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THE RIGHT TO PRIVACY & ASSISTED REPRODUCTIVE TECHNOLOGIES: A COMPARATIVE STUDY OF THE LAW OF GERMANY AND THE U.S.

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I. INTRODUCTION

A. Law & Medicine

The law is not static; America's most famous judge, Oliver Wendell Holmes, Jr., has pointed out that the law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[1] Political, social, economic, and scientific changes happen continually, which in return demand the law's reaction. Thus, if "we try to specify a particularized right in some localized area, we discover that we have committed ourselves to a description of an entire social order."[2]

For example, the development of the right to privacy, which was to a great extent triggered by a law review article written by Samuel D. Warren and Louis D. Brandeis,[3] was a reaction to new technologies developing in 1890: the telegraph, tabloid newspapers, the high-speed printing press, and the telephone.[4] "Recent inventions and business methods," Warren and Brandeis wrote, "call attention to the next step which must be taken for the protection of the person. [Numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the housetops]."[5] Similarly, the German right to privacy has been developed in reaction to the growth of the mass media — the press, television and radio broadcasting.[6]

An area in which the unique relationship between law and natural sciences becomes most obvious is the field of medicine. Developments in this area are often meteoric; medical technology develops "so rapidly and pervasively that it risks overwhelming individuality."[7] "What once was solely

1. OLIVER WENDELL HOLMES, THE COMMON LAW 1, Little Brown and Company, Boston, (1881) (cited in Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1387 (Del, 1995)).

2. Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1379 (1984).

3. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

4. ROBERT ELLIS SMITH, THE LAW OF PRIVACY IN A NUTSHELL 8 (1993).

5. Warren & Brandeis, *supra* note 3, at 195.

6. *See* KARL LARENZ, LEHRBUCH DES SCHULDRECHTS, ZWEITER BAND 471-72 (10th ed. 1972); HEIN KOETZ, DELIKTSRECHT 273 (2nd ed. 1979).

7. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 Utah L. Rev. 963, 965 (1997).

within the realm of science fiction is now within the realm of reality. The field of biotechnology is rapidly producing questions the legal community has never before been called upon to answer."[8] The Nobel prize laureate Kary Mullis, who was the American researcher responsible for the technique permitting rapid replication of multiple copies of DNA which inspired the movie "Jurassic Park," noted this issue recently when she said that "anything that human beings can imagine is possible."[9]

Taking a more pessimistic view, Ellis Huber, the President of the German Chamber of Physicians ("*Bundesaerztekammer*") in Berlin, said, "Doctors today often can do more than people want or need for their happiness."[10] Others have pointed out that further developments in the area of genetic engineering and advances in medical technology may bring us closer to Huxley's Brave New World, closer than many of us would desire.[11] As with all scientific discoveries, the results can be used well or poorly.[12] Therefore, it is vital the law is able to keep pace with science.[13]

B. Law & Assisted Reproductive Technologies

Perhaps the biggest challenge the law faces at the beginning of the new millennium is how to respond adequately to the development in the area of assisted reproduction.[14] Today, the birth of a child is no longer considered an inevitable act of nature or an intimate, sacred act by which people create a family,[15] but as a "perfectly plannable enterprise."[16] The rapid expansion of reproductive technologies since the late 1970's accelerated the transformation of the family by undermining "sacred assumptions" about the reproductive process,[17] and simultaneously disrupted familiar social and biological anchors.[18] In 1996, nearly 65,000 assisted reproductive technology (ATR) treat-

8. Elizabeth Ann Pitrolo, *The Birds, the Bees, and the Deep Freeze: Is there International Consensus in the Debate over Assisted Reproductive Technologies?*, 19 Hous. J. Int'l L. 147, 148 (1996).

9. *"Back to the Future" More likely than "Jurassic Park", Chemist Says*, Rocky Mountains News, Dec.5, 1993, at A84.

10. *See* Stern, August 8, 1996, at A87.

11. *See* Herbert Harrer, *Aspects of Failed Family Planning in the United States of America and Germany*, 15 J. Legal Med. 89, 127 (1994); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. Cal. L. Rev. 942, 951 (1986); John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 Tex. L. Rev. 1371, 1384, 1387 (1998).

12. Pitrolo, *supra* note 8, at 205.

13. *See* Eberle, *supra* note 7, at 1001; *see also* BGH, NJW 1966, 2353 (2354) ("The law must not capitulate to technological development.").

14. *See* Robertson, *supra* note 11. Especially when combined with cloning.

15. *See* Gregory A. Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 23 Seton Hall Legis. J. 103, 106 (1998).

16. Harrer, *supra* note 11, at 89.

17. Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 Vt. L. Rev. 225 (1998).

18. *Id.* at 229; *see also* Triber, *supra* note 15.

ment cycles were carried out at about 300 programs in the United States.[19] According to an article in the July 1998 issue of Science Magazine, about 60,000 babies a year are now born in the United States as a result of artificial insemination, another 15,000 from in-vitro-fertilization, and at least 1,000 due to surrogacy arrangements.[20] It is estimated that another 30,000 embryos are currently in storage.[21] The U.S. infertility industry grosses approximately $2 billion annually.[22] In Germany, approximately 3,500 children are born each year as a result of reproductive techniques;[23] IVF has been used approximately 15,000 times in 1995,[24] and upwards of 20,000 embryos are frozen throughout Europe.[25]

The importance of these figures becomes obvious when one considers that in 1983 "more than one in eight American married couples failed to conceive after one year of trying."[26] It has recently been estimated that 5.4 million infertile couples are living in the United States.[27] According to recent studies, the year 2050 might mark the end of natural procreation.[28] Due to this prophecy and the increasing infertility of men around the globe,[29] the organization *World Wide Fund of Nature* considered proclaiming the year 1996 as the "Year of the Sperm."[30]

An assisted reproductive method like in-vitro fertilization, which was successfully performed as early as 1978 by the British doctors Robert Edwards

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19. *See* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryos Disputes*, 84 Minn. L. Rev. 55, 58 (1999); *see also* Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. Pa. J. Const. L. 150, 188 (1999); Pitrolo, *supra* note 8, at 149; Robertson, *supra* note 11, at 943; George P. Smith, *Assisted Noncoital Reproduction: A Comparative Analysis*, 8 B.U. Int'l L. J. 21 (1990); Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who is the Mother?* 16 Law & Ineq. J. 289, n.8-14 (1998); Triber, *supra* note 15, at 106 n.15.

20. ISLAT Working Group, *ART into Science: Regulation of Fertility Techniques*, 281 Science July 31, 1998, at 651; *see also* Coleman, *supra* note 19, at 56; Snyder, *supra* note 19, n.44.

21. Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 Wash. U. L. Q. 759, 763 (1998).

22. *See* Goffrey Cowley, *Ethics and Embryos*, Newsweek, June 12, 1995, at A 67. Payment for sperm and eggs is widespread among American infertility clinics; sperm donors typically receive $50, and egg donors receive $2,000, per donation; *See* Ann Alpers & Bernard Lo, *Commodification and Commercialization in Human Embryo Research*, 6 Stan. L. & Pol'y Rev. 39, 41 (1995); Christine L. Feiler, *Human Embryo Experimentation: Regulation and Relative Rights*, 66 Fordham L. Rev. 2435, 2455 (1998).

23. *See* Voss, Vernichtung Tiefgerforenen Spermas Als Koerperverletzung?, Deliktsrechtliche Probleme Ausgelagerter Koerpersubstanzen Des Menschen 4 n.23 (1997).

24. *Id.*

25. Smith, *supra* note 19, at 23.

26. *See* Robertson, *supra* note 11, at 944.

27. Snyder, *supra* note 19, n.10.

28. *See* VOSS, *supra* note 23, at 4 n.22.

29. The reasons for the high level of modern infertility consist of environmental and social factors, *See,* Triber, *supra* note 15, at 106, n.14; Robertson, *supra* note 11, at 945-46.

30. *See* Spiegel, *Nur noch halbe Maenner,* February 26, 1996, at A230.

and Patrick Steptoe,[31] rapidly spread throughout the United States, Canada, Europe and Australia shortly thereafter.[32] This method even produced children in countries like China where population control is a top state priority and where population reduction policies are strictly enforced.[33] Yet it may already be regarded as outdated today.

A more recent high-tech fertilization method, called intracytoplasmic sperm injection, developed by the Belgian gynecologist Prof. Andre van Steirteghem and the Vietnamese physician Dr. Ng,[34] apparently is able to achieve much better results. This method entails injecting a single sperm cell — for traditional fertilization methods, 50,000 to 100,000 sperm cells are needed — with an extremely thin glass needle directly into the woman's egg cell, thus enabling conception even in cases of low sperm count or impaired motility.[35] Gynecologists hope first, that they can help nine out of ten of those men who were previously infertile, and second, that the rate of malformation is not higher than the rate in traditional fertilization treatment.[36]

One thing is certain: this will not be the last innovation in the field of assisted reproductive medicine. After it has become possible to separate reproduction from sexuality and to distribute the tasks of biological maternity among several women within a very short period of time,[37] even more revolutionary developments — such as, the creation of an artificial uterus,[38] the complete extracorporeal gestation of human beings,[39] or even male pregnancy[40] — will challenge the societal and legal systems within the next decades. Thus, reproductive technology will remain "an area where the facts are still in flux and where the values are as yet uncertain, manifesting no clear social consensus."[41]

C. Scope of This Aticle

This article compares the development of the right to privacy and its potential to solve new problems caused by modern assisted reproductive technologies in the law of the United States and Germany. As a threshold, it is convenient to first examine how the terms "privacy" or "personality"[42] are defined in both countries, to ensure that one discusses essentially the same

31. *See* Feiler, *supra* note 22, at 2436; Robertson, *supra* note 11, at 943.
32. Robertson, *supra* note 11, at 943.
33. Pitrolo, *supra* note 8, at 149-50.
34. *See* Adolf Laufs, *Arzt und Recht im Umbruch der Zeit,* NJW 1995, 1590 (1593) n.74.
35. *See* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. Rev. 1077, 1081 n.12 (1998).
36. Voss, *supra* note 23, at 3 n.10.
37. Dolgin, *supra* note 17, at 280.
38. *See* Hirsch, *Die kuenstliche Befruchtung – vom rechtsfreien Raum ueber das Standesrecht zum Gesetz*, Festschrift fuer Walter Weissauer zum 65. Geburtstag 37, 63 (1986).
39. See Robertson, *supra* note 11, at 1032.
40. See Pitrolo, *supra* note 8, at 158.
41. Rao, *supra* note 35, at 1122.
42. Both terms will be used synonymously.

thing. Thereafter, it is necessary to show the origins of the right and its interpretation by the highest courts of both jurisdictions. One can then discuss to what extent the right to privacy is a suitable concept in the area of reproductive health law, focusing on the right to procreate, the right of informational self-determination, the right to know one's heritage, and the right to enter into surrogacy contracts and their interdependence in this context. The article concludes with a critical comparison, and most importantly, an analysis of the question of what the United States and Germany can learn from each other. Note, the article will encompass the right to privacy in its constitutional context as well as under tort law.

Both in Germany and the U.S., the fundamental rights provisions found in the Constitution and Bill of Rights respectively perform the traditional defensive or negative function of protecting the individual against interference by the state. The German provisions, however, have sometimes been held to have a positive dimension as well, i.e. they impose various affirmative duties on the state to protect one citizen against another and even occasionally to overcome organizational, technical, or financial obstacles to the exercise of a fundamental right.[43] For example, the Constitutional Court has held that constitutional provisions protecting human dignity[44] and the right to life[45] *require*the legislature to make abortions a crime in most instances.[46] Similarly, the guarantee of broadcasting freedom in Art. 5 (1),[47] has been held to require the state to establish a legal framework in which all significant interests can make themselves heard.[48] In addition, the provision of Art. 7 (4)[49] protecting the right to establish private schools has been found to require in some cases that they be subsidized by the state.[50] Although affirmative constitutional rights and duties are not entirely unknown in the U.S.,[51] the Bill of Rights has

43. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 13-14 (1994).

44. Art. 1 (1) states: Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

45. Art. 2 (2) states: Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

46. *See* BVerfGE 39, 1.

47. Art. 5 (1) states in relevant part: Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed.

48. *See* BVerfGE 12, 205.

49. Art. 7 (4) states: The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the federal state and shall be subject to the laws of the states. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.

50. *See* BVerfGE 75, 40.

51. *See, e.g.,* Truax v. Corrigan, 257 U.S. 312 (1921).

been held to be basically, as Judge Posner wrote, ". . . a charter of negative rather than positive liberties."[52]

On the other hand, the law of torts focuses in both countries on the relationship between individuals among each other. Thus, the acknowledgement of a constitutional right to privacy does not necessarily predetermine the existence of a (private) right to privacy under tort principles. As will be discussed in more detail later,[53] the German Supreme Court has developed a "general right to personality" under tort law with explicit reference to Art. 1 and Art. 2 (1)[54] of the German Constitution.[55] Hence, it seemed vital to discuss the right to privacy in a broad sense and to examine constitutional as well as tort cases. Important distinctions will be pointed out whenever necessary.

II. PRIVACY DEFINED

A. *Germany*

In Germany, the general right to privacy is traditionally defined as the "right of the individual to have his dignity respected and to develop his individual personality."[56] Gierke defined personality as "the right to be valid as a person,"[57] and Kohler called privacy "the right to claim that a person is acknowledged as a valid moral and intellectual personality."[58] According to Michaelis, privacy is the "right to freely unfold one's power."[59] Moreover, Smoschewer called privacy the "epitome of all values which are not measurable in terms of money,"[60] and Erdsiek spoke of the protection of "those non-material values which remain when we disregard one's material assets."[61]

The most elaborate definition of privacy, however, was offered by Hubmann in his book The Right to Privacy.[62] Hubmann defines personality as

52. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Circ. 1983); *see also* DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989); Harris v. McRae, 448 U.S. 297, 316 (1980).

53. *See infra* text accompanying notes 80-123.

54. Art. 2 (1) states: Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

55. As LARENZ, *supra* note 6, at Sec. 72 III, points out, it is not entirely clear whether the Supreme Court applied Art. 1 and 2 (1) directly, regarding both rights as identical, or whether it viewed the constitutional provisions as establishing a right for the court to fill gaps in the Civil Code.

56. BGHZ 24, 72 (76); 27, 284 (285-86); NJW 1959, 525.

57. OTTO VON GIERKE, DEUTSCHES PRIVATRECHT, ERSTER BAND 703 (1895).

58. JOSEF KOHLER IN JOSEF KOHLER (PUBLISHER), ENZYKLOPAEDIE DER RECHTSWISSENSCHAFT, ERSTER BAND 587 (1904).

59. MICHAELIS, PERSOENLICHKEITSRECHTLICHE BEFUGNISSE IM DEUTSCHEN URHEBERRECHT 34 (1926).

60. Fritz Smoschewer, *Das Persoenlichkeitsrecht im allgemeinen und im Urheberrecht,* Ufita 3 (1930), 119 (136).

61. Gerhard Erdsiek, *Der Regierungsentwurf zum Persoenlichkeits- und Ehrenschutzgesetz,* Ufita 29 (1959), 1 (9).

62. HEINRICH HUBMANN, DAS PERSOENLICHKEITSRECHT (1953).

> [t]he own performance, constant creativity; it is the human person on its way to maturity . . . . It covers those valuable personal interests which have not been made independent rights by the law. The right to privacy protects all values and goods, the inner as well as the outer ones, the spiritual as well as the physical ones, and protects not only the outer, physical existence, but also his mental powers, his spirit, will and feelings.[63]

However, Hubmann himself has admitted that although probably everyone has some "dark imagination" of privacy, the attempt of an exact and complete analysis would lead to the point where this imagination would "melt away like mist;" the nature of personality would be "wrapped in a veil," surrounded by a "deep darkness," the "secret of mankind."[64]

B. United States

According to a recent comment, American law has never really sought to define human personhood or personality.[65] There are, however, the following statements, which give the right to privacy some contours:[66] In their famous law review article "The Right to Privacy"[67] Samuel D. Warren and Louis D. Brandeis defined the right to privacy as the "right to be let alone."[68] In fact, this was no creation of Warren and Brandeis, but rather a term that they took from Judge Thomas M. Cooley's definition in his treatise on tort law.[69] Privacy, they said, could be circumscribed as "the right of one who has remained a private individual, to prevent his public portraiture."[70] Citing a British case dating to 1769,[71] they acknowledged that the common law system would secure each individual "the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[72] Privacy would be "a part of the more general right to the immunity of the person, the right to one's personality."[73]

In his article "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,"[74] Edward J. Bloustein, citing Judge Andrew J. Cobb,[75] wrote,

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63. *Id.* at 60, 136, and 376.
64. *Id.* at 9, 10, 131-32, 135 and 149.
65. Eberle, *supra* note 7, at 973.
66. For a more comprehensive overview *see* SMITH, *supra* note 4, at 45-49.
67. Warren & Brandeis, *supra* note 3, at 193.
68. *Id.* at 195.
69. THOMAS M. COOLEY, ON TORTS (1888).
70. Warren & Brandeis, *supra* note 3, at 213.
71. Millar v. Taylor, 4 Burr. 2303, 2379 (1769).
72. Warren & Brandeis, *supra* note 3, at 198.
73. *Id.* at 207.
74. 39 NYU L. Rev. 962 (1964).
75. *See* Pavesich v. New England Life Insurance Co., 122 Ga 190, 195-96, 50 SE. 68, 70 (1905).

"Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty."[76] Similarly, Alan F. Westin defined privacy as "[t]he claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others . . . ." Privacy is the voluntary and temporary withdrawal of a person from the general society through physical and or psychological means . . . ."[77] Finally, privacy has been called "the attempt to control the time and manner of disclosures of personal information about oneself."[78] However, similar to the German situation, the exact meaning of the doctrine of the right to privacy in American law still remains unclear. It has been criticized as "exasperatingly vague and evanescent, often meaning strikingly different things to different people."[79]

III. ORIGIN AND HISTORICAL DEVELOPMENT OF THE RIGHT TO PRIVACY

A. Germany

1. Reichsgericht/Weimarer Reichsverfassung: No (Express) Right to Privacy

While the legal systems that existed in Germany in the nineteenth century provided an extensive protection of the right to privacy,[80] the drafters of the German Civil Code ultimately decided — ignoring the criticism of well known scholars[81] and in contrast to the laws of other European countries[82] and

76. 39 NYU L. Rev. 962, 1002 (1964).

77. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

78. SMITH, *supra* note 4, at 45.

79. ARTHUR R. MILLER, THE ASSAULT ON PRIVACY (Univ. of Mich. Press 1971) (cited in SMITH, *supra* note 4, at 45 n.115).

80. The *Civil Code of Saxony* of 1863 gave judges the discretion to award damages in cases involving the "dissemination of untrue statements about a person's life, personal abilities, conduct of office, established business, or other relations." B.S. MARKESINIS, THE GERMAN LAW OF TORTS 63 (3rd ed. 1994). Similar provisions existed in Preuseen; *See* Preussisches ALR I 6 sec. 10 et. seq., and in those German areas (on the left side of the Rhine river) in which the French *Code Civil* was applicable; DIETER LEUZE, DIE ENTWICKLUNG DES PERSOENLICHKEITSRECHTS IM 19. JAHRHUNDERT (1962); ERNST RABEL, GESAMMELTE AUFSAETZE, BAND III 103 (1919-1954); Robert Scheyhing, *Zur Geschichte des Persoenlichkeitsrechts im 19. Jahrhundert,* AcP 158 (1959/1960), 503; KONRAD ZWEIGERT & HEIN KOETZ, EINFUEHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS, BAND 2 Sec. 17 II (1984).

81. Distinguished scholars like J. Kohler (*Das Recht an Briefen,* ArchBuergR 7 (1893), 94, 101) and the famous "Germanist" OTTO VON GIERKE (DEUTSCHES PRIVATRECHT, ERSTER BAND (1895), SEC. 81; DRITTER BAND (1917), Sec. 211 II) attempted to establish a general right to privacy towards the end of the 19th century; *see also* FRANZ VON LISZT, DIE DELIKTSOBLIGATIONEN IM SYSTEM DES BUERGERLICHEN GESETZBUCHS 3, 20 (1898); REICHSJUSTIZAMT (PUBLISHER), ZUSAMMENSTELLUNG DER GUTACHTER-LICHEN AEUSSERUNGEN ZU DEM ENTWURF EINES BUERGERLICHEN GESETZBUCHS, BAND II 398 (1890).

82. *See* Swiss *Obligationenrecht* Art. 28 Swiss ZGB and Art. 41 (1); Austrian ABGB Sec. 1295 (I); Art. 2043 code civil Italiano; Art. 914 Greek ZGB; and the French Code Civil Arts. 1382 and 1383; (A similar provision contained Sec. 330 ZGB of the German Democratic Republic).

the first draft of the Civil Code[83] — not to include an explicit catch-all clause stating that all violations of the right to privacy should lead to compensatory damages. The Committee entrusted with the task of drafting the Code reasoned that:

> [it] (would be) repugnant to the dominant opinion among the population to place non-material values on the same level as property interests and to compensate with money interferes with non-material interests. The Code should not ignore this view, especially prevalent among the better circles of society. Only the worst elements (of society) would try to take advantage. Pursuit of profit, selfishness, and covetousness would be promoted and wrongful proceedings, started from ulterior motives, would be encouraged.[84]

In other words, the legal idea was that "anyone who would sell his honor for money had no honor."[85]

Making its judgments under the *Weimarer Reichsverfassung,* the *Reichgericht,* did not overstep the restrictions placed upon it, but emphasized in its decisions that a general right to privacy would be alien to the Civil Code and result in insolvable problems in delimiting actionable wrong from legal behavior.[86] More and more, however, the *Reichsgericht* broadened existing provisions protecting special areas of freedom. For example, it applied, by analogy, Sec. 862, 1004 Civil Code[87] to privacy rights.[88] Furthermore, it began to interpret the terms "willfully" and "public policy" in Sec. 826 BGB[89] in

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83. E I Sec. 704. *See* MOTIVE ZU DEM ENTWURF EINES BUERGERLICHEN GESETZBUCHS FUER DAS DEUTSCHE REICH, BAND II 724 et seq. (1888); B. MUGDAN, DIE GESAMMELTEN MATERIALIEN ZUM BUERGERLICHEN GESETZBUCH FUER DAS DEUTSCHE REICH, II. BAND 404-405, 1267 (1899).

84. *See* PROTOKILLE DER KOMMISSION FUER DIE ZWEOTE LESUNG DES ENTWURFS DES BUERGERLICHEN GESETZBUCHS, BAND I 622-23 (1897).

85. Harry D. Krause, *The Right to Privacy in Germany – Pointers for American Legislation?*, 1965 Duke L.J. 481, 511.

86. *See* RGZ 69, 401 (403-404); 113, 413 (414-15).

87. Sec. 862 Civil Code states: (1) If the possessor is disturbed in possession by unlawful interference, he may demand from the disturber the cessation of the disturbance. If further disturbances are apprehended, the possessor may seek an injunction. (2) The claim is excluded, if the possession of the possessor is defective relative to the disturber of his legal predecessor and the possession has been obtained within the year preceding the disturbance. Sec. 1004 Civil Code states: (1) If the ownership is interfered with otherwise than by dispossession or withholding of possession, the owner may demand from the disturber the removal of the interference. If further interference is to be apprehended, the owner may sue for an injunction. (2) The claim is excluded, if the owner is obliged to tolerate the interference.

88. RGZ 60, 6 (7).

89. Sec. 826 Civil Code states: A person who willfully causes damage to another in a manner contrary to public policy is bound to compensate the other for damage.

an extensive way.[90] Additionally, it applied Sec. 22 et seq. *Kunsturhebergesetz* (Act on Artistic Creations)[91] with "great ingenuity."[92]

2. "Schachtbrief"[93]

The first time a general right to privacy was acknowledged was in 1954. The German Supreme Court had to decide the following case: The defendant company had published in its weekly journal an article with the title "Dr. Schacht & Co." and the sub-title "Political considerations concerning the foundation of a new bank." The article contained a comment concerning the new Bank for Foreign Trade founded by Dr. Schacht, a former secretary of commerce under Hitler, and expressed in opposition to Dr. Schacht's political activity during the national-socialist regime and the years after the war. On the instructions of Dr. Schacht who was the plaintiff and an attorney, sent the defendant a letter in which he said that he would represent Dr. Schacht's interests, that certain statements in the abovementioned article were incorrect, and that he asked the defendant to correct the article. In addition, the plaintiff asked the defendant to inform him of the unrestricted execution of the required correction by the end of the week, otherwise legal proceedings would be taken. The defendant, instead of answering the plaintiff's request, published the letter in the following week's issue of the Journal, along with various opinions by readers of the article, under the heading "Letters from Readers." The plaintiff argued that such a kind of publication would constitute an injury to his right to privacy. The publication of the letter, written in his capacity as attorney for Dr. Schacht, would deliberately misleading as the public. The incorrect impression would be created that his letter was a mere expression of opinion by a reader, although the plaintiff had only acted as a lawyer within the scope of his client's instructions. The defendant, however, argued that it lay within the publisher's discretion whether and at what place in its journal to

90. RGZ 115, 416 (417-18); 162, 7 (10-12).

91. Sec. 22 KUG ("Right to one's image") states: Pictures or portraits may be distributed or displayed only with the consent of the person portrayed, i.e., the subject. In cases of doubt, consent is considered to have been given if the person portrayed has received a consideration for allowing himself to be portrayed. When the subject dies and for up to 10 years thereafter, the consent of the next of kin is required. Next of kin within the meaning of this law are the surviving spouse and children of the subject and, if neither the spouse nor the children are alive, the parents of the subject. Sec. 23 KUG describes the types of pictures that do not require consent: (1) The following may be distributed or publicly displayed without the required consent according to Sec. 22: 1. Pictures within the realm of contemporary history; 2. Pictures in which the persons appear only incidentally in a landscape or other location; 3. Pictures of meetings, receptions, processions and other gatherings in which the persons portrayed have participated; 4. Pictures that have not been produced by order or request, but whose distribution or display would be in the higher interests of art. (2) Consent does not, however, extend to distribution and display in which the legitimate interests of the subject or the next of kin are infringed. For a discussion of the KUG *see also* Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 Loy. L.A. Ent. L.J. 479, 501 (1999).

92. *See* MARKESINIS, *supra* note 80, at 65 (*citing* RGZ 69, 401).

93. BGHZ 13, 334. English version in part by F.H. LAWSON and B.S. MARKESINIS.

print the communication. The District court found for the plaintiff, but was reversed by the Court of Appeals, which found "no lawful disparagement" of the plaintiff.

The German Supreme Court restored the District Court's judgment.[94] It reasoned that the *Reichsgericht*, although not expressly acknowledging a general right to privacy, had already, in many decisions on Sec. 823 Civil Code[95] under the *Weimarer Reichsverfassung*, approved the protection of certain personality rights. The Court decided, taking into consideration that on May 23, 1949 the new German Constitution (*Grundgesetz*) had been put into force, including the recognition of the right of every human being to have his dignity respected (Art.1),[96] the right to free development of one's personality (Art. 2),[97] and the general personality right was to be regarded "as a constitutionally guaranteed fundamental right."[98] The Court went on to hold that by the defendant's electing to publish the plaintiff's request, but omitting essential parts of the letter, that interests of the plaintiff in the nature of personality rights had been infringed:

> Every verbal expression of a definite thought is an emanation from the author's personality, even when the protection of copyright cannot be attributed to its form. It follows that in principle only the author is entitled to decide whether and in what form his notes are communicated to the public; for every publication of the notes of a living person under his name is rightly regarded by the public as proceeding from a corresponding direction of his will. The nature of the notes and the method of their communication is subject to the criticism and valuation of public opinion, which draws conclusions from the circumstances about the author's personality. While an unauthorized publication of private notes constitutes — as a rule — an inadmissible attack on every human being's protected sphere of secrecy, a modified reproduction infringes the personality rights of the author because such unauthorized alterations can spread a false picture of his personality. In general, not only unauthorized omissions of essential parts of the author's notes are inadmissible, but also additions through which notes presented for publication only for certain purposes ac-

94. BGHZ 13, 334 (338).

95. Sec. 823 Civil Code states: (1) A person who, willfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom. (2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault.

96. *See* Constitution of Federal Republic of Germany *supra,* note 44.

97. *See id. at* Art. 2(1) and 2 (2).

98. BGHZ 13, 334 (338).

> quire a different color or tendency from what he expressed in the form chosen by him and the kind of publication he had allowed.[99]

From these rules it followed that the defendant would only have been entitled to either publish the text in complete form, or, restricting itself to the required correction, to make visible that there had been a demand for correction.

3. "Herrenreiter"[100]

The defendant, a limited partnership, was the manufacturer of a pharmaceutical preparation that had the reputation to be able to increase sexual potency. To advertise this preparation in Germany, the defendant disseminated a poster with the picture of the plaintiff, a competition rider, or show-jumper. Its source was an original photograph of the plaintiff, which had been taken by a press agency at a show-jumping competition. The plaintiff had not given permission for the use of his portrait.

The plaintiff claimed damages from the defendant for the injury he suffered from the dissemination of the poster. The plaintiff argued that the amount of damages should be a fair sum to be fixed by the court, not falling short of DM 15,000. The defendant denied any fault and pleaded that, after touching up, the plaintiff's features were not recognizable in the poster, and that it had not itself designed or produced the poster but had ordered it from a respectable, *reliable advertising agency.* The District Court ordered the defendant to pay DM 1,000, a sum that the Court of Appeals raised to DM10,000.

The defendant's appeal was unsuccessful.[101] Continuing the tradition of the "Schachtbrief" decision,[102] the Supreme Court awarded damages on the basis of compensation for the non-material injury[103] which the plaintiff had suffered as a result of the invasion of his personality. The court explained:

> The sacredness of human dignity and the right to free development of the personality protected by Art.1 of the Constitution are also to be recognized as a civil right to be respected by everyone in daily life, in so far as that right does not impinge upon the rights of others and is not repugnant to constitutional order or the moral law. This so-called general right to one's personality also possesses legal validity within the framework of the civil law and enjoys the protection of Sec. 823 Civil Code under the designation of "other right" . . . .

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99. *Id.* at 338-39.
100. BGHZ 26, 349.
101. *Id.* at 351.
102. *See supra* text accompanying notes 93-97.
103. Sec. 253 Civil Code defines a non-material injury as "an injury which is not an injury to property."

> Articles 1 and 2 of the Constitution protect — and indeed must be applied by the courts in the administration of justice — what is called the concept of human personality; they recognize in it one of the supra-legal basic values of the law. Thereby they are directly concerned with the protection of the inner realm of the personality which, in principle, only affords a basis for the free and responsible self-determination of the individual and an infringement of which produces primarily so-called immaterial damage, damage expressed in the degradation of the personality. To respect this inner realm and to refrain from invading it without authorization is a legal command issuing from the Basic Law itself. And it follows from the Constitution that in cases of invasion of this sphere, protection must be given against damage characteristic of such an invasion.[104]

Under this reasoning, the Court then extended, by analogy, Sec. 847 Civil Code,[105] which allows an equitable compensation in money for non-pecuniary loss in cases of "deprivation of liberty," traditionally interpreted as covering only the deprivation of freedom of bodily movement,[106] to the facts of this case. It found the Court of Appeal's determination of the sum of DM 10,000 to be an appropriate compensation, especially taking into account the plaintiff's social and business position. The court pointed to the fact that the plaintiff "moved in a social circle the members of which were for the most part known to each other and where the risk of making oneself an object to ridicule was especially great."[107]

4. "Ginsengwurzel"[108]

The plaintiff was a professor in the law faculty of a German university at which he held a chair of international and ecclesiastical law. From a stay in Korea he had brought with him a ginseng root, that he placed at the disposal of his friend Professor H., a pharmacologist, for research. The latter mentioned in an scientific article on ginseng roots that he had come into possession of genuine Korean ginseng roots "through the kind assistance" of the plaintiff. This led to the plaintiff being described in a popular scientific article, which

104. BGHZ 26, 349 (354-55).

105. Sec. 847 states: (1) In the case of injury to the body or health, or in the case of deprivation of liberty, the injured person may also demand fair compensation in money for damage which is not damage to property. (2) A similar claim belongs to a woman, against whom an immoral crime or offense is committed, or who is induced by fraud, by threats or by abuse of a relationship of dependence to permit extra-marital cohabitation.

106. *See* JULIUS VON STAUDINGER & KARL SCHAEFER, KOMMENTAR ZUM BGB, I. BAND, 5. TEIL (10th/11th ed. 1975), Sec. 847 n.12, Sec. 823 n.33.

107. BGHZ 26, 349 (359).

108. BGHZ 35, 363.

appeared in 1957, along with Professor H. and other scientists, as one of the best-known ginseng researchers of Europe.

The defendant company dealt in a tonic containing ginseng. In an advertisement for this tonic the plaintiff was referred to as an important scientist expressing an opinion on its value, and in an editorial note, printed in immediate connection with an advertisement in another journal, allusion was made to its use as an aphrodisiac. Both the advertisement and the journal were widely distributed. The plaintiff claimed that he had suffered an unauthorized attack on his personality right; and that the advertisement gave rise to the impression that he had, for payment, issued an opinion on a controversial topic in a department of knowledge not his own, and unprofessionally lent his name to advertising a doubtful product. He had suffered damage to his reputation as a learned man and had been made an object of ridicule to the public and above all to his students. In reliance on "Herrenreiter", he claimed DM 10,000 as satisfaction for the harm done to him. The District Court awarded DM 8,000 as damages for pain and suffering. The Court of Appeals affirmed.

The Supreme Court held that by invoking the plaintiff's scientific authority in its advertising to encourage belief in the effectiveness of its preparation for the mentioned purposes, the defendant had unlawfully disparaged his personality right:

> The references to researches by the plaintiff, which lacked any objective foundation, was in the circumstances calculated to make him an object of ridicule in society and lessen his scholarly reputation. Moreover, he was bound to feel outraged by the way his name was used in advertising a preparation recommended as a sexual stimulant . . . . The Court of Appeals rightly characterized the defendant's conduct as irresponsible.[109]

In accordance with the "Schachtbrief"[110] and "Herrenreiter"[111] judicial precedents, the Court emphasized that, although Sec. 253 Civil Code states that money compensation can be claimed for non-pecuniary damage only in cases expressly designated by the law, this restriction had lost its literal strictness when the new German Constitution was introduced in 1949:

> When the Civil Code established that enumeration principle, the high value of the protection of human personality and its special sphere had not received the recognition that it enjoys according to Arts. 1 and 2 (1) of the Constitution. From the standpoint of the Civil Code, the protection of property interests always stood in the foreground, whereas the personal

109. BGHZ 365-66.
110. *See supra* text accompanying notes 93-99.
111. *See supra* text accompanying notes 102-107.

> worth of a human being received only insufficient and fragmentary protection. In recognizing a general personality right of mankind and granting it the protection of Sec. 823 (1) Civil Code, the courts drew for civil law purposes the consequences resulting from the rank the Constitution assigned to the worth of human personality and the protection of its free development. That protection, however, would be incomplete and full of loopholes if an infringement of the personality right did not give rise to a sanction adequate to the violation. Just as the restriction of the protection by the law of tort to specific legal interests of a human being has proved too narrow to afford the protection of personality required by the Constitution, so a narrowing of immaterial damages, for immaterial loss to cover only injury to specifically mentioned legal interests, no longer conforms to the value-system of the Constitution . . . . The elimination of damages for immaterial loss from the protection of personality would mean that injury to the dignity and honor of a human being would remain without any sanction of the civil law, which deals with the disturbance of essential values and makes the doer of injury owe satisfaction to the victim for the wrong done to him. The law would then renounce the strongest and often only instrument calculated to ensure respect for the personal worth of the individual.[112]

However, as one might have expected after "Herrenreiter", this was not the end of the Court's reasoning. It instead proceeded that it

> does not mean that the legal consequences of injuries to body, health, and freedom on the one hand and the violation of the personality sphere on the other hand must be exactly the same or at least largely correspond to each other. A need for differentation is already indicated by the fact that the factual aspect of an injury to a general personality right is much less specific than where body, health, or freedom is injured . . . . If for every overstepping of the limits, however petty, compensation for immaterial loss were to be awarded to the person affected, there would be a danger that unimportant injuries would be used inappropriately to make a gain . . . . In injuries to the general personality right the satisfaction function of damages for pain and suffering advances into the foreground as that of compensation recedes. Hence it will always be necessary to look at the kind of injury to the personality right to see if the person affected, whose injury cannot otherwise be redressed,

112. BGHZ 35, 363 (367-68).

> should be granted satisfaction for the wrong he has suffered. That will in general only be the case when the doer of damage is blamed for a *serious fault* or when an *injury* to a personality right is *objectively significant*.[113]

Applying these standards, the Supreme Court held that the Court of Appeals had been correct in fixing the amount of damages to DM 8,000.[114]

5. "Soraya"[115]

In the famous "Soraya" case, the German Constitutional Court[116] had to determine the validity of the approach the Supreme Court had taken. The tabloid "Das neue Blatt mit Gerichtswoche," published by the Axel Springer publishing house and famous for its reports on high society members, contained, accompanied by photos, a wholly fictitious interview with the former wife of the Shah of Iran, Princess Soraya Esfandiary-Bakhtiary. The fictitious interview, labeled a "special report with exclusive interview" under the heading "[T]he Shah stopped writing me letters," fabricated intimate details of her former life.

The Princess brought suit, claiming damages for injury to her general right to privacy. The District Court, under reference to the Supreme Court's precedents "Leserbrief," "Herrenreiter" and "Ginsengwurzel," ordered the defendant to pay DM 15,000 as damages. The Court of Appeals and the Supreme Court affirmed. The defendant brought "Verfassungsbeschwerde" (complaint of unconstitutionality), claiming a violation of Arts. 2 (1) in connection with Arts. 20 (2), (3), 5 (1), (2), 103 (2) and 3, 12, 14 of the Constitution.

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113. *Id.* at 368-69.

114. *Id.* at 370.

115. BVerfGE 34, 269 (1973).

116. The relationship between the Supreme Court and the Constitutional Court can be summarized as follows: According to Sec. 13 Gerichtsverfassungsgesetz [GVG] (Act concerning the constitution of the courts), the *ordentlichen Gerichte* (courts with general jurisdiction) have jurisdiction over all civil and criminal suits, except for those which fall under the jurisdiction of the administrative and other special courts. Similar to the American system, there are trial courts on the District Court level (called *Amtsgerichte* [Sec. 23 GVG] and *Landgerichte* [Sec. 71 GVG]), Courts of Appeal (*Landgerichte* [Sec. 71 GVG] or *Oberlandesgerichte* [Sec.119 GVG]) and a Supreme Court (the *Bundesgerichtshof* [Sec. 133 GVG] in *Karlsruhe* [Sec. 123 GVG]). In addition, the Constitutional Court, also based in *Karlsruhe* (Sec. 1 (2) Bundesverfassungsgerichtsgesetz [BVerfGG] (Act concerning the constitution of the Constitutional Court)) has limited jurisdiction according to the catalogue of Art. 93 I of the German Constitution in conjunction with Sec. 13 BVerfGG. The most relevant fields of jurisdiction are Sec. 13 BVerfGG No.6 (the federal government, a state government or 1/3 of Congress articulates doubts about the compatibility of a federal or state law with the Constitution), No.11 (a court expresses doubts about the constitutionality of a law which is essential to decide a pending case) and No.8a (suit of unconstitutionality by an individual).

The Constitutional Court found for the plaintiff, explicitly affirming the constitutionality of the Supreme Court's implementation of constitutional values in the Civil Code:[117]

> The personality and dignity of an individual, to be freely enjoyed and developed within a societal and communal framework, stand at the very center of the value order reflected in the fundamental rights protected by the Constitution. Thus, an individual's interest in his personality and dignity must be respected, and must be protected by all organs of the state (see Arts. 1 and 2 of the Constitution). Such protection should be extended, above all, to a person's private sphere, i.e., the sphere in which he desires to be left alone, to make . . . his own decisions, and to remain free from any outside interference. Within the area of private law such protection is provided . . . by the legal rules relating to the general rules relating to the general right of privacy.[118]

What made the decision so remarkable was that the Constitutional Court seemed to question the supremacy of Parliament — since the Supreme Court had created a remedy for intangible assets in contrast to the wording of Sec. 253 of the Civil Code, and to suggest that the Judiciary was not wholly bound by statutory law at all, but that there was a right of "creative jurisprudence" ("*schoepferische Rechtsfindung*").[119] Pointing to the implementation of Article 20 (3) of the Constitution in 1949,[120] the Court held that the Constitution had altered the traditional civil law limitation to the statutory law:

> Statutes and law . . . are not necessarily identical . . . . Law is not synonymous with the totality of written statutes . . . Social conditions must often take priority over the text of a statute. Rather than being static, norms reflect the context of social relations in their socio-political environment; their content differs under these circumstances. This is especially so in the present age, which has witnessed dramatic social and legal change over the course of the 20th century. In such a context, the judge cannot simply consult written law and meet his obligation to declare the law. Instead, the judge has a 'free hand' to interpret law in regard to substantive justice and changing social conditions.[121]

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117. BVerfGE 34, 269 (281).

118. *Id.* at 281-82.

119. *Id.* at 287-88.

120. Art. 20 (3) states: The legislature shall be bound by the constitutional order; the executive and the judiciary by law and justice.

121. BVerfGE 34, 269 (288-89).

B. United States

1. Early Origins

The Ninth Amendment of the American Constitution, which provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"[122] is the earliest and probably most authoritative articulation of the principle that certain fundamental rights like the right to privacy exist, albeit unspecified in the Constitution.[123] The first judicial recognition of the right to privacy followed soon after the ratification of the Constitution. In 1798, Justice Chase in *Calder v. Bull,*[124] proposed that natural law might render legislation invalid even if the legislation does not violate any specific constitutional principles or provisions.[125] In the same decision, however, Justice Iredell stated that if " the legislature of any member of the union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[126] This view prevailed from the early 1800's and lasted for the next 90 years.[127]

In 1890, two Boston attorneys named Charles Warren and Louis Brandeis (later he became a Supreme Court justice) propounded the right to privacy in their famous law review article,[128] arguing that the law should recognize a right to an "inviolate personality" that would protect "thoughts, emotions, and sensations . . . whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression,"[129] and that the courts should create this new right rather than wait for legislators to act. "The intensity and complexity of life" and "modern enterprise and invention," they said, made the time ripe for judges to redefine the nature of personal rights to protect "appearance, sayings, acts, and . . . personal relation(s), domestic or otherwise."[130]

The New York Court of Appeals initially rejected Warren's and Brandeis' approach in *Robertson v. Rochester Folding Box Co.*[131] In 1903, in reaction to *Robertson*, the New York legislature enacted a privacy statute which imposed liability for unauthorized use of a person's name, portrait, or picture

122. U.S. CONST. Amend. IX.

123. Jed Rubenfeld, *The Right of Privacy*, 102 HARV L. REV. 737, 741 (1989).

124. 3 U.S. (3 Dall.) 386 (1798).

125. *Id.* at 387-88.

126. *Id.* at 399.

127. *See* Rubenfeld, *supra* note 123, at 742. Though the Fourteenth Amendment, which was enacted after the Civil War, gave the Supreme Court a great deal more constitutional material to consider.

128. *See* WARREN & BRANDEIS *supra* note 3 at 193.

129. WARREN & BRANDEIS, 4 HARV L. REV. 193, 196 (1890).

130. *Id.* at 206, 213; *see also* DARIEN A. MCWHIRTER & JON D. BIBLE, PRIVACY AS A CONSTITUTIONAL RIGHT 75 (1992).

131. 64 N.E. 442, 443 (N.Y. Ct. App. 1902).

for advertising purposes.[132] Then, in 1923, the Supreme Court held that the Fourteenth Amendment's Due Process Clause

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[133]

The right to privacy has been further described "as against the (power of) government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."[134] Finally, in *Thiede v. Town of Scandia Valley*,[135] the Minnesota Supreme Court emphasized that

> the entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are . . . the pursuit of happiness; . . . and the right to establish a home and family relations . . . . The rights, privileges, and immunities of citizens exist nonwithstanding there is no specific enumeration thereof in State Constitutions.[136]

2. *Griswold v. Connecticut*[137]

The real "breakthrough" in the acknowledgement of a general right to privacy came in 1965. The State of Connecticut had a birth control statute that prohibited the use of contraceptives. Enforcement of this statute led to the conviction in a "test case" of the executive and medical directors of the Planned Parenthood League of Connecticut, Estelle Griswold and Dr. C. Lee Buxton. Convicted as accessories for giving married persons information, instruction and medical advice concerning the means of preventing contraception, each was fined $100.

Appellants alleged at trial that the statute as applied violated the Fourteenth Amendment of the American Constitution.

The Court struck down the statute, at least as the statute applied to married persons. In overturning the conviction, Justice William O. Douglas, writing for the Court, stated that there was a "zone of privacy" within a

132. N.Y. Civ. Rights Law sec. 50-51 (West 1992 & Supp. 2001).
133. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
134. Olmstead v. U.S., 277 U.S. 438, 478 (1928).
135. 217 Minn. 218, 14 N.W. 2d 400 (N.W. 1944).
136. *Id.* at 405; for additional cases *see* Rubenfeld, *supra* note 123, n.27-43.
137. 381 U.S. 479 (1965).

"penumbra" created by several guarantees of the Bill of Rights that includes the right to personal privacy.[138] The State of Connecticut was found to have unconstitutionally interfered with that privacy in enacting and enforcing the ban on contraception.[139]

3. *Roe v. Wade*[140]

"Jane Roe" — Norma McCorvey — was a poor Dallas woman who had allegedly become pregnant as a result of a rape. A Texas statute criminalized abortion and provided for prison terms of up to 10 years. Unable to obtain a legal abortion in Texas, McCorvey carried the pregnancy to term and placed the child for adoption. In her landmark suit against the State of Texas, she was joined by plaintiffs "John and Mary Doe", a married couple, and a Dr. Hallford, a licensed physician. They alleged that the Texas abortion statute violated rights of personal privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The Court invalidated the Texas statute,[141] finding that the state had violated the woman's constitutional right to privacy. The Court established a woman's right to have an abortion without undue restrictive interference from the government. The Court held that a woman's right to decide for herself to bring or not to bring a pregnancy to term is guaranteed under the Fourteenth Amendment and that Government regulation could be upheld only if it was narrowly tailored to promote a compelling state interest.[142] In attempting to balance the State's rights against the rights of the individual, Justice Blackmun held that the State's legitimate interest in protecting potential life increased as the pregnancy advanced.[143] While allowing that the State may forbid abortions during the third trimester, Blackmun wrote that a woman is entitled to obtain an abortion freely, after consultation with a doctor, in the first trimester and in an authorized clinic in the second trimester.[144]

4. *Bowers v. Hardwick*[145]

In August 1982, respondent, a gay Georgia man, was arrested in his home for engaging in oral sex there with another man in violation of a Georgia sodomy law. Under the statute, sodomy was defined as performing or submitting to "any sex act involving the sex organs of one person and the mouth or anus of another." It declared the offense of sodomy punishable by imprisonment for not less than one and not more than 20 years. Respondent then

138. *Id.* at 484.
139. *Id.* at 485-86.
140. Roe v. Wade, 410 U.S. 113 (1973).
141. *Id.* at 164.
142. *Id.* at 153-55.
143. *Id.* at 159.
144. *Id.* at 163.
145. Bowers v. Hardwick, 478 U.S. 186 (1986).

brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. He asserted that he was a practicing homosexual.

The Court upheld the statute, holding that the fundamental right to privacy as guaranteed by the Constitution does not extend to sex acts regarded as sodomy under state law, even if such acts take place between consenting adults in the confines of the home.[146] The Court, in a five to four opinion, upheld the constitutionality of the Georgia statute on the grounds that it reflected a legitimate belief by society that certain sex acts are immoral and unacceptable.[147] For the majority, neither the text of the Constitution, nor any philosophy of individual freedom could serve as a principled basis for a judicial definition for a right to engage in homosexual activity.[148]

The dissenting Justices[149] believed that independent judicial review of regulations on intimate sexual relations was essential because a basic aspect of individual liberty depends on a person's freedom to make decisions regarding intimate relationships and sexual matters.[150] In a very notable dissent, Justice Harry Blackmun argued that the ruling violated one of the most fundamental rights of all, "the right to be let alone."[151]

5. *Webster v. Reproductive Health Services*[152]

The State of Missouri enacted three statutes to regulate abortions, one of which prohibited the use of public funds, employees or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life, and which required physicians to perform tests to determine the viability of any fetus believed to be at least 20 weeks old by performing "such medical examinations and tests as are necessary to a finding of (the fetus') gestational age, weight and lung maturity." Moreover, the preamble of the statute declared that "(the) life of each human being begins at conception," and that "unborn children have protectible interests in life, health and well being." It required that all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and Supreme Court precedent. Plaintiffs, state-employed health professionals and private non-profit corporations providing abortion services, brought suit, challenging the constitutionality of the Missouri statute. The District Court struck down each of the above provisions, among others, and enjoined their enforcement. The Court of Appeals for the Eighth Circuit af-

146. *Id.* at 191-95.

147. *Id.* at 196.

148. *Id.* at 191-95.

149. Justice Blackmun dissented, with whom Justice Brennan, Justice Marshall, and Justice Stevens joined. *See id.* at 199.

150. *Id.* at 205.

151. *Id.* at 199.

152. Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

firmed, ruling that the provisions in question violated the Supreme Court's decisions in *Roe v. Wade* and subsequent cases.[153]

Without overruling *Roe v. Wade*, the majority of the Supreme Court upheld the restrictions as constitutional.[154] Chief Justice Rehnquist, delivering the opinion of the Court, concluded that the preamble did not by its terms regulate abortions or any other aspect of appellees' medical practice, but could also be interpreted to do no more than offer protections to unborn children.[155] The other restrictions would not contravene the Supreme Court's abortion precedents, either, as Missouri's decision to use public facilities and employees to encourage childbirth over abortion would place no governmental obstacle in the path of a woman who chose to terminate her pregnancy.[156]

In a strong dissent, Justice Blackmun, with whom Justice Brennan and Justice Marshall joined, criticized the plurality's approach as being "far more remarkable for the arguments that it does not advance than for those it does."[157] "Never in my memory," Justice Blackmun wrote:

> Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. Today, *Roe v. Wade* and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure. The plurality does not even mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an 'unenumerated' general right to privacy as recognized in many of our decisions . . . . These are questions of unsurpassed significance in this Court's interpretation of the Constitution, and mark the battleground upon which this case was fought . . . . As we recently reaffirmed . . . few decisions are 'more basic to individual dignity and autonomy' or more appropriate to that 'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy . . . . It is impossible to read the plurality opinion . . . without recognizing its implicit invitation to every State to enact more and more restrictive abortion laws . . . . Thus, 'not with a bang, but with a whimper,' the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to

153. Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988)
154. *Supra* note 152, at 522.
155. *Id.* at 506.
156. *Id.* at 510.
157. *Id.* at 537, 546.

believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children.[158]

6. *Cruzan v. Director, Missouri Department of Health*[159]

On the night of January 11, 1983, Nancy Cruzan lost control of her car as she traveled down a road in Missouri. The car overturned, and Cruzan was found lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neuro-surgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). Such an anoxic state leads to permanent brain damage after 6 minutes and it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks and then progressed to an unconscious state in which she was able to orally ingest some nutrition. Surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent of her then husband. Subsequent rehabilitative efforts proved unavailing. She remained in what is called a "persistent vegetative state," a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function.[160]

After it became apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked the hospital to terminate the artificial nutrition and hydration procedures, which would cause her death. The employees of the hospital refused. The parents then sought and received authorization from the State Trial Court for termination. The Court found that a person in Cruzan's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures."[161] The Court also found that Cruzan's "expressed thoughts at age twenty-five in a somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration."[162]

The Supreme Court of Missouri reversed by a divided vote. The Court recognized a right to refuse treatment embodied in the common law doctrine of informed consent, but expressed skepticism about the application of that doctrine in the circumstances of this case. The Court also declined to read a broad right of privacy into the State Constitution which would "support the right of a person to refuse medical treatment in every circumstance,"[163] and

158. *Id.* at 546-57.
159. 497 U.S. 261 (1990).
160. *Id.*
161. *Id.*
162. *Id.* at 268.
163. *Id.*

expressed doubt as to whether such a right existed under the U.S. Constitution. It then decided that the Missouri Living Will statute[164] embodied a state policy strongly favoring the preservation of life. The Court found that Cruzan's statements to her roommate were "unreliable for the purpose of determining her intent, and thus insufficient to support the co-guardians claim to exercise substituted judgment on Nancy's behalf."[165] It rejected the argument that Cruzan's parents were entitled to terminate her medical treatment, concluding that "no person can assume the choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here." The Court also expressed the view that "broad policy questions bearing on life and death are more properly addressed by representative assemblies"[166] than judicial bodies.

In a 5-4 vote, the U.S. Supreme Court upheld the Missouri Supreme Court decision.[167] To answer the question whether Nancy Cruzan had a right under the U.S. Constitution that required the hospital to withdraw life-sustaining treatment from her, Chief Justice Rehnquist, delivering the opinion of the Court, first turned to the common law doctrine of informed consent. Citing Justice Cardozo in *Schloendorff v. Society of New York Hospital*,[168] Rehnquist pointed out that every person of adult years and sound mind had a right to determine what should be done with his own body and that a patient generally possesses the right not to consent, i.e., to refuse treatment.[169] Moreover, a number of courts had based a right to refuse treatment on a constitutional privacy right.[170] However, the Court emphasized that the determination that a person had a "liberty interest" under the Due Process Clause of the Fourteenth Amendment did not end the inquiry, but that these liberty interests had to be balanced against the relevant state interests, in particular the legitimate interest of a state to safeguard a person's choice between life and death through the imposition of heightened evidentiary requirements.[171] The Court — assuming for the purposes of the pending case that the U.S. Constitution in fact granted a competent person a right to refuse lifesaving hydration and nutrition — held that a State might properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and was entitled to guard against potential abuses in such cases.[172] The Court stated:

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164. MO. REV. STAT. § 459.010-.055 (1986).

165. 497 U.S. 261, 268 (1990).

166. *Id.* at 269.

167. *Id.* at 287.

168. Schloendorff v. New York Hospital, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914).

169. 497 U.S. 261, 269-70 (1990).

170. *See In re* Quinlan, 70 N.J. at 38-42, 355 A.2d at 662-664; Supt. of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858, 102 S.Ct. 309, 70 L.Ed.2d 153 (1981); In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

171. 497 U.S. 261, 279-281 (1990).

172. *Id.* at 281-282.

> We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.[173]

In a concurring opinion, Justice O'Connor opined that a seriously ill or dying patient whose wishes were not honored might feel a captive of the machinery required for life-sustaining measures or other medical interventions, and that such forced treatment might burden the individual's liberty interests as much as any state coercion.[174] Thus, the liberty guaranteed by the Due Process Clause had to be construed to protect, "if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."[175]

7. *Planned Parenthood v. Casey*[176]

The State of Pennsylvania enacted its Abortion Control Act in 1982, and amended it in 1988 and 1989. Planned Parenthood challenged five provisions of the Act. The Act contained an informed consent requirement, a 24-hour waiting period requirement, a spousal notification requirement, a parental consent requirement, and a reporting requirement. Although the essential holding of *Roe v. Wade* was reaffirmed,[177] a plurality of the Court rejected the trimester test that *Roe* established.[178] In addition, a different plurality ruled that state laws that regulate abortions would be upheld as long as the laws do not create an "undue burden" or present a "substantial obstacle" to the woman's choice.[179] As to the right to privacy in general, the Court said:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . Our cases recognize 'the right of the individual, married or single, to be free

173. *Id.* at 283.
174. *Id.* at 288.
175. *Id.* at 289.
176. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
177. *Id.* at 846.
178. *Id.* at 872-73.
179. *Id.* at 874-876.

> from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' . . . . Our precedents 'have respected the private realm of family life which the state cannot enter.' . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty of the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about theses matters could not define the attributes of personhood were they formed under compulsion of the State.[180]

C. Comparison

Comparing the development of the right to privacy in Germany and the U.S. reveals a number of similarities. From the outset, the lack of specific provisions relating to the right to privacy in both the U.S. Constitution and the German Civil Code urged both countries' highest courts to find an alternative way to effectively protect personality rights. As if the problem of not having an explicit protective provision was not difficult enough to solve, the German *Reichsgericht* and later the German Supreme Court were faced with the fact that Sec. 253 Civil Code seemed to bar any compensation for non-material injuries for violations of the right to privacy.

Both countries' courts discerned the necessity of protecting certain inalienable rights of the human being, and developed the right to privacy on a case-by-case basis. In the U.S., the first attempts were made shortly after the ratification of the Constitution, but these attempts turned out to be unsuccessful for more than a century. In Germany, the "general right to personality" was accepted more than fifty years after the enactment of the Civil Code, but only five years after the enactment of the (new) German Constitution. In their efforts to establish a right to privacy, both the American and the German courts put emphasis on the social and technological changes which occurred in the 20th century. American courts pointed out that some "natural law" rendered certain legislation invalid if it violated inalienable privacy rights.

Similarly, the German Supreme Court held that social conditions often had to take priority over the text of a statute. Notably, the fact that the courts in Germany, rather than the German legislature, established the right to privacy is unusual and resembles more a common law than a civil law approach. It has been subject of discussion whether the German courts have really been entitled to such an extreme form of "*richterlicher Rechtsfortbildung*" (judicial development of the law) under the principle of the separation of powers

180. *Id.* at 851.

(*Grundsatz der Gewaltenteilung*).[181] However, the establishment of the doctrine of a general right to personality has been characterized as one of the greatest achievements ever by a German court.[182]

Finally, both countries' highest courts have both established and restricted privacy rights. The German Supreme Court limited its recognition of the "general right to personality" in *Ginsengwurzel* by establishing the "serious fault" and "objectively significant injury" requirements for damages under Sec. 847 Civil Code. Likewise, after the right to privacy had been established by the United States Supreme Court in *Griswold* and *Roe* in 1965 and 1973, the Court's later decisions focused more on limiting rather than broadening privacy rights.

IV. THE RIGHT TO PRIVACY & ASSISTED REPRODUCTIVE TECHNOLOGIES: SELECTED AREAS OF CONFLICTING INTERESTS

A. The Right to Procreate Versus the Right Not to Procreate

1. Germany

a. The Right to Procreate as a Protected Legal Right within Arts. 1, 2 Constitution and Sec. 823 Civil Code

The right to procreate would undoubtedly be protected by the broad provisions of Arts. 1 and 2 (1) of the German Constitution.[183] A much more controversial issue is whether the right to procreate (called *"Recht auf Familienplanung,"* which literally is to be translated into "the right to engage in family planning"[184] and which has been defined as the right to decide whether, when and how often parents want to have children)[185] is protected under the tort provision of Sec. 823 (1) Civil Code. The discussion whether or not to acknowledge such a right began in the early 1970's when the courts for the first time were confronted with cases which dealt with negligence based, unwanted pregnancies.[186] A number of German scholars have argued that such a right should be part of the general right to privacy under Sec. 823 (1)

181. Sec. 20 (2) of the German Constitution states: All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.

182. *See* WALTER ERMAN & HERMANN WEITNAUER, HANDKOMMENTAR ZUM BUERGERLICHEN GESETZBUCH, 1. BAND (8th ed. 1989), Anh. zu Sec. 12 n.3; JOSEF ESSER & HAND-LEO WEYERS, SCJI;DRECJT, BAND II: BESONDERER TEIL (6th ed. 1984) Sec. 55 I 1 b); THEODOR MAUNZ & GUENTER DUERIG & ROMAN HERZOG, GRUNDGESETZ, KOMMENTAR, BAND I (May 1994), Art. 1 (1) n.38.

183. *Cf.* BVerfGE 39, 1 (42-43).

184. *See* Harrer, *supra* note 11, at 108.

185. York Schnorbus, *Schmerzensgeld wegen schuldhafter Verletzung von Sperma,* JuS 1994, 830 (835).

186. *See* BGHZ 76, 249; 76, 259; LG Itzehoe, FamRZ 1969, 90.

Civil Code,[187] the majority of the authors discussing that right, however, have reacted with disapproval.[188] Thus, the courts have left the question explicitly open until 1983, when the Supreme Court decided the following case.

b. "Wrongful Life"[189]

The first plaintiff, the legitimate daughter of the second and third plaintiff, was born on February 24, 1977. The first plaintiff suffered severe damages to her health because the second plaintiff, her mother, had caught German measles (rubella) during the first weeks of her pregnancy. The plaintiffs charged the defendant gynecologist with having failed to diagnose the mother's illness with the result that the pregnancy — which had been desired in principle — was not terminated.

The child and her parents asked for a declaration that, subject to a statutory assignment, the defendant was liable "to pay compensation in respect of all the damage which they have suffered or will suffer in the future as a result of the second plaintiff's infection during her pregnancy."[190] The District Court dismissed the first plaintiff's claim but granted the parents the declaration which they had sought. The Court of Appeals of Munich rejected the first plaintiff's appeal and, upon the defendant's appeal, rejected the parents' claim as well. It emphasized that the defendant had not caused the injury to the first plaintiff; to the contrary, he was responsible for the fact that the first plaintiff was alive and enjoyed legal capacity.

The Supreme Court reversed the decision of the Court of Appeals insofar as the claims of the parents were concerned.[191] The gynecologist was held liable on a contractual basis, because in his capacity as a medical practitioner, he had received and accepted the mandate of investigating the danger of serious injury to the child which could result from the infection of the mother during the first weeks of her pregnancy. The Court decided that he had carried out this mandate negligently.[192]

This holding, however, only concerned the compensatory damages under Sec. 249 et seq. Civil Code. When confronted with the question of whether the gynecologist's negligence would also give rise to tort damages for pain and suffering (*Schmerzensgeld*) under Sec. 823 (1), Sec. 847 (1) Civil

187. *See, e.g.*, ARNO DEBO, DER UNTERBLIEBENE SCHWANGERSCHAFTSABBRUCH 81 (1986); HERBERT HARRER, ZIVILRECHTLICHE HAFTUNG BEI DURCHKREUZTER FAMILIENPLANUNG, 237, 256, 370 (1989).

188. *See, e.g.*, WOLFGANG DEUCHLER, DIE HAFTUNG DES ARZTES FUER DIE UNERWUENSCHTE GEBURT EINES KINDES ("WRONGFUL BIRTH"), EINE RECHTSVERGLEICHENDE DARSTELLUNG DES AMERIKANISCHEN UND DEUTSCHEN RECHTS 192 (1984); KATHARINA WAIBL, KINDESUNTERHALT ALS SCHADEN 197 (1986).

189. BGHZ 86, 240; translation by LIPSTEIN in MARKESINIS, *supra* note 80, at 142.

190. *Id.*

191. BGHZ 86, 240 (241).

192. *Id.* at 244.

Code,[193] the Court held that such damages — as the defendant did not interfere directly with the personal health of the second plaintiff by involving her in an unwanted birth — were only possible on the grounds that the birth of the first plaintiff had exceeded the inflictions which accompany a birth without complications.[194] To the contrary, the Court explicitly rejected basing such damages on the possible violation of the second plaintiff's right to privacy in the form of her right to decide whether or not to procreate. "No pecuniary damages can be awarded," the Court held, "in respect of a violation of the "right to plan a family" as an emanation of the general right to one's personality [references] if a decision involving the personality of the party affected was only frustrated *in fact* — as was here the case."[195]

Although the Court's holding has a limited effect because it only applied to frustrations "in fact," there has been no German court which accepted a "right to plan a family" since this decision.[196] The Courts' reasoning is that Sec. 823 Civil Code is protecting the *integrity* of a person, not an *activity,* and the planning of a family is classified as fitting in the latter category only.[197]

c. The Destruction of Frozen Sperm as a Bodily Injury

In 1993, however, the German Supreme Court decided the following case:[198] The plaintiff, at the age of 31, had to undergo surgery for the removal of scrotal cancer. He was informed that the operation would result in his become infertile. Hence, he requested the defendant hospital to freeze (cryopreserve[199]) some samples of his sperm and keep them for him. The hospital did so. The plaintiff became infertile. Later, the plaintiff got married. Since he and his wife wanted to have children, he requested that his wife be impregnated with his sperm. It turned out that, due to negligent behavior of employees of the hospital, the samples had been destroyed without the plaintiff's consent.

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193. *See supra* notes 95 and 105.

194. BGHZ 86, 240, 248 (The second plaintiff needed a Caesarian operation to bear the first plaintiff).

195. *Id.* at 249.

196. *See, e.g.,* OLG Duesseldorf, NJW 1992, 1566 (1567).

197. It is well established under German law that tortious duties are not imposed, like guarantees in the law of sales, in order to protect a contractor's expectations of utility and value in the acquisition of an undefective thing, *see* BGHZ 77, 215 (218); BGHZ 80, 186 (188). They rather relate to the interest which people have in the integrity of their belongings or possessions, in not having them adversely affected by the chattel which the manufacturer puts into commerce (*Integritaetsinteresse*), *see* BGHZ 86, 256. A defendant is not liable on the basis of Sec. 823 (1) Civil Code if only the plaintiff's financial interest (*Aequivalenzinteresse*) and not his interest in the integrity of his property (*Integritaetsinteresse*) were affected, *see* BGHZ, NJW 1992, 1678.

198. BGHZ 124, 52 = NJW 1994, 127; translation in part by N. SIMS in: WALTER VAN GERVEN, TORTS 177, HORT PUBLISHING, (1999).

199. For details of the procedure of cryopreservation *see* VOSS, *supra* note 23, at 8 n.39; Snyder, *supra* note 19, n.7.

The plaintiff brought suit against the hospital for payment of "Schmerzensgeld" in the amount of DM 25,000. He argued that Sec. 847 (1) German Civil Code[200] should, by analogy, apply to a breach of his general right to privacy. The District Court and the Court of Appeals of Frankfurt (a.M.) both rejected plaintiff's claim, arguing in accordance with the "wrongful life" decision that Sec. 823, 847 German Civil Code would not protect a right to procreate as a special application of the right to privacy.

The German Supreme Court, reversing the lower courts' decisions, found for the plaintiff.[201] Surprisingly, however, the court's rationales were not based — as it had been argued by the plaintiff — on a violation of the plaintiff's right to procreate, but instead the rationale was based on the theory of a violation of the physical integrity of the plaintiff.[202] The court reasoned that a body part that gets separated from the human body will — according to the predominant though not uncontested view — become an object. The consequences of this are that the right of the affected person to his body becomes transformed into ownership of the separated body part.[203] If this view was, as the Court of Appeals had held, also true for cryopreserved sperm, then the destruction of the plaintiff's sperm could not be deemed a bodily injury for which Sec. 847 Civil Code confers a claim sounding in damages. According to the Supreme Court, this view does not fit the context of modern assisted reproduction technologies.[204] It therefore held that the concept of bodily injury within the meaning of Sec. 823, 847 Civil Code had to be interpreted more broadly, i.e. "any unauthorized interference," in one person's integrity, should be prohibited.[205] "What is protected by Sec. 823 (1) Civil Code," the Supreme Court went on to say, "is not the material substance, but the existentially determined scope of personality which materializes in how one feels physically. Sec. 823 (1) Civil Code protects the body as the basis of personality."[206]

Taking into consideration present-day medical possibilities, the right of self-determination which the holder of the right derives from the general right to privacy, would, according to the Supreme Court, assume additional significance for the object of protection, namely the body:

> Medical advances enable components to be removed from the body and to be reincorporated in it later. That is true, for example, of skin and bone parts intended for transplantation in the person's own body, of eggs removed for fertilization and of blood donation intended for oneself. If components are re-

200. *See supra* note 105.
201. BGHZ 124, 52 (53).
202. *Id.* at 54-55.
203. *Id.* at 54.
204. *Id.* at 54-55.
205. *Id.* at 54.
206. *Id.*

> moved from the body in order subsequently to be reunited with it in accordance with the intention of the holder of the right for the purpose of preserving bodily functions or of performing them, then the view taken of Sec. 823 (1) Civil Code as affording comprehensive protection of physical integrity whilst preserving the right of self-determination of the holder of the right, must lead to the result that those components, even when separated from the body, retain *functional unity* with it, from the point of view of the protective purpose of the provision. It thus appears necessary to regard damage to or destruction of such separated body parts as a bodily injury within the meaning of Sec. 823 (1), 847 Civil Code.[207]

The Court went on to distinguish these cases from situations where the separated body parts are not intended by the holder of the right to be reintegrated into his body, and applied the abovementioned rule that separated parts would become objects in a legal sense. This is due to the fact that the functional unit no longer holds true.[208] This would be true, for example, in the case of donated organs which, in accordance with the wishes of the donor, are intended to be implanted in another person, and in the case of blood donations intended for third parties.[209]

On the basis of these findings, the Court called the preserved sperm intended by the holder of the right to be used for his reproduction an "exceptional case:"[210]

> On the one hand, the sperm is definitely separated from the body of the holder of the right, on the other hand it is intended to fulfill a typical bodily function, that of the reproduction of the holder of the right. In any event, if, as in this case, the preserved sperm is to take the place of lost reproductive capacity, it has no less weighty and substantive importance for the physical integrity of the holder of the right, and the self-determination and self-realization inherent therein, than the egg or other body parts which on the basis of the foregoing observations continue, even after removal from the body, to be covered by the protection which the body enjoys under Sec. 823 (1), 847 Civil Code.[211]

The Court concluded that, the sperm being analogous and equivalent to a body part which is to be returned to a person's body, there is an equivalent need of

207. *Id.* at 55.
208. *Id.*
209. *Id.*
210. *Id.* at 56.
211. *Id.*

protection under the law of tort, and that therefore the same legal consequences should apply under tort principles.[212]

d. Discussion

The question of whether or not to accept the right to procreate under German tort law should be answered in the affirmative. Only this interpretation would adequately clarify the increasing impact of the right of self-determination and the necessary protection of the right to privacy, especially in the area of procreative freedom.[213]

The Supreme Court's 1993 decision which declines to adopt this interpretation can be criticized in a number of respects. For example, it seems to be quite obvious that the criminal courts will not follow the civil court's approach and hold that the destruction of frozen male sperm falls under the category of the criminal offense of "battery."[214] This would lead to the result that an identical term, "bodily injury," would be defined differently in civil and criminal law. Although such a result is not per se impossible, it would nevertheless conflict with the "unity of law" (*Einheit der Rechtsordnung*) principle of German law.[215]

Moreover, some of the examples the Court offers do not survive a strict scrutiny analysis. Human blood, as well as the female egg, is to be reintegrated into the body it comes from, whereas male sperm will be finally and irreversibly disconnected from the man's body. Thus, there is no "functional unity" in the latter, male case.[216]

Furthermore, the amount of DM 25,000 found to be adequate to compensate the plaintiff for the injury he suffered seems inappropriately high. German courts are generally much more restrictive than their American counterparts when awarding damages. For example, in the case of rape, damages are usually in the area of DM 5,000 to DM 10,000.[217] In the case of mental pain and suffering, however, which seem to be quite similar to the case at hand, the award is not usually more than DM 10,000 to DM 15,000 in the

212. *Id.* at 56-57.

213. Harrer, *supra* note 11, at 108.

214. Adolf Laufs & Emil Reiling, *Schmerzensgeld wegen schuldhafter Vernichtung deponierten Spermas?*, NJW 1994, 775; Matthias Rohe, *Anmerkung zu BGH vom 09.11.1993 (Z 124, 52)*, JZ 1994, 465 (466).

215. The "Einheit der Rechtsordnung" principle stands for the proposition that private, criminal and public law do not exist independently from each other, but coexist in a special reciprocal relationship. Although the principle does not require that terms were defined identically in different contexts, it favors a construction which acknowledges that every single area of the law is part of a greater whole. *See* PETER SCHWERDTNER, DAS PERSOENLICHKEITSRECHT 2, 309 (1976); THILO RAMM, EINFUEHRUNG IN DAS PRIVATRECHT, BAND 3 G 756 (1970); FRANZ VON LISZT, DIE GRENZGEBIETE ZWISCHEN PRIVATRECHT UND STRAFRECHT 8 (1889); Ernst Zitelmann, *Ausschluss der Widerrechtlichkeit*, AcP 99 1, 11 et seq. (1906).

216. *See* Forster, *supra* note 21, at 775.

217. *See* Volker Emmerich, *Anmerkung zu BGH vom 09.11.1993 (Z 124, 52)*, JuS 1994, 351 note 8; Joachim Rosengarten, *Der Praeventionsgedanke im deutschen Zivilrecht*, NJW 1996, 1935 (1936).

civil courts.[218] Hence, one could at least have expected an explanation why the injury in this case was more onerous to the plaintiff.

However, the main point to be criticized, is that the Supreme Court did not attempt to analyze the issues raised by the facts of this case under any theory of a possible violation of the plaintiff's right to privacy in the form of his right to procreate. Apparently, it saw itself "handcuffed" by its former precedents which held that a right to procreate would not exist under Sec. 823 (1) Civil Code.[219]

Such an approach could have been possible, however, for two different reasons. First, the Supreme Court's distinction that Sec. 823 (1) Civil Code protects the *integrity* but not the *activity* of a person is not feasible. This results from the fact that integrity and activity are not, as the Court seems to believe, exclusive of one another, but rather stand in a special reciprocal relationship. For example, what benefit does the owner of property have from the fact that the item he owns is unscathed if he is not entitled to use his property? Consistent with this idea, the Supreme Court has acknowledged that a violation of the protection of property according to the meaning of Sec. 823 (1) Civil Code does not only involve physical damage to the substance of an item, but also the lasting or temporary disturbance of the usage of it.[220] This simple example already clarifies the uncertainty of the Court's distinction between integrity and activity.

Secondly, this approach is possible because even if the Court's distinction that only the integrity and not the activity is protected, the Court could and should nevertheless have distinguished its former cases on the basis of the special facts of the case. What really creates the problem the Court had with the case is the puzzling term "right to family planning." "Planning" is indeed an activity, namely the intellectual process that serves as a guide to determine one's future behavior.[221] But the result of "planning" is a "plan," i.e. a program that determines future behavior in advance.[222] If such a plan has already been made, why should it not be part of the rights protected by Sec. 823 (1) Civil Code?

A comparison of a few hypotheses illustrates how much more convincing an approach acknowledging a right to procreate is, rather than the Court's excessive definition of "bodily injury." First hypothesis: The forecasted infertility to be caused by the operation does — due to fortunate circumstances — not take place. The plaintiff's sperm is destroyed by the clinic. In this case, the Supreme Court would have difficulties if it wanted to deny a bodily injury. There is no reason apparent why the sperm should not belong to the

218. *See* Andreas Slizyk, BECK'SCHE SCHMERZENSGELDTABELLE 288 NR. 606/289 NR. 711 (1993).

219. *See* Currie *supra* note 43.

220. BGH, NJW 1977, 2264 (2265); VersR 1995, 348.

221. *See* MEYERS ENZYKLOPAEDISCHES LEXIKON XVIII 756 (1976).

222. *See* BROCKHAUS ENZYKLOPAEDIE XIV 658 (1972).

man's body just because he is still able to produce sperm. The sperm donated to the reproductive clinic is as suited to be used for procreation as had the man become infertile — maybe the man does not even know that he has not become infertile. A consequent application of the Court's rationales would have the consequence of having to hold the clinic liable for damages from bodily injury to the man's body. To the contrary, according to the solution on the basis of a right to privacy, one could evaluate to what extent the right to procreate of the potential parents is in fact reduced in value. If the man was still fertile, the destruction of the sperm would not lead to liability in tort.

Second hypothesis: In order to protect his ability to procreate, the man donates sperm to three different clinics, one located in Berlin, one in New York and one in Sydney. The first sample gets destroyed after one year, the second one after 10 years, and the third one after 25 years. It seems difficult to assume that a person can spread one's body worldwide with the result that the destruction of any of the bodily substances would result in tort claims by this person. On the other hand, it is not obvious how one should determine an objective restriction of the amount of sperm that should be attributed to the human body. For example, it would not be convincing to hold that a tortious destruction of sperm can only be found in the destruction of the last sample, because one does not negate a bodily injury in case of the destruction of a kidney even if the person still has another, functional one. Moreover, such an approach would be in contrast to the Court's holding that the protection of the body continues to have an effect on the separated substance, because it is not plausible that the protection should be suspended until the penultimate sperm is destroyed.

To the contrary, if one's argument is that of a right to procreate, one could weigh to what extent the enforcement of this right has in fact been diluted. Accordingly, depending on the facts of a case, there could be a tortious interference with one's right to procreate not only when the last sample is destroyed, but earlier, because as a general rule, it is the right of the potential parents to determine by how many samples they want their right to be protected. The chance to become parents can already be decreased when a sample is destroyed and there is still another one existing.

Third hypothesis: A man and his wife are getting divorced shortly after the sperm is donated. Thus, the man abandons his plan to use the sample for later paternity. However, years after the operation, he meets another woman with whom he wants to have a child. The sample has been destroyed in the meantime.[223]

The right to change one's mind does not need any further discussion, as it flows from the general right of self-determination every individual undoubt-

223. See Wolfgang Nixdorf, *Zur aerztlichen Haftung hinsichtlich entnommener Koerpersubstanzen: Koerper, Persoenlichkeit, Totenfuersorg,* VersR 1995, 740 (743) (donor blood for later reinfusion, which is not needed due to successful surgery).

edly has. The acknowledgement of this right, however, would, under the Supreme Court's approach, result into the consequence that there was a tortious bodily injury if the sample was destroyed at the time the man had not abandoned his plan to use the sperm and at the time the plan was readopted, but not in the time between these two moments. Hence, the legal determination would depend on the state of mind of the donor, which will not always be obvious. One could only solve that problem by holding that once a plan to have a child with one partner has been abandoned, a man is, for all times, deprived of his right to procreate in regard to the sperm he donated in view of this plan. In this case, the breaking up of the partners could be regarded as a (rebuttable) presumption that the sample is not to be used for the procreation of the partners later. However, such a rule cannot be upheld by any legal theory, and would, in practice, only be troublesome and costly. Also, it would be even more unjust to a man who has become infertile in the meantime to deprive him of any legal protection, although there would still exist a sample to realize his wish to become the father of a child.

Thus, the only solution is to determine whether a plan to procreate existed at the time the sperm was destroyed. This plan is made visible when a man deposits sperm with a reproductive clinic. As long as the customer asks for the storage of the sperm and he pays for the fees the clinic charges, there is — even if there is a separation of the customer and his partner — the presumption that he has the intent to use the sample for later procreation. Not until the man asks for the destruction of the sample — a request which can also be expressed by ceasing to pay for the charges, — the surrender of the plan to procreate becomes obvious; if the customer changes his mind back and later, again, wishes to procreate, he then has the obligation to inform the clinic, and any destruction of the sperm in the meantime must be attributed to his fault.

Fourth hypothesis: Due to negligence of the reproductive clinic a woman does not become fertilized with the sperm of her husband, but with the sample of a donor, which the donor had given to the clinic before an operation had made him infertile. The Supreme Court in this case could not hold that the fertilization constituted an injury the donor's body, because the sperm has fully achieved its destination, the association with a female egg. The fact alone that a different woman than the intended one has been inseminated cannot lead to a finding of a physical violation of the donor's right of protection of his body within the meaning of Sec. 823 (1) Civil Code. The result would be that — absent claims on the basis of contract law — the donor would have lost his ability to procreate, without having any claims against the clinic. To the contrary, under the approach of a right to procreate, the donor would have such claims, because his plan was to have a certain woman fertilized, which has become impossible after the insemination of the other woman. The donor should be awarded damages from the clinic due to the frustration of his plan to have a family.

Fifth hypothesis: A woman secretly uses contraceptives while having sexual intercourse with her partner. At the same time, the man intends to inseminate the woman. In this case, the Supreme Court would have no other choice other than to ascertain a bodily injury to the man's body committed by the woman. The only way not to enforce the man's claim would be to rule that he is estopped from doing so due to a precedence of the woman's right to control her body over the man's right to protect his.

Under a right to procreate, on the other hand, if defined as a plan between two partners to create a family, the solution would be obvious. The fact that the woman used contraceptives would manifest that a mutual plan to create a family did not exist, no matter what the woman had told the man. Thus, the man would not be entitled to damages, as no plan to procreate has been violated.

2. United States

Similar to the German definition, the right to procreate has been defined as "the right to make contemporaneous decisions about how one's reproductive capacity will be used."[224]

a. *Skinner v. Oklahoma*[225]

Oklahoma's Habitual Criminal Sterilization Act[226] provided for the sterilization, by vasectomy or salpingectomy, of "habitual criminals." A habitual criminal was defined as any person who, having been convicted two or more times, in Oklahoma or in any other state, of "felonies involving moral turpitude," is thereafter convicted and sentenced to imprisonment in Oklahoma for such crime. Expressly excepted from the terms of the statute were certain offenses, including embezzlement.

The petitioner was convicted in 1926 of the crime of stealing chickens, and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with firearms, and was again sentenced to the Reformatory. In 1934 he was convicted of robbery with firearms for the second time, and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the Attorney General instituted proceedings against him.[227]

Petitioner challenged the constitutionality of the Act citing the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. A jury found that the operation of vasectomy could lawfully be performed on him. The Supreme Court of Oklahoma affirmed by a 5-4 decision. The U.S. Supreme Court reversed the decision. It acknowledged that the Oklahoma Act

224. Coleman, *supra* note 19, at 57.
225. Skinner v Oklahoma, 316 U.S. 535 (1942).
226. Okla. Stat. Ann. tit. 57, 171 (West 1935).
227. 316 U.S. 535 (1942).

deprived individuals of "a right which is basic to the perpetuation of a race — the right to have offspring."[228] Said the Court:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[229]

b. *Davis v. Davis*[230]

Junior and Mary Sue Davis married in April 1980. A couple of months later, Mary Sue's right fallopian tube had to be removed, followed by a ligation of her left fallopian tube, leaving her without functional fallopian tubes by which to conceive naturally. Beginning in 1985, the Davises went through six attempts of IVF, but the hoped-for pregnancy never occurred. A fertility clinic in Knoxville, Tennessee, then offered them cryogenic preservation, scheduled for November 1988. A gynecologist was able to retrieve nine ova for fertilization. At that time, the Davises had no thoughts of divorce; there was no discussion, let alone an agreement, concerning disposition in the event of a divorce.[231]

After fertilization was completed, a transfer was performed in December 1988; the rest of the four-to-eight cell entities were cryogenically preserved. Unfortunately, a pregnancy did not result, and before another transfer could be attempted, Junior filed for divorce. Mary Sue then asked for control of the "frozen embryos" with the intent to have them transferred to her own uterus, in a post-divorce effort to become pregnant. She later changed her mind and asked for the authority to donate the "frozen embryos" to a childless couple. Junior objected to both proposals, saying that he preferred to leave the embryos in their frozen state until he decided whether or not he wanted to become a parent outside the bounds of marriage.

The County Court granted the divorce and concluded that the eight-cell entities at issue were not preembryos but were children "in vitro." It invoked the doctrine of "parens patriae" and held that it was "in the best interest of the children" to be born rather than destroyed. Finding that Mary Sue was willing to provide such an opportunity, but that Junior was not, the trial judge awarded her "custody" of the "children in vitro."[232]

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228. *Id.* at 536.
229. *Id.* at 541.
230. 842 S.W. 2d 588 (Tenn. 1992).
231. *Id.*
232. *Id.*

The Court of Appeals explicitly rejected the trial court's reasoning, as well as the result, and reversed. It found that Junior had a "constitutionally protected right not to beget a child where no pregnancy has taken place," and held that "there is no compelling state interest to justify . . . ordering implantation against the will of either party."[233]

The Tennessee Supreme Court affirmed the Court of Appeals' decision, holding that Junior was entitled to custody of the preembryos.[234] Absent a written agreement about the disposition of unused embryos and Tennessee statute regulating such disposition, the Court noted the different models proposed by medical-legal scholars, including the so-called "implied contract" and "equity" models.[235] The Court found both models to be unsuitable to solve the pending case. Rather, the Court emphasized the need to weigh the constitutionally protected interests at stake against each other,[236] and found the parties' exercise of their constitutional right to privacy to be determinative.[237] The Court said:

> Here, the specific individual freedom in dispute is the right to procreate. In terms of the Tennessee State constitution, we hold that the right of procreation is a vital part of an individual's right to privacy. Federal law is to the same effect . . . . If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[238]

Thus, although the United States Supreme Court had never addressed the issue of procreation in the context of IVF, it appeared clear to the Supreme Court of Tennessee that the parties' right to procreative autonomy — composed of the right to procreate on the one hand and the right to avoid procreation on the other[239] — had to govern the dispute. The Court said that it was "not unmindful of the fact that the trauma . . . to which women are subjected in the IVF process is more severe than is the impact of the procedure on the men."[240] However, the women's experience has to be seen, according to the Court, "in the light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood."[241] Hence, Mary Sue and Jun-

233. *Id.*
234. *Id.* at 604.
235. *Id.* at 590-91.
236. *Id.* at 591 and 603-604.
237. *Id.* at 598.
238. *Id.* at 600 (*citing* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
239. *Id.* at 601. 603.
240. *Id.* at 601.
241. *Id.*

ior were regarded as "entirely equivalent gamete-providers,"[242] and an interest in avoiding genetic parenthood was held to be "significant enough to trigger the protections afforded to all other aspects of parenthood."[243] Finally, in balancing the parties' interests, the Court considered the imposition of unwanted parenthood on Junior, with all its possible financial and psychological consequences,[244] and the burden on Mary Sue of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children.[245] It found that Junior's interests were more important, because "donation, if a child came of it, would rob him twice — his procreative autonomy would be defeated and his relationship with his offspring would be prohibited."[246] The Court said in dicta that the case would have been "closer," if Mary Sue had been seeking to use the embryos herself and if she was not able to achieve parenthood by any other reasonable means.[247]

c. *Del Zio v. Presbyterian Hospital of New York*[248]

A case that does not directly deal with the right to privacy, but resembles the German case in BGHZ 124, 52, is the following decision: The Del Zios, after their marriage in 1968, unsuccessfully tried to have children. In 1970, Mrs. Del Zio learned that her fallopian tubes were blocked, and operations to remove the blockage were unsuccessful. Mrs. Del Zio's physician, Dr. William Sweeney of New York Hospital, advised Mrs. Del Zio of the possibility of attempting in vitro fertilization, although at that time the procedure had not been successfully performed in humans. Mrs. Del Zio agreed, and the procedure was undertaken on September 12, 1973. Dr. Sweeney removed the ova at New York Hospital, the ova was taken to Presbyterian Hospital where Dr. Shettles obtained semen from Mr. Del Zio, prepared the culture and placed it in an incubator at Presbyterian where it was to remain for four days.[249]

The following day, September 13, 1973, defendant Dr. Vande Wiele learned of the test tube and its contents, ordered it removed from the incubator and brought to his office, and then had it placed in a deep freeze. These actions effectively terminated the procedure and destroyed the culture. When Mrs. Del Zio learned of the destruction, she suffered mental distress. The Del Zios brought suit under the theory of intentional infliction of emotional distress. The jury, after deliberating for approximately 13 hours, found for the

242. *Id.*
243. *Id.* at 603.
244. *Id.* at 603.
245. *Id.* at 604.
246. *Id.*
247. *Id.*
248. 1978 U.S. Dist. LEXIS 14450.
249. *Id.*

plaintiffs and awarded $50,000 damages for mental pain and suffering. Defendants moved for judgment nonwithstanding the verdict or for a new trial.[250]

The United States District Court for the Southern District of New York concluded that the verdict was fair, reasonable and lawful, and dismissed defendant's motions.[251] The District court found that there was sufficient credible evidence from which the jury could reasonably find that the plaintiffs had met their burden of establishing the three elements of the intentional tort cause of action under New York law.[252] The District court further found that the defendants acted with "utter disregard" of the substantial certainty that severe emotional distress would follow from the decision to destroy the contents of the test tube.[253] Moreover, the court found that the jury could reasonably infer from the medical evidence that there was more than an insignificant or remote possibility of success of the procedure. This finding has been confirmed by the subsequent successful human in vitro fertilization by Edwards and Steptoe.[254]

d. Discussion

The abovementioned cases, including the abortion decisions mentioned earlier, illuminate that the rights to procreate and to avoid procreation are, at least in regard to natural/coital reproduction, well established in the law of the U.S.[255] These rights should include coital as well as, noncoital reproduction via assisted reproductive methods.[256] This is because protection is the result of the insemination, not the act itself,[257] and infertile couples possess the same

250. *Id.*

251. 1978 U.S. Dist. LEXIS 14450, at * 24.

252. Under New York tort law, one who intentionally or recklessly conducts himself toward another person in a manner so shocking and outrageous that it exceeds all bounds of decency, such person is liable to such other person for any resulting severe mental distress and consequential expenses. Before a defendant can be held liable under this claim, a jury must be satisfied that the plaintiff has proven by a fair preponderance of evidence each of the following three essential elements: First, that a defendant's conduct was so extreme, outrageous and shocking that it exceeded all reasonable bounds of decency. Second, that a defendant acted with the intent to inflict emotional distress or on the other hand that he acted recklessly and with utter disregard of the consequences that might follow and under circumstances known to him which made it substantially certain that the emotional distress would follow. And third, that the defendants' conduct caused severe mental distress to the plaintiffs. *See id.* at * 5-6.

253. *Id.* at *14.

254. *See Harrer*, *supra* note 11 at 943.

255. *See* Pitrolo, *supra* note 8, at 168 n.149-151.

256. *See* Rao, *supra* note 35, at 1081 et seq.; Robertson, *supra* note 11, at 958 et seq.; Robertson, *supra* note 11, at 1390; Snyder, *supra* note 19, n.73, 83-99; Triber, *supra* note 15, at 125; Smith, *supra* note 19 at 39-9, points out that "under international law, such a right might be found within the right to health" and that "under U.S. law, a woman's right to the new reproductive biology may be grounded in the penumbra creating the right to privacy."

257. *See* Richard McCormack, How Brave a New World 311-12 (1981); Robertson, *supra* note 11, at 960 n.66. However, a traditional Catholic view is that the unitive and the procreative should be combined in one act, thus making the separation of sex and reproduction, either to procure pleasure or to procure offspring, wrong.

abilities to rear children as fertile couples.[258] The definition of the "right to procreate" as the freedom to use one's procreative "capacity"[259] would not be accurate, as persons who are incapable of reproducing on their own should be protected as well. Thus, the right to procreate should protect married as well as unmarried couples.[260] The decision to adopt a child should be regarded as much a reproductive choice as is the decision to conceive through natural means.[261] Arguably, even a right to engage in genetic selection or cloning might be part of that choice.[262] Finally, the right to procreative liberty might even survive the death of a person,[263] and could also include some limited parental rights, in particular the right to raise a child.[264]

The real problem is not the existence of a right to procreate, but the balancing of interests between the right to procreate on the one hand and the right to avoid having offspring on the other. As has been pointed out by the Court in *Davis*,[265] strong arguments can be made to give priority to the choice of the partner who decides not to have children. First, immense financial obligations result from becoming a biological parent.[266] Second, a pregnancy imposes enormous physical burdens upon the woman.[267] Finally, and perhaps most important, the knowledge of the existence of one's child can impose lifelong psychological and emotional burdens on the parent.[268] These burdens might also prohibit a woman from becoming artificially inseminated with donor sperm without her husband's knowledge or consent and to have her husband declared the legal father of the child.[269]

However, the Court in *Davis* has also indicated that its decision would have been much more difficult if Mrs. Davis desired the embryos for her own reproduction and would have been unable to have offspring by any other

258. Robertson, *supra* note 11, at 1390. This could be an argument for a right of gay couples as well, *see* Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,* 1990 Wis. L. Rev. 297. Recently, two gay British men have become the parents of twins born in Modesto, California, to a surrogate mother using in-vitro fertilization. They face a battle to win British passports for their son, Aspen, and daughter, Saffron. Lawyers have warned Tony Barlow, 35, and Barrie Drewitt, 32, that as unmarried fathers, they have no automatic right to pass their nationality to the twins and that birth certificates issued in the U.S. might not be recognized in Britain. *See Gays' Twins,* USA Today, December 13, 1999.

259. *See* Coleman *supra* note 224.

260. *See* Rao, *supra* note 35, at 1080 n.8; Robertson, *supra* note 11, at 962 et seq.; Smith, *supra* note 19, at 28, 41. However, whether the act of sexual reproduction continues to receive constitutional protection when it occurs outside the boundaries of marriage is an open question.

261. *See* Cahn & Singer, *supra* note 19, at 170.

262. Robertson, *supra* note 11, at 953 and 1390-91.

263. *Id.* at 997.

264. *See* Snyder, *supra* note 19, n.64 et seq., 75, 126-127.

265. *See infra* text accompanying notes 265-267.

266. *See* Coleman, *supra* note 19, at 81 n.139.

267. *See* Forster, *supra* note 21, at 771; Robertson, *supra* note 11, at 1389.

268. *See* Coleman, *supra* note 19, at 82, 96-97; Robertson, *supra* note 11, at 979-80; Tushnet, *supra* note 2, at 1367.

269. *See* Rao, *supra* note 35, at 1085.

means.[270] One partner's desire to have a child no less precious than the other partner's choice to avoid having offspring.[271] Some commentators have gone one step further and argued that a partner unable to produce additional embryos has a constitutional right to use the couple's remaining frozen embryos to have a child.[272] This assumption stems from the vital importance procreation has for the individual: connecting people with nature and the next generation, giving them a sense of immortality, and enabling them to rear and parent children.[273] In rebuttal to the other partner's argument that the birth of a child will result in financial obligations, one can point to the fact that these obligations can be extinguished.[274]

Moreover, some courts and commentators have argued that one should also consider the child's interest to be born in this context. For example, the county court in *Davis* held that it was in the best interest of the child to be born rather than to be destroyed, and the court gave this fact decisive importance in its decision.[275] Similarly, some religious and right-to-life groups promote the "right-to-life" model.[276] The Louisiana legislation that affords fertilized eggs the same protection to life as that of (living) human beings[277] is one example of the influence these organizations have in some cases on the state level. It has been pointed out that such a model places a heavy burden on donors and sperm banks that would likely abolish IVF procedures in those states.[278]

Finally, there may be state interests that could legitimately limit the right to procreate under certain, although very limited circumstances. Courts have uniformly upheld prison regulations that denied inmates, even if they are married, the ability to procreate via artificial insemination using their own semen. In *Goodwin v. Turner*,[279] the U.S. Court of Appeals for the 8th Circuit found that a prison's policy against artificial insemination was constitutional because it was "reasonably related to the legitimate penological interest of treating all inmates equally, to the extent possible,"[280] and thus rejected the prisoner's claim that he be allowed to provide a container of his sperm to his wife. In *Anderson v. Vasquez*,[281] a federal district court denied death row prisoners their wish to preserve their semen for artificial insemination, reasoning that the

270. Davis v. Davis, 842 S.W. 2d 588, 604 (Tenn., 1992).

271. *See* Rao, *supra* note 35, at 1086; Triber, *supra* note 15, at 125 ("two rights of equal significance").

272. *See* Susan Remis Silver & Lee M. Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 Harv. J.L. & Tech. 593, 614 (1998).

273. Robertson, *supra* note 11, at 1389; *see also* Robertson, *supra* note 11, at 956.

274. Coleman, *supra* note 19, at 81-82 n.140.

275. *See supra* note 221 at 596.

276. See Triber, *supra* note 15, at 135-36 n.162.

277. *See* LA. REV. STAT. ANN. sec. 9:121-133.

278. Triber, *supra* note 15, at 136; *see also* Feiler, *supra* note 22, at 2442, 2450 et seq.

279. 908 F.2d 1395 (8th Cir. 1990).

280. *Id.* at 1400.

281. 827 F.Supp. 617 (N.D. Cal. 1992).

fundamental right to procreate was not consistent with imprisonment and thus "does not survive incarceration."[282] Finally, in *Percy v. New Jersey Department of Corrections*,[283] the state appellate court held that security risks, scarce resources, and equal protection concerns would justify a penitentiary policy prohibiting inmate procreation through assisted reproductive means.[284]

Balanced against each other, no bright line rule seems to exist that would avoid all hardships that the colliding privacy rights produce. To the contrary, only a balancing of interests on a case-by case basis is feasible to appropriately weigh the interests involved under different circumstances. Under this approach, the gender of the partner who seeks reproduction should not affect the analysis of the competing interests at stake.[285] Furthermore, if a partner can have children with another partner, it seems appropriate to hold that the former partner's wish not to become a parent has to be respected.[286] This has to be true even when it has already cost the other partner significant financial, emotional and physical efforts to get pregnant, e.g. if the woman's eggs have already been taken from her body for IVF.[287] In addition, if the possibilities of surrogacy or adoption are realistic alternatives to the creation of a child with one's own genes, the wish to avoid offspring by the other partner should become predominant.

3. Comparison

A comparison between German and U.S. law, as acknowledged by the highest courts of both countries, shows many similarities and some differences. Although the German Constitutional Court would acknowledge a right to procreate under Art. 2 (1) of the German Constitution,[288] the German Supreme Court does not acknowledge a "right to plan one's family" as an aspect of the general right to privacy under Sec. 823 Civil Code.[289] This result is surprising, as the general right to personality has been developed under express reference to the Constitution. The Supreme Court does compensate for damages caused by the interference with a person's family planning. The Court does this by extending the term "bodily injury" to include human substances that have been separated from the human body, even when these substances are not intended to be retransferred into the body from which they come.[290]

282. *Id.* at 620.
283. 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1994).
284. *Id.* at 1074.
285. Coleman, *supra* note 19, at 81, 85.
286. *Id.* at 82-83.
287. *Id.* at 86.
288. *Cf.* BVerfGE 39, 1 (42-43).
289. *Cf.* BVerfGE 12, 205 (259).
290. *See id.* at 258-260.

Similar to the German situation, American courts fully acknowledge a constitutional right to procreate.[291] American courts have also awarded civil damages for the tortious interference of a couple's plan to procreate. They award this under the category of emotional distress.[292] The German approach is very problematic. It would be much more appropriate if German law acknowledged a right to plan one's family under tort law. Although the American approach seems less open to attack, it has already been proposed to acknowledge "wrongful destruction" as a new tort in American law.[293] German courts could learn from considering the comments that Radhika Rao has made, that "privacy does not simply guarantee individuals the right to sexual, reproductive, and parental autonomy. It protects the relationship between people that develop in the course of these activities, rather than the individual's solo rights to engage in such activities."[294] These comments illuminate that it is not the individual's activity, but a couple's plan that deserves protection against tortious interferences.

A fundamental difference between German and American law is in the area of damages for mental distress when one's right to procreate is violated. As pointed out above, German courts are reluctant to award large pecuniary damages for non-material injuries.[295] To the contrary, American courts have awarded damages more generously, as seen in the *Del Zio* case.[296] Such damages are questionable. However, the chances of one embryo implanting are less than 10%.[297] These monetary differences are to a great extent based on the general differences in awarding damages in both countries.[298]

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291. *See id.* at 264-267.

292. *See id.* at 267-268.

293. *See* Robertson, *supra* note 11, at 1036 n.335 (citing Cohen, *The Brave New Baby and the Law: Fashioning Remedies for the Victims of In Vitro Fertilization*, 4 Am. J. L. & Med. 319 (1978); and *see generally,* Fanta, *Legal Issues Raised by In Vitro Fertilization and Embryo Transfer in the United States*, 2 In Vitro Fertilization & Embryo Transfer 65, 80 (1985)).

294. Rao, *supra* note 35, at 1103; *see also* Coleman, *supra* note 19, at 85: "An individual's unilateral decision to have a child without regard to her partner's views is simply not the sort of intimate activity to which the right to procreate is meant to apply."

295. *See id.* at 260; *see also* VOSS, *supra* note 23, at 165-66.

296. *See id* at 267-268.

297. Robertson, *supra* note 11, at 1037 n.335.

298. It is noteworthy that German law does not provide for punitive damages, reasoning that the punishment of a person belongs to criminal rather than private law. German courts have thus declined to enforce American punitive judgments in Germany, *see* BGH, VersR 1992, 1287; OLG Munich, NJW 1992, 3113; ADOLF BAUMBACH & WOLFGANG LAUTERBACH & JAN ALBERS & PETER HARTMANN, ZIVILPROZESSORD-NING MIT GERICHTSVERFASSUNGSGESETZ UND ANDEREN NEBENGESETZEN Sec. 328 n.44 (53rd ed. 1995).

B. The Right of Informational Self-determination Versus the Right to Know One's Heritage

1. Germany

a. The Right to Know One's Heritage

The German Constitutional Court has, in accordance with the majority of Germany's legal scholars, acknowledged a right to know one's heritage, based on the assumption that such a right would be vital to "find and understand oneself."[299]

i. The Right to Know One's Heritage I[300]

After having reached full age, the plaintiff sought a judicial declaration that she was not the marital child of the husband of her mother. However, according to Sec. 1598, in conjunction with Sec. 1596 I No.2 Civil Code, a child who recently acquired majority status was only entitled to pursue a declaration of her legitimacy or illegitimacy so that she could determine her heritage in the event that her parents were divorced or separated for three years. In this case, the mother and her husband declared that they did not intend to separate. The District Court suspended the trial and submitted the question to the Constitutional Court whether the abovementioned sections of the Civil Code were constitutional.[301]

The German Constitutional Court held that Sec. 1593 and Sec. 1598, in conjunction with 1596 I No.2 Civil Code, were unconstitutional insofar as they barred a majority age child from the judicial clarification of his heritage without exceptions.[302] The court announced a substantive right to know one's heritage:

> It is a violation of general personality rights . . . to limit a majority age child's ability to determine her heritage to the statutorily enumerated circumstance . . . . The right to free development of personality and human dignity guarantees all individuals an autonomous area of private life formation in which they can develop and protect their individuality . . . . Knowledge and development of individuality are closely bound with certain constitutive facts. Among these is included one's heritage.[303]

Knowledge of heritage is decisive because it reveals genetic origin and is thus central to individual identity. It can be described as a "key factor for individual self-discovery and self-understanding . . . . As an individual character

299. *See* BVerfGE 79, 256 (269).
300. BVerfGE 79, 256.
301. *Id.*
302. *Id.* at 266.
303. *Id.* at 268-69.

trait, ethnicity and knowledge of heritage offer individuals . . . important connections to understanding and development of their own individuality. Hence, personality rights include knowledge of one's heritage."[304] The Court limited the breadth of its holding, however, by ruling that "Article 2 in connection with Article 1 [German Constitution] confers no right to obtain knowledge of one's heritage; rather, they protect against the withholding of attainable information."[305]

ii. The Right to Know One's Heritage II[306]

According to Sec. 1598 Civil Code, a two-year statute of limitation governed the right of adults newly of age to seek judicial declaration of their biological origin. The German Constitutional Court invalidated this statute,[307] relying on the fact that the limitation might operate to foreclose any possibility for young people to discover their heritage.[308] The Court held that "[t]he impossibility of clarifying one's own heritage can be a considerable burden and can undercut one's (inner) security."[309] It then ordered that the law must be changed, consistent with personality rights, so that a child might learn her identity.[310]

b. The Right of Informational Self-determination

Likewise, the Constitutional Court has established a right of informational self-determination.[311] This right provides the individual with protection against the collection, processing and usage of personal data.[312] The term 'data' in this context is broadly defined, covering more than intimate information in a narrow sense.[313]

i. The Census Act Case[314]

In 1983 the German government enacted the Federal Census Act, which required the collection of comprehensive data concerning Germany's demographic and social structure. The Act set the parameters for the country's population count and required rudimentary personal information, such as name, gender, address, nature of household occupants, marital status, religious affiliation, job occupation, and work setting. The Act also required citizens to fill out detailed questions concerning their sources of income, mode of transporta-

304. *Id.* at 269.
305. *Id.* at 269.
306. BVerfGE 90, 263.
307. *Id.* at 264.
308. *Id.* at 272.
309. *Id.* at 273.
310. *Id.* at 276-77.
311. *See* BVerfGE 27, 1 ("Mikrozensus").
312. *See* DIETER Schwab, Einfuehrung in das Zivilrecht n.285 (12th ed. 1995).
313. *See* OLG Nuremberg, [NJW] 28.2 (1993), 796 (796-97).
314. BVerfGE 65, 1.

tion to and from work, educational background, and use of dwelling, including method of heating and utilities. The Act further allowed information obtained to be transmitted to the local government, which could then use the information for the purpose of planning, environmental protection, and redistricting. Over one hundred people filed suit, complaining that the Act's intrusiveness threatened their privacy rights.

The German Constitutional Court agreed with this statement, at least temporarily, and suspended the census until its constitutionality could be determined.[315] The core concern was that comprehensive and intrusive population surveys may yield personality profiles that, when digested by modern computing techniques, will facilitate the government's ability to voluntarily access such information at will and use it as it sees fit. This carries with it the danger of converting the human being into a mere object of statistical survey, depersonalizing the human element.[316] The more is known about a person, the easier this person can be controlled.

According to the Constitutional Court, the right of informational self-determination protects against such governmental intrusions.[317] The right has been defined as

> the authority of the individual to decide fundamentally for himself, when and within which limits personal data may be disclosed . . . . [T]his decisional authority requires a special measure of protection under present and future conditions of automatic data processing. [For example,] the technological capability of storing [highly] personalized information concerning specific people is practically unlimited and retrievable in seconds . . . without concern for distance . . . . [T]his information, when connected to other data sources, . . . can produce a complete or partial personality profile, over which the affected individual has no control, and the truth of which he cannot confirm . . . . The possibilities of acquiring information and exerting influence have increased to a degree never previously known.[318]

ii. Disclosure of Medical Records[319]

The right of informational self-determination is not unlimited. The plaintiff, a doctor, claimed damages from the defendant, an employee of an insurance company. The insurance company asked the defendant to investigate a

315. *Id.* at 43.
316. *Id.* at 42-43.
317. *Id.* at 43.
318. *Id.* at 42-43.
319. BGHZ 24, 72; translation in part by N. SIMS in: VAN GERVEN, *supra* note 198, at 173 et seq.

fraud that the plaintiff had possibly committed by submitting allegedly false medical certificates. Allegedly, the plaintiff submitted these false certificates to prove damage sustained as a consequence of physical injury caused to him by a third party (K). In order to prove fraud, the defendant contacted the third person's attorney(R) and showed him the false certificates. The plaintiff's claim for damages was based on violations of a statutory duty of confidentiality and his right to privacy in respect of his health. Both the District Court and the Court of Appeals rejected the plaintiff's claim.

The Supreme Court dismissed the plaintiff's request for review of the Court of Appeals' decision.[320] The Supreme Court held that, although a general right to personality had to be recognized, the violation of that right could only be established by a balancing of interests.[321] In this case, the Court found that the interest of a patient in his medical files not being disclosed without his consent outweighed the interest of an insurance company engaged in investigating suspected fraudulent claims. The Court stated:

> The notion of the general right to privacy has the breadth of a general clause and is ill-defined . . . . The Court of Appeals rightly takes the view that the unauthorized communication of medical certificates concerning the state of health of another person . . . may constitute an interference with the domain of secrecy protected by the right to privacy . . . . This is not, however, an unqualified right. The general right to privacy does not afford the possibility of the unrestrained implementation of one's own interests . . . . Limits are set by the twofold prohibition on infringements of the constitutional order and offences against good morals, and on infringing the rights of others. In case of a possible interest arising from the fact that everyone has the same general right to privacy and from the fact that the free development of personality consists of individual endeavors to excel, a dividing line is necessary in the event of conflict which must be drawn on the basis of the principle of a balancing of rights and interests . . . . Depending on the configuration of circumstances, the scope of the right to privacy may vary considerably . . . . In truth the considerations of the Court of Appeals come down, then, to this: Under the circumstances prevailing, the plaintiff's interest in confidentiality of the medical certificates concerning his state of health was not so great as to outweigh the interest of the defendant and of K in ascertaining whether the insurance company or K had not received undue advantage. The Court of Appeals thereby demonstrated the limitation of the plain-

320. *Id.* at 75.
321. *Id.* at 80.

> tiff's right to privacy in the preservation of confidentiality in relation to his affairs, namely a limitation based on the balancing of rights and interests on the facts of the particular case. It did not deem the scope of this right to extend so far as to enable communication of the insurance documents to lawyer R to be considered an infringement. That assessment is not open to legal objection.[322]

c. The Conflict Between the Right of Informational Self-determination and the Right to Know One's Heritage

The right of informational self-determination and the right to know one's heritage may collide, as illustrated in the following case decided by the Constitutional Court in 1997.[323] The plaintiff had been born in 1959. Shortly thereafter, she was transferred to a children's home, and was later raised by foster parents. The plaintiff tried to force her mother to tell her who her biological father was, arguing she needed this information for personal reasons, as well as for the enforcement of potential claims in regard to the law of inheritance. The defendant mother, on the other hand, pointed to the fact that she had engaged in sexual intercourse during the time of conception with a variety of men, some of whom would now be married and live in intact families. Thus, she was of the opinion that she did not have to name them.[324]

The District Court found for the plaintiff on the basis of Sec. 1618a in connection with 1934a et seq. Civil Code and in view of Art. 6 (5) of the Constitution.[325] The Court of Appeals amended the judgment to include only an obligation of the mother to tell her daughter, under reference of name and address, with whom she had sexual intercourse in the time between the 181st and 302nd day before the plaintiff was born. The defendant mother brought "Verfassungsbeschwerde" (suit of unconstitutionality) based on a violation of her right of informational self-determination (Art. 2 Constitution).

The Constitutional Court reversed, holding that an obligation to name the men with whom she had sexual intercourse during the time of conception would violate the mother's private sphere protected by Articles 2 (1) in connection with 1 (1) of the Constitution.[326] "The general right to privacy," the Court wrote,

> protects the inner personal area of life and the preservation of its basic conditions. It encompasses the right to have one's

322. *Id.* at 78-83.

323. 1997 BVerfG, NJW, 1769.

324. *Id.*

325. Art. 6 (5) states: Children born outside of a marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

326. *Id.* at 1769.

> private and intimate sphere protected. This includes family matters and the personal, including the sexual relations to one's partner. Moreover, the right to privacy protects the authorization to freely decide whether or to what extent and to whom one wants to reveal one's personal life.[327]

The Court acknowledged, however, that this right to informational self-determination is not without its limits, i.e. restrictions have to be imposed whenever it is in the predominant community's interest or when such a right would conflict with the constitutional right of another person.[328] When balancing such interests, the Court held, a judge has broad discretion as to which interest to give priority:

> Neither the child's right to know his heritage (Article 2 (1) with 1 (1) Constitution) nor Articles 6 (5) or 14 (1) Constitution predetermine a special answer for the question whether a child has a claim against its mother to name its father . . . Whether such a claim exists has to be determined by the legislature or the judiciary.[329]

d. Discussion

The right of informational self-determination is of vital importance in the area of human substances: blood and sperm hold a variety of information about a person.[330] In addition, through scientific analysis, knowledge about a human being can be gained which could not be more detailed.[331] Whether and to what extent such analyses are permissible must therefore be dependent on the person's will.

With regard to the modern possibilities of genetic technology and their impact on the blood and sperm of a person, a discussion evolved whether one should acknowledge a "right to one's genetic sphere" as a special form of the right of informational self-determination.[332] This would adequately express the idea that a right exists which protects the individual right to make his knowledge and the knowledge of third persons about his genetic constitution dependent on his will. In particular, prior to a genetic analysis, such a right would require a physician to fully inform the patient about the consequences

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327. *Id.*

328. *Id.*

329. *Id.* at 1769-70.

330. *See* NORBERT JANSEN, *Die Blutspende aus Zivilrechtlicher Sicht* 45 (1978); Michael Schroeder & Jochen Taupitz, Menschliches Blut: Verwendbar Nach Belieben des Arztes? 44, 64 (1991).

331. *See, e.g.*, LG Cologne, MedR 1995, 409 (410).

332. *See* Erwin Deutsch, *Die Genomanalyse im Arbeits- und Sozialrecht – Ein Beitrag zum genetischen Datenschutz*, NZA, 657 (658), 1989; Jochen Taupitz, *Privatrechtliche Rechtspositionen um die Genomanalyse: Eigentum, Persoenlichkeit, Leistung*, JZ, 1089 (1092, 1094, 1098-1099), 1992.

of his decision to permit the analysis. Then, after the examination, it would be necessary to discuss the results with him. Furthermore, a patient would have a constitutionally protected right to access and delivery of photocopies in his medical files. This corresponds with the physician's duty not to disclose the data to third persons, at least not until the data is anonymous. On the other hand, a patient would be protected from information imposed on him, but to which he does not want to have access (the so-called "right not to know").[333] Finally, a patient would be entitled to order the destruction of his medical files.

One should add that inasmuch as conclusions can be drawn from the examination of one person to another person's genetic constitution — one might think of the case of the genetic analysis of a child, in which necessarily detailed information about the genetic constitution of the parents becomes available — their own right of informational self-determination has to be considered. Hence, an analysis of human substances must be forbidden until all persons whose rights are affected by the examination have been consulted and have consented.

The right to know one's heritage is substantially discussed in the area of new assisted reproductive technologies as well. After a few scholars originally took the position that the interest of the donor to remain anonymous would be so important that it should outweigh the child's interest to know their heritage,[334] the majority since then has correctly held that the latter should always prevail.[335] This view is based on the fact that the individual knowledge about one's forbearers is of vital importance, not only in respect to the realization of one's right to maintenance,[336] to avoid hereditary diseases,[337] or to avoid later marriages between relatives,[338] and especially for the development of one's personality and identity.[339] This is true because a parent-child relationship does not *end* — like in many cases in the animal kingdom — with

333. *See* WOLFGANG VAN DEN DAELE, GENOMANALYSE, GENETISCHE TESTS UND 'SCREEBUBG' 15 (1985).

334. *See* Ernst Benda, *Humangenetik und Recht – eine Zwischenbilanz,* NJW, 1730, 1985; Erwin Deutsch, *Artifizielle Wege menschlicher Reproduktion: Rechtsgrundsaetze zur Konservierung von Sperma, Eiern und Embryonen; kuenstliche Insemination und ausserkoerperliche Fertilisation; Embryotransfer,* MDR, 177 (181), 1985.

335. *See* BARTOLD BUSSE, DAS RECHT DES KINDES AUF KENNTNIS SEINER ABSTAMMUNG BEI HETEROLOGER KUENSTLICHER BEFRUCHTUNG (SAMENSPENDE, EISPENDE, EMBRYOSPENDE), EIN BEITRAG ZU DEN VERFASSUNGSRECHTLICHEN GRENZEN DER MODERNEN FORTPFLANZUNGSMEDIZIN 138 (1988).

336. According to Sec. 1601 German Civil Code, "relatives in direct line are obliged to furnish maintenance to each other." Sec. 1589 states that "persons of whom one is the issue of the other are related in direct line."

337. Hereditary diseases have been discussed in the context of: 1) Phenylketonuria (PKU), *see* Lori B. Andrews & Nanette Elster, *Article: Adoption, Reproductive Technologies, and Genetic Information,* 8 Health Matrix 125, 126, 133-34 (1998); 2) Leukemia, *see id.* at 143 and Robertson, *supra* note 11, at 1016 n.260; 3) Kidney malfunction, *see* Robertson, *supra* note 11, at 1016 n.260; 4) Heart disease, *see* Andrews & Elster *supra* note 177, at 146-47 and Cahn & Singer, *supra* note 19, at 175; and 5) Cancer, *see* Cahn & Singer, *supra* note 19, at 175.

338. *See* BGHZ 82, 173 (177); BUSSE, *supra* note 335, at 18-19.

339. Cahn & Singer, *supra* note 19, at 173 et seq.

the birth of the child, but continues in the child's lifetime.[340] On the other hand, the parent-child-relationship does not *start* with birth, but does always include the past as well.[341]

Due to these rationales, the usage of a so-called "sperm cocktail" is not permitted in Germany.[342] This prohibition is justified because the child would thereafter be deprived of its possibilities to learn about its natural parents. A negation of the child's right to have his father disclosed would be an unjustified discrimination against a child who has been naturally procreated, according to German law in Sec. 1600a Civil Code and in Sec. 640h Federal Rules of Civil Procedure provide the latter with such a right.

However, the general acknowledgement of this right does not identify against whom a right to disclosure would be enforceable. A potential obligor is the child's mother in case she herself knows the name of the donor. One could argue that the idea expressed in Sec. 385 (1) No.2 Federal Rules of Civil Procedure, which is an exemption to Sec. 383 (1) No.3 Federal Rules of Civil Procedure, would lead to the mother's obligation to disclose the donor's name. This provision, however, is more accurately to be construed as not involving a duty to disclose the circumstances of the acts of procreation themselves, i.e. the mother is not obliged to disclose the father's name. Notwithstanding the child's right to know its heritage, the mother's own sphere of intimacy is insofar of decisive importance.[343]

Another person who may have a duty to disclose is the gynecologist who conducts the artificial insemination. An interest to protect one's intimacy does not exist in his case. Hence, one could only argue that the interests which protect the mother from disclosure also protect the physician from disclosing the donor's name. The gynecologist is only indirectly affected by the mother's interests. Instead, he takes over an active part in the procreation of the child, without which the child would not be born at all. Thus, his obligation to the child should be more serious than possible obligations to the mother. The gynecologist should be obliged to disclose the donor's name according to Sec. 242, 810 and 823 (1) Civil Code.[344] An agreement between the physician and the mother not to disclose the donor's name would be void under the law due to a violation of the child's constitutionally protected right to know its heritage. Despite the existence of provisions like Sec. 203 (1) No.1 Criminal Code, Sec. 53 (1) No.3 Federal Rules of Criminal Procedure or Sec. 383 (1) No.6 Federal Rules of Civil Procedure, the gynecologist does not have a right to refuse to testify in court.

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340. *See* Kurt Mueller, *Zeugnispflicht bei heterologer Fertilisation*, FamRZ 1986, 635.

341. *See* KARL JASPERS, PHILOSOPHIE 479 (1948).

342. *See* ADOLF LAUFS in: HANS-LUDWIG GUENTHER & ROLF KELLER, FORTPFLANZUNGSMEDIZIN UND HUMANGENETIK – STRAFRECHTLICHE SCHRANKEN? 102 (2nd ed. 1991).

343. BGHZ 82, 173 (174 et seq.); Deutsch, *supra* note 334, at 188.

344. Mueller, *supra* note 340, at 636; HELMUT NARR, AERZTLICHES BERUFSRECHT 177-78 (1973).

2. United States

a. The Right to Know One's Heritage: *Michael H. v. Gerald D.*[345]

The right to know one's heritage is not fully established in American case law. The closest American Supreme Court case to the line of German Right to Heritage cases is the following case, although the issue is the biological father's right, rather than the children's right.

On May 9, 1976, in Las Vegas, Nevada, Carole D., an international model, and Gerald D., a top executive in a French oil company, were married. The couple established a home in Playa del Rey, California, in which they resided together as husband and wife when one or the other was not out of the country for business. In the summer of 1978, Carole became involved in an adulterous affair with a neighbor, Michael H. In September 1980, she conceived a child, Victoria D., who was born on May 11, 1981. Gerald was listed as father on the birth certificate and has always held Victoria out to the world as his daughter. Soon after delivery of the child, however, Carole informed Michael that she believed he might be the father.[346]

In the first three years of her life, Victoria remained with Carole, but found herself within a variety of quasi-family units. In October 1981, Gerald moved to New York City to pursue his business interests, but Carole chose to remain in California. At the end of that month, Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father. In January 1982, Carole visited Michael in St. Thomas, where his primary business was based. There, Michael held Victoria out as his child. In March, however, Carole left Michael and returned to California to live with her husband.[347]

Michael filed a filiation action in the Superior Court of California to establish his paternity and right to visitation. Gerald moved for summary judgment on the ground that there were no triable issues of fact as to the child's paternity. He relied on California Evidence Code Sec. 621, which contains a presumption that the husband of the child's mother is a child's father,[348] provided that the husband is neither sterile nor impotent. This presumption can only be rebutted by the husband or the wife, and then only in limited circumstances. Michael challenged this statute as unconstitutional.[349]

The Superior Court, finding enough evidence that the mother and her husband had been cohabiting at the child's conception and birth and that Gerald was neither sterile nor impotent, granted the husband's motion and rejected the unconstitutionality challenges. The California Court of Appeals affirmed, holding, inter alia, that (1) the conclusive presumption statute did not violate

345. 491 U.S. 110 (1989).
346. *Id.*
347. *Id.*
348. The German Civil Code contains the same presumption in Sec. 1592 No.1.
349. 491 U.S. 110 (1989).

the rights of the putative father or the child under the due process clause of the Federal Constitution's Fourteenth Amendment and (2) the statute did not violate the child's rights under the Fourteenth Amendment equal protection clause.[350]

The Supreme Court affirmed, holding that a natural father can never "have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth."[351] According to the Court, the conclusive presumption statute did not infringe on the due process rights of the putative father or the child, or on the child's equal protection rights. It reasoned, inter alia, that (1) the putative father's procedural due process claim failed, because the statute, although phrased in terms of a presumption, was the implementation of a substantive rule of law.[352] The Court then held that (2) the putative father's substantive due process claim failed, because the power of a natural father to claim paternity of a child born into a woman's existing marriage with another man, and to assert parental rights over such a child, is not so deeply embedded within society's traditions as to be a fundamental right qualifying as a liberty interest;[353] (3) the child had no due process right to maintain filial relationships with both her putative father and her mother's husband;[354] and lastly (4) the statute did not violate the child's equal protection rights insofar as the statute denied the child, unlike her mother and her mother's husband, the opportunity to rebut the presumption of paternity.[355] A number of concurring[356] or dissenting[357] opinions, however, indicated that a right to know one's heritage might well exist.

b. The Right of Informational Self-determination: *Whalen v. Roe*[358]

In 1972 the New York Legislature enacted a statute which classifies potentially harmful drugs and provides that prescriptions for the most dangerous legitimate drugs (Schedule II) be prepared on an official form. One copy of the form, which identifies the prescribing physician, dispensing pharmacy, drug and dosage, and patient's name, address and age, must be filed with a central registry at the state Health Department. The Health Department logs the forms, records the data on magnetic tapes for processing by a computer, and then stores the forms in a room which is surrounded by a locked wire fence and protected by an alarm system. The computer tapes are kept in a

350. *Id.*
351. *See* Justice Stevens' concurring opinion, 491 U.S. 110, 133 (1989).
352. *Id.* at 119.
353. *Id.* at 124-27.
354. *Id.* at 130-31.
355. *Id.* at 131.
356. *Id* at 132. (O'Connor, Kennedy and Stevens, J.J., concurring).
357. *Id* at 136. (Brennan, Marshall & Marshall, J.J., dissenting); *id.* at 157 (White and Brennan, J.J. dissenting).
358. 429 U.S. 589 (1977).

locked cabinet, and the computer is run "off-line" when the tapes are run, so that no terminal outside the computer room can read or record any information on the tapes. Public disclosure of the identities of patients is expressly prohibited by the statute, except when disclosure is made: (1) to another person employed by the department; (2) pursuant to judicial subpoena or court order; (3) to a government agency authorized to regulate a person who is authorized by the statute to deal in controlled substances; or (4) to the central registry of the Department.[359]

A few days before the statute became effective, litigation was commenced by a group of patients regularly receiving prescriptions for Schedule II drugs, by prescribing doctors, and by two associations of physicians. The plaintiffs offered evidence tending to prove that people in need of Schedule II drugs may decline such treatment because of a fear that the misuse of the computerized data could cause them to be stigmatized as "drug addicts." The District Court enjoined enforcement of the provisions of the statute dealing with the reporting of patients' names and addresses, holding that the doctor-patient relationship is a zone of privacy accorded constitutional protection and that the identification provisions invaded that zone.[360]

The Supreme Court reversed, holding that the New York statute was "the product of an orderly and rational legislative decision."[361] The Court acknowledged the State's "vital interest in controlling the distribution of dangerous drugs."[362] It further acknowledged the existence of a constitutionally protected right to privacy, consisting of the individual's interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions. The court also noted "the mere existence in readily available form of the information about patient's use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations."[363] The Court was persuaded, however, that the statute did not pose a "sufficiently grievous threat" to either interest which could have established a violation of constitutionally protected rights:[364]

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files . . . much of which is personal in character and potentially embarrassing or harmful if disclosed . . . . Nevertheless New York's statutory scheme, and its implementing administrative proce-

359. *Id.*
360. *Id.*
361. *Id.* at 597.
362. *Id.* at 598.
363. *Id.* at 600.
364. *Id.*

dures, evidence a proper concern with, and protection of, the individual's interest in privacy.[365]

c. The Conflict Between the Right of Informational Self-determination and the Right to Know One's Heritage

i. *Alma Society v. Mellon*[366]

The plaintiffs are adult adoptees and an association of such persons. Under New York law, adoption records are to be sealed. Adopted persons — upon reaching adulthood — are only permitted access to the files by "showing of good cause." Plaintiffs filed suit to challenge the constitutionality of these statutes, arguing that they should be constitutionally entitled to obtain their sealed adoption records, including the names of their natural parents, without the showing of any cause.[367]

Plaintiffs' supporting affidavits indicated that lack of access to such records caused some of them serious psychological trauma and pain and suffering, may cause them or their children medical problems or misdiagnoses for lack of history, may create in some persons a consciousness of a danger of unwitting incest, and in others a "crisis" of religious identity or what they feel is an impairment of religious freedom because they are unable to be reared in the religion of their natural parents. Moreover, they cite a study indicating that 128 out of 152 natural families selected at random agreed to meet an adult adoptee.[368] The District Court dismissed the complaint, finding the New York laws to be constitutional.[369]

The Second Circuit affirmed the District Court's decision holding that, because of the State's appropriate recognition of the privacy interests of the natural and adoptive parents and the substantial promotion of important state interests, neither the Fourteenth Amendment Due Process and Equal Protection Clause, nor the Thirteenth Amendment would be violated. The Court held that the "appellants' novel claims do not fit into any as yet recognized category of 'privacy',"[370] and took into consideration that more interests than the plaintiffs' were involved. Namely, those of "first, the natural parent(s) who [have] surrendered custody of the adopte[d] child to the State and in turn an agency or other family, and second, the adopting family which has, presumably, nurtured the child to the age of adulthood."[371] Relying on two then recent Supreme Court cases, *Quilloin v. Walcott*[372] and *Zablocki v. Redhail*,[373]

365. *Id.* at 605.
366. Alma Soc. Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979).
367. *Id.*
368. *See id.* at 1233 note 13 (citing JONES, THE SEALED ADOPTION RECORD CONTROVERSY: REPORT OF A SURVEY OF AGENCY POLICY, PRACTICE AND OPINION (1975)).
369. *Id.*
370. *Id.* at 1231.
371. *Id.*
372. Quillon v. Walcott, 434 U.S. 246 (1978).

the Court recognized that a state may consider all these conflicting interests, and that the New York statutes did no more than to take these privacy interests into account.[374] The Court limited its holding, however, by recognizing that "upon an appropriate showing of psychological trauma, medical need, or of a religious identity crisis . . . the New York courts would appear required under their own statute to grant permission to release all or part of the sealed adoption records."[375]

ii. *Doe v. Sundquist*[376]

In 1995, the Tennessee Legislature enacted several statutory provisions and amendments regarding the law of adoption. Section 36-1-127(c) of the new law, which became effective July 1, 1996, provides in relevant part: "(1) (A) All adoption records . . . shall be made available to the following eligible persons: (i) an adopted person . . . who is twenty-one (21) years of age or older . . . ; (ii) the legal representative of [such] a person . . . ; (B) Information . . . shall be released . . . only to the parents, siblings, lineal descendants, or lineal ancestors, of the adopted person . . . , and only with the express written consent . . . [of] the adopted person . . . ."[377] The new law also provides for a "contact veto," under which a parent, sibling, spouse, lineal ancestor, or lineal descendant may register to prevent contact by the adopted person.[378] A violator of the "contact veto" is subject to civil and criminal liability.[379]

A group of plaintiffs, consisting of both biological parents who had surrendered their children for adoption, adoptive parents and a non-profit child-placing agency, challenged the constitutionality of the new law in the federal as well as in the Tennessee state courts, alleging, inter alia, a violation of their right to procreate and their right of informational self-determination. The plaintiffs' suits were unsuccessful in both jurisdictions.[380]

In regard to the plaintiff's contention that open adoption records were violating their rights under the U.S. Constitution, the U.S. Court of Appeals for the Sixth Circuit affirmed the District Court's denial of the plaintiff's motion for a preliminary injunction, reasoning that the Tennessee legislature had made

> a serious attempt to weigh and balance two frequently conflicting interests: the interest of the child adopted at an early age to know who that child's parents were, an interest entitled

373. Zablocki v. Redhail, 434 U.S. 374 (1978).
374. 601 F.2d 1225, 1233 (1979).
375. *Id.* at 1233.
376. 106 F.3d 702 (1997), *cert. denied*, U.S. 118 S. Ct. 51, 139 L. Ed. 2d 16 (1997), 2 S.W. 3d 919 (1999).
377. TENN. CODE ANN. sec. 36-1-128 (1996 & Supp. 1998).
378. *Id.*
379. TENN. CODE ANN. sec. 36-1-132 (1996 & Supp. 1998).
380. 106 F.3d 702 (1997), *cert. denied*, U.S. 118 S. Ct. 51, 139 L. Ed. 2d 16 (1997), 2 S.W. 3d 919 (1999).

> to a good deal of respect and sympathy, and the interests of birth parents in the protection of the integrity of a sound adoption system.[381]

The Court said it was "powerless to disturb this resolution"[382] since the Constitution did not elevate the right to avoid disclosure of adoption records above the right to know the identity of one's parents.[383] It found the plaintiffs' right to procreate not to be relevant for the case at hand, as the challenged law did not limit adoptions.[384] In respect to the plaintiffs' alleged right to avoid disclosure of confidential information, the Court answered that such a right "has not been fleshed out by the Supreme Court" and would run counter to their decisions in *J.P. v. DeSanti*,[385] *Doe v. Sundquist*,[386] and *Doe v. Wiggington*.[387]

Similarly, evaluating the constitutionality of the law under the Tennessee Constitution, the Tennessee Supreme Court held open adoption records to be lawful.[388] The Court found the decision of whether to carry a pregnancy to term to be fundamentally different from the decision of whether to surrender a child for adoption,[389] and held that the confidentiality of records was a statutory matter left to the legislature.[390] Said the Court:

> The disclosure provisions reflect the legislature's determination that allowing limited access to adoption records is in the best interest of both adopted persons and the public. The provisions do not, however, allow unfettered access in disregard of the sensitivities and privacy interests involved. To the contrary, disclosure is limited to an adopted individual or that individual's legal representative, 21 years of age or older. Moreover, extensive provisions are included to allow a birth parent or other related individual to register a "contact veto" and eliminate or reduce the risk that disclosure of identifying information will have a disruptive effect upon the lives of the biological and adoptive families . . . . Absent a fundamental right or other compelling reason, we reject the invitation to expand constitutional protection to the non-disclosure of personal information.[391]

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381. 106 F.3d 702, 707 (1997).
382. *Id.*
383. *Id.* at 705.
384. *Id.* at 706.
385. 653 F.2d 1080 (6th Cir. 1981).
386. 21 F.3d 733 (6th Cir. 1994).
387. 106 F.3d 702, 706 (1997).
388. Doe v. Sundquist, 2 S.W. 3d 919, 927 (1999).
389. *Id.* at 926.
390. *Id.*
391. *Id.* at 926.

d. Discussion

These cases illustrate the point that neither a right to know one's heritage, nor a right of informational self-determination are yet recognized by the majority of the American courts and many scholars.[392] The idea of such privacy rights yielding information has gained more weight on the state level, as the recent discussion about the adoption record cases shows.[393] Adoption records along with the adoptee's original birth certificate have traditionally been sealed in the United States, i.e. closed not only to the general public, but also to all adoptees and their parents.[394] A new birth certificate is issued which substitutes the adoptive parents' name for that of the biological parents, proclaiming that the adoptee is the adoptive parents' child.[395] Children could get access to information only if they could demonstrate "good cause,"[396] a term which is only defined in Virginia[397] and involves a balancing of the best interests of the adoptee with the interests of the adoptive and birth parents.[398]

Over the past twenty years, however, a number of states have established different procedures that allow contact between adoptees and their genetic relatives if certain prerequisites are met. Three different approaches can be distinguished: First, more than twenty states have enacted some form of mutual consent registry, i.e. they allow persons who are directly involved in the adoption procedure to register their consent to meet and, to a certain degree, exchange information.[399] In some states, it is enough that one parent agrees,[400] whereas in others mutual consent of the biological parents is necessary for releasing identifying information.[401] Although Congress has repeatedly considered the creation of a national mutual consent registry,[402] these considerations have been fruitless to date such that mutual consent registries still operate at the individual state level only.[403]

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392. *See also* Cahn & Singer, *supra* note 19, at 161 note 50; Claudine R. Reiss, *Comment: The Fear of Opening Pandora's Box: The Need to Restore Birth Parents' Privacy Rights in the Adoption Process*, 28 Sw. U. L. Rev. 133, 142, 145 et seq. (1998).

393. *See* Cahn & Singer, *supra* note 19, at 153 et seq.

394. Cahn & Singer, *supra* note 19, at 154; Reiss, *supra* note 392, at 137.

395. *Id.*

396. Andrews & Elster, *supra* note 337, at 137 et seq.; Cahn & Singer, *supra* note 19, at 154.

397. VA. CODE ANN. sec. 63.1-236 (Michie 1995) (defining the term "good cause" as "a showing of a compelling and necessitous need for identifying information").

398. *See* Andrews & Elster, *supra* note 337, at 136-37 et seq.

399. *See* Andrews & Elster, *supra* note 337, at 147 note 107; Cahn & Singer, *supra* note 19, at 162 et seq.

400. *See, e.g.,* MASS. ANN. LAWS ch. 210, sec. 50 (Law. Co-op. 1994); 23 PA. CONS. STAT. sec. 2905 (1998).

401. *E.g.,* N.Y. PUB. HEALTH sec. 4138-d (McKinney 1985 & Supp. 1998).

402. *See* Cahn & Singer, *supra* note 19, at 163 n.59. Senator Carl Levin has advocated the enactment of legislation to establish a federal mutual consent registry since 1980. The legislation has passed the Senate several times, but has never passed the House. The House Ways and Means Subcommittee recently held hearings to consider the registry.

403. Cahn & Singer, *supra* note 19, at 163.

Secondly, more than fifteen states have opted for so-called "search and consent" procedures. Under these procedures, a state becomes a "confidential intermediary" with an affirmative obligation to search for and request consent from the adoptive parents for the release of identifying information if an adoptee or biological parents requests so.[404] If the adoptive parents decline to give their consent, the adoptee can still petition the court to open the adoption records under the traditional good cause standard.[405] The "confidential intermediary" approach has found some support by the courts as well.[406]

Finally, a few states have opted for completely open records. Two states, Alaska[407] and Kansas,[408] allow adult adoptees — without any judicial or administrative hearing, but based merely on a request — access to their original birth certificates. Other states, namely Minnesota,[409] Washington,[410] Vermont,[411] Delaware,[412] Oregon,[413] and, as seen in *Doe v. Sundquist,*[414] Tennessee,[415] have adopted statutes which differ in detail, but are all "open records statutes."

None of these concepts is completely satisfactory, however. The mutual consent registries, for example, have typically been understaffed as well as underfunded and thus have had difficulties in publicizing their existence as well as in matching registrants.[416] The "confidential intermediary system," on the other hand, is even more expensive than the mutual consent registries,[417] and includes conditions that restrict their use.[418] Under both approaches, there has been criticism by the registrants due to a "lack of control."[419] The reasons why a truly open adoption record system is problem-

404. *See* Andrews & Elster, *supra* note 337, at 148-49; Cahn & Singer, *supra* note 19, at 165-66.

405. *See, e.g.,* MINN. STAT. ANN. §. 259.89 (3) (6) (West Supp. 1998).

406. *See* Golan v. Louise Wise Serv., 507 N.E.2d 275, 279 (N.Y. 1987).

407. *See* ALASKA STAT. §18.50.500 (Michie 1998).

408. *See* KAN. STAT. ANN. §65-2423 (Supp. 1998).

409. *See* MINN. STAT. ANN. §259.89(b) (West 1998).

410. *See* WASH. REV. CODE §26.33.345 (1997).

411. *See* VT. STAT. ANN., tit. 15A, §6-105(b) (2) (Supp. 1998).

412. *See* DEL. CODE ANN. tit. 13, §923 (Supp. 1998).

413. *See* Cahn & Singer, *supra* note 19, at 168. On November 3, 1998, Oregon voters passed a ballot initiative that allows adoptees to receive their original birth certificates in the same manner as any other person. This initiative was blocked from becoming law, however, by a preliminary injunction of an Oregon trial court.

414. *See id.* at 172-173.

415. *See* TENN. CODE ANN. § 36 – 1 – 1 – 127 (c) (1996 & Supp. 1998).

416. *See* Alan W. Strasser, *Adoption Search and Registry Laws of Vermont and New York: Whose Best Interest is Being Served,* 28 Suffolk U. L. Rev. 669, 688 (1994); *See* Cahn & Singer, *supra* note 19, at 164.

417. *See* Cahn & Singer, *supra* note 19, at 165.

418. *See* OKLA. STAT. tit. 10, §7508-1.3 (c) (1) (Supp. 1998). For example, the Oklahoma registry is unavailable to an adult adoptee who knows of a minor biological sibling, Moreover, an adoptee can only apply after she has been registered with the state's mutual consent registry for at least six months, *See* D. Marianne Brower Blair, *The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests,* 33 Tulsa L.J. 177, 254 (1997).

419. *See* Cahn & Singer, *supra* note 19, at 166.

atic have been pointed out in *Doe v. Sundquist* and also include the danger of promoting "genetic essentialism," i.e., the view that human beings are merely the sum of their genes.[420]

In addition to all these reasons, the policy arguments remain which have traditionally been made for sealed adoption records. Offering the child the opportunity to begin its life without the stigma of illegitimacy;[421] giving the child the chance to become part of a family which desperately wants a child and can care for I,[422] securing the adoptive family's life from intrusion by the birth parents or the public,[423] enabling the birth parents to erase a traumatic past and to "move on and attempt to rebuild their lives,"[424] and reducing the likelihood of natural parents resorting to abortions or to the black market.[425]

However, the trend to a more open adoption policy on the state level has to be welcomed. Traditional sealed record laws have not given appropriate weight to the child's need to gain information about his heritage, a need that is essential to that person's identity and self-image[426] and to avoid genetic diseases.[427] Scientific studies have evidenced that many adoptees suffer from "genealogical bewilderment"[428] and that adoptees account for a disproportionate percentage of total psychiatric patients.[429] Moreover, one has to consider that the new statutes limit the child's access to his records by requiring a minimum age, and arguably, by this time, the other parties' rights have become less serious in the meantime. As Naomi Cahn and Jana Singer have pointed out:

> Focusing on the concept of identity, and particular on its fluidity, suggests that the appropriate solution to the adoption records controversy is one that allows for change over time. At the time a birth parent relinquishes a child for adoption, it is that parent's identity that is most salient . . . . As an

420. *See* Andrews & Elster, *supra* note 337, at 149-151; Cahn & Singer, *supra* note 19, at 184 et seq.

421. *See In re* Anonymous, 390 N.Y.S.2d 779, 781 (Supr. Ct. 1976); Mills v. Atlantic City Dept. of Vital Statistics, 372 A.2d 646, 649 (N.J. Super. Ct. Ch. Div. 1977); Cahn & Singer, *supra* note 19, at 155.

422. Reiss, *supra* note 392, at 138.

423. *See* Sarah E. Nugent, *The Release of Nonidentifying Information to Adopted Children: Striking a Balance Between the Rights of Biological Parents and Adopted Children*, 23 Rutgers L.J. 709, 713 (1992).

424. *See* Joel D. Tenenbaum, *Introducing the Uniform Adoption Act*, 30 Fam. L.Q. 333, 340-41 (1966); Andrews & Elster, *supra* note 337, at 140.

425. *See* Carol Chumney, *Current Trends in Tennessee Family Law: Tennessee's New Adoption Contact Veto is Cold Comfort to Birth Parents*, 27 U. Mem. L. Rev. 843, 871 (1997); Andrews & Elster, *supra* note 337, at 141; Reiss, *supra* note 392, at 139.

426. *See* Reiss, *supra* note 392, at 142.

427. *See supra* note 337 and accompanying text.

428. *See In re* Maples, 563 S.W.2d 760, 767 (Mo. 1978) (*en banc*).

429. *See* SOROSKY et al., THE ADOPTION TRIANGLE: THE EFFECT OF SEALED RECORDS ON ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS 30, 96 (1978); *see also* Mills v. Atlantic City Dept. of Vital Statistics, 372 A.2d 646, 654-55 (N.J. Super. Ct. Ch. Div. 1977).

> adopted child matures, however, and the birth parent's relinquishment recedes in time, the child's identity should begin to predominate. By the time the child reaches the age of majority, the child's need to construct her identity interests outweigh the birth parent's earlier desire to prevent the establishment of a parent-child relationship. Moreover, the child's status as an adult diminishes any claim a birth parent may have to make decisions on behalf of the child.[430]

On the other hand, completely open adoption records bear the risk that the parents' right of informational self-determination or right to confidentiality as the "individual interest in avoiding disclosure of personal matters"[431] may be left without protection. Leaving the parents without these protections would run afoul with their importance for human personality.

In sum, the approach that uses "confidential intermediaries" seems best suited to balance the rights of all parties involved in the adoption process. Moreover, non-identifying information could be provided to the adoptive parents at the time of the adoption, including information like medical history and ethnic background.[432] Today, at least twelve states require a compilation of a social history if obtainable;[433] thirty-four require a medical history;[434] twenty-four require a genetic history or history of hereditary conditions;[435] and twenty-one require a health history.[436] The Uniform Adoption Act provides for the release of non-identifying medical and other relevant information to the adoptive parents prior to the adoption.[437] This kind of information might in many cases be sufficient to give the child the opportunity to develop a self-identity and to avoid inheritable diseases, without intruding too far into the biological parents' privacy rights.[438] One commentator has drafted a possible provision which would reflect these considerations.[439]

Finally, the discussion about adoption records is very useful for the comparable discussion about privacy rights in the artificial insemination context. For the child, the need to discover its biological origins in this area is as im-

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430. Cahn & Singer, *supra* note 19, at 174-75; *see also* SOROSKY *supra* note 430, at 90-91.

431. *See* Whalen v. Roe, 429 U.S. 589, 599 (1977).

432. *See* PAUL SACHDEV, UNLOCKING THE ADOPTION FILES 92 (1989); Nugent, *supra* note 423, at 718; Reiss, *supra* note 392, at 153.

433. *See* Andrews & Elster, *supra* note 337, at 129 n.13.

434. *Id.* n.14.

435. *Id.* n.15.

436. *Id.* n.16.

437. *See* UNIF. ADOPTION ACT §2-106, 9 U.L.A. 17 (Supp. 1999); *see also* Carrie L. Wambaugh, *Comment: Biology is Important, But Does Not Necessarily Always Constitute a "Family": A Brief Survey of the Uniform Adoption Act,* 32 Akron L. Rev. 791, 815 (1999).

438. Reiss, *supra* note 392 at 153.

439. *Id.* at 154-55.

portant as in the adoption context.[440] Sperm donors may later regret not having contact with their biological children and thus suffer similar symptoms as women who have surrendered their child for adoption and are haunted by concern about the well-being of the child.[441] Notwithstanding these facts, sperm donors have traditionally been promised anonymity by infertility clinics or under state law.[442]

Similarly, Sec. 5 (a) of the Uniform Parentage Act provides that all documents relating to an artificial insemination "shall be kept confidential and in a sealed file" and that they are "subject to inspection only upon an order of the court for good cause shown."[443] The abovementioned procedures, however, in the adoption context may be transferred into the context of assisted reproduction and implemented by infertility clinics to give the child's privacy rights greater weight. One good example which has been implemented by a clinic is the Sperm Bank of California's "Yes" donor program in which sperm donors can consent to have their identities disclosed to their biological children upon a child's request when the child becomes of age.[444]

Similarly, courts may soon have to answer the request of a child, conceived with donor gametes, to have access to the records disclosing his genetic parents' identities, and may then use a "confidential intermediary" to protect the privacy rights of the parties involved,[445] or at least provide the child with some non-identifying information at a certain age.[446] Moreover, the collection, compilation and disclosure of personal data will lead to the same con-

440. *See* Jeanne Marie Laskas, *Left Unsaid*, Wash. Post Mag., Mar. 29, 1998, at W35; Barbara Vobejda, *Egg Donation: A Growing Business; Fertility Successes Raise Demand, Price*, Wash. Post, Mar. 7, 1999, at A7.

441. *See* Robertson, *supra* note 11, at 1016; Cahn & Singer, *supra* note 19, have emphasized, however, that, while similar policy arguments could support openness in the context of sperm and egg donors, there would be "some differences" in the context of sperm and egg donors which would make them "much more difficult than claims to adoption records." *Id.* at 172-73. They have pointed out that "issues of "relinquishment" or "abandonment" may be far less complex; "giving up" sperm or an egg may be far more comprehensible to a child than is "giving up" a baby. Thus, "donor" children may have fewer psychological issues surrounding their origins, and knowing the identity of their genetic parents may be less central to their sense of self. Even these children, however, sometimes express strong interest in meeting their biological relatives . . . . For gamete donors, the issues are similarly complex. Like birth parents after adoption, gamete donors lack a legal relationship with their "children." However, unlike a gamete donor, a birth mother who relinquishes a child for adoption has carried and nurtured that child for nine months of pregnancy. The issues may also be different for male and female donors; like many biological fathers, sperm donors seem far less troubled by anonymity than some egg donors, who have undergone more invasive procedures and may have created a bond with the recipient family. Additionally, male donors are capable of "fathering" many more children than are female donors." *Id.* at 188-89.

442. *See* Andrews & Elster, *supra* note 337, at 138; Cahn & Singer, *supra* note 19, at 188.

443. UNIF. PARENTAGE ACT §5, 9B U.L.A. 296, 301-302 (1987 & Supp. 1990).

444. *See* Seligson, *Seeds of Doubt*, Atlantic Monthly, March 1995, at 28; Andrews & Elster, *supra* note 337, at 148-49.

445. *See* Andrews & Elster, *supra* note 337, at 149.

446. *See* Robertson, *supra* note 11, at 1017 n.266.

flicts as in the adoption records context.[447] Elaborate "go-between systems" with the involvement of various intermediaries which make sure that a sperm source will never learn who received his sperm[448] — often requested by lesbian couples undergoing assisted reproduction to guarantee that the sperm donor will under no circumstances have access to the child[449] — are highly problematic.

3. Comparison

By reasoning that intimate information reflects human personality, because it is an important component of both the inner person and the public persona,[450] the German Constitutional and Supreme Court have extended degrees of protection over personal data,[451] honor, rights to one's good name,[452] portrayal of self,[453] image,[454] and spoken word.[455] It has already been pointed out that cases like the *Census* case proffer a "sensible way to preserve the inviolability of personhood and human freedom amidst dramatic technological change."[456] These doctrines are not (yet) part of American constitutional law.[457] However, American law should develop similar rights of informational self-determination.[458] The recent trend in America shows that courts are beginning to give more and more weight to these privacy rights.[459]

On the other hand, the American concept of using a "confidential intermediary" and the disclosure of certain non-identifying information could serve as a model for determining the privacy rights in the assisted reproduction context in Germany. If accompanied by appropriate procedural safeguards against misuse, the "confidential intermediary" model seems capable of providing artificially procreated children with the information they need for the development of their personality without depriving the genetic parents of their own privacy rights. The effectiveness of the concept could be enhanced by adopting a provision which gives the child a right to petition a court to open the reproductive file in case of the genetic parents' rejection of their consent if the opening of the record seems appropriate under the particular circumstances of the case. The judge could then use discretion to balance the parties' interests on a case-by-case basis.

447. *See* Andrews & Elster, *supra* note 337, at 135-36.
448. *See* Robertson, *supra* note 11, at 1007 n.229 (citing Davies, *Artificial Insemination* in WOMEN AND THE LAW 8-1, 8-21-8-22 (C.H. Lefcourt ed. 1984)).
449. *See* Robertson, *supra* note 11, at 1007 n.229.
450. *See* BVerfGE 65, 1, 42-43.
451. BVerfGE 65, 1.
452. BVerfGE 30, 173.
453. BVerfGE 34, 269.
454. BVerfGE 35, 202.
455. BVerfGE 54, 208.
456. Eberle, *supra* note 7, at 1055.
457. *Id.* at 1051.
458. *Id.* at 1055.
459. *See* Dolgin, *supra* note 17, at 227.

C. *The Right to Enter Into Surrogacy Contracts*

1. Germany

In general, German contract law is dominated by the principle of freedom of contract *(Vertragsfreiheit)*.[460] Thus, there can be no doubt that the ability to enter into all kinds of contractual agreements is part of the general right to personality *(allgemeine Handlungsfreiheit)* protected under Art. 2 (1) of the German Constitution.[461] This freedom is not unlimited, however. Sec. 134 Civil Code states that a legal transaction which violates a statutory prohibition is void. Moreover, according to Sec. 138 (1) Civil Code, the same is true if a transaction violates public policy.

With respect to surrogacy contracts, the German courts have held that such contracts are to be considered unconscionable.[462] Moreover, the German legislature enacted the *Embryonenschutzgesetz* (Act for the Protection of Embryos) on December 13, 1990, which in Sec. 1 (1) expressly prohibits surrogacy,[463] and imposes criminal sanctions for violations.[464] Thus, all surrogacy contracts in Germany are void under Sec. 134, 138 Civil Code.

2. United States

Unlike the German situation, the American case law dealing with the right to enter into surrogacy agreements is highly controversial.

a. *Surrogate Parenting Associates v. Kentucky ex rel. Armstrong*[465]

The Surrogate Parenting Association ('SPA') was a medical clinic in the business of arranging for surrogates to have children for couples. The surrogate, procured by the SPA, was artificially fertilized with sperm from the husband of the couple. Under the surrogate contract, the surrogate would then forfeit her parental rights, leaving the infertile wife free to adopt the child. The surrogate was provided with all her pregnancy expenses and attorney fees and received compensation, a portion of which was paid prior to giving birth, with the remainder due after the termination of the surrogate's parental rights. SPA received a fee for its procurement services in addition to being paid for

460. OTTO PALANDT, BUERGERLICHES GESETZBUCH, KOMMENTAR Sec. 145 n.7 (58th ed. 1999).

461. *See, e.g.*, BVerfGE 8, 274 (328); INGO VON MUENCH (PUBLISHER), GG-KOMMENTAR, BAND 1 (4th ed. 1992), Art.2 n.16.

462. PALANDT, *supra* note 460, at Sec.138 n.48; Harrer, *supra* note 11, at 123 n.203.

463. *See* PALANDT, *supra* note 460, at Einf v Sec. 1591 n.31; in addition, the German *Adoptionsvermittlungs-gesetz* (Act for the Brokerage of Adoptions) prohibits the brokerage in regard to surrogates, *See id.* at Sec. 138 n.48.

464. *See* Kathryn Venturatos Lorio, *The Process of Regulating Assisted Reproductive Technologies: What We Can Learn From Our Neighbors – What Translates and What Does Not,* 45 Loy. L. Rev. 247, n.98 (1999). *See also* Dolgin, *supra* note 17, at 225 n.2.

465. 704 S.W. 2d 209 (Ky. 1986).

the performance of the artificial fertilization and obstetric care for the surrogate.[466]

Under Kentucky law, any agreement made by a birth mother to surrender custody during the five days following birth was voidable. The SPA contracts permit the surrogate to change her mind and void the contract during these five days. The Attorney General of the State of Kentucky brought suit to invalidate the corporate charter of the SPA. The District Court found for the SPA, but the decision was reversed by the Court of Appeals.[467]

The Kentucky Supreme Court reinstated the trial court's decision.[468] It held that the SPA was not in violation of any existing Kentucky law. The court distinguished the abovementioned surrogacy procedure from a contract to sell a baby on the grounds that the surrogacy agreement took place prior to insemination.[469] Moreover, the court held that since the Kentucky legislature had explicitly sanctioned the IVF process, it had put its "stamp of approval" on "tampering with nature in the interest of assisting a childless couple to conceive."[470] The court emphasized that the agreement was in fact voidable during the first five days after birth, and refused to label the SPA's activities as illegal without clearer guidance from Kentucky's legislature.[471]

b. *In re Baby M.*[472]

William Stern and his wife entered into an agreement with Mary Beth Whitehead for her to gestate a baby and subsequently release it to them for adoption. Ms. Whitehead's consideration was to receive a fee of $10,000. She was artificially fertilized with the husband's semen, became pregnant, and delivered Baby M. After birth, however, she changed her mind and claimed custody rights of her child. The biological father, on the other hand, argued that his right to procreate entitled him to enforcement of the contract. The trial court upheld the surrogacy contract as a valid contract, terminated Ms. Whitehead's parental rights, granted sole custody to the child to Mr. Stern and permitted Mrs. Stern to adopt Baby M.

The New Jersey Supreme Court affirmed the decision in part and reversed in part.[473] The court held surrogate contracts conflict with New Jersey statutes which 1) prohibit the use of money in connection with adoptions; 2) require proof of abandonment or parental unfitness before a court may order termination of parental rights or an adoption is granted; and 3) make the surrender of custody and consent to adoption irrevocable.[474] In addition, surro-

466. *Id.*
467. *Id.*
468. *Id.* at 214.
469. *Id.* at 211.
470. *Id.* at 212.
471. *Id.* at 214.
472. 537 A.2d 1227 (N.J. 1988).
473. *Id.* at 1264.
474. *Id.* at 1240-46.

gacy agreements were against New Jersey public policy.[475] Regarding Mr. Stern's right to procreate, the court held that the custody, care, companionship, and nurturing that follow birth were not parts of this right.[476] The court went on to balance the parties' competing interests, holding that a biological father's right to procreate cannot extend so far as to deprive the biological mother of her own right to procreation.[477] The court did, however, affirm the District Court's order awarding custody to Mr. Stern as being in the best interest of the child.[478] The case was remanded to determine visitation rights because the trial court was precluded from making a determination on that issue.[479]

c. *Johnson v. Calvert*[480]

Crispina and Mark Calvert, a married couple, were unable to have a child without medical assistance, because Ms. Calvert's uterus had been removed in 1984. In 1989, Anna Johnson, a co-worker of Ms. Calvert, offered to serve the Calverts as a gestational surrogate. The parties entered into a surrogacy contract according to which Ms. Johnson would gestate an embryo created from Crispina's and Mark's gametes and would give birth to the resulting child. Ms. Johnson promised that, at the birth of the baby, she would surrender her maternal rights to the Calverts. The contract further provided that Ms. Johnson would receive a $10,000 fee in a series of installments. After six months of her pregnancy, Ms. Johnson told the Calverts that unless they would pay the entire balance due she would refuse to surrender the above-mentioned rights. As a result, the parties ended up in court a number of months before the baby Christopher, was born in September 1990. Ms. Johnson argued that an obligation to surrender her maternal rights would deprive her of her constitutional right to the companionship of her child. The Calverts, on the other hand, emphasized their constitutional interests as the child's natural parents in regard to their procreative choices and their relationship with their child.[481]

The trial court held that the Calverts were the "legal" parents of Christopher, because Crispina was the child's "genetic, biological, and natural mother," while Ms. Johnson was but a "gestational carrier," a "host," and a "genetic hereditary stranger" to the child, comparable to a foster parent and a wet nurse. Similarly, although relying on state statutory law based on the Uniform Parentage Act, the California Court of Appeals found that Ms. Calvert's genetic connection to the child constituted her "natural" maternity, and held that the "legal" mother of a child is its "natural" mother.[482]

475. *Id.* at 1246-50.
476. *Id.* at 1253.
477. *Id.* at 1254.
478. *Id.* at 1256-61.
479. *Id.* at 1261-64.
480. 851 P.2d 776 (Cal. 1993).
481. *Id.*
482. *Id.*

The California Supreme Court affirmed, but on entirely different grounds. It reasoned that neither the parties' biological relationships to the child, nor state statutory law would provide clear guidance.[483] The intentions of the parties to parent, as manifested by the surrogacy contract, should govern.[484] The court concluded:

> Although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law.[485]

d. *In re Marriage of Moschetta*[486]

Cynthia Moschetta, sixteen years Robert Moschetta's senior and already a mother when she married him at the age of 40, previously had a tubal ligation. She was unlikely to have more (biological) children, but a number of years after their marriage they decided that they wanted children. They unsuccessfully attempted fertility treatment, and then, in 1989, turned to surrogacy. A surrogacy broker introduced the Moschettas to Elvira Jordan. The parties negotiated a surrogacy agreement without the advice of counsel. Ms. Jordan agreed to be artificially fertilized with Robert's semen, to gestate and give birth to the resulting baby, to then terminate her maternity rights, and finally assist in the adoption process that would declare Cynthia Moschetta the child's legal mother. Jordan was to receive $10,000 as consideration. The artificial insemination was performed privately and without medical assistance.[487]

Before the birth of baby Marissa in May 1990, the Moschetta marriage began to deteriorate, and a divorce was considered. Ms. Jordan, learning of the Moschettas' marital problems while still pregnant, reconsidered the surrogacy contract. Shortly after the baby was born, Ms. Moschetta went to court to seek a dissolution of her marriage and parental rights to and custody of Marissa.[488]

The trial court held that Elvira Jordan and Robert Moschetta were the parents of Marissa pursuant to the surrogacy contract and granted them joint

483. *Id.* at 781.
484. *Id.* at 782.
485. *Id.*
486. 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).
487. *Id.*
488. *Id.*

legal and physical custody. Ms. Moschetta then filed a brief with the Court of Appeals supporting the trial court's declaration of Elvira's maternity.[489]

Robert, however, continued to argue for Cynthia Moschetta's legal motherhood. In order to preclude Ms. Jordan's maternity and his having to share custody of Marissa with Elvira, he cited *Johnson v. Calvert*,[490] which held that the intent of the parties as manifested by the surrogacy agreement shall be decisive. He referred to California Evidence Code Sec. 621 and California Civil Code Sec. 7015, and relied on the argument that Cynthia "received" the child into her home and thus, on equal protection grounds, be deemed the mother.[491]

The California Court of Appeals rejected all of Mr. Moschetta's arguments. As to his reliance on *Johnson v. Calvert*, the court responded that, in the absence of natural maternity, a woman could only establish a mother-child relationship by complying with the procedures which are outlined in the state adoption laws of California and that the contract at issue did not substitute for compliance with these laws.[492] In other words, the Court premised maternity on either natural procreation or adoption, and further limited "natural" procreation to women with some biological connection to the child involved.[493]

e. *In re Marriage of Buzzanca*[494]

Similar to Moschetta, this case involved a surrogacy contract between the intending parents, a married couple, Luanne and John Buzzanca, and a surrogate, Pamela Snell. As in Moschetta, the marriage of the intending parents deteriorated and was dissolved before the child was born. However, in Buzzanca neither intending parent was a genetic parent to the baby, Jaycee, who was born in 1995. Rather, Pamela had become pregnant through the use of an embryo created from the semen and ova of anonymous donors at a Californian infertility clinic.

A couple of months after the child's birth, Luanne Buzzanca, who had brought the baby home from the hospital, sought child support from John as part of the action to dissolve their marriage. John denied paternity duties, although he admitted that he had signed the surrogacy agreement. However, he argued that because he signed the surrogacy contract after the baby's conception, he was not a party to the contract. Luanne then sought a judicial declaration of John's natural parentage. The trial court found that neither John nor Luanne was a lawful parent of Jaycee, but declared her a child without

489. *Id.*

490. *See supra* notes 295-296.

491. *Id.*

492. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994).

493. *See* Dolgin, *supra* note 17, at 244.

494. 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

parentage. Luanne's potential maternity was made dependent on her willingness and ability to comply with state adoption procedures.[495]

The Court of Appeals reversed.[496] The court emphasized the fact that Jaycee never would have been born had not John and Luanne agreed to have a fertilized egg implanted in Pamela Snell, the surrogate.[497] The court went on to say that establishing natural parentage under the law need not depend on proof of any biological relation between mother and child, because public policy would favor, whenever possible, the establishment of legal parenthood with the concomitant responsibility.[498] The court grounded Luanne's maternity first on California's statutory scheme for regulating parentage in cases of artificial reproduction, and second, on an expansive reading of *Johnson v. Calvert*.[499] The court defined Ms. Buzzanca's consent as constituting a basis on which to premise her maternity and treated the consent as the legal equivalent to a genetic or gestational link between putative mothers and children in other cases.[500]

f. *R.R. v. M.H.*[501]

In November 1996, Robert and Margaret Rascoe, wishing to have a biological child, but unable to procreate due to Margaret's infertility, entered into a contract with Michelle Hoagland, a surrogate. New England Surrogate Parenting Advisors arranged the terms of the surrogacy for a fee of $6,000. According to the agreement, Hoagland was to receive $10,000 to conceive, gestate, and bear a child created from her ova and Robert's semen. The surrogate further promised that she would surrender custody to Robert and his wife at the child's birth. The agreement, however, did not provide for the termination of Michelle's maternity, but only for her relinquishing custody of any child who would be born as a result of the contract. Hoagland became pregnant in 1996, but informed the Rascoes, before the child's birth in August 1997, that she had decided to retain custody of the child upon its birth. She returned part of the money paid to her.[502]

Robert Rascoe filed suit to have his paternity declared and to establish his rights under the surrogacy contract. A Massachusetts state court granted temporary custody of the child to the Rascoes. Hoagland received the right to unsupervised visitation amounting to 12 hours each week. The Court of Appeals affirmed.[503]

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495. *Id.*
496. *Id.* at 293-94.
497. *Id.* at 288.
498. *Id.* at 290.
499. *See supra* notes 295-296.
500. 72 Cal. Rptr. 2d 280, 288-90 (Ct. App. 1998).
501. R.R. v. M.H., 689 N.E. 2d 790 (Mass. 1998).
502. *Id.*
503. *Id.*

The Massachusetts Supreme Court, in light of public policy concerns and state adoption laws, refused to validate the compensated surrogacy agreement.[504] Under Massachusetts' adoption law, a woman is not allowed to provide binding consent to terminate her parental rights with a view toward adoption of her child by some other party earlier than the fourth day after the child's birth.[505] In addition, the law prohibits payments to a birth mother beyond expenses of birth.[506] Finally, Massachusetts law does not provide for private adoptions.[507]

The Court further declined to rely on Massachusetts' artificial insemination law as a model for deciding whether to approve of traditional surrogacy, as the situation of a sperm donor was held to be distinguishable from that of a surrogate mother on the grounds that surrogate motherhood is never anonymous and the surrogate's commitment and contribution was "unavoidably much greater" than that of a sperm donor.[508]

g. *Kass v. Kass*[509]

Maureen and Steve Kass married in 1988. In 1989, the couple sought, due to Maureen's exposure in utero diethylstilbestrol (DES), medical help to conceive a child. Between 1990 and 1993, the Kasses unsuccessfully attempted in vitro fertilization (IVF) ten times at a Long Island infertility clinic, which amounted to costs of more than $75,000.00. However, the clinic was successful in fertilizing nine ova during the last IVF procedure in May 1993. Physicians then implanted four of the fertilized ova in the uterus of Maureen's sister, Eileen, who had agreed to serve as a gestational surrogate. The remaining five embryos were cryopreserved. Eileen did not become pregnant. In July, eight weeks after the IVF procedure and cryopreservation, Maureen instituted a divorce action, asking for "sole custody" of the frozen embryos. Steven Kass, in contrast, wished to donate the embryos to the clinic storing them. He relied on informed consent agreements between Maureen and himself which had been signed prior to the May IVF. The Kasses were divorced in May 1994. The trial court found for Maureen. It gave her the right "to take possession of the five zygotes . . . for purposes of attempting conception." The appellate court disagreed. It held the consent agreements to be determinative.[510]

The New York Court of Appeals affirmed.[511] It ruled that "agreements between progenitors . . . should generally be presumed valid and binding, and

504. *Id.* at 797.
505. *Id.* at 796.
506. *Id.*
507. *See id.*
508. *Id.* at 795.
509. 696 N.E.2d 174 (N.Y. 1998).
510. *Id.*
511. *Id.* at 182.

enforced in any dispute between them."[512] In particular, the Court concluded that the consent agreements were not in fact marred by ambiguity.[513] The Court almost entirely avoided discussing the issue of a constitutional right to procreate, as well as questions relating to the ontological status of the embryos.[514]

h. Discussion

The discussion about how to deal with surrogacy contracts under U.S. law is far from clear and continues to evolve. Several state courts have developed models for dealing with surrogacy cases. Three main approaches can be distinguished: First, some courts, like the Massachusetts Supreme Court in *R.R. v. M.H.*[515] and the New Jersey Supreme Court in *In re Baby M*,[516] try to solve surrogacy problems by using traditional family concepts, although acknowledging that these concepts have to be transferred into a new and different legal environment. These courts use analogies to traditional family concepts like the concept of adoption and its standard of the "best interest of the child." However, it is unclear whether these concepts really fit the context of new reproductive technologies and surrogacy.[517] For example, there are good reasons to prohibit payments beyond medical expenses in the adoption context, but it is doubtful whether making it a crime to pay such money in the surrogacy contract would be constitutional.[518] Moreover, such an application of the law would — for the majority of the cases — prevent gestational surrogacy, and would thus run afoul of the idea that surrogate gestation may actually be more desirable than existing adoption, foster parent, and stepparent practices, since the rearing couple will also be the genetic parents.[519]

Secondly, some courts, like the Californian courts in *Johnson v. Calvert*[520] and *In re Marriage of Buzzanca*,[521] premise parentage predominantly on the factor of choice and "intent" to raise the child. One has to admit that intending parents in fact seem to be "especially suited to the parental role."[522]

512. *Id.* at 180.
513. *See id.* at 182.
514. *Id.*
515. *See supra* notes 57-58.
516. *See supra* note 444 at 107-07, 105-06.
517. See Cahn & Singer, supra note 19, at 160.
518. *Doe v. Kelly*, 100 Mich. App. 169, 307 N.W.2d 438 (1981), held that the Michigan "baby-selling" statute could constitutionally be applied to a surrogate transaction in which a married couple paid a surrogate to be inseminated, carry the child to term and relinquish it to the couple at birth. However, the Kentucky Supreme Court has held that a similar surrogate agreement does not violate the Kentucky statute against "baby selling." *See* Surrogate Parenting, Inc. v. Com. Ex. Rel Armstrong, 704 S.W.2d 209 (Ky. 1986); *see also* Harry D. Krause, *Artificial Conception: Legal Approaches*, 19 Fam. L.Q. 185, 199-204 (1985); Robertson, *supra* note 11, at 1012-1013.
519. Robertson, *supra* note 11, at 1013-1014.
520. *See supra* note 452, at 55-56.
521. *See supra* note 456.
522. *See* Dolgin, *supra* note 17, at 277.

However, this approach is not applicable to all surrogacy contracts. The California Court of Appeals emphasized this point in *In re Marriage Moschetta* when the Court explicitly refused to apply the *Johnson* intent-model to cases involving not gestational, but traditional surrogacy agreements. It is unclear whether the *Buzzanca* Court was really correct in broadening the holding of *Johnson* that "natural" maternity can be predicated on intention by applying this concept to a woman who bore no biological connection to the child involved; no conclusive explanation was offered why consent should really be treated as an equivalent to genetic motherhood. In addition, the question of what standard to apply to parentage disputes involving only one biological mother remained unsolved.[523] In addition, the "intent" approach has to deal with the fact that such intent may change, which in many cases will not be obvious to some of the parties involved.

Finally, other courts, like the New York Court of Appeals in *Kass v. Kass*[524] or the Tennessee Supreme Court in *Davis v. Davis*,[525] emphasize the contractual agreements into which the parties entered, and allow those agreements to determine the relationships between family members. This approach seems to have its merits by providing a familiar bright line rule as long as the parties deal at arm's length. There is widespread concern, however, that biological parents, often occupying a higher socioeconomic status, will be able to take advantage of poor, uneducated women in the surrogacy bargaining process.[526] Commentators have expressed their concern that the unequal bargaining power in such cases will lead to grossly one-sided contractual agreements that favor the genetic parents and leaving the surrogate without (adequate) protection.[527] Moreover, enforcing gestational surrogacy contracts has been described as "to treat the body as a reproductive machine and the child as an instrument to selfish ends."[528]

Robertson has proposed to solve the contract enforcement problem by distinguishing damages from specific performance as a remedy for the surrogate's breach of contract.[529] In his opinion, procreative liberty does require that a contract is honored, but it does not require that it be enforced by specific performance. Instead he argues that if a surrogate is not enjoined from aborting, she can be ordered to pay damages to the couple for the loss they have suffered.[530] This proposal does not adequately reflect that the interests of the

523. *See id.* at 253.

524. *See supra* note 472, at 299-14.

525. *See supra* note 221, at 265-267.

526. *See* Carl H. Coleman, *Gestation, Intent and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497(1996).

527. Snyder, *supra* note 19, n.16.

528. Robertson, *supra* note 11, at 1014; *see also* GENA COREA, THE MOTHER MACHINE (1985).

529. Robertson, *supra* note 11, at 1015.

530. *Id.*

couple who want to have a child are idealistic, and that awarding monetary damages will fail to compensate for the loss of that child.

The controversy surrounding surrogacy is much too complex to be solved in this thesis. The cases and their analysis have shown possible solutions and their benefits and detriments. One commentator has already tried to show that the different approaches represent a "continuum of responses"[531] which "read as a group . . . are harmonious and can be explained in terms of one broad theory of familial relationships."[532]

3. Comparison

The analysis of the American case law shows exactly why the German legislature has chosen not to allow surrogacy contracts at all: surrogacy cases consist of a complex fact pattern with multiple interests involved. A plain contractual approach fails in those cases where the parties possess unequal bargaining power. There are also ethical concerns about the use of the human body as a "reproductive machine." If no specific statutory law exists, traditional concepts, in particular adoption concepts, have to be applied by analogy. However, these concepts do not always fit the context of assisted reproductive technologies. Furthermore, an intent/choice model seems critical at least in those traditional surrogacy agreements where a "mother" has absolutely no biological connection to the child.

Hence, by completely prohibiting surrogacy, the German legislature has restricted both the power to enter into contractual agreements in general as well as the right to procreate. This decision has a heavy impact, considering that surrogate motherhood might be an ultimate possibility to bypass sterility.[533]

In sum, the right to procreate cases, the right of informational self-determination and the right to know one's heritage, a reconciliation of both countries' approaches is not possible in regard to the right to enter into surrogacy contracts.

V. CONCLUSION

The foregoing analysis demonstrates that the concept of privacy and its relation to new assisted reproductive technologies in Germany as well as in the U.S. is still "marked by a fair degree of normative uncertainty."[534] Germany and the United States both are highly developed, advanced industrial societies coping with change and technological revolution, and both value individual freedom in the context of a stable society.[535] They struggle to preserve traditional concepts of family and, at the same time, to respect the right of autono-

531. Dolgin, *supra* note 17, at 273.
532. *Id.* at 227.
533. *See* Harrer, *supra* note 11, at 122-23.
534. *See* Robertson, *supra* note 11, at 952.
535. Eberle, *supra* note 7, at 966.

mous individuals to independently determine their lives and make their own choices.[536] Such societies require time to evolve when faced with change, a luxury that — unfortunately — is not permitted in the field of biotechnology.[537]

How, then, can the comparison between the two countries' laws help to improve the situation? In general, "through study of other cultures, we learn, by comparison, something important about ourselves."[538] "Perhaps this is the central purpose of comparative law: We learn, by looking at others, important truths about ourselves which can then be reevaluated or reaffirmed," and thus "we discover alternative concepts of humanity, personality, and community."[539] In other words, "By observing the problems associated with various other responses, we may be able to avoid some of the same difficulties; likewise, the successes of other nations may provide a roadmap for our approach .... Both understanding and insight may be gained from a comparative analysis."[540] The process of learning is necessary to the profession because if lawyers fail to become educated to the challenges and complexities of new scientific and technological advances in the field of reproductive biology, "they will increasingly lack understanding of the questions to be asked, let alone answers to be given."[541]

In particular, the analysis has shown that the right to privacy is not an absolute right, but must be balanced with other societal concerns and the privacy rights of other people.[542] This is no novel knowledge, but had already been acknowledged by Samuel D. Warren and Louis D. Brandeis in 1890,[543] and has been confirmed by many courts and scholars since.[544] Thus, there is still no alternative to determining the exact extent of the right by considering the particular circumstances of individual and personal values on a case-by-case basis.[545] In this regard, I respectfully disagree with Radhika Rao who has said that "new reproductive technologies . . . raise issues too complex to be decided according to constitutional principles that permanently balance basic values, setting them into constitutional stone."[546] To the contrary, Germany's

536. Dolgin, *supra* note 17, at 272.

537. Pitrolo, *supra* note 8, at 205.

538. Eberle, *supra* note 7, at 966; *see also* THOMAS MANN, JOSEPH IN EGYPT (1938), translated in CURRIE, *supra* note 43, Dedication: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be."

539. Eberle, *supra* note 7, at 1055.

540. Lorio, *supra* note 464, n.6 et seq; *See id.* at n.130. However, any attempt of "wholesale adoption" must be tempered.

541. Smith, *supra* note 19, at 52-53.

542. *See* Feiler, *supra* note 22, at 2446 and 2456 et seq.

543. *See* Warren & Brandeis, *supra* note 3, at 214.

544. *See, e.g.,* Rao, *supra* note 35, at 1106; Tushnet, *supra* note 2, at 1371 et seq.

545. Bergmann, *supra* note 91, at 502; Coleman, *supra* note 19, at 78; Eberle, *supra* note 7, at 987.

546. Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1495-96 (1995).

concept of a "general right to personality," found in Articles 1 and 2 (1) of the German Constitution and in Sec. 823 (1) Civil Code, and the American concept of the right to privacy, based in the Fourteenth Amendment of the Constitution and its Due Process Clause, are both open-ended.[547]

In addition, it has been pointed out that America might, on its way to the development of a right of informational self-determination, make use of the German approach as elaborated in the *Census* case.[548] German law, correctly defined, might also be helpful to the American legislature in adapting tort remedies to an infertility context involving embryos and collaborators.[549] On the other hand, if dignitarian rights are justifiably viewed as indispensable to German law, then the German Constitutional Court might profit from a transplantation of certain techniques employed by the American Supreme Court to preserve fundamental rights, for example the application of strict scrutiny.[550] Such an importation has already occurred to some extent in the *Right to Heritage II* case.[551] It has been shown that a certain degree of difference between both nations' approaches in respect to modern assisted reproductive technologies and the usefulness of the concept of a right to privacy in this area still exists.[552] It is also true to some extent that their views have converged somewhat.[553] For example, the German courts' recent decisions show that they increasingly recognize that aspects of personality may have a commercial value, and that these personalities are to some extent marketable.[554] The German law has moved towards the American approach.[555]

The fact that both nations' approaches come closer to each other can only be welcomed. In the new millennium, where national borders have become relinquished to some extent, it is preferable to come to an international consensus, as no domestic solution would effectively be able to protect against the "reproductive tourism." This concept is leading child-seeking couples to travel from their homes to other nations that have more liberal approaches.[556] This phenomenon is especially obvious in the European countries,[557] but is equally true in the relation between the U.S. and Germany. An international

547. *See* Eberle, *supra* note 7, at 977.

548. *See supra* text accompanying notes 93-97.

549. Robertson, *supra* note 11, at 1036.

550. *See* Eberle, *supra* note 7, at 1056.

551. *See supra* note 72.

552. Eberle, *supra* note 7, at 1052 ("[T]he difference in constitutional doctrine may also be because our private law, unlike German law, did not develop these concepts comprehensively, and, thus, unlike German constitutional law, American law had no ready base to stand on.").

553. *See* Eberle, *supra* note 7, at 979 ("The movement of both courts . . . seems very much in the same general direction, notwithstanding different textual, historical, philosophical, and cultural settings.").

554. *See* Walter Leisner, *Von der persoenlichen Freiheit zum Persoenlichkeitsrecht,* FS Hubmann 295, 304 (1985).

555. Bergmann, *supra* note 91, at 521.

556. *See* Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 216 (1996).

557. *See* Lorio, *supra* note 464, n.107-120.

consensus will not be easy to achieve. This is true because as with all international treatises the problem is that different political, social, cultural and religious moral concepts collide,[558] especially in the area of assisted reproductive technologies. On the other hand, there are a number of international organizations, like the International Federation of Fertility Societies[559] or the Center for Reproductive Law and Policy,[560] which appear capable of enhancing the approach for an international consensus. One possibility would be to draft Uniform Acts[561] or Restatements that provide guidance for the domestic approach. Such an approach has been taken by the international trade law sector with the Principles of International Commercial Contracts, drafted and published by the UNIDROIT (The Rome Institute) in 1994,[562] or by the United Nations' International Covenant on Economic, Social and Cultural Rights.[563]

Finally, the fact that some decisions of both the American and German courts have been criticized should not be misunderstood as a statement that they are useless. Progress is only possible by making mistakes."[564] In this regard, even decisions that do not properly apply traditional concepts to new technological challenges have merit because they trigger a discussion that then leads the way to a more sound solution.

558. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 1, 8 (1987) ("Whether meant to or not, law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which in turn helps to shape: stories about who we are, where we came from, and where we are going.").

559. *See* Lorio, *supra* note 464, n.16.

560. The Center for Reproductive Law and Policy (CRPL) is a non-profit legal and policy advocacy organization dedicated to promoting women's reproductive rights. CRLP's domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services.

561. For the U.S. domestically, *see* Sec. 5 of the UNIFORM PARENTAGE ACT, *supra* note 443.

562. *See* Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281 (1994).

563. *See* Smith, *supra* note 19, at 30.

564. SCHWERDTNER, *supra* note 215, at 351; *see also* Dolgin, *supra* note 17, at 226, describing the American courts' approach as "judicial trial and error."