

# Prosser's *Privacy* and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?

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#### INTRODUCTION

After fifty years, William Prosser's article *Privacy* rests securely in the canon of classic American law review articles. Today, Prosser's verdict on the momentous article by Samuel Warren and Louis Brandeis can fittingly be applied to his own work: "It has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law."<sup>1</sup> The Berkeley Dean's *Privacy* had an enormous influence on the development of the law. After he proposed a set of four torts that grant protection against certain kinds of invasive behavior, state courts and legislatures adopted this framework, and the acceptance of his privacy torts occurred to an astonishing degree throughout the United States.

At the fiftieth anniversary of Prosser's *Privacy*, this Article takes a comparative approach in assessing his accomplishments. Germany's legal system offers a fitting point of comparison because of its well-developed privacy law as well as its rich media landscape with similar kinds of invasions of privacy.<sup>2</sup> Moreover, the United States and Germany share a Western cultural focus regarding the importance of the individual and the significance of permitting each person to use self-determination in forming her life.<sup>3</sup>

We begin in Part I by examining two cases that provide a window into contemporary privacy tort law in the United States and the Federal Republic of Germany. The subject matter of the cases also proves quite similar; in each, a plaintiff objected to an author's sharing of intimate details about him or her with the public. The American decision, *Bonome v. Kaysen*, concerned a memoir that revealed numerous intimate details of the author's life with the

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1. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960). For the seminal article by Warren and Brandeis, see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. See *infra* Part III.

3. For a discussion of how this concept of individual self-determination marks a basic normative concept of the modern Western world, see CHARLES TAYLOR, *THE MALAISE OF MODERNITY* 27-28 (House of Anansi Press Inc. 2003) (1991).

plaintiff.<sup>4</sup> The German decision, the *Esra* opinion, concerned a novel that depicted the author's relationship with his girlfriend and included many intimate details about them.<sup>5</sup>

The author in *Bonome* was found not to have violated his subject's tort right of privacy. In *Esra*, the German Federal Constitutional Court, the highest court for deciding questions of constitutional law, found a violation of a legal right of the girlfriend and ordered a ban on the publication of the novel.<sup>6</sup> We will show how the difference in two results can be explained, at least in part, by whether a legal system understands privacy as a unitary concept, as in Germany, or as a limited group of harm-based torts, as in the United States.

Having set out these two cases, the Article discusses the classic Prosser paper of 1960 in Part II. Prosser decided that the common law privacy cases were not tightly linked to each other in a conceptual fashion, but rather were "a complex of four distinct and only loosely related torts."<sup>7</sup> The splintering of the privacy tort was a highly significant and profoundly creative jurisprudential choice. We argue that Prosser built on the earlier work by Warren and Brandeis to operationalize their central insight into terms that the U.S. legal system could easily adopt. Prosser also freed privacy law from certain limitations of the old common law tort of defamation.<sup>8</sup> Yet, there is a road not taken in American privacy law—that of a right of personality. The idea behind such a right is that each person, as a unique and self-determining entity, is due certain kinds of protection.

Part II also traces how scholars in the United States once discussed the privacy tort as an interest in personality. Here we examine both the seminal paper written by Warren and Brandeis in 1890 as well as Edward J. Bloustein's article of 1964.<sup>9</sup> The latter paper represents a valiant last stand for privacy-as-personality in the United States. Part II demonstrates that the road not taken in the United States was never an unknown path but, rather, one that leading scholars proposed for adoption at different junctures over a more than seventy-year period. Nonetheless, it was Prosser's vision that carried the day.

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4. *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*1 (Mass. Dist. Ct. Mar. 3, 2004).

5. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], BVerfGE 119, 1, at para. 101 (Ger.) = 61 NJW 39, at para. 101 (2008) (Ger.) = 39 IIC 606, at para. 101 (2008) (English translation by D.W. We cite from this translation. The decision is partially divided into paragraphs and partially not. We cite from paragraphs where given; otherwise we cite pages of the English translation in 2008 IIC 606).

6. *Id.* at para. 104.

7. Prosser, *supra* note 1, at 422.

8. See *infra* note 119 and accompanying text.

9. Warren & Brandeis, *supra* note 1; Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

The Article then explores the development and current status of the right of personality in Germany. German law views the privacy tort as safeguarding an interest that rests on human dignity.<sup>10</sup> In that legal system, it is a basic principle that each human has a right of dignity that is inviolable.<sup>11</sup> This concept influences the entire Basic Law—the German constitution—and provides the general basis for the right of personality, which is a “source right” (*Quellrecht*) that has proved a fertile source of other legal interests.

Thus, while there is one unitary concept of tort privacy in Germany, more than four categories follow from it. Moreover, many of the resulting categories can be placed into the Prosser categories. In other words, there has been a fair amount of convergence between the two legal systems. Another aspect of the convergence concerns judicial methodology. German courts engage in a balancing approach that is quite similar to the tack of American courts.

There are also significant differences between the approaches in Germany and the United States. One highly significant difference is that German personality rights have a constitutional aspect. As a result, they apply to the behavior of both the government and private parties.<sup>12</sup> Another difference is that German law does not balance interests in cases that involve “a core area of life formation.”<sup>13</sup> In these cases, the court conducts a necessary examination of whether a “significant impact” on the core interest took place. If such an impact occurred, the court must protect the individual against the violation of her interests. Information about the core area of private life is subject to absolute protection.<sup>14</sup> We then return to our two case studies and show how the American case, *Bonome*, illustrates Prosser’s general approach, and how the German case, *Esra*, demonstrates the similarity between Bloustein’s vision for tort privacy law and the jurisprudence that developed within Germany.

In the third and final Part, we consider the present and future status of tort privacy in Germany and the United States and the relative merits of the two approaches. Here, we have selected certain important topics and doctrinal areas that are both common to and significant for the two legal systems. The subjects are the commercial interest in one’s identity, consent, and newsworthiness. We conclude by discussing the question posed in this Article’s subtitle: are four privacy torts better than one? The answer turns, however, on the role that each legal form plays in its respective legal system and underlying culture. Our approach is to consider the different legal and cultural functions served by the different forms of the privacy tort in the United States and Germany.

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10. Bundesgerichtshof [BGH] [Federal Supreme Court], BGHZ 13, 334, 338.

11. Federal Supreme Court, BGHZ 24, 72, 78.

12. Federal Constitutional Court, BVerfGE 7, 198, 204. For a discussion, see *infra* Part II.D.

13. Federal Constitutional Court, BVerfGE 7, 1, at para. 70. For a discussion, see *infra* Part II.F.2.

14. *Id.*

The four privacy torts of Prosser are brilliantly tailored to accord with and, in turn, influence American law and American values. Prosser's genius rested in providing just enough theory, doctrine, and rules of thumb to create a level of comfort for American judges deciding cases and for state legislatures enacting tort privacy statutes. Germany's unitary concept of a right of personality has proven similarly successful. It supplies a highly abstract framework, one with deep philosophical elements, around which a complete German cosmology of tort privacy has been constructed. Its great merit for the German legal system is to furnish a theoretical vantage point from which judges and scholars can engage in the necessary confrontation with potentially messy facts and inconsistent categories.

At a minimum, our analysis challenges recent scholarship that takes a far more skeptical view of Prosser's *Privacy*. For example, Lior Strahilevitz wishes us to turn our backs on Prosser and reject "basically everything he sought to accomplish."<sup>15</sup> Moreover, Neil Richards and Daniel Solove view Prosser's work as leading to a pernicious "ossification" of tort privacy.<sup>16</sup> In our view, however, Prosser pragmatically assessed the kind and amount of privacy that the American legal system was willing to accommodate. Without Prosser's contribution, there would likely be less, and not more, protection of tort privacy in the United States.

## I.

### KISS AND TELL: TWO DECISIONS FROM AMERICAN AND GERMAN PRIVACY LAW

We begin our comparative examination of privacy tort law with two decisions, one from a U.S. court and one from a German court. We look at the cases in the spirit of Prosser, who self-identified as a "packrat," that is, as a collector and sorter of judicial opinions.<sup>17</sup> The U.S. case concerned an author who violated the privacy of her boyfriend in publishing a memoir about their relationship that included highly intimate details. The German case concerned an author who violated the privacy of his girlfriend in publishing a novel about their relationship that also included highly intimate details. In the latter case, the author also harshly attacked the girlfriend's mother, who might one day have been the author's mother-in-law, but instead became the second plaintiff in the litigation against the author. Both cases raise similar issues about privacy, special protection for sensitive information, and freedom of expression.

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15. Lior Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2037 (2010).

16. Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887 (2010).

17. WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS*, at xii (3d ed. 1964).

A. *The Case of the Whining, Pleading, Sex-Obsessed Boyfriend, or the Bonome Decision*

J. Joseph Bonome owned a tree surgery and landscape business in Cambridge, Massachusetts. Married and with stepchildren, he became involved in an extramarital relationship with Susanna Kaysen in 1993. Kaysen was the author of the memoir *Girl, Interrupted*, which had been published that same year. As the trial court in *Bonome v. Kaysen* explained of her, “She had gained success and notoriety for her book.”<sup>18</sup> Her memoir was made into a successful film, which was released in 1999.

After pressure from Kaysen, Bonome left his wife, whom he divorced before moving into Kaysen’s home. During this period of their relationship, Kaysen also began work on a new book. As the court noted, “Despite Bonome’s inquiries, Kaysen would not reveal the subject of the book to him.”<sup>19</sup> An ominous sign, as it turned out: the relationship between Bonome and Kaysen ended in 1998.

In 2001 Kaysen published a new memoir, *The Camera My Mother Gave Me*, and this book led to *Bonome v. Kaysen*. As the *Bonome* court described it, “The book is an autobiographical memoir chronicling the effects of Kaysen’s seemingly undiagnosable vaginal pain in a series of ruminations about the condition’s effects on many aspects of her life, including her overall physical and emotional state, friendships, and her relationship with her boyfriend.”<sup>20</sup> Kaysen portrays the “boyfriend,” a central figure in the memoir, in highly negative terms. Kaysen describes him as “always bugging [her] for sex” as well as “whining and pleading.”<sup>21</sup> She depicts him as insensitive to her physical pain, and on one occasion, in the court’s words, as “physically forceful in an attempt to engage her in sex.”<sup>22</sup> That behavior leads Kaysen to ruminate “about whether the relationship had exceeded the bounds of consensual sexual relations into the realm of coerced non-consensual sex.”<sup>23</sup>

As for the impact of the book on Bonome’s privacy, Kaysen does not name her boyfriend in the book and, indeed, even alters some details about his life, such as his occupation and the place from which he came.<sup>24</sup> Nonetheless, the relationship between Kaysen and Bonome was well known, as the court observed, to his “family, friends, and clientele.”<sup>25</sup> As a result, these individuals

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18. *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*1 (Mass. Dist. Ct. Mar. 3, 2004).

19. *Id.*

20. *Id.*

21. *Id.* at \*2. As the trial court observes, a central theme of the book is “the impact of her chronic pain on the emotional and physical relationship with Kaysen’s boyfriend.” *Id.* at \*2.

22. *Id.*

23. *Id.*

24. *Id.* at \*1–2, \*7.

25. *Id.* at \*1.

knew that he was the boyfriend in the book. Bonome sued Kaysen for violating his tort interest in avoiding “public disclosure of private facts,” which is, of course, one of the four privacy torts that Prosser first identified.<sup>26</sup>

The court granted the defendant’s motion to dismiss Bonome’s case.<sup>27</sup> It decided that the plaintiff had failed to state a claim on which relief could be granted.<sup>28</sup> Consider, though, that Kaysen’s memoir included, beyond the negative portrayal of her boyfriend, an explicit discussion of her sex life with him, including a discussion of whether he had tried to rape her.<sup>29</sup> Bonome alleged that he suffered “severe personal humiliation” and considerable damage to his reputation “among a substantial percentage of his clients and acquaintances.”<sup>30</sup> Nonetheless, the court found for Kaysen without even a trial.

The First Amendment made all the difference in the outcome of the case. At the nonconstitutional level, the court had identified a fairly equal match between Kaysen’s right to disclose her life story and Bonome’s own interest in controlling “the dissemination of private information about himself.”<sup>31</sup> Indeed, had the court’s analysis stopped at this point, Bonome’s interest might have proved weightier. As the court observed, the information about the plaintiff in this case concerned subjects “at the core of the most intimate and highly personal sphere of one’s life.”<sup>32</sup>

Yet, it was of decisive importance that Kaysen was reporting on matters of legitimate public concern, and that this interest was grounded in the U.S. Constitution’s First Amendment. The *Bonome* court found that the First Amendment requires only a “sufficient nexus between those private details” and at least one issue of public concern.<sup>33</sup> This nexus has two dimensions: the first requires a logical tie between the subject matter and some topic in which the public could fairly be interested; the second calls for proportionality between the information revealed and the subject matter to be illuminated.<sup>34</sup> Kaysen’s memoir fulfilled both tests.<sup>35</sup>

As we will see, the Federal Constitutional Court in the *Esra* case presented a more complex test for analyzing the kinds of interests implicated by a tell-all book. It developed a double sliding scale for assessing a mixture of fact and fiction in a novel and engaged in careful literary exegesis in evaluating the extent to which characters in a book were disassociated from their models

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26. *Id.* at \*3.

27. *Id.* at \*2, \*7.

28. *Id.*

29. *Id.* at \*2.

30. *Id.*

31. *Id.* at \*4.

32. *Id.*

33. *Id.* at \*6.

34. *Id.* at \*6–7.

35. *Id.*

in life.<sup>36</sup> Another key difference in the *Esra* decision concerned the heightened protection in German constitutional law for a “core area of private life.”<sup>37</sup> These distinctions led to a far different outcome in the German litigation for the author’s right of artistic freedom.

*B. The Case of the Interfering Mother-in-Law, or the Esra Decision*

The basic facts of the *Bonome* case are strikingly similar to a German case that reached a far different result. As in *Bonome*, the litigation in Germany resulted from a writer drawing on material from his own life.<sup>38</sup> The material also touched on highly intimate matters involving the relationship of two parties. Where the author in *Bonome* was found not to have violated her subject’s privacy, however, the German Federal Constitutional Court in the *Esra* case identified a violation of a legal interest, and ordered a ban of the contested book.<sup>39</sup>

The author B., the defendant in the case, had published a novel, *Esra*, in 2003.<sup>40</sup> Thus, one notable, although not decisive, difference between the two cases is that *Esra* is fiction while *The Camera* is a memoir.<sup>41</sup> The difference was not decisive because the Federal Constitutional Court found *Esra* to be a *roman à clef*, or a novel based on real-life models. In the court’s view, this kind of work required analysis, as we will discuss shortly, of the degree of fictionalization involved and the extent of interference with personality rights.<sup>42</sup> Note as well that while the Federal Constitutional Court in its opinion refers to the author of the novel only as “B.,” it also states the correct name of the novel, *Esra*, and explains that the presentation copy of the book to his girlfriend was signed “Maxim B.”<sup>43</sup> German media also widely reported on the litigation and the true identity of the author, namely, Maxim Biller.<sup>44</sup> The use of the initial “B.” in the opinion accords with historical naming conventions in German litigation and also served to provide a thin veil around the defendant’s identity.

The two *Esra* plaintiffs felt that their depiction in the novel violated their general right of personality.<sup>45</sup> Through both the Civil Code and the Basic Law, German law protects a general right of personality, which guarantees human

36. Federal Constitutional Court, BVerfGE 119, 1, at para. 85 = 39 IIC 606, at para. 85 (2008).

37. *Id.* at para. 70.

38. Federal Constitutional Court, BVerfGE 119, 1, at para. 59 = 39 IIC 606, at para. 59 (2008).

39. *Id.* at para. 107.

40. MAXIM BILLER, *ESRA* (2003).

41. Federal Constitutional Court, BVerfGE 119, 1, at para. 90 = 39 IIC 606, at para. 90 (2008).

42. *Id.* at para. 85.

43. *Id.* at para. 71.

44. *See, e.g.*, David Hugendick, *Kein Augenmaß*, ZEIT ONLINE, Feb. 13, 2008, <http://www.zeit.de/online/2008/07/esra-urteil>.

45. Federal Constitutional Court, BVerfGE 119, 1, 2 = 39 IIC 606, 607 (2008).

worth and dignity.<sup>46</sup> As the German Federal Constitutional Court states, the right of personality serves to “secure the closer personal sphere of life and the maintenance of its basic condition.”<sup>47</sup> This right, which has been well developed through case law, safeguards a private and intimate sphere of life.<sup>48</sup> It protects against “statements that are capable of having a negative effect on a person’s reputation, in particular his or her public image,” especially when these “distorted or falsified representations” will have a significant impact on the development of personality.<sup>49</sup>

The first plaintiff in *Esra* was the author B.’s former girlfriend, and the second plaintiff was the ex-girlfriend’s mother.<sup>50</sup> As we will see below, the Court found for the girlfriend and against her mother. The Federal Constitutional Court began by noting that B. portrayed both plaintiffs in a highly unfavorable light.<sup>51</sup> The Court also helpfully explained the book’s plot:

[It] tells the love story of Adam, a writer, and Esra, an actress, and takes place in Munich. Adam as the first-person narrator describes the relationship and the variety of obstacles that the couple faces: Esra’s family, in particular her imperious mother, Esra’s daughter from her first marriage, the father of this daughter and above all Esra’s passive fatalistic personality.<sup>52</sup>

To keep matters interesting, moreover, “[a]t various points, the novel contains the description of sexual acts between Esra and the narrator.”<sup>53</sup>

The differences between *Esra* and *Bonome* and the respective approaches taken by the two courts provide a window into the privacy jurisprudence of the two legal systems. *Bonome* had objected to a memoir in which he was unnamed and details of his identity had been changed. The American court noted, however, that his status as Kaysen’s former boyfriend permitted

46. For an introduction to this concept, see Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963 (1997); KARL-NIKOLAUS PEIFER, INDIVIDUALITÄT IM ZIVILRECHT 137–40 (2001).

47. Federal Constitutional Court, BVerfGE 119, 1, at para. 70 = 39 IIC 606, at para. 70 (2008).

48. Federal Supreme Court: BGHZ 13, 334, 338 (1954) (protecting against false light situations); BGHZ 24, 72, 78 (1957) (protecting against disclosure of medical records); BGHZ 26, 349, 354 – “Gentleman rider” case (1958) (protecting against unauthorized appropriation of personal attributes in advertising); BGHZ 45, 296, 307 (1966) (protecting against mass media publication of erroneous facts); BGHZ 50, 133, 143 – Mephisto (1968) (protecting against *roman à clef* with misleading interpretation of biographical facts); Federal Constitutional Court, BVerfGE 35, 202, 220 = 26 NJW 1226 (1973) (protecting against public disclosure of private facts with regard to criminal past, right to rehabilitation); Federal Supreme Court, BGHZ 131, 332, 337 = 49 NJW 1128, 1129 - Caroline von Monaco III (1996) (protecting celebrity against paparazzi).

49. Federal Constitutional Court, BVerfGE 119, 1, at para. 71 = 39 IIC 606, at para. 71 (2008).

50. Federal Constitutional Court, BVerfGE 119, 1, 2 = 39 IIC 606, 607 (2008).

51. Federal Constitutional Court, BVerfGE 119, 1, 4 = 39 IIC 606, 607 (2008).

52. *Id.*

53. Federal Constitutional Court, 39 IIC 606 at para. 75 (2008).

acquaintances to identify him as the party named in the novel.

In contrast, *Esra* was a work of fiction, and one that contained a traditional disclaimer that all characters in it were invented and that any similarity that these characters shared with real persons was accidental.<sup>54</sup> Yet, this disclaimer was not enough to absolve the author of potential liability; the Federal Constitutional Court employed its applicable test, which proved similar to the one in *Bonome*.<sup>55</sup> The test turns on whether the individual in the novel would be identified by “a more or less large circle of acquaintances.”<sup>56</sup> As the Court noted, only celebrities are generally known to the public.<sup>57</sup> By considering the impact on the plaintiff’s actual network of relationships, therefore, this test ensures that the protection of personality rights in the context of novels is not limited merely to prominent individuals.<sup>58</sup>

As in *Bonome*, the court in *Esra* found that the literary work had identified real-life persons.<sup>59</sup> Even after B. changed details in his novel during the course of the litigation, a “decryption” of the real identities of the models behind the chief characters of the novel was possible.<sup>60</sup> The German Court stated, “this identification practically imposes itself in the light of the combination and accumulation of the numerous facts.”<sup>61</sup> To give some examples, the person behind Lale, *Esra*’s mother, shared several traits with the character in the novel: she was the winner of the Alternative Nobel Prize and owned a hotel in Turkey where she ran a holiday resort club.<sup>62</sup> Similarly, the real *Esra* is an actress who once received a Federal Film Prize for a role she played in a movie, which may easily be found by searching for the title in the Internet.<sup>63</sup> One need not be Inspector Columbo (Peter Falk) or Detective Chief Inspector Derrick (Horst Tappert) to connect these dots and decipher the identities of the characters in the novel. Interestingly enough, and as we have seen above, it is also easily possible to decipher the identity of B., the author of the novel, after reading the Federal Constitutional Court’s *Esra* opinion. Yet, the use of pseudonyms in reported cases in Germany is ultimately *not* about providing an absolute shield

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54. Federal Constitutional Court, BVerfGE 119, 1, 3 = 39 IIC 606, 607 (2008).

55. *Id.* at para. 95.

56. Federal Constitutional Court, 39 IIC 606, 610 (2008).

57. Federal Constitutional Court, BVerfGE 119, 1, at para. 75 = 39 IIC 606, at para. 75 (2008).

58. *Id.* In the United States, Lior Strahilevitz has drawn on the way information is known or unknown within groups to develop a “social networks theory” of privacy. Lior Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

59. Federal Constitutional Court, BVerfGE 119, 1, at para. 74 = 39 IIC 606, at para. 74 (2008).

60. *Id.* at para. 76.

61. *Id.*

62. Federal Constitutional Court, 39 IIC 606, 607 (2008).

63. The novel’s sense of verisimilitude is heightened by its tracking of events through detailed and precise use of street names in Munich, where it takes place.

for the identity of litigants.<sup>64</sup> Rather, pseudonyms are used to provide, at best, a low to medium disguise—a veil—over identity. The cloaking is carried out for a number of reasons, including respect for the dignity of the participants and the overall interest of society in a fair trial.<sup>65</sup> Other issues are raised, however, by the use of pseudonyms in a novel.

As noted above, the Federal Constitutional Court found a violation of the girlfriend's right of personality but not of her mother's.<sup>66</sup> This distinction was, in part, aesthetic. The Court developed a double sliding scale to assess the mixture of fact and fiction in the novel, which, as noted, it viewed as a *roman à clef*:

The greater the correspondence between the image and the original, the more serious is the interference in personality rights. The more the artistic presentation affects the dimensions of personality rights that enjoy the particular protection, the greater must be the degree of fictionalisation in order to exclude the infringement of personality rights.<sup>67</sup>

The Federal Constitutional Court's analysis here involved two steps. First, it saw close portrayals of identifiable individuals as requiring analysis of the kinds of personality rights implicated. Second, it considered whether the impact on the specific personality rights was neutralized by a matching degree of "fictionalisation." By this term, the Court meant changes, alterations, and other artistic input into the work that moved the novel away from its anchoring in real-life models.<sup>68</sup>

Thus, the Federal Constitutional Court engaged in a special kind of literary exegesis, which involved internal textual sleuthing and a comparison with evidence about the actual characteristics of the two plaintiffs.<sup>69</sup> For the majority, the treatment of the Esra character was not adequately disassociated from its model and, moreover, represented a highly intense invasion of her personality rights. Regarding the former girlfriend—the first plaintiff—the

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64. Indeed, the lack of significant redaction of details in some judicial opinions also demonstrates that the use of pseudonyms in German cases does not primarily seek to protect the privacy, at least not in the sense of anonymity, of litigants. Thus, the German Federal Constitutional Court not only stated that the copy of the novel that "B." gave to his girlfriend was signed "Maxim," but included the full text of the somewhat personal dedication handwritten in it. BVerfGE 119, 1, 3 = 39 IIC 606, 607 (2008).

65. These issues are also present in the approach in German law to the broadcast of court proceedings. The applicable statute forbids "audio and visual recordings" of court proceedings for "public display purposes." Gerichtsverfassungsgesetz [GVG] [Code on Court Constitution], Mai 9, 1975, BGBL I 1077, § 169. For a general discussion of the interests that restrict "limitless" access of "the public" to judicial proceedings, see Federal Constitutional Court, BVerfGE 103, 44, 64 = 54 NJW 1633, 1635 (2001).

66. Federal Constitutional Court, BVerfGE 119, 1, at para. 107 = 39 IIC 606, at para. 107 (2008).

67. *Id.* at para. 88.

68. *Id.* at para. 105.

69. *Id.* at para. 101.

Court also placed additional weight on two factors: first, the defendant had violated “a core area of private life that is subject to absolute protection”; and second, the defendant had violated the aspects of personality rights that “exten[d] to the relationships between parents and their children.”<sup>70</sup> While our analysis concentrates on this first point, we note that, regarding the latter, the Court declared that “the depiction of the daughter’s life-threatening illness”<sup>71</sup> and her recognizable depiction beyond doubt to those around her amounted to a violation of the personality rights of the first plaintiff, Biller’s girlfriend, that was of great intensity.<sup>72</sup>

To return, then, to the first of the factors in the established case law of the Federal Constitutional Court, there is a core area of private life that receives heightened protection even beyond that granted to the general private sphere of life.<sup>73</sup> At the same time, however, the German constitution also explicitly safeguards the freedom of artistic expression. The Basic Law protects this interest in its Article 5(3), which expands on the general protection it grants freedom of opinion in Article 5(1).<sup>74</sup> When the right of artistic freedom collides with the right of personality, German constitutional law calls for a balancing of the two interests.<sup>75</sup>

In *Esra*, the Federal Constitutional Court found that the girlfriend’s interests trumped the artistic freedom of the author B.<sup>76</sup> Due to “the realistic and detailed narration of events originating in the author’s direct experiences” and the explicit subject matter, which implicated the core aspect of the right of personality, the Court decided that the personality rights of the first plaintiff trumped the artistic freedom of the novelist.<sup>77</sup> The author had engaged in “precise depiction of the most private details of a woman who is clearly identifiable as the author’s actual sexual partner.”<sup>78</sup> Indeed, as long as there was a significant impact on the core area of intimate life, German law did not permit the usual balancing process, but required protection of the intimate sphere from harm.<sup>79</sup>

This part of the *Esra* opinion also shows that the right of personality, and its protection of human dignity and worth, should not be confused with honor or reputation. The purpose of the personality interest is to prevent a person from being degraded to a mere object, or, as German law would have it, from

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70. *Id.* at para. 72.

71. *Id.* at para. 103.

72. In the judgment of the Court, this aspect of the novel “has no place in the public eye.” *Id.* at para. 103.

73. *Id.* at para. 88.

74. Federal Constitutional Court, BVerfGE 30, 173 = 24 NJW 1645 – Mephisto (1971).

75. *Id.*

76. *Id.* at para. 102.

77. *Id.*

78. *Id.*

79. *Id.* at para. 88.

being denied “subjectivity.”<sup>80</sup> In the absence of consent from a former partner to publication of intimate details about a highly personal relationship, an author degrades this person to the status of a mere object of his own self-realization.<sup>81</sup> In contrast to this holding regarding the first plaintiff, the Federal Constitutional Court held against the second plaintiff—the girlfriend’s mother.<sup>82</sup> In a close reading, the Court parsed the novel and found it to contain adequate distancing and fictionalization of this portrait to make it permissible.<sup>83</sup> We will discuss this aspect of the *Esra* decision in more detail below.<sup>84</sup>

## II.

### PROSSER’S PRIVACY AND THE GERMAN APPROACH: FOUR TORTS AND THE RIGHT OF PERSONALITY

Having set out these two cases, this Article now turns to *Privacy*, the classic Prosser article from 1960. As we will discuss, Prosser created a series of four distinct torts that shared some but not all characteristics. The splintering of the legal interest was a decisive move in the development of privacy tort law, and this area of law continues to exist within this framework.

At the same time, however, American scholars have also presented a unified view of privacy law as based on a right of personality. After discussing Prosser’s approach, we discuss the most important works in the United States that have advocated privacy-as-personality. This rejected path is fascinating on a number of grounds, one of which is that it is the one that Germany has adopted. This Part will also examine the German acceptance of a privacy tort based on a right to personality, and the important role that the judiciary has played in this development.

Finally, this Part revisits *Bonome* and *Esra*. The American case demonstrates the enduring influence of Prosser and adopts his views regarding the need for a newsworthiness exception. The German case shows how an approach based on a right of personality can lead to a different result than one based on Prosser’s torts.

#### A. The Four Privacy Torts

Before we discuss the classic Prosser article, a brief prologue is needed to situate it within his overall efforts as a privacy policy entrepreneur. In short, *Privacy* forms only part of a first track in an ambitious two-prong effort. The

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80. Federal Constitutional Court, 62 NJW 3089, 3090 (2009).

81. Karl-Nikolaus Peifer, *Verbote und Gebote – Tabus in den Medien*, in SKURRILITÄT UND TABUS IN DEN MEDIEN, 93, 104 (Sonja Ganguin & Uwe Sander eds., 2006); MARION BASTON-VOGT, DER SACHLICHE SCHUTZBEREICH DES ALLGEMEINEN PERSÖNLICHKEITSRECHTS 32 (1997).

82. Federal Constitutional Court, BVerfGE 119, 1, at para. 92 = 39 IIC 606, at para. 92 (2008).

83. *Id.* at para. 96.

84. See *infra* Part II.F.2.

first track consisted of Prosser's scholarship, including the 1960 article. As Neil Richards and Daniel Solove have shown, moreover, the critical breakthrough in Prosser's thinking about torts occurred in his 1953 Cooley lecture at the University of Michigan.<sup>85</sup> It is in this lecture, reprinted in Prosser's 1954 collection *Selected Topics on the Law of Torts*, that his four-part approach to tort privacy first appears, albeit only in a sketchy form.<sup>86</sup> The second edition of Prosser's torts treatise, which appeared in 1955, adopted the four-part approach.<sup>87</sup> Finally, a German translation of a Prosser manuscript on privacy followed in 1956 in *Rabels Zeitschrift*, the leading periodical for comparative and international law in Germany.<sup>88</sup> This paper represents a fascinating transitional work between the 1955 treatise and the 1960 *California Law Review* article. The manuscript for the article in the *Rabels Zeitschrift* does not exist in the modest Prosser archives at the U.C. Berkeley School of Law and, as far as our research indicates, it has never been published in English.

Prosser's policy entrepreneurship in the area of privacy law also involved a second track: his work for the American Law Institute as Reporter on the Restatement (Second) of Torts.<sup>89</sup> Through his service as Reporter, Prosser was able to oversee the adoption of his privacy torts into the Restatement. From that launching pad, his classification proved highly persuasive to states, lawmakers, and judges and has become the modern framework for the privacy tort in the United States.<sup>90</sup> In all this work, Prosser engaged in a close reading of the applicable case law and other sources to develop the argument that privacy involved different kinds of interests, that these interests were only loosely related, and that they would best be protected through the establishment of four distinct privacy torts.

One of the most striking aspects of Prosser's article, his division of the privacy tort, occurs at the end of its introductory section. Before the decisive passage, however, Prosser first discussed *The Right to Privacy* by Warren and Brandeis. He also traced the path of case law and legislation in this area. As he noted, the number of judicial decisions alone approached "something over three hundred cases in the books."<sup>91</sup> Prosser was also fully conversant, as his article

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85. Richards & Solove, *supra* note 16, at 1898.

86. *Id.* (citing WILLIAM PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* (1954)).

87. *Id.* (citing WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS* (2d ed. 1955)).

88. William Prosser, *Das Recht auf die Privatsphäre in Amerika*, 21 *RABELSZ* 401 (1956). For another Prosser article in German, see WILLIAM L. PROSSER, *KAUSALZUSAMMENHANG UND FAHRLÄSSIGKEIT* (Arbeitsgemeinschaft für Forschung des Landes Nordrhein-Westfalen, Vol. 74, 1957).

89. G. EDWARD WHITE, *TORT LAW IN AMERICA* 158–61 (1980).

90. Thus, the Prosser categories provide the organizing principle for discussion of privacy, whether in a treatise or casebook. *See, e.g.*, DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 78–231 (3d ed. 2008); J. THOMAS MCCARTHY, 1 *THE RIGHTS OF PUBLICITY AND PRIVACY* 538–788 (2d ed. 2009); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 1131–96 (9th ed. 2008).

91. Prosser, *supra* note 1, at 388.

amply demonstrates, with the many law review articles already published on the topic.<sup>92</sup> Thus, Prosser's first few pages alone demonstrated his complete mastery of the field of American privacy.

Prosser's preliminary discourse is followed by a highly significant declaration. Prosser observes:

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone."<sup>93</sup>

Prosser was engaged in an act of highly creative jurisprudence, and one that was grounded in his careful sifting and interpretation of common law decisions. Yet, in his work, Prosser presented himself as akin to a scientist who examines a problem. As Prosser writes, it is in studying these cases that something "emerged from the decisions."<sup>94</sup> As if he had set out to examine a single phenomenon with the use of his microscope, Prosser concluded that he was staring at four things.

Here are the phenomena that emerged from the case law: despite certain shared aspects, the common law privacy cases were not tightly bound to each other through any single concept. As Prosser stated, the privacy torts were best viewed as a "complex of four distinct and only loosely related torts."<sup>95</sup> He observed that "these four types of invasion may be subject, in some respects at least, to different rules; and that when what is said as to any one of them is carried over to another, it may not be at all applicable, and confusion may follow."<sup>96</sup>

As we have noted, Prosser then carried this four-part classification into his work on the American Law Institute's Restatement (Second) of Torts. As Reporter for this project, Prosser was able to anchor his four torts in the Restatement's sections 652B, 652C, 652D, and 652E.<sup>97</sup> In the Cooley lecture, the 1955 edition of his treatise, the paper in *Rabels Zeitschrift*, the *California Law Review* article, and the Restatement sections, Prosser's four torts are the same. The privacy torts are: (1) intrusion upon seclusion; (2) public disclosure of embarrassing private facts; (3) false light publicity; and (4) appropriation of name or likeness.

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92. See *id.* at 383 n.3, 384 nn.6-7, 385 nn.13-14, 387 n.50, 388 n.52, 391 n.81, 398 n.129, 403 n.166, 407 n.194, 415 n.264 (citing privacy law review articles).

93. Prosser, *supra* note 1, at 389.

94. *Id.*

95. *Id.* at 422.

96. *Id.* at 389.

97. RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1977).

This splintering of the privacy tort was a momentous move. Before Prosser, the privacy tort was contested and defined inconsistently. In a 1954 survey of the landscape, Samuel J. Hofstadter noted, “the doctrine has had a checkered career.”<sup>98</sup> Hofstadter also observed, “States have differed not only to the scope of a right of privacy, but even as to its existence. In a majority of the states, the existence of such a right is still an undetermined question.”<sup>99</sup> Prosser’s classification proved extraordinarily persuasive for wavering state courts and legislatures. Almost all states have adopted at least some of the privacy torts, and the resulting statutes and common law decisions, as the Massachusetts court demonstrated in *Bonome*, generally rely on the framework that is Prosser’s grand creation.<sup>100</sup>

Subsequent to Prosser’s notable efforts, the desire to classify privacy law has continued unabated. In this sense, Daniel Solove proves the modern heir of the Berkeley Dean. Solove’s *Understanding Privacy* from 2008 conceives of information privacy, a broader field than tort privacy, in terms similar to Prosser’s approach to privacy. Solove views information privacy as “a plurality of different things.”<sup>101</sup> Although he explicitly references Ludwig Wittgenstein’s concept of a “family resemblance” as his chief paradigm, his basic methodology is shared by Prosser.<sup>102</sup> The organizing concept for Prosser and Solove alike is the view that privacy law concerns a number of interests, which overlap only in certain ways.

There is another similarity between Solove’s recent work and Prosser’s classic scholarship. In Solove’s methodology, it is only through classification of different kinds of actions and different kinds of harms that we can understand the interests that privacy law protects. In a review of *Understanding Privacy*, Danielle Citron and Leslie Henry perceptively observe that Solove’s approach “is to conceptualize privacy from the bottom up, rather than the top down.”<sup>103</sup> Rather than starting with an abstract notion of privacy, Solove toils

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98. SAMUEL H. HOFSTADTER, *THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK* 53 (1954).

99. *Id.*

100. See MCCARTHY, *supra* note 90, at 31–32 (noting that Prosser’s article has been “immensely influential”).

101. DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* ix (2008). By Solove’s count, there are four kinds of harm to a data subject: (1) information collection; (2) information processing; (3) information dissemination; and (4) invasion. Each of these groups then leads in turn to “different related subgroups of harmful activities.” *Id.* at 103. To give a final example of Solove’s taxonomic work, he identifies two forms of information collection, which are (1) surveillance, and (2) interrogation. *Id.* at 104.

102. See *id.* at 44 (“Wittgenstein’s notion of family resemblances frees us from engaging in the debate over necessary and sufficient conditions for privacy, from searching for rigid conceptual boundaries and common denominators. If we no longer look for the essence of privacy, then . . . we should focus more concretely on the various forms of privacy and recognize their similarities and differences.”).

103. Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1111 (2010).

with “working hypotheses” derived from concrete situations.<sup>104</sup> This description also perfectly fits the method exhibited in Prosser’s *Privacy*, and here too Solove is the modern heir of the Berkeley Dean.

Prosser sorted his hundreds of cases into four piles based on the nature of the underlying invasive actions and the kinds of injuries involved. In three of the four torts, the harm is a mental one. In the first of the privacy torts, intrusion upon seclusion, Prosser crafted an interest to protect against prying behavior that is objectionable to the reasonable person. One way he did so was by critically requiring “offensiveness” to trigger the protections of the tort.<sup>105</sup> In his view, such harmful behavior was not adequately prevented by a variety of other tort actions, such as trespass, nuisance, and the intentional infliction of mental distress.

In the public disclosure of private facts—Prosser’s second tort—the harm is to reputation. Here, Prosser sought to develop a defamation-type action, but one without defamation’s defense regarding the truth of the matter alleged. Defamatory statements are, of course, *false* comments that lower one’s reputation in the community.<sup>106</sup> In contrast, the public disclosure of private facts is about giving publicity to true things “which the customs and ordinary views of the community will not tolerate.”<sup>107</sup>

As for false light, the third privacy tort, it is publicity that places the plaintiff in an offensive and inaccurate light before the public. Here, too, the harm is mental distress, and one caused by having lies spread about a person.<sup>108</sup> Prosser wrote, “The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation.”<sup>109</sup>

Turning to his fourth and final privacy tort, however, Prosser found a different harm at stake. In his definition, appropriation of name or likeness is “the exploitation of [the] attributes of the plaintiff’s identity.”<sup>110</sup> Prosser summarily concluded that “appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye.”<sup>111</sup> The difference is that the “interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff’s name and likeness as an aspect of his identity.”<sup>112</sup> Prosser also noted that this interest is “a right of value upon which the plaintiff can capitalize by selling licenses.”<sup>113</sup> With evident approval, he

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104. *Id.* (citing Solove, *supra* note 101, at 49).

105. Prosser, *supra* note 1, at 391, 396.

106. For a discussion of the requirement regarding harm to the esteem in which one is held in the community, see DAN B. DOBBS, *THE LAW OF TORTS* 1126–27 (2000).

107. Prosser, *supra* note 1, at 397.

108. *Id.* at 400.

109. *Id.*

110. *Id.* at 401.

111. *Id.* at 406.

112. *Id.*

113. *Id.*

cited the first case that developed a “right of publicity,” and concluded that this decision, though not yet followed, “would seem clearly to be justified.”<sup>114</sup> The law followed Prosser’s judgment in this regard, and the right of appropriation and its sub-branch, the right of publicity, have flourished. Indeed, this branch of tort privacy has become perhaps the most powerful of the four—at least, if measured in terms of the kinds of financial interests that it protects.<sup>115</sup>

Prosser’s achievement is a towering one. Building on Warren and Brandeis, he operationalized, or “translated,” their central insight into terms that the U.S. legal system eagerly adopted. Warren and Brandeis had sought to develop a right of privacy for “the value of mental suffering.”<sup>116</sup> Prosser followed this goal and sought to protect individuals against mental harm, but he stripped out any high level concepts of *why* privacy should be protected. We see the same method here that Edward White identifies in his analysis of Prosser’s method in the context of tort law’s principle of the “last clear chance.”<sup>117</sup> As White explains, Prosser wrestled “some surface intelligibility from the chaos of cases . . . before him,” and then developed classifications that were distinctive and persuasive enough to “take on a doctrinal function.”<sup>118</sup>

As a technical matter, moreover, Prosser unhinged privacy law from the common law’s long established tort of defamation while preserving only those limitations on the old tort that he found necessary in the new context.<sup>119</sup> Reputation still remained an interest to be protected within the public disclosure and false light torts. Yet, Prosser also drew on the concept of the right “to be let alone.”<sup>120</sup> He did so to allow protection against mental harms in addition to those interests protected by defamation, namely, the safeguarding of reputation against libel and slander. Further, in Prosser’s torts the plaintiff no longer had to prove actual damages.

To summarize, we have found that Prosser’s splintering of the privacy tort into four parts, a momentous move, established the still current schema for this area of law. He provided a decisively non-unified approach to the privacy tort, which greatly assisted state adoption of these torts. In the next Section, we show that scholars have also discussed a far different vision of privacy, one that is unified around a single interest but that failed to gain acceptance in the States. Thus, we now examine the road that Prosser and American law did not take.

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114. *Id.* at 407. The case is *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

115. *See infra* Part III.A.

116. Warren & Brandeis, *supra* note 1, at 213.

117. WHITE, *supra* note 89, at 158–61.

118. *Id.* at 161.

119. Prosser, *supra* note 1, at 398.

120. *Id.* at 389.

### B. An American Right of Personality?

In the period between Warren and Brandeis's article and Prosser's *Privacy*, American scholars frequently conceived of tort privacy as protecting a single thing, which was the right of "inviolable personality." As we have already noted in the Introduction, German law views tort privacy through this same perspective. In the next Section, we will more fully discuss the foundation of this interest in Germany.<sup>121</sup> We first wish to trace how scholars in the United States once discussed tort privacy in similar terms.

As is so often the case for American privacy law, the discussion starts with Warren and Brandeis. In their *Right to Privacy*, Warren and Brandeis showed themselves to be masters of comparative law. They drew primarily on English common law sources.<sup>122</sup> Yet, they also considered continental law, in particular, French copyright law and the nascent French right of privacy.<sup>123</sup> At a key point in their argument, however, they turned, somewhat suddenly, to a concept from German philosophy: the right of personality.<sup>124</sup> To some extent at least, Brandeis had been exposed to German thought through his family background, its cultural milieu, and his own education. Brandeis was born in Louisville, Kentucky to a family with German roots, and one that returned for business reasons to Germany while he was a teenager. Brandeis then spent three semesters, from 1873 to 1875, at the Annen-Realschule in Dresden.<sup>125</sup>

Warren and Brandeis drew on the concept of a personality interest to develop their right of privacy as more than a new property right. Of their "right to be let alone," Warren and Brandeis first noted its similarity with interests in being free from assault, false imprisonment, malicious prosecution, and defamation. They then wrote, in a critical passage:

In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private

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121. See *infra* Part II.C.

122. See, e.g., Warren & Brandeis, *supra* note 1, at 201–05, 207–12. In his analysis of these same sources, Robert Post critiques their use of the English sources and argues that their "argument from authority" largely "rests upon a strained and historically sterile reading of a single decision, *Prince Albert v. Strange*." Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 655 (1991).

123. See Warren & Brandeis, *supra* note 1, at 214, 215 n.1, 216 n.1, 218 n.2 (treating French law); see also *id.* at 198 (comparing Roman law).

124. *Id.* at 205–07.

125. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 22–23 (2009).

property, but that of an inviolate personality.<sup>126</sup>

This language demonstrates how nimbly Warren and Brandeis maneuvered around the concept of property. They confessed that their right of privacy resembles interests that are owned, like property, and conceded that one might even speak of them as a property interest. Nonetheless, Warren and Brandeis believed that the true principle in privacy law is the concept of the “inviolable personality.” Later in the article, they defined their proposal as placing “the right to privacy” in the context of “a part of the more general right to the immunity of the person, the right to one’s personality.”<sup>127</sup>

As we have noted, Prosser stripped out these high-level concepts. He transposed Warren and Brandeis’s work into a comfortable middle range, one light on theory but heavy on doctrinal distinctions for judges and practitioners to follow. At the same time, it is not especially clear what Warren and Brandeis meant by their “right of personality.” They did not define the term, and their footnotes are unhelpful on this score.<sup>128</sup> Their intention seems to have been to draw on continental philosophy to suggest that each person deserves protection against certain kinds of mental harms simply as a consequence of her status as a human. Precisely this idea proved to be highly influential in German law as well as European human rights jurisprudence.<sup>129</sup> As Robert Post keenly summarizes, moreover, the two authors sought to protect the “emotional integrity” due to each person and make damages available “for distress and anguish.”<sup>130</sup> It was then left to the community, as represented by the jury in privacy cases, to decide on the borders between unacceptable and acceptable invasions of privacy.<sup>131</sup>

For many years after Warren and Brandeis’s contribution, other authors on the subject of privacy also rallied around the notion of the right of personality as the basis for a privacy tort. The sway of this idea remained unchallenged, its deeper underpinnings largely unexamined, until Prosser introduced his four-part classification. Subsequent to Warren and Brandeis’s article, there are numerous mentions in U.S. privacy literature of privacy as a personality right. For example, in *Interests of Personality*, published in 1915,

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126. Warren & Brandeis, *supra* note 1, at 205.

127. *Id.* at 207.

128. See Bloustein, *supra* note 9, at 970 (“Unfortunately, the learned authors were not as successful in describing the interest violated by publicity concerning private lives as in saying what it was not.”).

129. HUW BEVERLEY- ET AL., PRIVACY, PROPERTY AND PERSONALITY 218 (2005). For a discussion of Article 8 of the European Convention on Human Rights and its protection of private life, see SOLOVE & SCHWARTZ, *supra* note 90, at 1004–43.

130. Post, *supra* note 122, at 647, 663–65.

131. *Id.* at 651–53. Post argues that Warren and Brandeis elaborated a legal system for privacy that set standards for the kind of respect that each member of the community owes to another. He develops this view in Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989), and revisits the topic in Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2001).

Roscoe Pound adopted the approach of Warren and Brandeis in discussing privacy and drew more explicitly on German sources.<sup>132</sup> In surveying the rights of personality, Pound included “the disputed legal right of privacy” as “[a]nother phase of the same interest.”<sup>133</sup> This right protected a “demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers.”<sup>134</sup> In 1929, a note in the *Harvard Law Review*, while conceding that the right to privacy “was an amorphous concept,” referred to it as one of the “interests of personality.”<sup>135</sup> As late as 1941, Louis Nizer, the famous American trial lawyer, briefly stated his view in an article in the *Michigan Law Review* that tort privacy served to protect “inviolable personality.”<sup>136</sup>

Finally, and in a last stand in the United States for the right of personality as the basis for a tort privacy right, Edward Bloustein in 1964 sought to develop “a general theory of individual privacy.”<sup>137</sup> The main title of his article describes its thesis, and its subtitle identifies the perspective that it seeks to refute: *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*. Thus, Bloustein self-consciously defined his tasks as countering Prosser. The job was also one of some urgency, Bloustein noted, because Prosser’s “influence on the development of the law of privacy begins to rival in our day that of Warren and Brandeis.”<sup>138</sup>

For Bloustein, the starting point in answering Prosser was with Warren and Brandeis and their view that privacy protects an “inviolable personality.”<sup>139</sup> Bloustein defined these terms in a way that turns out not only to capture the core of the views of Warren and Brandeis, but that accords with the German definition of the right of personality: “I take the principle of ‘inviolable personality’ to posit the individual’s independence, dignity, and integrity; it defines man’s essence as a unique and self-determining being.”<sup>140</sup> Bloustein’s problem with Prosser was that he missed the true essence of the harm in privacy cases, which was the violation of human dignity. Rather than emotional trauma, as Prosser would have it, the real problem was the “blow to human dignity, an assault on human personality.”<sup>141</sup> Privacy was needed, Bloustein

132. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 350–58, 362–64 (1915).

133. *Id.* at 362. Pound divided individual interests into three categories: (1) interests of personality, which he viewed as protecting “the individual physical and spiritual existence”; (2) “domestic interests”; and (3) individual economic life. *Id.* at 349.

134. *Id.* at 362.

135. Note, *The Right to Privacy Today*, 43 HARV. L. REV. 297, 300 (1929).

136. Louis Nizer, *The Right to Privacy: A Half Century’s Developments*, 39 MICH. L. REV. 526, 528 (1941).

137. See Bloustein, *supra* note 9, at 963.

138. *Id.* at 964.

139. *Id.* at 971.

140. *Id.*

141. *Id.* at 974.

wrote, to protect against “degradation of personality.”<sup>142</sup>

Bloustein also recognized a real difference if “the tort of invasion of privacy [were] taken to protect the dignity of man” as opposed to Prosser’s four tort interests.<sup>143</sup> For Bloustein, “[c]onceptual unity is not only fulfilling in itself,” but also is an “instrument of legal development.”<sup>144</sup> This argument has two components. The first, regarding the “fulfilling” nature of conceptual unity, is partially aesthetic and also has hints of Ockham’s Razor, which is the idea that shorter or simpler theoretical models are preferable.<sup>145</sup> The second is more outcome-oriented; Bloustein believed that centering privacy around human dignity would lead to different outcomes than Prosser’s four torts.<sup>146</sup> This result follows because “[t]he interest served by the remedy . . . enters into the complex process of weighing and balancing of conflicting social values which courts undertake in affording remedies.”<sup>147</sup> In other words, Bloustein believed that keeping the dignity interest squarely before courts would lead to their striking a different balance in specific cases.<sup>148</sup> Once courts realized that the harm in the specific instance before them was one to the plaintiff’s human worth, they would reach better results.

Bloustein’s prediction as to dissimilar judicial outcomes proves correct if we use German law as a point of comparison to U.S. privacy law. The orientation in the German tort law of personality around dignity has made a difference in specific cases. Moreover, in Germany, this starting point has led to the development of many more kinds of protected interests than exist in the United States.<sup>149</sup> One is also reminded of Bloustein’s prediction that if the privacy tort focused on human dignity instead of being bound to Prosser’s four categories, it would be freer to grow in response to “threats posed by some of the aspects of modern technology.”<sup>150</sup>

In the United States, nonetheless, the outcome of the Prosser-Bloustein debate has been a decisive victory for the Berkeley Dean. As Prosser proposed near the end of his article, “[I]t is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.”<sup>151</sup> In the half-century since Prosser’s article, U.S. tort privacy law has halted at the lines that he drew. This result is a tribute to Prosser’s creativity

142. *Id.* at 984. Bloustein adds that privacy served as a bulwark against a “violation of individual integrity.” *Id.* at 991.

143. *Id.* at 1004.

144. *Id.*

145. Marilyn McCord Adams, *Ockham’s Razor*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 629 (Robert Audi ed., 2d ed. 1999).

146. Bloustein, *supra* note 9, at 1004.

147. *Id.* at 1005.

148. *See infra* Part II.F and discussion of *Bonome* and *Esra*.

149. *See infra* Part II.C.

150. Bloustein, *supra* note 9, at 1005–06.

151. Prosser, *supra* note 1, at 423.

and persuasiveness.

In the next Section, we trace the path to acceptance of the right of personality in German law. Then we discuss how the tort right of personality has a binding effect, or *Drittwirkung*, on private disputes and state actions. Finally, we conclude that the use of a unitary value grounded in the fundamental worth of human dignity has led to the protection of more interests than those covered by Prosser's four privacy torts. In his 1964 article, Bloustein predicted such a result would follow from the use of a unitary concept of privacy. At the same time, moreover, the German emphasis on the protection of dignity has not led to radically weaker protection for the freedom of expression. The German right of personality permits publication of newsworthy matters and strong criticisms of others that impinge on privacy.

### C. The Road to Personality Rights in Germany

The paths to the creation of tort privacy protections in the United States and Germany were different. Contrary to the likely path that one might expect for a civil—rather than common—law system, the judiciary has played a more dramatic role in the development of the German right. This result goes against the grain; as Harry Krause once summarized, “The German legal system is a code system, and statutory treatment of legal subject matter is natural. Judicial legislation is anomalous.”<sup>152</sup> Yet, in Germany, the Federal Supreme Court and Federal Constitutional Court have played the most critical role in developing the right of personality through their interpretations of the Basic Law and the Civil Code, the *Bürgerliches Gesetzbuch* (or BGB).

As we have seen, Warren and Brandeis discussed “a right of personality” in their article in 1890. The concept of this right, however, dates back even further to Kantian notions of personhood and ideas of humanism from Western culture.<sup>153</sup> Nonetheless, many legal commentators in Germany throughout the

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152. Harry D. Krause, *The Right to Privacy in Germany—Pointers for American Legislation?*, 1965 DUKE L.J. 481, 484 (1965).

153. Immanuel Kant provides the foundation for the German dignity approach to privacy. See IMMANUEL KANT, *GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN* 64 (4th ed. 1797) (“A person and indeed every rational creature exists as a goal for itself, not merely as a means for optional use by this or that volition.”) (“der Mensch und überhaupt jedes vernünftige Wesen, existiert als Zweck an sich selbst, nicht bloß als Mittel zum beliebigen Gebrauch für diesen oder jenen Willen.”). The idea entered the discourse on private rights and tort law in the nineteenth century. Some authors then tried to draw on it to develop a strong personality-backed right in intellectual creations. See Karl Gareis, *Das juristische Wesen der Autorrechte sowie des Firmen- und Markenschutzes*, 35 BUSCHS ARCHIV 185, 187 (1877) (“capable of development are all those theories that interpret copyright as a ‘right of legal personality’”) (“entwicklungsfähig sind alle jene Theorien, welche das Urheberrecht als ein ‘Recht der Persönlichkeit’ auffassen”).

Other scholars, especially Otto Friedrich von Gierke, loosened the link to intellectual property law. These authors advocated a personality right which granted to the person a sphere of control over her own life formation. See 1 OTTO FRIEDRICH VON GIERKE, *DEUTSCHES PRIVATRECHT* 260 (1895) (suggesting that personality rights are “all the rights that guarantee the holder the enjoyment of a personal good or the triggering of a personal power over all others”)

nineteenth and the early parts of the twentieth century rejected the idea of a personality right as too broad and vague to become part of the law.<sup>154</sup> German courts throughout the early 1900s were also reluctant to allow the legal protection of personality, apart from certain statutorily protected interests, such as the interests safeguarded through copyright law.<sup>155</sup>

After World War II, German law developed a different view of personality rights. Equipped with knowledge of the horrors of Hitler's Germany, the framers of the Basic Law saw protection for dignity as the state's most fundamental role.<sup>156</sup> Human dignity is the guiding principle that influences the entire Basic Law as well as the general basis for the right of personality.<sup>157</sup> As the Federal Constitutional Court summed up this concept in 1977, the individual cannot be made the "mere object of the state."<sup>158</sup> Rather, "the intrinsic dignity of the person consists in recognition of him as an independent personality."<sup>159</sup> During the process of drafting the Basic Law, Carlo Schmid, one of the German framers, summed up the primacy of the individual in these terms, "The state is there for the individual's sake, the individual is not there for the state's sake."<sup>160</sup>

At this juncture, it is important to observe that this account of the development of personality rights in Germany differs notably from James Q.

("alle Rechte, die dem Berechtigten den Genuss eines persönlichen Gutes oder die Betätigung einer persönlichen Kraft allen anderen gegenüber gewährleisten").

154. See, e.g., I FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 335 (1840) (arguing that there is no such thing as a right to one's person). For a contemporary analysis, see Peifer, *supra* note 46, at 138–47; STEFAN GOTTWALD, DAS ALLGEMEINE PERSÖNLICHKEITSRECHT 9 (1996); Diethelm Klippel & Gudrun Lies-Benachib, *Der Schutz von Persönlichkeitsrechten um 1900*, in *Das Bürgerliche Gesetzbuch und seine Richter* 343, 356 (Ulrich Falk & Heinz Mohnhaupt eds., 2000); DIETER LEUZE, DIE ENTWICKLUNG DES PERSÖNLICHKEITSRECHTS IM 19. JAHRHUNDERT 68 (1962).

155. See OLG Hamburg, 6 GRUR 210 (1901); Reichsgericht, RGZ 51, 369; Reichsgericht, RGZ 41, 48, 50 – Richard-Wagner-Briefe; Reichsgericht, RGZ 156, 372, 374. In the case concerning Richard Wagner, the Reichsgericht found that there was no personality right violated by publication of letters written by Wagner.

156. CHRISTIAN BOMMARIUS, DAS GRUNDGESETZ: EINE BIOGRAPHIE 15–17 (2009); GOTTWALD, *supra* note 154, at 50–56.

157. In the words of Carlo Schmid, "The form of Article 1 must be carefully considered. It establishes, as it were, the general provisos for the entire catalogue of fundamental rights. In its systematic meaning, it is the true key to the whole." 4th session of the General Commission (Grundsatzausschuss) of Sept. 23, 1948, published in: *Der Parlamentarische Rat 1948–1949 – Akten und Protokolle*, vol. 5/1, 61, 64 (Kurt G. Wernicke & Hans Booms eds., 1993).

158. See, e.g., Federal Constitutional Court, BVerfGE 45, 187, 228 (finding unconstitutional a lifelong imprisonment without chance of parole). In this case, the Federal Constitutional Court held: "It conflicts with . . . human dignity to make humans into the mere object of the State. The sentence, 'The human must always remain a goal unto himself' is effective in unrestricted manner for all areas of law."

159. *Id.*

160. "Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen." The drafters of the German Basic Law had intended to write this idea into the Constitution, but later chose the more abstract formula of the current Article 1's first sentence: "Human dignity shall be inviolable." See KLAUS STERN, STAATSRECHT, vol. IV/1, 9, 13 (2010).

Whitman's analysis in his important article, *Two Western Cultures of Privacy*.<sup>161</sup> Whitman perceptively traces the elements of personality protection that already existed in German law before and after the enactment of the Civil Code. He also provides a richly detailed historical reading of the social, cultural, and legal aspects of European privacy interests. Where we disagree with Whitman, however, is at his "delicate point," which is the "painful" matter that he raises concerning the protection of personality by the Third Reich.<sup>162</sup> Whitman interprets the relevant legal history as indicating that "Nazi law directly prefigured the law of postwar Germany."<sup>163</sup> He does so against the standard interpretation by German legal scholars of the acceptance of personality interests in the postwar period as a profound reaction to the terrible rule of the National Socialists. In this matter, we agree with the conventional wisdom.

Whitman correctly points to the National Socialist Party's efforts to develop a "right of personality" based on the honor of the German people, or *Volk*.<sup>164</sup> Yet, the proposed legal interest of the National Socialists was racially based and communal, which is one reason that we view the Basic Law as marking such a decisive break with the advocacy of a right of personality in the Third Reich. The National Socialists envisioned a community-based, not an individual-based, personality interest.<sup>165</sup> Just as Hitler's jurists excluded foreigners, Jews, and racially unworthy people from the safeguards of the personality interest, even members of the German *Volk* could lose its protection if they failed the requirements of their racially-defined community.<sup>166</sup> National Socialist leaders in fact used the concept of "racial honor" (*Volksehre*) as a means to control political and social behavior and make that behavior conform to the collective interests defined by Hitler and his henchmen.<sup>167</sup>

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161. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 *YALE L.J.* 1151, 1180–89 (2004).

162. *Id.* at 1187.

163. *Id.* at 1188.

164. *Id.* at 1187–88.

165. See GOTTWALD, *supra* note 156, at 50–56 (arguing that the National Socialistic order was directed against individualism because a weak individual could be much better integrated into the collective organization of the state and its substructures).

166. Thus, German officials began as early as 1934 to decline to perform marriages between Germans and those who did not belong to the "Aryan" race. For a discussion of why such marriages were "immoral, through and through," see *Amtsgericht Bad Sülze*, 64 *JW* 2309 (1935). The Nuremberg Race Laws, adopted on Sept. 15, 1935, provided a statutory basis for exclusion on racial grounds.

167. Heinz Hermann provides an illustration of this perspective in his dissertation, *DAS ALLGEMEINE PERSÖNLICHKEITSRECHT* (1935). Hermann writes:

The good of the whole Volk comes first. The right of personality has to comply with this doctrine. . . . According to this idea, each person has a specific value for the community of the Volk. This value comprises itself and permits itself to some extent to be calculated according to a person's cultural, economic, and moral achievements. The negative side is also to be taken into account, i.e. this value decreases or disappears entirely when the person is active in a fashion antagonistical or harmful to the Volk. . . .

The contrast with the postwar approach could not be greater. The Basic Law grants protection of dignity to all humans (*Menschen*) due to their unique individual status rather than their racial identity. The Basic Law also declares in its critical Article 1(1) that human dignity is “inviolable,” which means that the State cannot take it away or destroy it.<sup>168</sup> Whitman’s discussion of the concept of the “universal German right to protection of personality” during the Third Reich boldly revisits a largely forgotten chapter in legal history.<sup>169</sup> Nonetheless, the Basic Law’s concept of human dignity is best seen as a decisive break with that period’s concept of personality in law.

German courts, meanwhile, took additional steps to develop a right of personality in the postwar period and to solidify the notion of a right of privacy ground in the dignity of the individual. The most critical of these occurred through a series of pivotal decisions of the Federal Supreme Court and the Federal Constitutional Court.<sup>170</sup> The German Civil Code, enacted in 1900, does not contain a right of personality. In the groundbreaking *Schacht* judgment of 1954, the Federal Supreme Court read such a right into the Civil Code.<sup>171</sup> The Federal Supreme Court declared that the enactment of the Basic Law’s Articles 1 and 2 meant that the right of personality was “another right” in the sense of the Civil Code.<sup>172</sup> The Federal Supreme Court identified an interest in “the right of the individual to be respected in his dignity as a human being and to develop his individual personality.”<sup>173</sup>

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War is to be declared on the viewpoint that, “Each person is an equal person.”

*Id.* at 26.

168. Matthias Herdegen, *in* Grundgesetz, Art. 1, note 73 (Theodor Maunz et al. 2009); see Bommaris, *supra* note 156, at 15–17 (describing the centrality of the concept of the inviolability of human worth to the Basic Law and its framers).

169. *Id.* at 1188.

170. For an early comparative article on these developments, see Krause, *supra* note 152. For a later analysis, see Eberle, *supra* note 46, at 963. For descriptions of these developments in the German legal literature, see CHRISTIAN BUMKE & ANDREAS VOSSKUHLE, CASEBOOK VERFASSUNGSRECHT 76–84 (5th ed. 2008); HEINRICH HUBMANN, DAS PERSÖNLICHKEITSRECHT (2d ed. 1967).

171. Federal Supreme Court BGHZ 13, 334 = 7 NJW 1404 (1954).

172. *Id.*

173. Federal Supreme Court, 7 NJW 1404, 1405 (1954). In *Schacht*, a newspaper had published a communication that it received from an attorney as a letter to the editor, which it was not, and had only published parts of the letter. As a result, the newspaper created a misleading impression, namely, that the attorney was expressing his own views regarding a controversial person rather than simply making legal claims on behalf of his client. In the United States, this incident might be considered a false light case. In Germany, it has that element as well, but it is largely conceptualized as a case about human dignity, which is the organizing concept behind all personality right cases. As a result, the Federal Supreme Court focused on the fact that the attorney had not consented to the form of the publication—that is, its highly edited and misleading form. Moreover, the editor of the newspaper had not offered any reason for his behavior and had refused to either print a corrected statement about the attorney’s clients, or explain why he would not do so. The court held that the newspaper had to print the full statement that the attorney sent to it as part of his representation of his client.

In case after case following *Schacht*, however, the Federal Constitutional Court has

In 1958, in the “Gentleman Rider” (*Herrenreiter*) case, the Federal Supreme Court went further than the *Schacht* holding and identified a damage remedy for personality rights within the Civil Code.<sup>174</sup> In its opinion, the Federal Supreme Court stated that just as the Civil Code provides a right of damages against those who rob others of physical freedom, it should also be read as protecting against injury to the “undisturbed exercise of decision-making.”<sup>175</sup> The portrayal of the plaintiff without his permission in an ad for a medicine to aid potency represented a “disregard of this right” to “freedom of self-determination over his personal sector of life.”<sup>176</sup> The court concluded that “the protection of ‘inner freedom’” was at stake in the case.<sup>177</sup>

Finally, in its 1973 *Soraya* opinion, the Federal Constitutional Court seconded these decisions of the Federal Supreme Court.<sup>178</sup> *Soraya* concerned the publication of an invented interview with the former wife of the Shah of Iran. In upholding the awarding of damages to the plaintiff, the Federal Constitutional Court found that Articles 1 and 2 of the Basic Law protected, “above all, . . . a person’s private sphere, i.e. the sphere in which he desires to be let alone, to make . . . his own decisions, and to remain free from any outside interference.”<sup>179</sup>

#### *D. Constitutional Rights Against Private Parties and a Prolific “Source Right”*

These judicial decisions were controversial at the time. Commentators questioned whether the high courts had exceeded the appropriate limits of judicial power and disregarded the need for parliamentary supremacy.<sup>180</sup>

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emphasized that the right of personality does not permit an individual to be depicted before the public only as he wishes, or in a way that “is pleasant for him.” Federal Constitutional Court, 63 NJW 1587, at para. 24 (2010); Federal Constitutional Court, BVerfGE 82, 236, 269; Federal Constitutional Court BVerfGE 97, 125, 149 – Caroline von Monaco. Therefore, *Schacht* and these other cases are not about a person’s control of her public image, but about the correction of facts that are gravely misleading about the person.

174. Federal Supreme Court, BGHZ 26, 349 = 1958 NJW 827.

175. Federal Supreme Court, 1958 NJW 827, at 830.

176. *Id.*

177. *Id.*

178. Federal Constitutional Court, BVerfGE 34, 269 = 26 NJW 1221 (1973).

179. Federal Constitutional Court, BVerfGE 34, 269, 281. *See* Federal Constitutional Court, 26 NJW 1221, 1223 (1973) (“The systems of values of the Basic Law finds its focal point in the free human personality and his dignity, which develops in the social community. It is due respect and protection from all points of governmental power (Art. 1 and 2 para. 1 GG). Such protection extends to the private sphere of humans, the sector in which a person can remain alone, to reach decisions in his own responsibility, and to be free from invasions of all kinds.”).

180. *See* Karl Larenz, *Verhandlungen des Deutschen Juristentages*, vol. 42/II part D, 34, 36 (reporting on the German Legal Association’s Annual Meeting in 1959). Larenz argues that the creation of a general personality right and compensatory damages for a violation of this interest touches upon a matter of legal policy, not of legal doctrine. Therefore, according to Larenz, the decision to create a right of personality should belong to the Parliament and not the courts. For a description of this German debate as well as a description of a never-enacted proposal to amend the German Civil Code to include a statutory privacy right, see Krause, *supra* note 152, at 489–

Today, a half-century later, these landmark decisions about personality rights are uniformly accepted.<sup>181</sup> We now wish to make three additional points about these interests in order, later in this Article, to explore critical differences with the American privacy tort.

First, German law treats the general personality right as a “source right” (*Quellrecht*) that has proven a fertile source of a related series of legal rights. Though there is one unitary concept of tort privacy in Germany, more than four categories follow from it. Second, many—albeit not all—of these resulting categories can be re-sorted and placed comfortably into one of the Prosser categories. Third, despite the possibility of aligning these categories, there are still some significant differences between the approaches in Germany and the United States. One of the most important is that German personality interests have a constitutional dimension that applies both to the government’s behavior and to that of private parties. In contrast, American tort rights in privacy generally lack such a basis in constitutional law.

As for the initial point, the general personality right is a “source right” that has proven a fertile source for the creation of a related series of legal rights.<sup>182</sup> In contrast to Prosser’s vision, German law has a single high-level concept of *why* privacy should be protected, and this concept binds all of the privacy torts. The underlying unity of this concept continues to tie future jurisprudential developments to the fundamental constitutional requirement that the State protect each person’s dignity. Yet, this interest protects personality against more than just a restricted set of actions and harms. Like the concepts of property or liberty, the personality right is elastic and open to further development. It has led to the creation of a long list of additional interests grounded in dignity and personality. Generally, the right has been used to protect honor and reputation, privacy in a spatial sense (a “*Privatsphäre*,” or a private area), individuality, and commercial uses of personality.<sup>183</sup>

The second point is that many of the cases interpreting the personality right can also be re-sorted and placed comfortably into the Prosser categories. One might view the *Schacht* decision of 1954 and the *Soraya* decision of the Federal Constitutional Court as false light cases because the gist of the harm in both cases was in the use of information about the plaintiffs to create a misleading impression about them. German courts have also ruled on cases that

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181. See Roland Rixecker, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Anhang zu § 12 note 11 (Kurt Rebmann & Franz Jürgen Säcker & Roland Rixecker eds., 5th ed. 2006) with further references.

182. See Federal Supreme Court, BGHZ 24, 72, 76 = 10 NJW 1146, 1147 (1957) (protecting medical records) (the interest at stake is a “source right,” or a “framework right” (*Rahmenrecht*)); Karl Larenz, *Das ‘allgemeine Persönlichkeitsrecht’ im Recht der unerlaubten Handlungen*, 8 NJW 521, 525 (1955) (“source right”).

183. Baston-Vogt, *supra* note 81; Peifer, *supra* note 46.

an American lawyer would consider “intrusion upon seclusion” actions.<sup>184</sup> As an example, in 1957, the Federal Supreme Court found for the defendant in a case concerning the use of a snapshot from a hidden camera in circumstances where the person photographed would have a reasonable expectation of privacy.<sup>185</sup> Moreover, German law protects one’s image and voice against certain kinds of use in advertising.<sup>186</sup> This final interest has led to development of a German equivalent of both the right of appropriation and right of publicity.<sup>187</sup> While German Law has another way of classifying these decisions, they demonstrate judicial logic and outcomes significantly similar to the decisions reached through Prosser’s approach.

Yet, there are also significant differences. One is that the German constitution’s fundamental rights, including its personality rights, limit the actions of private parties. In contrast, the U.S. Constitution’s fundamental rights generally only protect the individual against the state’s activities.<sup>188</sup> In German legal terminology, the American rights are *Abwehrrechte*, or “rights of defense,” solely against governmental activity.<sup>189</sup> Yet, the German constitution is meant to create an “objective order of values” that is applicable to actions of private parties as well as to those of the government.<sup>190</sup> German constitutional law has a concept of “*Drittwirkung*,” which means that private parties can rely on certain constitutional rights in cases against other private parties.<sup>191</sup> *Esra* is a clear example of *Drittwirkung*. In *Esra*, the Federal Constitutional Court directly applied the plaintiffs’ constitutional right of personality and evaluated it against the artistic freedom of the author and his publisher.

184. See, e.g., Federal Constitutional Court, BVerfGE 101, 361 – Caroline von Monaco II.

185. In this case, journalists interviewed a landlord who had refused a lease to a homecoming prisoner of war. Federal Supreme Court, BGHZ 24, 200 = 10 NJW 1315 (1957). During the interview, the landlord was photographed with a hidden camera. The photo was then used to illustrate a press article critical of his behavior.

186. See, e.g., Federal Supreme Court, 50 NJW 1152 – Bob Dylan (1997); Federal Supreme Court, 60 NJW 689 – Rücktritt des Finanzministers (2007).

187. We examine these interests in more detail, *infra* Part III.

188. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1543 (6th ed. 2009) (“It is a commonplace that the commands of the Constitution are directed to governmental entities, not to private parties. . . . When private individuals act, and when private companies act, they are generally free from constitutional restrictions.”).

189. Cf. Federal Constitutional Court BVerfGE 7, 198 – Lüth. For a discussion and excerpts in English, see DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 361–69 (2d ed. 1997).

190. This is particularly true for the assessment of human dignity. See Günter Dürig, *Der Grundrechtssatz von der Menschenwürde*, 81 AÖR 117, 119 (1956) (asserting that human dignity must be used in the interpretation of any other constitutional value, and any tort claim has to be interpreted to give due respect to human dignity).

191. Federal Constitutional Court, BVerfGE 7, 198, 204 (interpreting the basic rights as part of an objective order of values that also influence the interpretation of private law); Günter Dürig, *Grundrechte und Zivilrechtsprechung*, in *Festschrift für Nawiasky*, 157, 176–78 (Theodor Maunz ed., 1956); Matthias Herdegen, in *Grundgesetz*, Art. 1 Abs. 3, note 59 (Theodor Maunz et al. eds., 2005).

We can contrast the approach in *Esra* with that in *Bonome*, where the only constitutional interest at stake was the First Amendment's guarantees of free expression. The privacy interests of Kaysen's boyfriend in *Bonome* were only anchored by state statutory privacy law.<sup>192</sup> In *Esra*, however, the Federal Constitutional Court was also obliged to evaluate the constitutional dimensions of the plaintiffs' personality interests. The German Court then assessed these rights against the guarantee of free expression in Article 5 of the Basic Law. When private parties invade privacy, a significant doctrinal aspect of this comparative difference is that courts in the United States look at only one value, freedom of expression, as part of their constitutional analysis.

One might think of these differences, in sum, as an even constitutional balance at the start of the judicial analysis in Germany and a constitutional tilting of the balance away from privacy in the United States. These different starting points do not necessarily lead, however, to remarkably different results in the comparative outcomes in most privacy cases in the two countries. In the next Section, we explore how German courts apply the right of personality in privacy tort cases. Unlike the dramatic results in *Esra*, German privacy tort cases exhibit a high degree of convergence with many similar cases in the United States.

#### *E. The Judicial Methodology of German Tort Privacy Cases*

For Prosser, a systematization of existing privacy cases provided a rational way to identify zones of privacy. He started with a series of harms and problematic activities and began, industriously, to classify cases. The difference in the German approach is that it employs a single principle, the dignity basis of the right of personality, to derive a series of rules. Once the German legal order accepted that there was a general personality right, however, it had to define the rules that followed from this tort. Judges and legislators had to work together to build a system that sorted cases into the categories of rights to be protected. Despite these different starting points, an examination of the German methodology for judicial decision making shows why the two legal systems sometimes reach quite similar outcomes in certain cases.

German courts have an established three-step approach in cases involving the right of personality. First, judges decide which of the personality interests is at stake.<sup>193</sup> Second, the judges consider whether a possible justification for the allegedly infringing behavior exists.<sup>194</sup> Acceptable justifications include a legitimate public concern in the topic due to the newsworthiness of the matter reported, or some other factor, such as the plaintiff's consent. Third, courts

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192. In California, however, the state constitutional right to privacy does extend to the private sector. See *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 641-49 (Cal. 1994).

193. See, e.g., Federal Supreme Court, 53 NJW 2195, 2197 - Marlene Dietrich (2000).

194. See, e.g., Federal Supreme Court, 62 NJW 2888, 2891 - Lehrerbewertungen im Internet (2009).

generally balance competing interests through an analysis that evaluates the nature and quality of the infringing activity, the kind of publication, and certain subjective factors, such as the malice or intent of the defendant.<sup>195</sup> This balancing approach also includes a proportionality test.<sup>196</sup> Among the elements of this test is scrutiny of whether the invasion of the personality right is excessive in comparison to the benefits that it will achieve.<sup>197</sup>

Note, however, that in cases such as *Esra* that involve “a core area of life formation,” no such balancing of interests will take place.<sup>198</sup> Rather, the third stage of analysis will involve an assessment of whether a “significant impact” on that core interest occurred. This area of privacy protection illustrates an important difference from the American approach, and we return to it below.

Thus, with the exception of the “significant impact” requirement in tort privacy cases involving highly intimate matters, German law generally requires courts to balance the interests present in tort privacy cases. As an illustration, in 2009, the Federal Supreme Court refused to issue a general prohibition (*Generalverbot*) on the publication of photographs of the children of Franz Beckenbauer, a famous and successful soccer player, coach, and businessman.<sup>199</sup> While noting the strong constitutional protections for the personality rights of children, the court also observed, “The question of the permissibility of the publication of a picture requires in every individual case a weighing of the information interest of the public and the interest of the pictured party in the protection of his private sphere.”<sup>200</sup> This balancing test also applies in the case of children. The *Beckenbauer* court noted as well that “children, especially those of celebrities today, are ‘presented’ in such a fashion in the public that a predominant interest in the information is to be affirmed.”<sup>201</sup> With these words, the Federal Supreme Court left the door open for balancing the interests in future cases involving photographs of celebrities’ children, such as the Beckenbauer children.

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195. *Id.*

196. *See, e.g.*, Federal Supreme Court, 99 GRUR 396, 399 – Polizeichef (1997).

197. *See* Federal Constitutional Court, BVerfGE 23, 127, 133; Federal Constitutional Court, BVerfGE 61, 126, 134. For a scholarly discussion, see Heinrich Hubmann, *Grundsätze der Interessenabwägung*, 155 AcP 85 (1956).

198. Federal Constitutional Court, 39 IIC 606, at para. 88 (2008).

199. Federal Supreme Court, 112 GRUR 173 (2010).

200. *Id.* at 174.

201. *Id.* at 175. The Federal Supreme Court analyzed a number of possible situations in which publication of the photographs would be permissible. For example, the parents might grant consent for a public appearance of the children in a way that created justified public interest. Moreover, the court observed that even if the publication of the children’s pictures was only permissible in such limited circumstances, it could not restrict freedom of press through a blanket prohibition on publication until the children turned eighteen. *Id.*

### F. *The Two Case Studies Revisited*

We now return to our two cases, *Bonome* and *Esra*. *Bonome* follows Prosser's general approach and also illustrates his views regarding the need for a large exception for newsworthiness. Conversely, the *Esra* case, as Bloustein anticipated, shows how a dignity approach can sometimes lead to different results in a privacy case than Prosser's privacy tort. Thus, the case studies illustrate an area of divergence within the larger context in which the two legal systems frequently converge in their results in tort privacy cases. We trace additional areas of convergence in this Article's final Part, which considers the future of tort privacy in Germany and the United States. In the meantime, we remain in the present and turn to *Bonome* to demonstrate the continuing heavy influence of Prosser on American tort privacy law.

#### 1. *Bonome and Newsworthiness*

Prosser largely rejected liability in tort privacy for matters of public interest reported by the media. Due to Prosser's strong belief in liberal flows of information, moreover, his article reflects a strong undercurrent of skepticism about the legal protection of privacy.<sup>202</sup> He warned that scholars had not given sufficient consideration to the "dangers" posed by the growth of the privacy torts. In particular, they missed "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."<sup>203</sup> Prosser emphasized that safeguards for freedom of the press are deeply rooted in American law and sought to solidify the law's deferential approach to public reports of a wide variety when they conflict with privacy.<sup>204</sup> Prosser did so through three steps in his article and two further steps taken in the Restatement.

First, Prosser developed a broad definition of news as simply anything that is noteworthy. In his approach, news consists of "all events and items of information which are out of the ordinary humdrum routine."<sup>205</sup> If an event or person is somehow different from the ordinary, reporting about the matter will generally be legally privileged and beyond the constraints of any personal privacy interest. Prosser did not merely restrict newsworthiness to the unusual. He also noted that the "web of news and public interest" can extend to "interesting phases of human activity in general" and so much more.<sup>206</sup> American law has followed this path, and, as Richard Epstein has commented, accepts "the prosaic sources of newsworthiness."<sup>207</sup> In other words, judges will

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202. See Prosser, *supra* note 1, at 410–22.

203. *Id.* at 422.

204. See ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995).

205. Prosser, *supra* note 1, at 412.

206. *Id.* at 413.

207. EPSTEIN, *supra* note 90, at 1160.

consider a report on a person newsworthy simply because the subject is so typical or representative.<sup>208</sup> There is no simple refuge in ordinariness.

Second, Prosser accepted an inherently circular definition of newsworthiness that defers to the media's judgment. Prosser stated, "To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news."<sup>209</sup> The newsworthiness of a report can be demonstrated simply by its appearance, well, in the news.<sup>210</sup>

Third, Prosser was wary of the judiciary developing "a power of censorship over what the public may be permitted to read."<sup>211</sup> This point builds on his deferential approach to the media's definition of newsworthiness. Here, Prosser found a further ground for legal deference to the press: in his view, it is essential in a democratic order that judges not arrogate editorial power to themselves.<sup>212</sup>

Fourth, the tendency to favor the informational requirements of the public over privacy is further strengthened by an additional requirement in the Restatement not found in Prosser's article. In *Privacy*, Prosser argued for protection against reporting details of private life, the revelation of which an ordinary person would find offensive or otherwise objectionable. The Restatement further narrows the scope of this privacy protection; in its formulation of the torts of public disclosure and intrusion upon seclusion, it reaches only intrusions or revelations of matters that are "highly offensive."<sup>213</sup> This single word—*highly*—raises the bar for a privacy action higher than that in Prosser's article.<sup>214</sup>

Fifth, Prosser observed that the test for the permissibility of reporting private information should be whether it is of "legitimate public concern."<sup>215</sup> He suggested that there is a rough relation between the importance of the public

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208. Judge Richard Posner's opinion for the Seventh Circuit in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232–35 (7th Cir. 1993), illustrates this point. Judge Posner found that Luther Haynes's life story was newsworthy, despite his claims of privacy, simply because it illustrated elements of the large scale migration beginning in the 1940s of African Americans from rural areas of the South to urban areas in the North.

209. Prosser, *supra* note 1, at 412.

210. For the newsworthiness requirement, see generally SOLOVE & SCHWARTZ, *supra* note 90, at 119–31. For two perspectives on deference to the media in determining what is newsworthy, compare Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protection Against Disclosure*, 53 DUKE L.J. 967 (2003) (opposing deference to media) with Eugene Volokh, *Freedom of Speech and Information Privacy*, 52 STAN. L. REV. 1049, 1089 (2000) (favoring deference to media).

211. Prosser, *supra* note 1, at 413.

212. *Id.* at 413–14.

213. RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977).

214. The "highly offensive" standard can prove difficult for plaintiffs. Nonetheless, some plaintiffs have met it. For a list of disclosures that have met this requirement, see MCCARTHY, *supra* note 90, at 564–67.

215. Prosser, *supra* note 1, at 417.

figure and the occasion for the public interest, on one hand, and the nature of the private facts that can be revealed, on the other. As a result, “there is very little in the way of information about the President of the United States, or any candidate for that high office, that is not a matter of legitimate public concern.”<sup>216</sup> In the Restatement’s public disclosure tort, this concern is represented by a formal requirement that only a matter that “is not of legitimate concern to the public” can furnish a basis for a tort action.<sup>217</sup>

*Bonome* shows that Prosser’s codification of the privacy tort proved influential in part because of his fine-tuned sense of the elements to synthesize from existing case law and how much of each ingredient to include. As White writes in his *Tort Law in America*, “one must add prescience” to the list of “the sources of Prosser’s influence as a Torts theoretician.”<sup>218</sup> White’s two examples in this regard are the involvement of Prosser in the development of products liability as well as his views, just noted, regarding the “dangers” of expanding privacy in light of the needs of the public for information.<sup>219</sup> Prosser built significant deference to the press and strong safeguards for freedom of expression into his torts. In turn, *Bonome* reflects the same worldview as Prosser’s. It is certainly not a case about dignity rights.<sup>220</sup>

In language that we have already cited, Prosser observed how the “web of news and public interest” can include “interesting phases of human activity in general.”<sup>221</sup> All this formulation requires “is some logical connection between the plaintiff and the matter of public interest.”<sup>222</sup> These arguments are a perfect expression of *Bonome*’s approach. The court’s holding in *Bonome* turns on a view, as in the Prosser article and Restatement, that the key test should be the relevancy of the matter revealed to issues of “legitimate public concern,” and that the law should also take a generous approach to assessing which matters were fit for public attention.<sup>223</sup> It decided that the information about the couple’s “sexual affairs” was “included to develop and explore . . . broader topics . . . of legitimate public concern.”<sup>224</sup> These topics were, first, “the way in

216. *Id.*

217. RESTATEMENT (SECOND) OF TORTS § 652D(b) (1977).

218. WHITE, *supra* note 89, at 176.

219. *Id.* at 168–76.

220. Interestingly enough, this case cites not only Prosser’s article but also two key articles that present a dignity vision of privacy: Pound, *supra* note 132, at 400 and Warren & Brandeis, *supra* note 1. See *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*3–4 (Mass. Dist. Ct. Mar. 3, 2004).

221. Prosser, *supra* note 1, at 413.

222. *Id.* at 414. Prosser also argues that is understandable for courts to allow “the benefit of the doubt” regarding the permissibility of a disclosure. *Id.* at 413.

223. The *Bonome* court quotes the Restatement’s Section 652D, Comment j regarding “giving information to the public for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.” *Bonome*, 2004 WL 1194731, at \*5 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (1977)).

224. *Id.* at \*6.

which Kaysen's undiagnosed physical condition impacted her physical and emotional relationship with 'her boyfriend,'" and, second, "the issue of when undesired physical intimacy crosses the line into non-consensual sexual relations in the context of her condition."<sup>225</sup>

To be sure, Prosser also argued in *Privacy* that "[s]ome boundaries . . . still remain" and these included the placing of information about "private sex relations" into "the public domain."<sup>226</sup> As a result, we cannot know precisely what the Berkeley Dean would make of the privacy implications of Kaysen's *The Camera My Mother Gave Me* and *Bonome*. At the same time, as Prosser put information about "private sex relations" as beyond the legitimate public interest, he strongly advocated ongoing protection of the "jealous safeguards thrown about the freedom of speech and of the press" as well as a recourse to "'ordinary sensibilities,' or the 'mores' of the community as to what is acceptable and proper" in privacy cases.<sup>227</sup> The level of revelation in memoirs has become considerably more explicit than at the time Prosser wrote, and he might, therefore, accept the "logical connection" test being applied even to information about "private sex relations." Moreover, the U.S. Supreme Court has acted subsequently to Prosser's publication, and on multiple occasions, to bolster those safeguards about freedom of speech, about which he was so concerned.

Seven years after the publication of Prosser's article, the Supreme Court identified strong constitutional limits on the false light tort. In *Time, Inc. v. Hill*, the Supreme Court found that individuals must accept "the risk of . . . exposure" to the public as "an essential incident of life in a society which places a primary value in freedom of speech and of press."<sup>228</sup> As a specific doctrinal matter, the Court decided that the First Amendment restricted the scope of the false light tort. It extended its famous holding in *New York Times v. Sullivan*, which was made in the context of defamation, to this privacy tort. In *Time, Inc. v. Hill*, it held that "false reports of matters of public interest" could not be penalized in tort law without "proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."<sup>229</sup> In a similar fashion, and as regards the public disclosure tort, the Supreme Court's later decisions in *Cox Broadcasting v. Cohn*, *The Florida Star v. B.J.F.*, and *Bartnicki v. Vopper* have used the First Amendment to place strong

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225. *Id.*

226. Prosser, *supra* note 1, at 417.

227. *Id.* at 422–23.

228. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

229. *Id.* at 388. The *Hill* Court also stated, in language reminiscent of Prosser,

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials.

*Id.*

limitations on a second privacy tort.<sup>230</sup>

## 2. *Esra and a Unity Concept for Privacy Protection*

Returning now to *Esra*, we see a distinctly different approach than that of Prosser and American law. The Federal Constitutional Court in that case used a unitary concept of tort privacy. The idea of a personality right in *Esra* made all the difference; as we have noted, it was the absence of the consent from the former girlfriend that was critical to the Court's decision. At the same time as the unitary concept made a difference for the former girlfriend, the first plaintiff, the Federal Constitutional Court denied relief for her mother, the second plaintiff. We will now discuss how this aspect of the case, as well as the Court's denial of damages, represents an example of convergence between the German and American legal systems. We then conclude this Section by discussing how the respective privacy torts of Germany and the United States each reflect elements of the larger legal and culture systems in which they function and are successful within their own systems.<sup>231</sup>

Regarding the plaintiff girlfriend, the Federal Constitutional Court's use of a dignity theory of privacy meant that her interest trumped that of the author. Since the girlfriend had not granted permission for the publication of the book, the author's revealing of intimate details about a highly personal relationship degraded her to the status of an object for his own self-realization. The Court also found it of critical significance that the case involved a serious infringement of the personality right's "core area of private life."<sup>232</sup> In such cases, as we have noted, German judges do not balance the public's interest in information against the invasion of privacy.

Information about the core area of private life is subject to absolute protection.<sup>233</sup> One of the most important steps in the development of the concept of the "inviolable area" came in a Federal Constitutional Court case concerning the use of diary-like entries by a criminal defendant.<sup>234</sup> The Federal Constitutional Court acknowledged that there were circumstances in which certain kinds of diary entries might be used in a criminal trial. Moreover, the mere presence of information in a diary did not guarantee any safeguards for it. Information about planning a crime, for example, would not be protected. At

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230. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that the press cannot be sanctioned for publishing truthful information contained in court records open to public inspection); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (maintaining that publication of truthful information, lawfully obtained by a newspaper, may be punished only when narrowly tailored to a state interest of the highest order); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that the First Amendment protects information illegally obtained from non-governmental sources).

231. We further develop this theme in Part III, *infra*.

232. Federal Constitutional Court, 39 IIC 606, at para. 88 (2008).

233. Federal Constitutional Court, BVerfGE 119, 1, at para. 88 = 39 IIC 606, at para. 88 (2008).

234. Federal Constitutional Court, BVerfGE 80, 367 = 43 NJW 563 (1990).

the same time, the Federal Constitutional Court declared, "Even serious public interests cannot justify encroachments of this area; an evaluation according to the principle of proportionality does not take place."<sup>235</sup> The Court called for analysis, on a case-by-case basis, of whether a matter belonged to this "inviolable area of private life formation."<sup>236</sup>

The Federal Constitutional Court in *Esra* even takes a final step that an American court is unlikely to ever take: it bans the publication of a novel on privacy grounds. In contrast, American courts will engage in a balancing approach even in cases involving highly sensitive information. *Bonome* illustrates this approach.<sup>237</sup> The *Bonome* court reasoned that the author had a First Amendment interest in telling her life story and the public had a legitimate interest in how a person's physical difficulties would affect her relationship with her boyfriend, including highly intimate aspects of it.<sup>238</sup> Thus, the *Bonome* court assessed the connection in Kaysen's book between a matter of public concern and the harm to the plaintiff. Ultimately, it adopted an approach typical for American courts when dealing with intimate personal information: it considered whether the private harm was disproportionate to the public value of the information.<sup>239</sup> Because Kaysen did not mention the plaintiff's name in the book, the court found that Bonome was not subject "to unnecessary publicity or attention."<sup>240</sup> The court also concluded, "The realm of people that could identify Bonome as the boyfriend are those close personal friends, family, and business clients that knew of the relationship."<sup>241</sup> The harm that Bonome suffered within this group might be "arguably odious" and the disclosure of the intimate information might have "breached a fundamental trust of their relationship."<sup>242</sup> Nonetheless, the harm to Bonome was not disproportionate in light of the legitimate subject matter discussed and the public's interest in his personal story.<sup>243</sup>

The German system is also sensitive to freedom of expression. In decision after decision, the Federal Supreme Court and Federal Constitutional Court have protected critical public discussion. At this point, we can explore a final aspect of the Federal Constitutional Court's decision in *Esra*, namely the portrayal of Lale, the mother of the girlfriend in the novel. In the novel, Biller is relentless in his hostility toward Lale, and the resulting portrait is highly negative. Nonetheless, the Federal Constitutional Court read the book as it felt

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235. *Id.* at 373 (referring to BVerfGE 34, 238, 245).

236. *Id.* at 374.

237. *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*1, \*6-7 (Mass. Dist. Ct. Mar. 3, 2004).

238. *Id.* at \*5-7.

239. *Id.*

240. *Id.* at \*7.

241. *Id.*

242. *Id.*

243. *Id.* at \*5-7.

any literate reader would and found strong indices of fictionalization in this portrait of Lale.<sup>244</sup>

Recall the multifaceted sliding scale used in German privacy law to evaluate novels in which fact and fantasy are combined. Using this standard, the Federal Constitutional Court found the author's depiction of the second plaintiff to be adequately distanced from reality. It stated:

[A] literate reader will be capable of realizing that the text is not limited to being a report-like description of real persons and events, and instead that there is a second level behind this realistic level. . . . It is this fictionalization of the figure of Lale that prevents the novel degenerating into an abuse of the second plaintiff.<sup>245</sup>

As for our own views of this matter, we remain unconvinced by the court's assessment of the reaction of its imagined "literate reader." A reader of Biller's novel might easily reach a far different conclusion concerning the relative distancing in the author's treatment of the two characters. Indeed, in a vigorous dissent to *Esra*, Justice Hohmann-Dennhardt dismissed the majority's approach as "a subjective impression seen through a judge's reading glasses."<sup>246</sup> Looking through our own reading glasses, we would agree with the dissenting Justice on the matter of the relative fictionalization of the portraits.<sup>247</sup>

Nonetheless, it is important to note that the Federal Constitutional Court's focus is on the "risk that personality rights can be used to suppress public criticism and the discussion of matters of importance for the public and society."<sup>248</sup> In this part of its opinion, it sounded a note that is deeply reminiscent of *Bonome*. The second plaintiff in *Esra* lost her action because of the need for public debate and the importance of artistic freedom. It is for similar reasons that the Federal Supreme Court denied the plaintiffs' claims for damages from the author and publisher of the book. The Federal Supreme Court refused such relief.<sup>249</sup> A grant of damages might discourage artists from discussing "areas of life 'sensitive to harm,' and discourage distributors, such as publishers, from releasing such works."<sup>250</sup> In short, it might have a chilling

244. Here, unlike in most of its opinion, the *Esra* court did not follow the lower courts, including the Federal Supreme Court, BVerfGE 119, 1, at para. 96 = 39 IIC 606, at para. 96 (2008).

245. Federal Constitutional Court, 39 IIC 608, at para. 96 (2008).

246. *Id.* at para. 120.

247. We would join the dissent in this regard because we are not convinced that a reader would find noticeable distinctions between these aspects of the artistic treatment of Lale and *Esra*. We would also dissent on another ground: we are not convinced that such artistic distancing would, in turn, lead all hypothetical literate readers to a shared judgment about the different levels of harm from the novel to the real-life models of these characters, *Esra* and Lale.

248. *Id.* at para. 79.

249. Federal Supreme Court, 63 NJW 763, at para. 13 (2010).

250. *Id.* For a discussion of this opinion in the press, see *Streit um "Esra-Roman": Maxim Biller muss keine Entschädigung zahlen*, ZEIT ONLINE, Nov. 11, 2009, <http://www.zeit.de/kultur/literatur/2009-11/esra-maxim-biller-entschaedigung>.

effect on authors and publishers.

Taken together, *Bonome* and *Esra* also show how the American and German privacy torts work well within each system due to their accord with deeper legal and cultural elements. In Germany, the unitary concept has proved successful. It provides an essential legal and cultural framework for the construction of German tort privacy. Its great merit is in providing a highly abstract framework, and one with deep philosophical roots, around which an entire German cosmology of tort privacy could be developed.<sup>251</sup> The necessary judicial confrontation with potentially messy facts and inconsistent categories proceeds from a shared theoretical vantage point.

In the United States, in contrast, tort privacy has been equally comfortable for fifty years in confronting adversaries with the four Prosser categories and with doing so at a middle range of abstraction. From a continental perspective, the lack of the deeper foundation may appear to be a flaw. For example, in their comprehensive work, *Privacy, Property and Personality*, Huw Beverley-Smith, Angsar Ohly, and Agnès Lucas-Schloetter argue that the right of privacy in the United States “remains somewhat conceptually uncertain and poorly defined.”<sup>252</sup> In our view, however, the middle range of definitional clarity, including the lack of comprehensive philosophical foundation, has proved a benefit in the United States. As a saying in Silicon Valley has it, “It’s not a bug, it’s a feature.” In other words, this approach to privacy, including a certain amount of definitional ambiguity, has proven beneficial.

The potential difficulty for Americans with privacy as an idea is its borderless nature. As Thomas Gerety observed in 1977, “privacy” has “a protean capacity to be all things to all lawyers.”<sup>253</sup> Prosser’s genius was in creating just enough theory, doctrine, and rules of thumb to give a sense that there was a settled core to privacy. Without being tied to any single deeper normative perspective on privacy, American judges would be able to proceed comfortably with these tools and also enjoy considerable flexibility when encountering different fact patterns.

### III.

#### THE PRESENT AND FUTURE OF TORT PRIVACY IN GERMANY AND THE UNITED STATES

In this Part, we conclude by looking into our crystal ball and providing some comparative predictions regarding the future of tort privacy in Germany and the United States. This analysis begins with the issue of protection for a commercial interest in one’s identity. In both Germany and the United States, this right has been developed in a way that strongly protects an economic

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251. On law as creating a cosmology, see LAWRENCE ROSEN, *LAW AS CULTURE* 11 (2006).

252. BEVERLEY-SMITH ET AL., *supra* note 129, at 207.

253. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977).

interest in the exploitation of one's identity. We then examine two important doctrinal categories present in both legal systems: consent and newsworthiness. Finally, we assess the question of this Article's subtitle: are four privacy torts better than one unitary concept?

#### *A. Prosser's Fourth Tort and the Commercial Interest in One's Identity*

Of Prosser's four privacy torts, the right of appropriation is in the most robust condition today. As the Restatement summarizes, this tort protects "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others."<sup>254</sup> In the United States, this interest has helped support a thriving market in the exchange of publicity rights and has led to valuable awards in litigation.

In its original conception, the right at stake was an interest to *prevent* the use of one's name or identity, but it was quickly extended to *permit* marketing, licensing, and other kinds of access to these and other personal attributes.<sup>255</sup> This additional interest in controlling the commercial use of one's identity is called the right of publicity, and Prosser welcomed its development in his 1960 article.<sup>256</sup> As one court stated, the right of publicity serves to secure "the exclusive right to exploit the commercial value that attaches to . . . identit[y]."<sup>257</sup>

Most commentators agree, moreover, that the right at stake, certainly in the publicity element of the appropriation tort, is a property-like interest in the exploitation of the financial value of one's identity.<sup>258</sup> Rather than a right to be let alone, it is a right to make money by profiting from public attention and by transforming personal attributes into quasi-trademark-like interests.<sup>259</sup>

254. RESTATEMENT (SECOND) OF TORTS § 652C, cmt. a (1977).

255. MCCARTHY, *supra* note 90, at 9–11; SOLOVE & SCHWARTZ, *supra* note 90, at 205–08.

256. Prosser, *supra* note 1, at 406–07. For the foundational scholarly exposition of this right, see Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954). Preceding Nimmer's account was a short student note, Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1123–30 (1953). Grodin accurately predicted that "the right of publicity may be extended beyond advertising cases." *Id.* at 1128.

For the breakthrough case, see *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F. 2d 866, 868 (2d Cir. 1953). See also MCCARTHY, *supra* note 90, at 9 ("The right of publicity is the right of a person to control the commercial use of his or her identity.")

257. *Jim Henson Prods., Inc. v. John T. Brady & Assoc., Inc.*, 867 F. Supp. 175, 188–89 (S.D.N.Y. 1994).

258. See MCCARTHY, *supra* note 90, at 543 ([T]he right of publicity is infringed by an injury to the pocketbook" and not "by an injury to the psyche."). On the property-like nature of this interest, see MCCARTHY, *supra* note 90 at 480; *Jim Henson Prods.*, 867 F. Supp. at 188–89. But see Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 414–17 (1999) (developing a Kantian-based personhood theory of a right of publicity with elements in autonomy as well as property).

259. See Prosser, *supra* note 1, at 423 (The right of appropriation "create[s] in effect, for every individual, a common law trade name, his own, and a common law trade mark in his

Moreover, the trend in the United States has been to extend broadly the right of publicity to protect many different indices of identity. For example, the right of publicity can protect a distinctive manner of singing, a racing car with distinctive decorations, and even a phrase ("Here's Johnny") associated with a famous performer.<sup>260</sup>

The overwhelming majority of states in the United States have also recognized a postmortem dimension to the publicity right.<sup>261</sup> The publicity right can be inherited, sold in whole or in part, and otherwise licensed after the subject's death. Before considering this development further, it is worth observing how this result provides a dramatic exception to the usual American rule concerning privacy rights. As J. Thomas McCarthy concisely states of the other three Prosser interests, these "classic . . . rights die with the person whose privacy was allegedly invaded."<sup>262</sup> McCarthy adds, "Both the commentators and the cases unanimously support this rule."<sup>263</sup> Yet, in a series of cases involving photographs of autopsies and gruesome death scenes, U.S. law has also developed a workaround to this rule by acknowledging the privacy interest that surviving family members have in preventing the publication of such photographs of the departed.<sup>264</sup>

In stark contrast to the general absence of postmortem privacy rights, the right of appropriation continues after death. As noted above, these rights are generally viewed as descendible property. The question of whether or not these interests were exploited during a party's life is also irrelevant.<sup>265</sup> McCarthy's survey of the duration of the postmortem right in the United States found varying guaranteed time periods ranging to include a potentially unlimited

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likeness.").

260. For a selection of cases, see SOLOVE & SCHWARTZ, *supra* note 90, at 205–31. For the "Here's Johnny" case, see *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). For "sound-alike" cases, see *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) and *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). For the protection of a distinctive racing car, see *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974). There is also a case identifying a right against "look-alike" models. See *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254 (N.Y. App. Div. 1984).

261. MCCARTHY, *supra* note 90, at 420–21.

262. *Id.* at 395.

263. See, e.g., *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298 (6th Cir. 2001); RESTATEMENT (SECOND) TORTS § 652I (1977) ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.").

264. The Supreme Court provides the leading discussion of this privacy interest of family members. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). For a Supreme Court case finding that a family member, the father of a deceased party, had a privacy interest implicated by release of information about the decedent, see *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). See also *Catsouras v. Dep't of the Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352 (Cal. Ct. App. 2010); *Melton v. Bd. of Cnty. Comm'r*, 267 F. Supp. 2d 859 (S.D. Ohio 2003); *Sellers v. Henry*, 329 S.W.2d. 214 (Ky. 1959); *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912). For a discussion of this interest of the relatives of deceased person, see MCCARTHY, *supra* note 90, at 399–401.

265. MCCARTHY, *supra* note 90, at 435–37.

period, one hundred years, seventy-five years, seventy years, sixty years, fifty years, forty years, thirty years, twenty years, and no stated duration.<sup>266</sup>

As for the potentially unlimited period of the right of appropriation, it is not an accident that Tennessee, the former home state of Elvis Presley, provides it.<sup>267</sup> More than three decades after his death, Elvis still provides an unrivaled economic bonanza for the state. In 2005, a publicly traded corporation, CKX, Inc. acquired an 85 percent interest in Elvis's name, image, and likeness.<sup>268</sup> The same company also owns the rights to *American Idol*.<sup>269</sup> At the end of March 2010, the company announced that it was in sales talks with JP Morgan Chase's private equity group.<sup>270</sup> If the transaction occurs, the publicity rights of the King will have been sold, resold, and then folded into a global financial services firm with assets of \$2 trillion. Other possible suitors have emerged, however, and the firm's fate is still unknown.<sup>271</sup> There is no business, it would seem, like Elvis business. Despite a recession in the United States, revenue at the "Presley Business" grew 12.8 percent compared to the prior year period.<sup>272</sup>

In California, the legislature has even extended the applicable statute *backward* in time to protect the interests of those who died as long as seventy years before the state first legislatively acknowledged this right. The *New York Times* reported on this retroactive statutory protection for celebrities of the early twentieth century with a noteworthy headline, "*Long Dead Celebrities Can Now Breathe Easier*."<sup>273</sup> In the United States, publicity rights are also a routine subject in negotiations with prominent individuals and, in the case of deceased celebrities, with their estates. For example, a front-page report in the *Wall Street Journal* on a \$250 million deal between Sony and the Michael Jackson estate noted that only Jackson's music and videos were at stake, and not "merchandise sales or fees for licensing his name and likeness."<sup>274</sup> In other

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266. *Id.* at 445–46.

267. TENN. CODE ANN. § 47-25-1104(b). The statute provides a fixed initial ten-year postmortem term with extension possible so long as there is commercial exploitation of the interest. For a discussion, see MCCARTHY, *supra* note 90, at 1103–04.

268. For a description of the company, see Profile: CKX, Inc., Reuters, *available at* <http://www.reuters.com/finance/stocks/companyProfile?symbol=CKXE.O> (on file with California Law Review). The company also has rights to the management of Graceland, Elvis's former home.

269. *Id.*

270. Brian Stelter & Michael J. de la Merced, *Company that Owns "American Idol" is Planning a Sale to a Private Equity Group*, N.Y. TIMES, Mar. 29, 2010, at B8, *available at* <http://www.nytimes.com/2010/03/30/business/media/30idol.html>.

271. Joe Flint, *CKX to Potential Buyers: Either Step Up, or We Move On*, COMPANY TOWN, L.A. TIMES (Aug. 16, 2010, 12:05 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/08/ckx-to-potential-buyers-either-step-up-or-we-move-on.html>.

272. CKX, Inc. *Reports Second Quarter and Six Month 2010 Results* (Aug. 13, 2010), <http://ir.ckx.com/releasedetail.cfm?ReleaseID=499251>.

273. Jordana Lewis, *Long Dead Celebrities Can Now Breathe Easier*, N.Y. TIMES, Oct. 24, 2007, at E4.

274. Ethan Smith, *Sony Places Big Bet on a Fallen 'King.'* WALL ST. J., March 16, 2010, at A1, *available at* <http://online.wsj.com/article/SB1000142405274870458840457512402386073>

words, the Jackson Estate has strategically chosen to maintain full control over the decedent's valuable rights of publicity.

In Germany, a similar interest is now well established and protected through the right of personality. Like U.S. law, German law also has taken a broad view in defining the indices of identity that the law protects. Thus, in one of its two cases from 1999 involving the estate of Marlene Dietrich, the Federal Supreme Court found that the right of personality extended to a famous pose of the actress from the film, *The Blue Angel*. Accordingly, the court held that the defendant violated this legal interest by having a look-alike model assume the same stance in an advertisement.<sup>275</sup> The Federal Supreme Court has also stated that protection extended beyond "facial features" to "other attributes, which characterize the person."<sup>276</sup>

As this 1999 case concerning Marlene Dietrich demonstrates, the German right of personality extends postmortem. Indeed, one of the earliest German cases that concerned a privacy-like interest was an opinion of the *Reichsgerichtshof* from 1899 about an unauthorized image of Bismarck in his coffin.<sup>277</sup> There are important differences to be noted, however, between these respective aspects of German and U.S. law. As we have noted, U.S. law distinguishes between Prosser's first three privacy torts, which end with death, and the right of appropriation, which continues postmortem. In German law, by contrast, the right of personality also continues postmortem. Even a deceased person continues to have an inviolable right to dignity.<sup>278</sup>

German law distinguishes, however, between the ideal and property aspects of such postmortem personality interests. The ideal part of the personality interest protects a classic dignity interest. As the Federal Supreme Court defines it, the covered area is "the protection of the claim to dignity and respect through personality."<sup>279</sup> If injury to this interest went uncompensated, moreover, the result would be highly negative. The Federal Supreme Court stated that "without such a claim" to compensation, "injuries to the dignity and honor of humans would frequently remain unpunished with the consequence that the legal protection of personality would be stunted."<sup>280</sup>

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5864.html.

275. Federal Supreme Court, 53 NJW 2201 (2000). In a similar fashion, American law protects publicity rights in a person's distinctive "performing persona." See MCCARTHY, *supra* note 90, at 336; see, e.g., *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 812 (9th Cir. 1997); *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979).

276. Federal Supreme Court, 53 NJW 2201 (2000).

277. Reichsgericht, RGZ 45, 170, 173 – Bismarck (1899). In this case, the court forbid publication of the photographs on the ground that it would not permit the journalists to profit from an illegal entry into the Bismarck Villa.

278. See, e.g., Federal Supreme Court, 60 NJW 684, 685 – kinski-klaus.de (2007).

279. Federal Supreme Court, BGHZ 128, 1, 15 = 53 NJW 2195, 2197 (2000).

280. *Id.*

In contrast, the property (*Vermögenswerte*) aspect of the personality right safeguards economic value. The Federal Supreme Court has pragmatically observed, "Through an impermissible use of the characteristics of personality, for instance, for purposes of advertising, commercial rather than ideal interests of the affected parties are frequently impaired."<sup>281</sup> Commercial interests were impaired because the subjects "felt themselves less injured in their honor and reputation than put at a financial disadvantage."<sup>282</sup>

While the ideal personality right cannot be inherited, it continues to exist after one's death because of its dignitary aspects. As the Federal Constitutional Court declared in the famous *Mephisto* case, concerning a novel by Klaus Mann, a son of Thomas Mann, the State has a duty to protect an individual against a violation of his dignity even after death.<sup>283</sup> According to the relevant case law, this period may last as long as thirty years.<sup>284</sup> The exact period depends on factors such as the nature and intensity of the infringement of the dignity interest. The need for protection also declines as the living generation's memory of the decedent fades.<sup>285</sup> In contrast to this thirty-year period for the ideal personality right, German law protects the property interest in personality for only ten years after the death of the concerned party.<sup>286</sup> Contrast that result with the term for postmortem publicity rights in the United States, which, as in Elvis's Tennessee, can be unlimited.

In a 2000 case involving the estate of Klaus Kinski, the Federal Supreme Court selected this comparatively short ten-year time period and did so for three reasons.<sup>287</sup> First, it stated that "the need for protection after death decreases with the increasing passage of time."<sup>288</sup> Second, a ten-year period protects "the justified interest of the public to be able to discuss the life and work of a personality widely known in his lifetime."<sup>289</sup> Third, a statute concerning the right to one's photograph also set a ten-year postmortem period for this interest.<sup>290</sup> The court thought legal security would be heightened if it simply adopted the same statute of limitations for the property aspect of the personality right.<sup>291</sup> Yet, the relevant statute concerning the right to one's

281. Federal Supreme Court, BGHZ 128, 1, 15 = 53 NJW 2195, 2197 (2000).

282. *Id.*

283. Federal Constitutional Court, BVerfGE 30, 173, para. 66. In another intersection of the Mann family saga with the right of personality, *The Blue Angel*, the film from which the personality right at issue in the *Dietrich* case derived, was based on a novel written by Heinrich Mann, Thomas Mann's elder brother. See HEINRICH MANN, PROFESSOR UNRAT (1905)

284. Federal Supreme Court, BGHZ 107, 385 – Nolde.

285. Federal Supreme Court, BGHZ 128, 1, 15 = 53 NJW 2195, 2197 (2000).

286. Federal Supreme Court, 53 NJW 2201 (2000).

287. Federal Supreme Court, 60 NJW 684 – kinski-klaus.de (2007).

288. *Id.* at 685.

289. *Id.*

290. *Id.* For the statute, see Kunsturhebergesetz § 22(3) [KUG] [Act on the Protection of the Copyright in Works of Art and Photographs], Jan. 9, 1907, BGBl. III/fna 440-3.

291. Federal Supreme Court, 60 NJW 684, 685 – kinski-klaus.de (2007).

likeness was enacted in 1907. Since then, there had been an acceptance of personality rights as well as an expansion of these interests and a steady rise of their economic value. Of the Federal Supreme Court's three arguments for the ten-year period, the last one is the weakest.

A German scholar has commented, with understatement, that the Federal Supreme Court's *Kinski* judgment of 2007 has "significant practical and economic meaning."<sup>292</sup> This same commentator also questioned whether the ten-year period for publicity-like interests was too short.<sup>293</sup> It is certainly brief compared with the law in the United States. Indeed, were we to advise a client on the best country in which to become a famous dead celebrity, our advice would be to head to Hollywood. Our hypothetical client would give up Germany's thirty-year postmortem protection of her ideal personality rights and, as a consequence, have no protection from the first three of the privacy torts in the United States. On the plus side, the celebrity would gain a much longer period, perhaps an unlimited one, for her heirs to market her publicity interests instead of Germany's relatively short ten years for the property aspect of the postmortem personality right. At the same time, however, we would also advise our hypothetical client that, on the whole, celebrities and other prominent individuals receive somewhat greater protection while alive for their privacy under German tort law. We discuss this point in Part III.B.2 below.

There is an impressively long list of dead celebrities in the United States whose estates earn millions of dollars per year long past the ten-year limit that German law imposes for publicity-like interests. For example, helped by an appearance in a Mercedes-Benz advertisement, the estate of Marilyn Monroe, who died in 1962, earned \$6.5 million in 2008 alone.<sup>294</sup> We already discussed Elvis, who, in death as in life, remains in a category of his own. The list of hundreds of Elvis licensees begins with Accutime watches and ends with Zippo lighters.<sup>295</sup> There is also a clearinghouse, GreenLight, which licenses agreements with the estates of dead celebrities, including Bruce Lee, who died in 1973, and Steve McQueen, who died in 1980. As *Forbes* explains, "Heirs contract with the company to work out deals for their loved ones to appear on high-end T-shirts, posters, commercials and videogames."<sup>296</sup> None of the American celebrities mentioned in this paragraph would still receive protection for the property aspects of their personality rights in Germany.

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292. Endress Wanckel, *Comment*, 60 NJW 686 (2007).

293. *Id.*

294. Dorothy Pomerantz, *A Star Is Reborn: How Hollywood Magicians Will Raise The Dead*, FORBES, Mar. 15, 2010, at 70, available at [http://www.forbes.com/forbes/2010/0315/entertainment-hollywood-cameron-movies-star-reborn\\_3.html](http://www.forbes.com/forbes/2010/0315/entertainment-hollywood-cameron-movies-star-reborn_3.html).

295. *Licensing, Endorsement, and Sponsorship*, ELVIS PRESLEY: THE OFFICIAL SITE OF THE KING OF ROCK 'N' ROLL, [http://www.elvis.com/licensing/list/default.asp?letter=\\*](http://www.elvis.com/licensing/list/default.asp?letter=*) (last visited Sept. 10, 2010).

296. Pomerantz, *supra* note 294.

Yet, there is also similarity in this area of law in Germany and the United States. In both countries, courts have recognized the risk that proprietization of personality or privacy might lead to restriction on free speech interests. As the Federal Supreme Court noted in *Kinski*, these property-like rights “should not permit the heirs to police or even to steer the public discussion of the deceased party.”<sup>297</sup> In the United States, Judge Kozinski has warned against extension of publicity rights as presenting a threat to “a rich public domain.”<sup>298</sup> In the academy, moreover, Michael Madow has criticized the right of publicity because “the power to license is the power to suppress.”<sup>299</sup> A law that gives a celebrity a right of publicity also grants her “a substantial measure of power over the production and circulation of meaning and identity in our society.”<sup>300</sup> Madow calls for the development of a “semiotic democracy” in which sufficient restrictions on the right of commercial appropriation provide greater opportunities for persons to participate “in the generation and circulation of meanings and values.”<sup>301</sup>

While these concerns are similar in both countries, Germany does more to limit the threat to the public sphere. Thus, to protect a robust public debate, German courts allow advertisers to use images of celebrities, dead or alive, so long as the advertisements allude to newsworthy events. For example, the Federal Supreme Court permitted a rental car company to publish an advertisement featuring a photograph of a German minister. The politician had been in the news because he served for only a short period before suddenly resigning.<sup>302</sup> Alluding to that recent event, the rental car company’s advertisement ironically promised that its cars would be available even to short-time employees. For the Federal Supreme Court, this advertisement was a constitutionally protected expression because it contributed to the discussion of a leading news topic.

In another case, the Federal Supreme Court held against the estate of Willy Brandt, the former chancellor, and in favor of a company that featured a collector’s coin with his portrait. It found an interest in publication of the coin that was worthy of protection; the medallion suitably presented information on its two sides “to inform in concise, but also expressive form about the person

297. Federal Supreme Court, 60 NJW 684, 685 (2007).

298. *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

299. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 145 (1993).

300. *Id.*; see ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 94–95 (1998)) (explaining that a star image is a shared creation that is not the product alone of the celebrity herself). But for a defense of the right of publicity as protecting celebrities against corporations, see Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 873 (1995).

301. Madow, *supra* note 299, at 147.

302. Federal Supreme Court, BGHZ 169, 340 – Rücktritt des Finanzministers = 109 GRUR 139 (2007).

and the achievements of the deceased party.”<sup>303</sup> This broad approach to newsworthiness is, if anything, reminiscent of the similar tack taken by American courts in non-appropriation tort privacy cases. We have seen such a wide-reaching concept of newsworthiness in the United States, for example, in *Bonome*. In the context of rights of publicity, however, American courts are unlikely to go as far as their German counterparts, and accept a newsworthiness connection as distinguishing the permissible from impermissible commercial use of celebrity identity.

In contrast to the German approach, which requires a mere connection to a news event, the most influential test on this side of the Atlantic is California’s “transformative” test.<sup>304</sup> Under this test, a use of a celebrity image is transformative if it significantly alters or changes it. A transformative use does not violate the right of publicity. Nonetheless, U.S. law also permits advertisers and other commercial entities to criticize, satirize, lampoon, and parody celebrities.<sup>305</sup> The leading case establishing this principle is *Cardtoons v. Major League Baseball Players Ass’n*.<sup>306</sup> In *Cardtoons*, a series of baseball cards making fun of athletes for their high salaries was found not to violate their right to publicity.<sup>307</sup> With this opinion, a case-law circle was completed: the most important of the earliest cases that identified the right of publicity involved litigation about unauthorized baseball cards.<sup>308</sup>

In conclusion, while both Germany and the United States protect commercial appropriation, the level of protection is far lower in Germany, where there is a powerful “newsworthiness” exception and a shorter applicable period for the interest postmortem. There is also a positive implication of the lower level of protection of the German publicity interest. It permits Germany to come closer to Madow’s vision of “semiotic democracy” with greater opportunities for persons to participate “in the generation and circulation of meanings and values.”<sup>309</sup>

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303. Federal Supreme Court, 49 NJW 593, 595 – Abschiedsmedaille (1996).

304. *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

305. *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959, 971 (10th Cir. 1996).

306. *Id.*

307. *Id.*

308. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.* 202 F.2d 866, 868 (2d Cir. 1953). Decisions before *Haelan* had also recognized these kind of interests. Thus, in 1941, Louis Nizer had talked about “the frequently recurring case which grants relief where privacy has been violated by a spurious endorsement of merchandise.” Nizer, *supra* note 136, at 548.

309. Madow, *supra* note 299, at 147.

*B. Similarities and Differences: Consent and Newsworthiness**1. Consent*

An area of significant similarity for German and American privacy tort law concerns the treatment of consent. In both legal systems, a party's permission obviates a possible violation of a privacy interest. This area is likely to be of heightened importance in the future. Due to media and social trends, increasing amounts of personal data are likely to become publicly available through concerned party's consent. Germany and the United States share a developing culture of self-revelation: new kinds of media, including reality shows, personal blogs, and social networking sites, are popular in both countries.

Some brief examples of the similarity of the privacy-invading aspects of the media landscape in the two countries will suffice. As an initial point, the same reality shows are sometimes broadcast in both countries in different national versions. "Big Brother" and "Top Model" are two of the most popular examples. Indeed, even after five seasons, "*Germany's Next Top Model*" remains "one of the most important sources of income" for ProSieben, the cable network on which it appears.<sup>310</sup> The influence of reality shows in Germany is also demonstrated by the German adoption of an English neologism, "*die Castingshow*." As Germany's Wikipedia explains, a casting show is "a television show that concerns the casting of potential singers, dancers, models and similar categories."<sup>311</sup> Social media are also popular in both countries, and American companies such as Facebook have proved widely successful in Germany. In one instance, an American company, classmates.com, purchased a leading German website, stayfriends.de, in a similar business.<sup>312</sup> In both countries, people are likely to continue to be ever more willing to give up privacy, and consent is the legal mechanism by which the surrender occurs.

Prosser discusses the important phenomenon of consent at the end of his article. Regarding the various defenses that may be raised to an invasion of privacy claim, he observes that "[c]hief among the available defenses is that of the plaintiff's consent to the invasion, which will bar his recovery as in the case of any other tort."<sup>313</sup> This permission might be express or implicit, as "by conduct, such as posing for a picture with knowledge of the purposes for which

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310. Matthias Kalle & Elisabeth Raether, *Ware Schönheit*, 26 ZEIT MAGAZIN, June 24, 2010, at 13. The show's host—Heidi Klum—is a German native, who according to one poll has "level of name recognition" with the German public of more than ninety-six percent. *Id.* at 14. As the ZEIT MAGAZIN added, "The same as Jesus." *Id.*

311. *Castingshow*, WIKIPEDIA, <http://de.wikipedia.org/wiki/Castingshow>.

312. The sale occurred in 2004. *Das Team hinter StayFriends*, STAYFRIENDS, <http://www.stayfriends.de/j/ViewController?action=teampage>.

313. Prosser, *supra* note 1, at 419.

it is to be used, or industriously seeking publicity of the same kind.”<sup>314</sup> If there is consent, no mental harm occurs, which means there is no violation of the first three torts. As for appropriation, if consent exists, in the sense of an agreement to a trade, there is no violation of Prosser’s final tort. No harm, no foul.

From his different starting point, Bloustein reaches a surprisingly similar conclusion about the consequences of consent. For example, consider his judgment on a famous early tort case involving a public embrace by a couple, the Gills, in the Farmers’ Market of Los Angeles.<sup>315</sup> In full agreement with the court’s decision, Bloustein writes, “The use of a photograph taken in a public place and published without comment in a news article could not be considered offensive to personal dignity because consent to such a publication, to the abandonment of privacy, is implied from the fact the Gills embraced in public.”<sup>316</sup> Bloustein adopts the American perspective that an appearance in a public place generally constitutes agreement to depiction in a photograph or other visual representation.<sup>317</sup>

In Germany, consent is also an important defense to a claim of a violation of a personality right. Thus, the *Esra* court stressed that neither of the two plaintiffs had agreed to the publication.<sup>318</sup> Behind this German rule is a simple concept: there is no requirement to protect dignity against the clear will of the person concerned. German tort law, like tort law in the United States, relies on a venerable Latin maxim to express this idea: *volenti non fit iniuria*, or “there is no injury to the volunteer.”<sup>319</sup>

German law differs from U.S. law, however, in that a mere appearance in public does not constitute consent to publication of one’s image.<sup>320</sup> As a result,

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314. *Id.* at 419–20.

315. Bloustein, *supra* note 9, at 991–92. The case is *Gill v. Hearst Pub. Co.*, 253 P.2d 441 (Cal. 1953).

316. Bloustein, *supra* note 9, at 991.

317. *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 939 (Mass. App. Ct. 1979); *Penwell v. Taft Broad. Co.*, 469 N.E.2d 1025 (Ohio Ct. App. 1984); *Gill*, 253 P.2d 441. See HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 103–28 (2009); Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 155–60 (2004).

318. The German Federal Constitutional Court did not emphasize the issue of consent because it was not at issue in the constitutional claim. As for the opinion of the Federal Supreme Court, it had only briefly discussed the lack of consent by either plaintiff to their portrayal in the novel. Federal Supreme Court, 58 NJW 2844, 2845 (2005).

319. Wolfhard Kothe, *Die rechtfertigende Einwilligung*, 185 ACP 105 (1985). On the use of the concept in U.S. tort law in the context of intentionally inflicted harm, see generally EPSTEIN, *supra* note 90, at 43–50.

320. Landgericht München I, 49 ZUM 922, 923 (2005) (holding that the appearance of the eighteen-year-old niece of fashion designer Gianni Versace at a public ball in Vienna did not constitute consent to a news report showing her picture and stating that she weighed so little that she could hardly stand without help and that she had “spindly legs” and a “hollow-cheeked face”) (“*spindeldürre Beine, hohlwangiges Gesicht*”). The Federal Supreme Court has also found that appearance at a public event, a horse riding competition, does not provide consent to use a photo from that event in a different context, 48 ZUM 919, 920 (2004) (holding that the participation of Caroline von Hanover’s daughter Charlotte Casiraghi in a riding event did not constitute consent

the two systems approach the spatial dimension of privacy differently. To be sure, consent to publication in Germany, as in the United States, need not be explicit. For example, the relevant statute regarding the right to one's image permits publication without consent if one is "only a secondary object" in a picture of a landscape, or when one participates in "assemblies, processions, and similar events."<sup>321</sup> Moreover, the Federal Supreme Court has held that an appearance by the child of a prominent person at a public event might constitute consent.<sup>322</sup> Nonetheless, even celebrities in Germany can enjoy the protection of privacy in a public place when there is no newsworthy interest in describing or photographing the situation and there is a justifiable expectation of being free from observation.<sup>323</sup>

Here, the key decision is one of the numerous cases in Germany involving a privacy claim by Princess Caroline of Monaco. In an opinion from 1999, the Federal Constitutional Court declared that the general personality right was not limited merely "to the domestic sphere."<sup>324</sup> The Court declared that an individual "must as a fundamental matter have the possibility of moving in a manner free from public observation in open, yet secluded places of nature, or in locations clearly isolated from the general public."<sup>325</sup> The key test was whether the person could justifiably assume that she was "not exposed to public view" and whether or not there was a public interest in the matter.<sup>326</sup> The public interest turned on whether the information would serve "democratic transparency and governance" rather than mere "curiosity."<sup>327</sup> Finally, if someone indicated consent to the publication of certain matters that were otherwise public, the general personality right would not be protected. As the Court observed, the right was *not* guaranteed in "the interests of the commercialization of oneself."<sup>328</sup>

The significance of consent for individual privacy in German law is further illustrated by the decision of a lower court in Frankfurt-am-Main concerning Katarina Witt, the German figure skating star.<sup>329</sup> Witt had signed an exclusive agreement with *Playboy* allowing explicit photographs of her to be

to a story about her weakness for horses (rather than for boys)).

321. Kunsturhebergesetz § 22 [KUG] [Act on the Protection of the Copyright in Works of Art and Photographs], Jan, 1907, BGBI. III/fna 440-3 states as a principle that the picture of a person may only be distributed or shown to the public if the person depicted has consented. KUG § 23 then establishes several exemptions to this general rule.

322. Federal Supreme Court, 54 ZUM 701 (2010) (discussing the appearance of Caroline's daughter at a public event).

323. We discuss the concept of newsworthiness in more detail below.

324. BVerfGE 101, 361 - Caroline von Monaco II = BVerfG, 53 NJW 1021 (2000) An English translation of this decision is available at IIC 2002, 104.

325. BVerfGE 101, at 384.

326. *Id.* at 395.

327. *Id.* at 391.

328. *Id.* at 385.

329. OLG Frankfurt am Main, 53 NJW 594 (2000).

taken and published in that magazine. Witt then sued another magazine, the *Frankfurter Allgemeine Sonntagszeitung*, because it published one of these photographs as part of a weekly column that provided a short, satirical rating of people in the news. The photograph was reproduced only in small format, accompanying a brief account of how and why Witt's appearance in *Playboy* earned her a plus rather than a minus in the magazine's scorekeeping.

The Frankfurt court noted that depiction of a naked body implicated legal protection for a core area of life formation. After all, this photograph revealed something that the law generally protects as highly intimate. As a consequence, the decision about publication of photographs that showed one naked "fundamentally belonged to the party who was pictured."<sup>330</sup> The court stated, however, that Witt had waived her absolute protection for the core area of life by agreeing to the initial publication of the photographs by *Playboy*.<sup>331</sup> It held: "The plaintiff had voluntarily sacrificed the absolute protection of this area of her intimate sphere by allowing the production and with that indicated agreement that the photos . . . be made accessible to the public."<sup>332</sup>

Yet, Witt's consent to the *initial* publication of these photographs did not necessarily allow all *further* publication of the images. In an essay that discussed this opinion, Walter Seitz quipped, "Naked one time, free forever."<sup>333</sup> This bon mot is not correct, however, because Witt's consent to the taking of the photographs did not mean that she waived all future protection of her privacy vis-à-vis the images. Rather, the consent constituted only a waiver of the absolute protection of her core area of private life. As a result, the court was obliged to balance Witt's personality rights against the "constitutionally protected information interest of the public."<sup>334</sup> In upholding the publication, the court in Frankfurt carried out a context-driven evaluation of the extent of the negative impact on Witt's personality interest and the public's interest in the information.

At any rate, and as we have noted, consent is likely to be important in the future because of the growing culture of self-revelation in both Germany and the United States. For the most part, apart from mourning the apparent loss of interest in privacy norms, or warning a younger generation of the risk of sharing "too much information," scholars in the United States generally have accepted the underlying consent paradigm.<sup>335</sup> One exception has been Anita

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330. *Id.* at 595.

331. *Id.* After this litigation, the Federal Constitutional Court refused to accept Witt's constitutional claim in an unpublished order. For press coverage of Witt's petition, see DER SPIEGEL, no. 47 (1999), available at <http://www.spiegel.de/spiegel/print/d-15118809.html> and <http://www.spiegel.de/panorama/0,1518,53326,00.html>.

332. OLG Frankfurt am Main, 53 NJW 594, 595 (2000).

333. Walter Seitz, *Einmal nackt – immer frei?*, 53 NJW 2167, 2168 (2000).

334. OLG Frankfurt am Main, 53 NJW 594, 594 (2000).

335. See Jeff Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG. (July 21, 2010) ("[I]t might be helpful for us to explore new ways of living in a world that is slow to

Allen, whose scholarship has explored “the moral limits” of insisting on “individual control over personal data.”<sup>336</sup> Allen has worried that people may choose “to give up more privacy than is consistent with liberal conceptions of the person or the liberal way of life.”<sup>337</sup>

In Germany, judges generally accept the permissibility of signed consent forms for reality shows as indicating consent to actions that would otherwise violate the right of personality. To an extent greater than in the United States, however, legal scholars in Germany have questioned the existing paradigm of consent to privacy invasions.<sup>338</sup> Some scholars have argued that consent cannot be validly granted in any situation where the core of human dignity is harmed, especially if the person consenting will not be able to fully understand the extent of the privacy invasion to which she is consenting.<sup>339</sup> This point is raised in particular regarding the participation of ordinary people—that is, non-celebrities—in talk shows and reality programs on television.<sup>340</sup> In many of these cases, individuals are required to sign consent forms, which are broadly worded and thus may not truly constitute a knowing waiver of consent.

Furthermore, scholars have questioned whether the granting of consent *before* the filming of talk shows or reality television programs should be viewed as conclusive at all.<sup>341</sup> In a sense, such consent is only preliminary; it

forgive.”), available at <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html>; DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* 198 (2007) (“[M]any people just don’t appreciate the extensiveness of their exposure online.”). A recent study suggests, however, that the younger generation does continue to be concerned about privacy. See Chris Jay Hoofnagle et al., *How Different are Young Adults from Older Adults When it Comes to Information Privacy Attitudes and Policies?* (Working Paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1589864](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589864). For coverage of this poll’s results, see Benny Evangelista, *Study: Young People Concerned About Privacy*, S.F. CHRON., Apr. 16, 2010, at D1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/04/15/BUTMICVCCA.DTL>.

336. Anita L. Allen, *Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 CONN. L. REV. 861, 871-74 (2000) [hereinafter Allen, *Privacy-as-Data*]; Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999) [hereinafter Allen, *Coercing Privacy*].

337. Allen, *Privacy-as-Data*, *supra* note 336, at 871.

338. In an older decision of the Federal Administrative Court [BVerwG] [Bundesverwaltungsgericht], this point was raised with respect to the dignity of women being used in “peep-shows” on a rotating stage surrounded by closed cabins in which men could watch these women without being seen themselves. See BVerwGE 64, 274, 280 = 35 NJW 664, 665 (1982) (arguing for defense of human dignity even opposed to the “intentions of the affected party” because of its “transcending importance”).

339. Ulrike Hinrichs, “*Big Brother*” und die Menschenwürde, 53 NJW 2173, 2175 (2000); DIETER DÖRR, *BIG BROTHER UND DIE MENSCHENWÜRDE* 70 (2000). Dörr does argue, however, that talk show participants will still be able to evaluate what they are doing up to a certain degree. See BEVERLEY-SMITH ET AL., *supra* note 129, at 137 (“[A] person who is informed about all relevant details of the envisaged project and who is free to revoke his permission at any time can also permit acts that would otherwise have violated his or her dignity.”).

340. With respect to talk shows, see UDO DI FABIO, *DER SCHUTZ DER MENSCHENWÜRDE DURCH ALLGEMEINE PROGRAMMGRUNDSÄTZE* 56 (1998). Di Fabio suggests that the protection of participants might also protect viewers, especially minors.

341. Ulrike Hinrichs, “*Big Brother*” und die Menschenwürde, 53 NJW 2173, 2175 (2000).

cannot be truly informed because the individual does not know the footage that will be broadcast. At the same time, however, other scholars have defended the use of consent in the area of reality television. In their view, greater legal regulation would constitute state paternalism concerning how people choose to earn money.<sup>342</sup>

## 2. Newsworthiness, Public Figures, and the News Fit to Print

Another area of similarity between German and American law, albeit with important nuances, concerns how newsworthiness affects the analysis in tort privacy cases. We have already seen how the impact of an “inviolable area of private life formation” can affect the analysis in privacy tort cases. As we noted, a Massachusetts trial court, in *Bonome*, defined broadly the matters that were of “public concern.” That court permitted Kaysen’s use of her boyfriend in her memoir to illustrate how an “undiagnosed physical condition impacted her physical and emotional relationship with [him].”<sup>343</sup>

In contrast, the Federal Constitutional Court in *Esra* did not engage in a newsworthiness analysis for the revelations about the first plaintiff. In German privacy law cases where the core area of privacy is implicated, as when the release of highly intimate information is at stake, there is no balancing. Like German law, however, American law does seek to provide greater protection for highly private information. It does so through an evaluation of all affected interests, private and public, including an evaluation of the newsworthiness of the data.

While German and U.S. privacy torts differ in their approach to highly intimate matters, their general approach to newsworthiness is similar. To begin with, both countries’ torts distinguish among classes of public figures. In Germany, there are public figures for all purposes (*absolute Person der Zeitgeschichte*) and public figures for limited purposes (*relative Person der Zeitgeschichte*).<sup>344</sup> The all-purpose public figures are politicians and well-known celebrities, and the public has a broad right to information about these people.<sup>345</sup> In contrast, public figures for limited purposes are people who become associated with some interesting or remarkable event, or are linked to an all-purpose public figure.<sup>346</sup> Reporting about these individuals is also

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342. See DI FABIO, *supra* note 340, at 37 (arguing that as long as the participant does not lose his role as an actively participating subject, human dignity is not violated); DÖRR, *supra* note 339, at 90; HUBERTUS GERSDORF, MEDIENRECHTLICHE ZULÄSSIGKEIT DES TV-FORMATS “BIG BROTHER” 34 (2000); NADINE KLASS, RECHTLICHE GRENZEN DES REALITÄTSFERNSEHENS, 206 (2004).

343. *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at \*6 (Mass. Dist. Ct. Mar. 3, 2004).

344. See Horst Neumann-Duesberg, *Bildberichterstattung über absolute und relative Personen der Zeitgeschichte*, 15 JZ 114 (1960).

345. Federal Supreme Court, 60 NJW 1977 (2007) – Caroline von Hannover.

346. In particular, German law considers criminals as “public figures for limited purposes.”

permitted, but the public's right to be informed about them is more limited and is more closely linked to the reason for their fame.

In one notable instance involving reports and photographs of Princess Caroline in the German press, the European Court of Human Rights found that the German law did not adequately protect the privacy of such all-purpose public figures.<sup>347</sup> This failure resulted from German courts overemphasizing freedom of the press and neglecting to analyze whether photographs and articles made a real contribution "to a debate of public interest."<sup>348</sup> The European Court did not, however, develop criteria in this decision for determining when a press report added to such a debate.<sup>349</sup> As a consequence of the European Court's opinion, the German press now sometimes adds a pretextual public interest angle to stories that essentially are only gossip about an all-purpose public figure.<sup>350</sup> Thus, a story in *Bunte* about photographs of Princess Caroline's husband embracing another woman emphasized how "a crisis within the royal family could quickly develop into a national crisis" in Monaco.<sup>351</sup>

In the United States, the Supreme Court has developed the concepts of the "public figure for all purposes," the "public figure for a limited range of issues," and the "involuntary public figure."<sup>352</sup> The first category includes people who are generally involved in public matters, the news, or public attention. The second includes those who voluntarily become involved in a

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*See* Kammergericht [Berlin Court of Appeals], 23 NJW-RR 1625 (2008) (discussing released terrorist). On the importance of a link to an all-purpose public figure, see Federal Supreme Court, 58 NJW 56 (2005).

347. European Court of Human Rights, 57 NJW 2647 (2004) – *Von Hannover v. Germany*.

348. *Id.* at para. 76. For analysis and further sources, see SOLOVE & SCHWARTZ, *supra* note 90, at 1014–15.

349. Nicolas Nohlen, Case Note, *Von Hannover v. Germany*, 100 AM. J. INT'L L. 196, 199–200 (2006). For a ringing endorsement of the case, see Robin D. Barnes, *The Caroline Verdict: Protecting Individual Privacy Against Media Invasion as a Matter of Human Rights*, 110 PENN. ST. L. REV. 599, 606 (2006) ("The Von Hannover court recognized the crucial links between human dignity, familial privacy, and the development of the human personality.").

350. For different analyses of the consequence of the *Von Hannover* decision, see Andreas Heldrich, *Persönlichkeitsschutz und Pressefreiheit nach der Europäischen Menschenrechtskonvention*, 57 NJW 2634 (2004); Stefan Engels & Uwe Jürgens, *Auswirkungen der EGMR-Rechtsprechung zum Privatsphärenschutz: Möglichkeiten und Grenzen der Umsetzung des "Caroline"-Urteils im deutschen Recht*, 57 NJW 2517, 2521 (2007); Barbara McDonald, *Privacy, Princesses, and Paparazzi*, 50 N.Y.L. SCH. L. REV. 205, 223–24 (2005).

351. Stefan Blatt & Katharina Zilkowski, *Caroline von Monaco: Geht ihre Ehe baden?*, BUNTE, Jan. 7, 2010, [http://www.bunte.de/royals/caroline-von-monaco-geht-ihre-ehe-baden-aid\\_14289.html](http://www.bunte.de/royals/caroline-von-monaco-geht-ihre-ehe-baden-aid_14289.html). For the Federal Constitutional Court's latest decision in litigation involving the royal family of Monaco, see BVerfG, Decision of Sept. 14, 2010, at [http://www.bundesverfassungsgericht.de/entscheidungen/rk20100914\\_1bvr184208.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20100914_1bvr184208.html) (identifying different boundaries for the general right of personality when a magazine publishes (1) photographs, or (2) the text of an article).

352. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46, 352 (1974). For later cases, see *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001).

particular public controversy or affair.<sup>353</sup> Finally, the third group includes those who become known through no intentional action of their own. Prosser anticipated this approach in his 1960 article by calling for proportionality between the importance of the figure and the occasion for the public interest, on one side, and the nature of the private facts that may be revealed about that figure, on the other.<sup>354</sup> The result is quite similar to German law's approach to newsworthiness.

Nonetheless, German courts using the right of personality continue to draw lines that U.S. courts do not. When engaged in a balancing of interests, German courts are more willing than American courts to find that a reported matter is not newsworthy, but merely "entertainment" (*Unterhaltung*) or otherwise lesser-valued speech.<sup>355</sup> The line drawing about whether matters are newsworthy may prove more complex in the future, however, with the emergence of new digital media, which have caused a splintering of the traditional media landscape in Germany and have increased the kinds of information sources available to the individual recipient. For example, the Internet has provided Germans with greater and more decentralized opportunities to exercise their freedom of opinion guaranteed by the Basic Law's Article 5.<sup>356</sup> In the past, traditional communication media were the main channels to communicate and express mass opinion. Today, social networks and individual websites have entered into this field.<sup>357</sup>

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353. For a proposal to classify participants in reality shows as limited-purpose public figures, see Darby Green, *Almost Famous: Reality Television Participants as Limited-Purpose Public Figures*, 6 VAND. J. ENT. & TECH. L. 94 (2003).

354. Prosser, *supra* note 1, at 413–15. American law has followed this path through the Restatement's requirement that the tort of public disclosure require revelation of a matter not of legitimate concern to the public. RESTATEMENT (SECOND) TORTS, 652D(b).

355. See Federal Supreme Court, 62 NJW 3030, 3031 (2009) (holding that acquisition of a house by former politician Joschka Fischer was not a matter of public interest, but only a lesser and legally unprotected matter of public curiosity).

356. A recent case of the Federal Supreme Court saw it applying established legal categories to a website, *spickmich.de*, that permits students to evaluate their teachers. The Federal Supreme Court noted that the ratings simply provided information about the "social sphere" rather than any intimate information. Regarding the impact of the Internet, it stated, "It cannot be doubted that over the Internet a more extensive exchange of views is possible than can take place on parent consultation days, or in the playground or schoolyard." Federal Supreme Court, 62 NJW 2888 (2009). This result was also a good thing; it allowed an exchanging of opinions by students, parents and teachers and the fulfillment of their information interests. *Id.* at 2892. Moreover, the court noted, "The right to freedom of expression is not restricted to judgments that are objectively and generally valid." *Id.* at 2893. In September 2010, the Federal Constitutional Court declined, without explanation, to hear an appeal from this decision of the Federal Supreme Court. *Lehrerin scheidert mit Klage gegen Spickmich*, SPIEGEL ONLINE, Sept. 22, 2010, at <http://www.spiegel.de/schulspiegel/wissen/0,1518,719015,00.html>. For a discussion of the Federal Supreme Court's decision, see Karl-Nikolaus Peifer & Johannes Kamp, *Datenschutz und Persönlichkeitsrecht*, 53 ZUM 185 (2009).

357. See Karl-Heinz Ladeur, *Die Verfassungswidrigkeit des Drei-Stufen-Tests für Online-Angebote des öffentlich-rechtlichen Rundfunks*, 53 ZUM 906, 909 (2009).

Other differences with American courts concern the public's right to obtain information about criminals and those charged with crimes. In Germany, criminals who are released from prison have a predominant interest in their privacy being protected against media coverage, whether through photographs by paparazzi, press releases, or documentary films.<sup>358</sup> Moreover, there is no general interest in knowing the identity of the perpetrator of a crime. In contrast, this information is generally considered public information in the United States, where police arrest photographs are released and, when celebrities are involved, quickly appear on the Internet. The leading American source for such information is *The Smoking Gun*, which posts arrest records, "mug shots," and other legal documents concerning the famous.<sup>359</sup>

If a crime is grave or the person who has committed the crime is a figure of public interest, however, German law does permit the press to disclose names and pictures of the accused party.<sup>360</sup> As a consequence, the results are the same in many instances under German and American law. Consider, for example, a recent controversy involving the weatherman Jörg Kachelmann, arrested for an alleged rape and on whose personal life the German press has reported in great detail post-arrest.<sup>361</sup> In an article noting the questionable evidence backing the charge against Kachelmann, *Die Zeit* argued that even should he be found innocent of the charge, the damage to his image could not be repaired.<sup>362</sup> His reputation was ruined, and his television career likely ended.<sup>363</sup>

The aggressiveness that the German press can take towards those accused of crimes was depicted in a famous novel. In *The Lost Honor of Katharina Blum*, Heinrich Böll, a winner of the Nobel Prize for literature, depicts a campaign by a right-wing tabloid against a simple housekeeper who had become involved with an alleged bank robber.<sup>364</sup> The newspaper in the novel,

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358. Federal Constitutional Court, BVerfGE 35, 202, 232 – Lebach I.

359. See *Mug Shots*, THE SMOKING GUN, <http://www.thesmokinggun.com/mugshots/index.html>.

360. Federal Supreme Court, 59 NJW 599 – Autobahnraser (2006); Federal Supreme Court, BGHZ 143, 199, 203 – Korruptionsverdacht.

361. For a report on the investigation against Kachelmann, his arrest, his questionable personal life with the lies that he told to his multiple girlfriends, and the weaknesses in the case against him, see Jürgen von Dahlkamp & Simone Kaiser & Barbara Schmid, *Justiz: Er schlaeft mit ihr!*, DER SPIEGEL, no. 23 (June 7, 2010), available at <http://www.spiegel.de/spiegel/print/d-70833818.html>; Hannelore Croll, *Kachelmanns Sex, Lügen und Wettervorhersagen*, BERLINER MORGENPOST (July 5, 2010), available at <http://www.morgenpost.de/vermischtes/article1337355/Kachelmanns-Sex-Luegen-und-Wettervorhersagen.html> (noting that, after more than one hundred days of investigation of Kachelmann, "about his private life we know much, about his guilt nothing").

362. Sabine Rückert, *Schuldig auf Verdacht*, DIE ZEIT, no. 26, June 24, 2010, at 15.

363. *Id.* For an update on the Kachelmann case, see Peter von Becker, *Justizopfer Kachelmann*, ZEIT ONLINE, July 29, 2010, <http://www.zeit.de/gesellschaft/zeitgeschehen/2010-07/kachelmann-haftentlassung-justizskandal>.

364. HEINRICH BÖLL, DIE VERLORENE EHRE DER KATHARINA BLUM (1974).

*Die Zeitung* (The Paper), is based on *Die Bild Zeitung* (The Picture Paper).<sup>365</sup> Early in the novel, Blum shows her interrogators at the police copies of *Die Zeitung* that report on her and asks “whether the State, as she expressed it—could do nothing in order to protect her against this filth and restore her lost honor.”<sup>366</sup> Böll depicts the inability and unwillingness of public officials and the legal system to protect Blum against the destruction of her reputation by the press. At the end of the novel, Blum takes the matter into her own hands, sets up an interview with the troublesome reporter, and shoots him dead. The thesis of the novel, as Böll states in an afterword, is that there is “a violence in headlines,” and that “we know only too little” about “where the violence of headlines can lead.”<sup>367</sup>

### *C. Are Four Privacy Torts Better than a Unitary Concept?*

We turn now to the question raised in this Article’s subtitle, which concerns the relative merits of the U.S. and German privacy tort systems. Each of these two approaches to tort privacy has its own strengths and weaknesses, and perhaps even more crucially, each reveals something essential about the underlying legal order in which it is embedded. The anthropologist Lawrence Rosen has described law as “a framework for ordered relationships.”<sup>368</sup> As Rosen argues, “we can no more comprehend the roles of legal institutions without seeing them as part of their culture than we can fully understand each culture without attending to its form of law.”<sup>369</sup> In this light, we will answer the question in our subtitle by considering the respective legal and cultural functions served by the four privacy torts in the United States and the unitary concept in Germany. To do so, we begin by returning to the thoughtful article about Prosser by Richards and Solove, who conclude with words of both praise and criticism for the Berkeley Dean.

Richards and Solove acknowledge that Prosser gave privacy “an order and legitimacy it had previously lacked.”<sup>370</sup> Nonetheless, they conclude that Prosser’s view of the tort was “rigid and ossifying.”<sup>371</sup> The Berkeley Dean thereby “stunted its development in ways that have limited its ability to adapt to

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365. On a page before the novel begins, Böll terms any similarities in its pages with the journalistic practices of the *Bild Zeitung* “neither intentional nor accidental, but rather unavoidable.” *Id.* at 5.

366. *Id.* at 60.

367. *Id.* at 144 (emphasis removed).

368. ROSEN, *supra* note 251, at 7.

369. *Id.* at 200. See Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 358–59 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (arguing in favor of an approach to comparative law that views “society (and its subsystems, including law) as a system constituted by the relation of its elements, rather than set up by elements that are independent of each other”).

370. Richards & Solove, *supra* note 16, at 1887.

371. *Id.* at 1924.

the problems of the Information Age.”<sup>372</sup> In making their argument, the authors offer a counterfactual account of how tort privacy might have looked without Prosser, or with a Prosser who had thought differently about the subject. While they offer the measured qualification that “[o]ne can never know what privacy law might have become had Prosser thought and wrote differently about privacy,” Richards and Solove nonetheless suggest that privacy might have been more “forward-looking” without Prosser.<sup>373</sup> They argue that American privacy law might have grown to recognize more kinds of torts, and that it might have accepted “more nuanced understandings of privacy in terms of levels of accessibility of information.”<sup>374</sup> The authors conclude that tort law should look beyond the narrow categories Prosser proposed and “regain the creative spirit it once possessed.”<sup>375</sup> One way for it to do so, in their view, would be to adopt the English approach to the tort of confidentiality.<sup>376</sup>

We would answer Richards and Solove’s counterfactual question differently: without Prosser, there would likely be less, not more, protection of tort privacy in the United States. In our view, Prosser pragmatically assessed the kind and amount of privacy that the American legal system was willing to accommodate. In a sense, the best guidepost for what might have been is provided by writers about tort privacy, such as Bloustein, who tried to organize it around dignity—and whose efforts notably failed in the United States.

From the American perspective, dignity proved no more convincing as an organizational principle for privacy tort law than the “right to happiness” concept that Leon Green, another pioneering scholar, once proposed.<sup>377</sup> The difficulty goes beyond Bloustein’s more general concession that only words “necessarily vague and ill-defined” would be able to express the kinds of “social goals” that are ultimately behind the protection of privacy.<sup>378</sup> American jurists have proven skeptical of dignity as an organizing principle for legal relations. One possible reason for this skepticism is raised in Whitman’s depiction of the United States as, comparatively speaking, a relatively rough-and-tumble place: “America is a place where interpersonal relations have always been a bit rough by comparison with many other parts of the world.”<sup>379</sup>

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372. *Id.* at 1890.

373. *Id.* at 1917.

374. *Id.* at 1920.

375. *Id.* at 1924.

376. *Id.* at 1922.

377. Leon Green, *The Right of Privacy*, 27 U. ILL. L. REV. 237, 250 (1932). Green discovered the concept in *Melvin v. Reid*, 297 P. 91, 94 (Cal. Ct. Ap. 1931). Although the notion of privacy-happiness has not panned out, California has added “privacy” explicitly to the inalienable rights that its state constitution protects. Unlike the federal Constitution, California also enforces this interest against private parties. For a discussion, see Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407, 1417–18 (2009).

378. Bloustein, *supra* note 9, at 1001.

379. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1280 (2000).

Another reason may be a shared American reluctance to expand the existing bedrock concepts of jurisprudence, property, and contract to include a subject as potentially slippery, from the American perspective, as dignity. Indeed, the tactic of progressive contemporary scholars in the United States who write about privacy has not been to argue in favor of dignity as a separate category. Rather, these scholars have engaged in nuanced readings of the jurisprudence of property and contract to show how they can be made compatible with some degree of individual information self-determination.<sup>380</sup>

While legal scholarship does well to point out the various problems with Prosser's framework, the time has also come to acknowledge that Prosser's influence has led to more tort privacy today than we otherwise would have.<sup>381</sup> In 1965, a scant five years after Prosser's article, and before the publication of the four-step approach to privacy in the Restatement (Second) of Torts, Krause concluded that the German approach to privacy created greater protection than did the U.S. approach.<sup>382</sup> Krause's judgment remains roughly correct today. Yet, the major change since 1965 in this area has been in the increase in the amount and kinds of tort privacy in the United States. This surge in judicial use and legislative adoption of privacy doctrine suggests that Prosser's categories created useful conceptual safe harbors for judges and state legislatures, who might otherwise have been hostile to the topic. By throwing his personal prestige and that of the American Law Institute behind these seemingly crisp categories, Prosser made it easier for courts and legislatures to find for privacy plaintiffs. Rather than creating an ossified privacy concept, Prosser's contribution generated useful doctrinal categories where previously had been unclassified cases and a lingering air of skepticism towards the tort.

Moreover, just as Prosser's four privacy torts resonate with principles of American law, so must additions to his framework. Consider, for example, the merits of confidentiality as a new privacy tort. As we have noted, Richards and Solove advocate use of this concept from English tort law to enlarge Prosser's canon.<sup>383</sup> While their argument introduces a useful comparative perspective, the authors do not consider Americans' general acceptance of the idea that one

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380. See, e.g., Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2084–94 (2004); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998); Haemmerli, *supra* note 258, at 383, 417–20.

381. On the general shortcomings, see Richards & Solove, *supra* note 16; Strahilevitz, *supra* note 15. For a discussion of the shortcomings of Prosser's categories in the online context and as regards health care data, see, for example, Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1634 (1999); Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 34 (1997).

382. Krause, *supra* note 152, at 488. For a comparative analysis of the German treatment of privacy in the early 1930's that already found a higher level of protection for this interest compared to the "Anglo-American law on this question," see H.C. Gutteridge, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 203, 211 (1931).

383. Richards & Solove, *supra* note 16; Neil M. Richards & Daniel J. Solove, *PRIVACY'S OTHER PATH: RECOVERING THE LAW OF CONFIDENTIALITY*, 96 GEO. L.J. 123 (2007).

risks betrayal of confidences as an element of human relations. An example of this concept is seen in Fourth Amendment jurisprudence.<sup>384</sup> More generally, American law views each individual as generally bearing the privacy risks of the ill-chosen friend who breaches a confidence.<sup>385</sup> To the extent that American law does provide protection for confidences, it is when they are bolstered through contracts or fall into the category of trade secrets.<sup>386</sup> Otherwise, when a betrayal of confidence occurs, the fault is in the stars, and the remedy outside of the law.

Lior Strahilevitz takes another approach to Prosser. Unlike Richard and Solove, he wishes not to add to the Prosser categories but to junk them.<sup>387</sup> He calls for us to turn our backs on Prosser and reject “basically everything he sought to accomplish.”<sup>388</sup> For Strahilevitz, the time has come for a replacement of “Prosser’s fragmented privacy tort . . . with a unitary tort for invasion of privacy.”<sup>389</sup> He proposes a simplification of the four Prosser categories “along the lines described by Warren and Brandeis.”<sup>390</sup> In Strahilevitz’s view, Warren and Brandeis developed a “basically welfarist balancing test.”<sup>391</sup> He reads these authors through the lens of a classic opinion by Judge Richard Posner, a leading law and economics theoretician, and decides that the necessary test is whether “the gravity of the harm to the plaintiff’s privacy interest [is] outweighed by a privacy policy interest.”<sup>392</sup>

In response, we would first note that our interpretation of Warren and Brandeis is not as parties who anticipated the law and economics movement, but rather as scholars deeply concerned with human worth. In language that we have already cited, Warren and Brandeis placed their privacy right into context as “a part of the more general right to the immunity of the person, the right to one’s personality.”<sup>393</sup> We also wonder if Strahilevitz’s advocacy of pure balancing ignores the benefit of Prosser’s seemingly distinctive and separate categories, which, over time, have been able to take on a doctrinal function that

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384. See *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *Lopez v. United States*, 373 U.S. 427 (1963).

385. *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 770 (N.Y. 1970).

386. As a leading intellectual property casebook states, “Today, every one of the United States protects trade secrets in some form or another.” ROBERT MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 35 (5th ed. 2009). For a definition of a trade secret, see *Restatement (Third) of Unfair Competition*: “A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 39 (1995).

387. Strahilevitz, *supra* note 15.

388. *Id.* at 1985.

389. *Id.* at 1959.

390. *Id.* at 1985.

391. *Id.*

392. *Id.* The Posner opinion is *Desnick v. Am. Broad. Co., Inc.*, 44 F.3d 1345 (7th Cir. 1995).

393. Warren & Brandeis, *supra* note 1, at 207.

judges and jurists have found useful and even reassuring in their decision making.

We wish to conclude with some final thoughts about divergence and convergence in the respective privacy tort law of Germany and the United States. In Germany, there is a unitary concept that has been successful in the sense of providing a framework for the construction of tort privacy. In that legal system, it was useful to begin with a highly abstract concept—and one with deep philosophical roots—in constructing an approach to tort privacy. In contrast, and as we have noted, tort privacy in the United States has rested on a middle-range of abstraction and four distinct types of interests.

Other differences between the two systems exist. In Germany, a confident judiciary is willing to parse literary works and to scrutinize the nature of public information to determine whether it constitutes mere “entertainment.” Moreover, Germany provides absolute protection for “information about a core area of life formation.”<sup>394</sup> It has developed categories that permit greater potential protection for privacy in public areas. Finally, Germany provides a period of dramatically shorter protection for postmortem publicity rights.

It would be a mistake, however, to overemphasize the differences between the two legal systems in their respective laws of tort privacy. For example, American courts also engage in nuanced literary and media analyses in the context of the appropriation tort to decide whether a “transformative” use of a celebrity identity has occurred. In addition, German law strongly protects freedom of expression that infringes on personal privacy. The recent concern about media reports on the private life of the weatherman Kachelmann and Böll’s novel, *The Lost Honor of Katharina Blum*, demonstrate that some observers have felt that German law does too much to protect the media and too little to protect individuals caught up in headlines. German law has also recognized and welcomed the value of a wide range of media, including the popular press and, more recently, blogs and websites, in providing new opportunities for freedom of expression.<sup>395</sup>

A final comment is also necessary regarding the convergence of legal results in the two systems. Rather than a starting point in case law and statutory law, we can imagine a purely sociological vantage point for the study of the two systems. This alternative effort would assume the perspective of the consumer of gossip magazines, reality television, celebrity blogs, and other kinds of popular media in Germany and the United States. Bilingual readers with time to spare might even start this project by looking at the websites of such publications as *Bunte* and the *Bild Zeitung*, on the German-side, and

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394. Federal Constitutional Court, BVerfGE 119, 1, at para. 88 = 39 IIC 206, at para. 88 (2008).

395. Federal Supreme Court, 62 NJW 2888 (2009) (teacher’s rating); Landgericht Regensburg, 12 MMR 363 (2009) (professor’s rating); Landgericht Berlin 10 MMR 668 (2007) (professor’s rating).

*People* and the *National Enquirer*, on the American side. These leading examples of privacy-invading media are quite similar. This study would likely end by identifying relatively few differences in the impact of popular media on personal privacy in the two countries and even fewer that are attributable to the respective privacy torts or other legal inputs.<sup>396</sup>

#### CONCLUSION

At the end of *Some Like It Hot*, Billy Wilder ended a brilliant film with a profound insight: "Nobody's perfect." William Prosser's privacy scholarship may not be perfect, but it has proven itself to be prescient, pragmatic, and highly persuasive. His four tort categories have provided useful conceptual safe harbors for judges and state legislators and encouraged the acceptance of privacy protections in tort law. Prosser "translated" Warren and Brandeis into terms that the U.S. legal system could adopt. While following Warren and Brandeis's goal of protecting individuals against mental harm, Prosser stripped out their high-level theory and instead developed a set of distinctive and persuasive classifications that have proven workable within the U.S. legal system. As a result, we have argued that Prosser's contribution has expanded tort privacy law.

Privacy has also played an important role in German tort law. The German privacy tort is based on a right to personality, a theoretical basis that U.S. scholars long advocated and that U.S. courts and legislators chose not to adopt. This primary difference between U.S. and German privacy law reflects the anchoring of German privacy in the value of human dignity.

There are further distinctions that we have drawn between the German and U.S. approaches to tort privacy. A second difference is that the general personality is a "source right" that has proved a fertile source for a related series of legal rights. Thus, while one unitary concept of tort privacy exists in Germany, there are more than four categories that follow from it. Many of these resulting interests can be re-sorted, however, into one of the Prosser categories.

A third difference is that German personality interests have a constitutional dimension that applies to actions by both the government and private parties. As a result, German judges are more likely to evaluate constitutional law interests in a tort privacy case than their counterparts in the United States. Finally, the German right of personality safeguards an absolutely protected sphere that is typically associated with highly intimate information or

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396. There is a continuing fascination in Germany, for example, with royalty, such as Princess Caroline or the Swedish royal family. As an illustration, the wedding of Princess Victoria in June 2010 was subject to nearly nonstop coverage in the German media. See Der Spiegel's summary of its coverage of Victoria, *Viktoria, Kronprinzessin von Schweden*, SPIEGEL ONLINE, [http://www.spiegel.de/thema/victoria\\_schweden/](http://www.spiegel.de/thema/victoria_schweden/). Americans are more exclusively interested in native-born entertainers than royalty with the exception of the English royal family.

extremely sensitive aspects of private life. While the U.S. system provides heightened protection for such information and aspects of private life, American courts will also typically evaluate the possible public interest in access to the underlying data. Balancing of interests is an inescapable aspect of American tort privacy law.

Despite these differences, this Article has also traced a strong degree of convergence between the two legal systems. Most significantly, we find that the German emphasis on the protection of dignity has not weakened the country's protection of freedom of expression. German tort privacy law permits publication of matters that are newsworthy or involve strong criticism—even when these publications may infringe on the privacy of others. Moreover, both systems permit similar kinds of invasions of privacy without legal recourse. Finally, we proposed an alternative vantage point for the study of tort privacy in the two countries that compares media and not law. This alternative effort would focus on the respective media landscapes of Germany and the United States. It would likely end by identifying relatively few differences in the privacy-invasive media culture of the two countries, and even fewer differences that are attributable to the respective privacy torts.

