H.Z. 345 (1956).

¹⁸⁹ Translated in note 19 *supra*.

¹⁹⁰ 24 B.G.H.Z. 72 (1957).

volved. The case established that the right of personality is one of the "other rights" protected under article 823 I of the BGB.¹⁹¹

5. The plaintiff leased an apartment to Mrs. G. and her daughter. Subsequently, the daughter's husband, who had been missing since the war, returned from Russia. The plaintiff refused to extend the lease contract to him and notified Mrs. G. accordingly. The press became aware of the matter, and a reporter from a weekly publication interviewed the plaintiff and photographed her without her knowledge. When the weekly informed the plaintiff's attorney that pictures had been taken, he warned against the publication of any matter that might adversely affect the plaintiff's reputation. This warning was received after the pictures of the plaintiff and a copy of her letter to Mrs. G., as well as a report on a developing boycott of her business, had gone into print. Since deleting the matter would have cost the weekly DM 750,000, publication ensued, and as a result the plaintiff suffered financial loss and anxiety through a public boycott of her business. In an action by the plaintiff against the weekly,¹⁹² the court emphasized the plaintiff's right to conduct her business without interference and found that the defendant's article, by appearing to express agreement with the boycott of her business, had aggravated the situation. The function of the press being to inform, not to punish, the publication was found to have gone beyond a privileged report on persons involved in current affairs. Similarly, the secret taking and publication of the plaintiff's picture was held to have exceeded the privilege, not only because it was published in connection with an unprivileged report, but also because "as a matter of principle persons in current affairs need not tolerate that, without their knowledge and against their will, pictures relating to their private spheres, to which the conduct of a business ordinarily belongs, are taken for purposes of publication."¹⁹³

6. In a suit involving a film comedy in which an actor represented Sir Arthur Conan Doyle, the heirs of Sir Arthur claimed that his right of personality had been injured by dissemination of the picture.¹⁹⁴ In rejecting their contention, the court stated that while

¹⁹¹ Cf. discussion in text accompanying note 90 *supra*.

¹⁹² 24 B.G.H.Z. 200 (1957).

¹⁹³ *Id.* at 208. (Author's translation.)

¹⁹⁴ 26 B.G.H.Z. 52 (1957).

the representation of a person by an actor may be actionable under articles 22 and 23 of the KUG,¹⁹⁵ the representation of a person "in the public eye" is privileged, if, as was the case in the action under consideration, the honor of the subject is not affected. Since the matter fell under the statute of limitation, the court refused to decide whether a violation of the right of personality might support compensation for non-pecuniary damage.

7. The plaintiff's picture was taken during his participation in a riding tournament. The picture was then used without his consent in advertising the defendant's product, which in the view of much of the population served to improve sexual potency. The plaintiff asserted that DM 15,000 would have been required to obtain his consent for the use of his picture in this manner. Comparing the plaintiff's recovery with a license fee, the intermediate court of appeals permitted an award in the amount of DM 10,000. The BGH went further, holding that if protection of the right of personality is to be adequate and the policy of the constitution effectuated, damage for non-pecuniary harm must be recoverable in a case such as this.¹⁹⁶

8. The defendant secretly recorded a private conversation with the plaintiff concerning settlement of long-standing difficulties between them. The defendant subsequently used the recording in other litigation involving the plaintiff, and the plaintiff complained.¹⁹⁷ The court ordered the recording destroyed, arguing that general distrust and suspicion would ensue if the unauthorized recording of private conversations were permitted. In addition, the court pointed out that the owner of the recording might falsify it by commission, omission or use out of context, and that the recording might be made available to persons for whom it was not intended. Thus, the court held that the recording of a private conversation would be permissible only with the consent of all participants, with the possible exceptions of recording blackmail threats in self-defense and recording simple, factual business messages. Although the court considered the circumstances of this case especially reprehensible in that the defendant had inveigled the plaintiff to participate in the conversation by making it appear to be a "man-to-man" oppor-

¹⁹⁵ Translated in note 19 *supra*.

¹⁹⁶ 26 B.G.H.Z. 349 (1958).

¹⁹⁷ 27 B.G.H.Z. 284 (1958).

tunity to settle their differences, the court thought it unnecessary to consider the possible applicability of article 826.¹⁹⁸

9. The defendant produced and sold small memorial plaques listing the names of soldiers killed and missing in the war who had lived in the plaintiff's community. Proceeds from the sale of the small plaques were to be used to finance a large plaque which the defendant promised to make available to the community without further charge. The name of the plaintiff's son appeared among the many classified as "missing" on the plaques. The plaintiff brought suit against the defendant, contending that she had the right to determine how her son might be honored and to forbid any tribute which she considered in bad taste.¹⁹⁹ She complained that her own right of personality was injured by the memorial's diminution of her hopes for the return of her son, and that her son's right to his name was infringed. Finally, she argued that the defendant's activity was not privileged because of the fact that it was primarily for profit rather than for honoring the dead and missing. The court held that the defendant's use of the name of the plaintiff's son as a means of identifying him in connection with a true report did not conflict with her son's rights. Cases involving the use of another's name in advertising were not considered analogous, since the son's name was given only limited mention and its use did not give the defendant any special advertising advantage. The court further held that the plaque was not in bad taste and that the plaintiff's right to the memory of her son was not infringed.

10. The defendant sold a product for the cleaning and fastening of artificial teeth. A well-known singer, Caterina Valente, complained of the text of one of the defendant's advertisements²⁰⁰ which took the following form:

Although I am not as famous as my great colleague, Caterina Valente, the stage was my world. . . . I say 'was' because a terrible thing happened one evening: I was on the stage of a well-known . . . theater and was singing . . . my most successful song. Suddenly, the upper plate of my artificial teeth loosened . . . and only a

¹⁹⁸ Article 826 is translated in text accompanying note 156 *supra*. The rationale of this decision was considered applicable to the recording of an opera in a case involving the rights of orchestra members. See 13 N.J.W. 2043 (1960).

¹⁹⁹ See 12 N.J.W. 525 (1959).

²⁰⁰ 30 B.G.H.Z. 7 (1959).

lightning-quick move prevented it from falling out. . . . My career and livelihood [were] destroyed. . . .²⁰¹

The defendant responded that since the plaintiff's name was itself advertised she should bear part of the cost. The court held that there was no abuse of Miss Valente's name within the meaning of article 12 of the BGB,²⁰² since that provision was found to provide protection primarily against the use of one person's name to identify another and against the unauthorized appropriation of the value of a person's name for advertising purposes. The court felt that although many readers instinctively would connect the plaintiff's name with the defendant's product, they would not regard the plaintiff as endorsing the product. The court decided, however, that mention of the plaintiff's name in connection with the defendant's product injured her personality to the extent that it tended to lower her in the eyes of the public.

11. The BGH interpreted the constitutional provisions underlying the general right of personality to prohibit a father's naming his son Bernhard Markus Antoinette.²⁰³ Since given names were found to have been developed to designate the sex of the bearer, the court held that intolerable confusion would result if male children could be given female names and vice versa, even if some of the given names correctly indicated the bearer's sex.

12. The BGH had occasion to discuss the privilege of the press in a case resembling *Schacht*.²⁰⁴ The plaintiff had circulated among members of a student dueling corps a letter in which he defended a student who had been dismissed from the corps for expressing in print "undemocratic views" concerning concentration camps and national socialism. The defendant weekly published excerpts from the letter. The plaintiff charged that the omissions had distorted the meaning of the circular, and his demand for correction was published by the defendant among its letters from readers. The court held that since the circular was not a literary accomplishment no questions of copyright were involved, and that the circular could not be considered confidential because it concerned a matter of

²⁰¹ *Id.* at 8. (Author's translation.)

²⁰² Translated in note 21 *supra*.

²⁰³ 30 B.G.H.Z. 132, 138 (1959).

²⁰⁴ 31 B.G.H.Z. 308 (1959). The *Schacht* case is summarized in the text accompanying notes 30-32 *supra*.

genuine public interest and had been circulated within a very large group. While recognizing the broad scope of constitutionally guaranteed freedom of the press, the court held that it was the duty of the press with respect to proposed publications to satisfy itself that the information is accurate and not exaggerated, that there is no unjustifiable infringement on the private sphere of any person, and that there is a defensible relationship between the purpose sought to be accomplished by the publication and any resulting injury to the subject's honor. The court found that the plaintiff had in fact expressed views amounting to nothing more than approval in principle of establishing internment camps. He had merely expressed doubts as to the genuineness of proof relating to Nazi crimes in concentration camps, while condemning such crimes as he felt had occurred. The defendant's report, on the other hand, had created the impression that the plaintiff approved of the operation of concentration camps in Hitler Germany. The court held that although the press does have the right to take sharp and clear positions attacking political views, due care must be used in presenting the facts on which readers will base their opinion. The plaintiff was found to be entitled to an order calling on the defendant to correct "the misleading one-sidedness of the report in accordance with available information."²⁰⁵

13. The plaintiff owned an apartment house in which Miss Nitribitt, a prostitute, had lived and was murdered in 1957. The murder had caused considerable publicity. The defendant produced a motion picture concerning these events which contained a picture of the outside of the plaintiff's apartment house and which, in the dialogue, twice mentioned its address. The plaintiff protested against disclosure of the address at the time the motion picture was made. He subsequently brought an action against the defendant, claiming that the reputation of his house was affected and the emotional tranquillity of his tenants disturbed.²⁰⁶ The court rejected the plaintiff's claim for injunctive relief, holding that the mere mention of the address of the prostitute did not involve an actionable injury to his honor and personality.

14. The plaintiff, a professor of law, brought back from Korea several ginseng roots which he turned over to a friend, a professor of

²⁰⁵ *Id.* at 318. (Author's translation.)

²⁰⁶ See 13 N.J.W. 1614 (1960).

pharmacology, for purposes of research. In a scientific publication concerning the roots, the pharmacologist mentioned that the plaintiff had helped him to obtain them. This publication led to a popularized scientific article mistakenly referring to the plaintiff as one of Europe's best known ginseng researchers. The defendant was in the business of selling a restorative tonic containing ginseng, and subsequent to this latter publication he advertised the product as follows:

According to scientists of standing such as Professor H. [and] Professor B. [plaintiff's name] ginseng as a pure product of nature affects the healthy organism restoratively...rebuilding [sexual] potency...²⁰⁷

In a magazine editorial discussing one of the defendant's advertisements, the following comment appeared:

[Ginseng] is the main ingredient of asiatic love potions and is said to be taken by women every evening.²⁰⁸

The plaintiff sued, arguing that the defendant's advertisements had created the impression that he had made a scientific judgment in a field unknown to him and that he had, unethically and for pay, permitted the defendant to use his name in advertising a dubious product.²⁰⁹ He also complained that he had been subjected to ridicule, especially in the eyes of his students. The defendant denied that the plaintiff was as well-known as he had represented himself to be and asserted that even if some amusement had resulted among his colleagues this would not support a claim for damages. The court awarded the plaintiff monetary compensation (DM 8,000) for non-pecuniary damages, emphasizing that the defendant had acted culpably in not obtaining the plaintiff's consent to the mention of his name, that the invasion was serious, and that the defendant's commercial purpose justified subjecting him to a duty to pay for what he appropriated. The court concluded that a failure to grant compensation would deny the right of personality its only effective sanction in cases such as this.

15. The plaintiff's banking establishment, M.F., was repeatedly reported by the defendant newspaper to have engaged in dealings

²⁰⁷ 35 B.G.H.Z. 363 (1961). (Author's translation.)

²⁰⁸ *Id.* at 364. (Author's translation.)

²⁰⁹ 35 B.G.H.Z. 363 (1961).

involving the sale of arms in the Near East. The plaintiff complained that these publications injured his reputation in the banking community and demanded compensation (DM 10,000) for alleged non-pecuniary damage.²¹⁰ The lower court rejected his complaint, but the intermediate appellate court awarded him DM 5,000, holding that the defendant, while justified in reporting on the arms dealings, did not have to mention the plaintiff's banking house by name so as to invade his private sphere. The intermediate court suggested that the defendant had no right to punish the plaintiff by publishing facts relating to his legally permissible trading activities. The BGH reversed the judgment, holding that: "Human activity in professional and occupational life does not generally take place in a secret zone. . . . It is not permissible to transfer principles that were developed for the protection of the so-called private sphere to a case involving a true report concerning the activity of persons in economic life."²¹¹ Furthermore, the public was considered to have a special interest in the matter, since assassination attempts repeatedly had been directed at arms dealers and there was discussion concerning the desirability of legislation regulating such activities. The court found that the defendant had *not* overstepped its privilege in reporting on the activities of the plaintiff's banking house, noting that the defendant had not mentioned the plaintiff himself by name.

16. The plaintiff, a sailor, joined Fidel Castro's troops in 1958, and pictures of him dressed in a Castro uniform appeared in numerous German newspapers. The defendant produced a newsreel concerning the death penalty in which he included shots of newspaper headlines relating to murders. One such headline had appeared adjacent to one of the pictures of the plaintiff, and the picture was included in the defendant's film. When the plaintiff's attorney brought this to the defendant's attention, the offensive picture was eliminated from the newsreel, which was already in circulation. The plaintiff sought DM 2,000 compensation for alleged non-pecuniary damage.²¹² This claim was rejected by the lower court, upheld in principle but reduced to DM 1,000 by the intermediate appellate court, and left unchanged by the BGH. The court found that the association of the picture and the headline would lead viewers to

²¹⁰ 36 B.G.H.Z. 77 (1961).

²¹¹ *Id.* at 80. (Author's translation.)

²¹² See 37 U.F.I.T.A. 120 (1962).

the conclusion that the plaintiff was a murderer, but this was not determinative in view of the court's holding that the plaintiff's right of personality was violated by the mere association of his picture with the murder report. The court also held that a showing of the plaintiff's picture would have been privileged only in connection with, for example, a report about Cuban troops or conditions in Cuba. Even if there had been some privilege, the court felt that the plaintiff's "legitimate interests"²¹³ would have outweighed it. The court found that the defendant was at fault by failing to use due care in putting the newsreel together and that the injury was grave, especially in view of the wide circulation of the newsreel. In view of this the court considered the award of compensation for non-pecuniary damage justified.

17. The plaintiff was a television announcer who was severely criticized by the defendant weekly and the defendant reporter in an article lamenting the situation of television announcing at a Berlin station. Quoting from letters from viewers, the defendants characterized the plaintiff as a "milked-out she-goat" and as belonging in a "second class honky-tonk" in the Hamburg red light district. One statement read as follows:

And the director sighs and comes out with his patent solution: 'It would be best if the ladies would marry.' 'But I beg your pardon' answers [the plaintiff], frightened, when she is asked about this possibility. A man, a husband. After all, she has gotten along without one for 16 years—just as many years as are required to be able to marry in the first place. She has a girl friend and a dog to whom her heart belongs—what should she do with a man?²¹⁴

The court held that these remarks, *having no factual support* and being suggestive of perverse tendencies in the plaintiff, were beyond the right of the free press to criticize. It upheld the intermediate appellate court's award of DM 10,000 compensation for non-pecuniary damage.²¹⁵ In reply to adverse comment in the legal literature, the court specifically reaffirmed its earlier decision to permit awards for non-pecuniary damage in cases involving injuries to the personality.²¹⁶

²¹³ See Article 23 II, KUG, translated in note 19 *supra*.

²¹⁴ 39 B.G.H.Z. 124, 128 (1963). (Author's translation.)

²¹⁵ 39 B.G.H.Z. 124 (1963).

²¹⁶ *Id.* at 130-33.