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James K. Weeks

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Comparative Law of Privacy

*James K. Weeks**

IN MANY SOCIETIES man is regarded as an acquisitive animal who constantly struggles to protect his accumulated treasures. In the Western world the pursuit of property is well-established, philosophically, as well as in actual practice; but of even greater importance though less well established is man's pursuit of happiness, that rather nebulous entity which makes life worth living.

That man should be allowed to develop his personality and protect it from injury or public scrutiny, and keep it as free and untrammled as possible has been conceded by much of the free world, at least in principle. In practice, however, frequently the right has been conceded but in many areas this concession is the beginning and the end of the matter. Particularly, this holds true in the Anglo-American world when it has come to the matter of judicially protecting this right of personality. Of course, where the courts have found such a right existing in the form of a property right they have been most willing to extend protection to it in a collateral way.

Where privacy, which is the right of seclusion as to one's name, person, or representation of self,¹ is associated with an action for libel or slander,² copyright infringement,³ breach of contract, trespass,⁴ assault and battery, or similar type of action, the Anglo-American courts seem perfectly willing as a gratuitous bonus, to grant it protection. It is only where this right to se-

* Asst. Prof. of Law, Syracuse University College of Law.

¹ Thayer, *Legal Control of the Press* 494 (4th ed. 1962).

² *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N. Y. S. 829 (1915); *McNulty v. Reess Pub. Co.*, 136 Misc. 833, 241 N. Y. S. 29 (1930); *Kimmerle v. New York Evening Journal*, 262 N. Y. 99, 186 N. E. 217 (1933); *Dunlop Rubber Co., Ltd. v. Dunlop*, (1921) 1 A. C. 367; *Sports, etc. Agency, Ltd. v. "Our Dogs" Publishing Co.*, (1916) 2 K. B. 880; *Thorley v. Lord Kerry* (1812) 4 Taunt. 354; *Peck v. Tribune Co.*, 214 U. S. 185 (1908); *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725 (1904). This list is not intended by any means to be exhaustive but is merely representative.

³ *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 P. 594 (1911); *Waring v. WDAS*, 327 Pa. 433, 194 A. 631 (1937), *Gee v. Pritchard*, (1818) 2 Swans. 403.

⁴ *Cherrington v. Abney* (1709), 2 Vern. 646; *Hickman v. Maisey* (1900), 1 Q. B. 752; *Harrison v. Duke of Rutland* (1893), 1 Q. B. 142; *Martin v. City Struthers*, 319 U. S. 141, 63 S. Ct. 862 (1943). Again the list is intended to be merely representative.

clusion stands naked and alone that many Anglo-American courts, and particularly the English, have encountered extreme difficulty in bringing themselves to recognize such a right, and allow a remedy for that alone. Admittedly, they will frequently go to considerable extremes to find some plausible ground for deciding in favor of the one whose right of seclusion has been violated. Why they cannot always decide upon the simple expedient of recognizing a right of seclusion or privacy as such is not always clear, but the almost universal excuse appears to be an inordinate fear of opening the gates to a flood of litigation. The validity of this is, at best, questionable.

The right of privacy in the common law world did not receive any particular consideration in jurisprudence until 1890. There previously had been cases involving something closely resembling it, but these had always been decided on other grounds. However, it was sometimes observed that a right to be left alone was an adjunct of some other interest which enjoyed explicit legal protection.⁵ In fact, some courts, both English and American, have always been prepared to state categorically that "no general right of privacy exists."⁶

In 1890 the problem of a right of privacy received special attention, when the now famous Harvard Law Review article by Messrs. Warren and Brandeis⁷ was published. In it the authors surveyed many cases in which it appeared that the judges were attempting to recognize and formulate such a right but gave it protection only where it was attached to some regularly recognized right. The gist of their article was that there existed a right to be free from publicity, where one was not a public figure or had not voluntarily placed himself in the public scrutiny. The authors seemed to feel that the press was responding in an over zealous manner to the public's voracious appetite for scandal and gossip, and for what happened within the intimate family circle. Privacy judicially recognized and protected is almost always an attempt to curb excesses of the press.

⁵ Warren and Brandeis, Right of Privacy, 4 Harv. L. Rev. 193 (1890).

⁶ *Victoria Park Racing Club v. Taylor* (1937), 58 C. L. R. 479, 496; in *Yoeckel v. Samonig*, 272 Wis. 430, 75 N. W. 2d 925 (1956), the defendant, the operator of a tavern, entered and photographed the plaintiff, a customer while she was in the ladies' rest room, it was held that there had been no invasion of privacy, as such a right did not exist in Wisconsin, and it was stated that in any event the creation of such a right was a matter for the legislature. *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 P. 594 (1911); *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902). But see Associate Judge Gray's dissent in *Roberson* case, *supra*.

⁷ *Supra*, n. 5.

As previously mentioned, it is noteworthy that the legal protection of a right to seclusion, privacy, or the right to be let alone, as it is variously known, is extended hesitatively and with considerable mental reservation by the courts. The fact that no such right was known at common law is the most frequently offered excuse. This lack of precedent is an understandable excuse as far as the common law, itself, is concerned, but to say there is no precedent is to display a total disregard for history, and possibly even English history in particular.

From the XII Tables of Roman Law onwards, portions of the Western World have recognized a right of privacy and afforded it legal protection. This view of the Roman Law has found its way into the modern Civil Codes of the Continent albeit with some difficulty in a few European countries.

Though the Romans probably settled most serious affronts to their dignity by duels, their law did provide a remedy (*actio aestimatoria iniuriarum*) for any act which showed contempt for the personality of the victim. The basic recognition of moral injury and a general law of personality (*Personlichkeitsrecht*)⁸ which had its inception in Roman law is found in many contemporary Civil Codes.

In the modern law a right of privacy may be explicit in the Code itself or arise from the judicial interpretation of relevant portions of a Code. The Civil Code of Argentina is an example of the former, where Art. 1112 provides that:

If the act should constitute an offense under the criminal law, the obligation arising therefrom comprises not only indemnity for damage, but also for the moral injury which the offense may have caused the person to suffer, either by molesting him in his personal security, or in the enjoyment of his property, or wounding his legitimate affections.⁹

The Swiss Civil Code¹⁰ exemplifies the latter type of treatment, and although it does not mention such a right per se, Swiss

⁸ The Codes of Switzerland, Turkey, Liechtenstein, Argentina, and the pre-World War II codes of Germany, Czechoslovakia and Poland.

⁹ Stone, *Tort Doctrine in Louisiana: The Materials For The Decision of a Case*, 17 *Tulane L. Rev.* 159, 179 (1942).

¹⁰ Article 49, Swiss Fed. Code of Obligations, and Art. 28, Swiss Civil Code, the *Obligationenrecht* and *Zivilgesetzbuch* respectively. The author of the article at n. 9, *supra*, indicates that Articles 41 and 42 of the Swiss Federal Code of Obligations are the proper ones affording protection to a right of privacy, since Article 41 in particular allows a remedy for acts *contra bonos mores*, but the better authority indicates that Article 49 of the same Code is more appropriate.

writers have pointed out that certain portions of the Code are intended to protect a right of privacy. The German Code also makes a similar provision¹¹ to that of the Argentine Civil Code. However, some question has arisen as to whether the German Code envisages a protection of privacy *per se*.¹² Probably much the same question could arise in any European or Civil law country from the lack of nominate torts, which are most familiar to common law lawyers.¹³

Some writers have marked the genesis of interest in the protection of personality with the development of eighteenth century individualist philosophy, or the "Age of Philosophical Radicalism," as it has been called. Gierke in particular has been singled out as the originator of the modern concern for the individual.¹⁴ In fact, some writers would deny altogether any Roman origins for protection of this facet of personality, and would date its birth from sometime in the 18th century. One writer¹⁵ went so far as to claim that the theory that any unauthorized and wilful intrusion into the private life of another gave rise to a cause of action had absolutely no counterpart in Roman Law.¹⁶ Later in the same article, however, he would grudgingly concede that perhaps it was covered by the Roman *actio aestimatoria iniuriarum*, but felt that, since this action required an "insult" as an essential element, this emasculated its effectiveness insofar as concerned invasion of privacy, and pertained instead to actions for defamation.¹⁷

In this writer's opinion, such a view totally ignored the Roman concept of *delict* and *injuria*, which were broad enough to easily protect one against intrusions upon his private life. Whether the Romans actually gave a remedy for such in practice, will, of course, never be known with certainty, but it would appear in view of the high regard for the dignity of the person held

¹¹ Article 826, German Civ. Code (*Bürgerliches Gesetzbuch*). It should be noted that all German cases involve pre-World War II situations and no attempt has been made by this writer to determine the present situation in West Germany, but it is assumed that protection of such a right is still recognized.

¹² Gutteridge, Comparative Law of The Right of Privacy, 47 Law Q. Rev. 203, 206-209 (1931).

¹³ And see, Buckland, *Textbook of Roman Law*, 585 (2d ed. 1950).

¹⁴ Gierke, *Deutsches Privatrecht*, I. Sec. 203.

¹⁵ Gutteridge, *op. cit. supra* n. 12, at 204.

¹⁶ *Ibid.*

¹⁷ Buckland, *op. cit. supra*, n. 13.

by the Romans, and the writings of their jurists that such a remedy would not be altogether alien to them, and perhaps may actually have been used.

The Modern Interest in Privacy-Anglo-American

In the modern world, outside of the Civilian systems, the recognition and protection of a right of privacy has had a muddled and uncertain development. In fact, in some areas it has failed to develop at all, while in others the attempts to formulate such a right have been abortive or have resulted in malformed doctrines. Still in others, particularly certain jurisdictions within the United States, the complexities of modern life have caused the courts to recognize this right for reasons running the spectrum from dubious to the highly laudable one of protecting society's interest in the self-rehabilitation of wrongdoers, as the California court did in *Melvin v. Reid*. In this case a motion picture studio was prevented from further showings of a film based upon incidents from the previous life of a self-reformed prostitute, and the plaintiff was awarded damages for this invasion. The trend in the United States, at least, is heavily in the direction of recognizing that such a right exists.¹⁸

In England and throughout the Commonwealth the situation is different. There the courts appear reluctant to recognize anything remotely resembling a right of privacy as it is shown in the majority of states of the United States which recognize it in one way or another.¹⁹ It may be noted that Justice Hugo Black

¹⁸ 41 Am. Jur. 927; 138 ALR 22; 168 ALR 446; 14 ALR 2d 750; C. J. S. "Privacy," Sec. 1. See also: Restatement of Torts, Sec. 867.

¹⁹ The right is recognized in Ala., Alaska, Ariz., Ark., Calif. (where it was first given recognition on a constitutional basis in *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931), and later clearly recognized the right apart from the California Constitution in *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942)); Conn., D. C., Colo., Fla., Ga., Ill., Ind., Ia., Kan., Ken., La., Mass., Mich., Mo., Mont., Nev., N. J., N. Y. (where it is governed by statute, Art. V, Sec. 50-51 Civil Rights Law, N. Y. Law 1909, Consol. Laws c. 6, which established a right of privacy against the unauthorized use of a person's name, portrait or picture for purposes of trade or advertising. This somewhat limits the right of privacy as defined by N. Y. courts, although the law has shown some flexibility in meeting varied situations; see: *d'Altomonte v. N. Y. Herald Co.*, 133 Misc. 302, 231 NYS 445 DSTC); N. C., Ohio, Okla. (where it is also statutory, 21 Okla. Stat. Ann. 839-840 (1950)); Ore., Penn., Tenn., Va. (where it is a matter of statute, Va. Code (1950) 8-650, "Unauthorized use of name of picture for purposes of trade or advertising"); W. Va., Utah (where it is also statutory, Utah Code Ann. 76-4-8, 76-4-9 (1953)); and S. C.

(Continued on next page)

of the United States Supreme Court has expressed the opinion recently (*N. Y. Times*, June 10, 1962) that libel and slander actions are unconstitutional as an infringement on Freedom of Speech. If such a view were to gain recognition in the courts, any discussion and further development of a right of privacy in the United States would most likely become moot, since most cases involving it, like the majority of libel and slander cases, concern encroachments by the Fourth Estate. This is not to say that protection of an individual's rights are absent, but they are protected in English courts under the guise of ordinary actions for defamation, trespass, breach of contract, or copyright infringements. Invasions of privacy are regarded by English courts as an "element of parasitic damages" which attach as a result of an injury to some other legally protected interest.²⁰ Where there is no invasion of a property right or injury to reputation there is no separate action in English courts,²¹ although numerous opportunities have presented themselves where recognition of the right *per se* could have been accomplished.

In one of the more famous English cases,²² which would have lent itself ideally to a judicial recognition of a right of privacy, the court refused to recognize it. This case involved an advertising cartoon depicting a famous English amateur golfer praising the qualities of a certain chocolate candy. The cartoon was accompanied by a doggerel verse, which standing alone should have served as a basis for some type of action. The verse read as follows:

The caddy to Tolley said, "Oh, Sir!
 Good shot, sir, that ball see it go, Sir!
 My word how it flies,
 Like a cartet of Fry's,
 They're handy, they're good and priced low, Sir!"²³

(Continued from preceding page)

The right has been expressly denied in *Wis.* (*Yoeckel v. Samonig, supra*, n. 6); *Wash.* (*Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 P. 594 (1911)); *Rhode Island*, (*Henry v. Cherry Webb*, 30 RI 13, 73 A. 97 (1909)); *Texas*; and *Nebr.*, (*Brunson v. Ranks Army Store*, 161 Neb. 519, 73 NW 2d 803 (1955)).

For a detailed survey of the law of privacy in the United States see: *Prosser, Privacy*, 48 Cal. L. Rev. 383 (1960).

²⁰ *Gee v. Pritchard* (1818), 2 Swan. 402; *Thurston v. Charles* (1905), 2 T. L. R. 659.

²¹ Note, *The Invasion of Privacy*, 35 *Austral. L. J.* 61 (Jul. 27, '61).

²² *Tolley v. J. S. Fry & Sons, Ltd.* [1930] 1 K. B. 467.

²³ *Id.* at 468.

The court held that the cartoon was defamatory inasmuch as it was likely to affect the plaintiff's amateur standing and allowed him to recover damages. It appeared that the judges in that case recognized that the plaintiff had been injured more in his right of privacy than in his reputation, but they extended defamation considerably to afford him a remedy. As always, they searched for some other legally recognized right on which to base their decision. However, Lord Justice Greer indicated by obiter that there ought to be a remedy against actions which were "inconsistent with the decencies of life."²⁴

The English courts have even gone to greater extremes to give protection where they obviously recognize protection should exist, and in consequence have bent the existing law considerably in the process. It would appear that the far simpler expedient of calling "a spade a spade" would afford greater protection and give to other hesitant judges throughout the world the courage to forge new paths into the apparent wilderness of privacy.

The extremes to which some judges, particularly the English, seem willing to go to give something just short of actual recognition of a right of privacy is illustrated by a relatively early English decision in *Gee v. Pritchard*,²⁵ where the Chancery Court granted an injunction against the publication of letters by the defendant, which had been written by the plaintiff but were in the defendant's custody. The court was very careful, however, to find a property right in the plaintiff before enjoining the publication, but the Lord Chancellor did seem to indicate that some explanation or defense of his decision was necessary when he stated:

I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction. . . .²⁶

Again one finds the tendency, almost amounting to an obsession, to call a right of privacy anything else but what it is, and to find a reasonably safe ground upon which to place the

²⁴ *Id.* at 478.

²⁵ (1818) 2 Swans. 403.

²⁶ *Supra*, n. 25, at 413.

decision. This concern with finding a property right instead of a right of personality is not peculiar to the English judges alone. In fact, this device was, and still is, used by American judges in those jurisdictions where the issue of a right of privacy has been brought before a court which finds itself unable, for one reason or another, to recognize the right *per se*. Similar occurrences have marked the development of the right on the Continent, particularly in France.²⁷

Certainly in one area of the world, India, influenced to a high degree by English and American law, and principally the former, a legal right of privacy was afforded judicial recognition and protection as early as 1888²⁸ (two years before the Warren and Brandeis article). However, this was accomplished by first recognizing that certain peoples have customarily recognized privacy, and then applying this custom to the judicial decision. Why something as sacrosanct as the natural right, inherent in Western philosophy, to be let alone, under most circumstances, did not have an early influence upon all English and American courts, and thereby gain judicial recognition, as did the Hindu and Muslim custom of privacy as regards *parda-nashin* women, in *Gokal Parasad v. Radho*, is not certain, except for the usual excuses of a lack of precedent and the fear of many vexatious suits following in the wake of recognition. This latter excuse has found little justification in view of the experience in those jurisdictions which have recognized the right.

In the *Radho* case, an English court in India showed an apparent willingness to recognize a right of privacy, particularly where such a right was indigenous to the custom and background of the litigants. The court stated:

In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India a usage or custom of privacy valid in law. I can see nothing unreasonable in a custom that such privacy shall be protected.²⁹

In spite of the fact that this particular judge considered it extremely "reasonable" to recognize a right of privacy, particularly where a customary tradition for its enjoyment exists,

²⁷ Walton, *The French Law as to the Right of Privacy*, 47 *Law Q. Rev.* 219 (1931).

²⁸ *Gokal Prasad v. Radho* (1888), *In. L. R.*, 10 *Alla.* 358.

²⁹ *Id.* at 385.

his counterparts on the bench in England, then and now, have failed to appreciate the virtue of this "reasonableness."

As recently as 1960³⁰ the English courts were again presented with the opportunity to recognize the right once and for all, and again failed to face the situation directly, preferring instead to seek some circuitous route to the decision. In this action the plaintiff's husband accused the defendant of breach of copyright in giving the plaintiff's wedding photographs to two newspapers. These newspapers, the *Daily Express* and the *Daily Mail*, used them to illustrate articles concerning the murder of the plaintiff's father. The publication of these photographs caused the plaintiff's wife considerable anguish and suffering. The court awarded damages for the breach of copyright, and then came closer to recognizing the right of privacy per se than had any other previous English court; for it allowed the plaintiff to recover exemplary damages because of the "scandalous" and "flagrant infringement" of his copyright by the defendant. Lord Justice Sellers felt that in addition the defendant showed a total disregard for the plaintiff's feelings and "sense of family dignity and pride."³¹ He further stated:

It was an intrusion into his life, deeper and graver than an intrusion into a man's property.³²

Here, the final separation of personality and property in English law could have been made, but again at the gates, the judges faltered and finally retreated, missing what would have been the proper place at which to drive the stake through the heart of this monster, which the English judges appear to fear, when they consistently refuse to give full recognition to a right of privacy, unencumbered and unadorned with the trappings of other legal rights.

Incidentally, there is not a total absence of precedent in English decisions for the development of new causes of action, particularly in the area of tort, a fact to which the history of the common law amply attests.³³

It appears to be only by historical accident that the action on the case was not developed to include protection of a right of

³⁰ *Williams v. Settle* (1960), 1 W. L. R. 1072, 2 All E. R. 806 C. A.

³¹ *Id.* at 1082.

³² *Ibid.*

³³ *Wilkinson v. Downton* (1897), 2 Q. B. 57, *Janvier v. Sweeney* (1919), 2 K. B. 316; 8 Holdsworth, *History of English Law*, 352 (1955).

privacy. An action for insult had been recognized in the Anglo-Saxon law and in the Teutonic tribal law,³⁴ but not in the medieval common law, which left this to the jurisdiction of the ecclesiastical courts. Perhaps a modern English judge with an attitude similar to the one exhibited by the judge in the case involving the *parda-nashin* women, could do much with the ancient basis that the Anglo-Saxon and Teutonic tribal law provided.

When the action on the case began to develop in the common law courts, the way was clear for the recognition and protection of a right of privacy by simply making the gist of the action the insult rather than the damage, but unfortunately for a right of privacy, the latter course prevailed.³⁵

One writer³⁶ has suggested that English courts could, if they wished to participate in this evolution of a legally protected right of privacy, do so by an awakening of the tort of "wilfully doing an act calculated to cause physical harm." This suggestion, however, seems inadequate from its inception, for in a majority of the privacy cases there is no physical harm but merely inconvenience, discomfort, and anxiety to the victim. It was for this reason that many American jurisdictions quickly saw the necessity of creating a new cause of action because defamation and the like were not broad enough to suffice.

The English Press has displayed an increasing inclination to pry into the personal affairs of many individuals. Two such occasions where the Press has done so were in the case of the English soccer team, whose members were seriously injured in a plane crash in Munich (the press invading the hospital without authorization in order to get photographs), and in the unwarranted intrusions by the press upon the bereaved family of a young Dutch girl who had been murdered while on a holiday trip to England. Accordingly there has been agitation for remedial legislation. One such attempt was the introduction of a private Bill before the House of Lords, *The Right of Privacy Bill* (1961), which sought to protect every individual against invasions of his privacy consistent with the public's right to be kept informed on matters in which they are reasonably concerned.

³⁴ Holdsworth, *op. cit.*, *supra*, n. 33, at 334-335.

³⁵ *Ibid.* See also: Pollock, Torts 324 (12th ed., 1962).

³⁶ Dworkin, Privacy and the Press, 24 Mod. L. Rev. 188 (1961).

One of the proponents of the Bill, Lord Denning, stated during debate on the proposal that:

If the law of England gives no remedy for an infringement of privacy then it becomes a duty at once to implement some Bill to put it right.³⁷

The proposed *Right of Privacy Bill* was sponsored by Lord Mancroft and was designed to "strike a balance between the essential freedom of the Press and the equally essential rights of the individual." Consistent with the decisions of many American jurisdictions, which recognized the right of privacy, the Bill exempted certain individuals from protection under it (obvious public figures; persons who voluntarily seek publicity; and those who because of the occurrence of some public event have had publicity thrust upon them.)

As would be expected, Lord Mancroft drew heavily upon American development of this doctrine as the authority for his proposal, and the ubiquitous Warren-Brandeis article was cited frequently. Little attention was paid to Continental developments in this area with the exception of a passing, but undetailed, comment that West Germany had by law made the unconsented disclosure of information concerning a person's private affairs actionable, unless justified in the public interest.

In spite of considerable desire in many quarters for the passage of such legislation, the proposed Bill failed to pass, largely because of strong Press opposition, which had been evident whenever proposals for closer scrutiny of the Press, in one form or another, had been made.³⁸

In 1949 the Royal Commission on the Press studied the problem and found that protecting individuals from the intrusions of the Press would be extremely difficult to achieve through legislation, which in all probability would be ineffective and incapable of enforcement in any event.³⁹

However, in South Africa, a former member of the British Commonwealth, the courts appear to be moving toward recognition of a right of privacy (through definition of *injuria*) ignoring the element of insult which others have felt to be the gist of the

³⁷ Parliamentary Debates (1960-61), Vol. 229, Feb. 28-Mar. 23, 607, 615.

³⁸ *Supra* n. 36 at 189. An example of this was the strong Press opposition to the Tucker Commission in 1958.

³⁹ *Ibid.*

action. In the two relatively recent South African decisions,⁴⁰ it was held that the unauthorized use and publication of a person's picture is capable of being an independent tort.

So here the citadel of non-recognition, in English courts, stands apparently unchanged and largely undamaged by the few ineffectual assaults which have been made upon it in the courts and legislative bodies. It apparently remains for the English, as the most likely recourse, to find reasonable extensions of existing actions to implement and protect against invasions of privacy.⁴¹

Up to now the subject has received very little treatment in English legal periodicals or law texts, and even less in reported decisions.⁴²

Continental Recognition of Privacy—France

The French have apparently allowed a right of action for violations of privacy. In a manner somewhat contradicting Prof. Higgins' observation, in "My Fair Lady": "that the French don't care what they do actually so long as they pronounce it correctly," the French courts have been careful to find that the defendant's fault has been proved,⁴³ but have failed to assign a particular title to this cause of action in keeping with their practice of not having nominate torts. Once the French are satisfied that fault on the part of the defendant has been proved they next determine if it has caused damage to the plaintiff, and if so, they allow damages, as well as injunctive relief in some cases.

⁴⁰ O'Keefe v. Argus Printing and Publishing Co., Ltd. (1954) (3) S. A. 244; Kidson v. S. A. Associated Newspapers, Ltd. (1957) (3) S. A. 461.

⁴¹ Buckland, *op. cit. supra* n. 13 at 585.

⁴² Apparently the only English legal periodical articles treating this subject to date have been the Winfield, Walton and Gutteridge articles in 47 Law Q. Rev. 23, 219, 203 (1931), and the article in 24 Mod. L. Rev. 188 (1961). Except for the brief note in 35 Austrl. L. J. 61, there has not been any treatment of the subject in Commonwealth legal journals. Even Fleming, *The Law of Torts* (2d ed. 1961), one of the latest English law texts on torts, gives only six pages (563-569) to the topic, and ends by remarking that the prospect of making the right of privacy a nominate tort in English law is not hopeful. See also: 25 Mod. L. Rev. 393 (1962); Brittan, *The Right of Privacy in England and the United States*, 37 Tulane L. Rev. 235 (Feb. 1963).

⁴³ Walton, *supra* n. 36, at 220. The French theory of "Fault" is contained in Articles 1382-1383 of the French Civil Code. Art. 1382 provides that: "Every act whatever of man which causes damage to another obliges him by whose fault it happened to repair it." The basis for a pecuniary recovery for violations of a right of privacy in French law is the "moral damage" caused the plaintiff.

Not unlike judges in other countries, the French judges have often resorted to associating a right of privacy with some other property right, but appear to be willing to accept in essence the idea of privacy as existing as an independent right.⁴⁴

The majority of the French cases, that this writer was able to find, dealt principally with the unauthorized use of a photograph or the unauthorized appropriation of a surname. In one of the early *cause célèbres* in this area⁴⁵ the judge remarked that:

The French law guarantees to every human being the complete sum of liberty compatible with the necessities of social life. . . (T)his right includes assuredly the right to withdraw one's countenance from the public view. . . (T)o reproduce, exhibit or sell the photograph of a person against his will is an invasion of liberty.⁴⁶

Another of the earliest French cases⁴⁷ to involve directly the matter of affording protection against invasions of privacy was brought by Alfred Dreyfus, who was to gain everlasting fame as the central figure in an espionage case in which he was the victim of religious bigotry and political intrigue. In this case, however, his name had been listed in a directory of all Jews in France, which had been compiled by the defendant. The Civil Tribunal of Lyons held, that not only did the plaintiff have a property right in his name, but secondly, and more important from the standpoint of the development of a right of privacy, that he was to be protected against "indiscreet publicity" as to his political and religious beliefs.

One writer on the French developments in the area of privacy⁴⁸ feels that the greatest strides have been in those cases which involved unauthorized publication, in one form or another, of portraits and photographs.

In *Whistler v. Eden*,⁴⁹ the painter had contracted to do a portrait of Lady Eden, but upon completion of the painting refused to deliver it, and instead exhibited it in a public art gallery.

⁴⁴ *Ibid.*

⁴⁵ *Vin Mariani Case*, Trib. civ. de la Seine, 20 janvier 1899, Dall. Per. 1902, 2, 73. Paris, 3 janvier 1908, Dall. Per. 1908, 2, 292.

⁴⁶ Paris, 3 janvier 1908, Dall. Per. 1908, 2, 292.

⁴⁷ Trib. Civ. de Lyon, 15 dec. 1896. Dall. Per. 97, 2, 174.

⁴⁸ *Supra* n. 50, at 225.

⁴⁹ Civ. 14 mars 1900, Dall. Per. 1900, 1, 497.

Subsequently he completely painted over the face of Lady Eden and placed a new face on the canvas. In rendering the judgment, the court treated both the right of privacy of the painter and the painted. In respect to the former, the court held that he had the right to withhold his work and pay damages for breach of contract, which constituted his right of privacy; and that the latter individual, who was represented by the painting, had the right to demand that it not be reproduced by the artist nor shown in its "recognizable form."

Where the right of privacy is invaded through the unauthorized use of photographs the French have developed a large body of law.⁵⁰ This jurisprudence is, perhaps, best summed up by one English writer who treated the subject, when he stated:

The following propositions, may, I think, be considered as settled law: —

(1) The photographer is, apart from stipulations to the contrary, the owner of the photograph.

(2) But the photographer cannot without the authorization, express or implied, of the person portrayed reproduce the photograph or expose it to the public.

(3) The authorization must be given by a capable person. So, in the case of a photograph of a minor child the father must consent.

(4) The authorization of the person represented may be inferred from circumstances.

(5) But such authorization is not implied from the fact that the sitter asked for or accepted a reduction of price.

(6) Nor even from the fact that the artist made the portrait gratuitously, though this in connexion with other facts may lead to the conclusion that the authorization was granted.

(7) The authorization is implied when a person in the public street voluntarily allows his portrait to be taken.

(8) When a photograph of a person has been taken without his consent and it represents him in surroundings or in such a way as to be calculated to affect his reputation injuriously or to make him ridiculous, a claim of damages will lie.⁵¹

American developments in this same area have closely paralleled that of the French although coming somewhat later

⁵⁰ *Supra* n. 50, at 225.

⁵¹ *Ibid.*

in point of time.⁵² Both the English and American courts⁵³ differ from the view set forth in (1), and hold that the person photographed and not the photographer is the exclusive owner of the picture.⁵⁴ Proposition (2) is followed in most American jurisdictions,⁵⁵ as are (3),⁵⁶ (4),⁵⁷ (7),⁵⁸ and (8).⁵⁹ There do not appear to be any American cases in point on propositions (5) and (6), although it appears that there is some authority for the proposition that other circumstances may be shown for the purpose of implying consent.⁶⁰

Both the French and many of the American courts appear satisfied that there is no invasion of privacy where the person portrayed is a public figure⁶¹ or the picture is used in connection with some event of public concern and interest.⁶²

Most of the French cases have involved the publication of photographs which defamed the plaintiff, and have not treated the situation where the publication was a mere invasion of privacy.⁶³ Most of the American cases in this area have been suits for defamation rather than privacy.

In France, there is no reason for denying a privacy action, and the absence of specific law on this point is the result of the

⁵² Specific French citations have been omitted. Anyone interested in reading the specific case for each point (1)-(8) is directed to the Walton article cited at n. 27, *supra*.

⁵³ Thayer, *op. cit.*, *supra*, n. 1, 492, *et seq.*

⁵⁴ Pollard v. Photographic Co. (1888), 58 L. J. Ch. 251, 40 L. R. Ch. Div. 345; White Studio Inc. v. Dreyfoos, 156 App. Div. 762, 142 NYS 37 (1913).

⁵⁵ *Ibid.* See also: Corliss v. E. W. Walker Co., 57 F. 434, 31 LRA 283 (Cir. Ct. D. Mass., 1893); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 SW 364 (1909); Almind v. Sea Beach Co., 157 App. Div. 230, 141 NYS 842 (1913); Kunz v. Allen, 102 Kan. 883, 177 P. 532; McNulty v. Press Publ. Co., *supra* n. 2; Young v. Greneker, 175 Misc. 1027, 26 NYS 2d 357 (1941) (a manikin of a living person held to be a portrait and hence protected under the N. Y. Civil Rights Law); Cf. Kunz v. Bosselman, 131 App. Div. 288, 115 NYS 650 (1909).

⁵⁶ Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S. E. 194 (1930).

⁵⁷ Freed v. Loew's, Inc., 175 Misc. 616, 24 N. Y. S. 679 (1940).

⁵⁸ Blumenthal v. Picture Classics, 235 App. Div. 570, 257 NYS 800 (1932); Binns v. Vitagraph Co., 210 N. Y. 51, 103 N. E. 1108 (1913).

⁵⁹ Metzger v. Dell Publishing Co., 207 Misc. 182, 136 NYS 2d 888 (1955).

⁶⁰ Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N. E. 2d 753 (1940).

⁶¹ Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 238 P. 2d 670 (1951); Sidis v. F-R Pub. Co., 113 F. 2d 806 (C. C. A. 2, 1940).

⁶² *Supra* n. 50, at 228. See also: Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. 2d 972 (1929); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939).

⁶³ *Supra* n. 43, at 227.

fact that no such cases have presented themselves to the French courts.⁶⁴

The proper basis for such an action in the French courts would be Article 1382 of the French Civil Code. Some observers are inclined to lay the basis for this right in the general category of Abuse of Right, but, in this writer's opinion, this would be extending that concept beyond its normal limits.⁶⁵ The Abuse of Right presupposes that the individual is acting within the limits of his legal rights but so conducting himself that his actions are contrary to what would be normally regarded as permissible use of them. The better view would incline towards the theory that where one purposely and intentionally invades the privacy of another, and no justification for this can be shown, that no right in fact exists for this invasion; it is this lack of right which gives rise to a cause of action. Although it is not certain, it would appear that a Frenchman desirous of vindicating his right of privacy would be well advised to proceed under Article 1382. It would be accurate to say that since the action arises more from a lack of right than an abuse of one, the liability must be grounded on the broad concept of fault which is the foundation of Art. 1382.

Germany

In Germany the protection of privacy has been accorded judicial recognition but it is rather difficult to say exactly where the foundation for it lies. The Germans frequently protect this right under the heading of defamation, copyright infringement, or where there is another proprietary right, but at the same time recognizing privacy as something separate.

The German Civil Code contains several articles which are relevant to a discussion of the development of a right of privacy.

Article 823 of the *Bürgerliches Gesetzbuch* is the basis for tort law in Germany and provides that any act done wilfully or negligently which infringes upon certain enumerated rights is unlawful. These rights include "the right to liberty" and "the right to property," and most importantly, "any similar right." It is this latter provision which may be intended to afford protection to privacy. Critics of this proposition have pointed out that

⁶⁴ *Id.* at 228.

⁶⁵ This would appear to be consistent with the view expressed by Planiol, *Civil Law Treatise*, Pt. 1, Sec. 872—pp. 480-485 (1939).

this Article was intended to protect only proprietary rights.⁶⁶ If that is true, another basis for such a right can be found in Article 226,⁶⁷ which provides a remedy where a right has been exercised for no other purpose than to inflict harm on another. However, it is in Article 826 that an incipient right of privacy clearly appears.

Article 826 forbids injuring anyone *contra bonos mores*, and this would most certainly be applicable to unwarranted intrusions into the private life of another. In several German cases this Article was the basis for a judgment for the plaintiff whose privacy had been invaded.⁶⁸

In the *Donner Case*,⁶⁹ the defendants were enjoined from exhibiting a film which represented a family tragedy, on the grounds that its showing constituted a moral injury.

As in many modern nations the intrusions upon the seclusion of a person frequently take the form of advertisements involving the use of the plaintiff's name or likeness.⁷⁰ In a famous case involving the use of Count Zeppelin's name on a brand of cigarettes and cigars,⁷¹ the German court held that this unauthorized use constituted a moral injury, as well as, an injury to his reputation. Although the court did grant an injunction it would not allow damages.

Without doubt the German law has kept pace with American developments in this area, and is certainly much ahead of current English attitudes toward protection of privacy. It is, however, somewhat behind other areas on the Continent. This is the result of uncertainty as to what specific portions of the German Civil Code are pertinent, and a certain reluctance on the part of German judges to extend their interpretations of Article 826. Nevertheless, the Germans seem to recognize such a right in substance if not in theory.

⁶⁶ Gutteridge, *supra*, n. 12 at 206.

⁶⁷ Art. 226 BGB, was intended to cover all rights and would render illicit all rights when used for the purpose of harming one. This interpretation clearly goes much beyond the French definition of Abuse of Right; and probably as Planiol (see n. 65, *supra*) points out is difficult to apply and appears to be in conflict with Art. 823, BGB.

⁶⁸ Nietzsche Case, R. G. E. Vol. 69, 403; O. L. G. Wien, Nov. 17, 1928.

⁶⁹ 71 Juristische Wochenschrift (1930).

⁷⁰ Gutteridge, *supra* n. 12, at 209.

⁷¹ 74 R. G. E. 311.

Switzerland

In the Swiss Civil Code, perhaps the most sophisticated of the modern European Codes, the protection of privacy depends upon the implementation of the Code with certain provisions of the Code of Obligations. The relevant portions of the respective Codes are Article 28 of the Swiss Civil Code, which provides for injunctive relief against unauthorized acts which injure a person in his personal relations, and in some instances the payment of money damages; and Article 49 of the Code of Obligations. This latter Article is utilized to implement Article 28 of the Swiss Code, and it provides that:

Where anyone is injured in his personal relations owing to the wilful or negligent act of some other person he is entitled to compensation in respect to pecuniary loss, and where this is justified by the exceptional gravity of the injury or due to a wilful or negligent act, he may also claim payment of a sum of money by way of moral damages. The judge may, however, decree some other kind of reparation to be made either in place of or in addition to the award of money by way of moral damages.

Certainly, this provision of the Code of Obligations does much to enlarge what would otherwise be the fairly restrictive provision of the Swiss Code, which gives injunctive relief solely, except in very special circumstances, in cases involving invasions of privacy.

Another possible basis for founding a cause of action in privacy cases can be found in the Swiss Code under the provision which provides a remedy for one injured by some act which is *contra bonos mores*.⁷² The better view, however, indicates that the proper basis for extending judicial protection to privacy is Article 28 of the Swiss Code as implemented by Article 49 of the Code of Obligations.

Fairly recently the problem of recognizing and protecting a right of privacy has been discussed in the Scandinavian countries.⁷³ However, this writer was unable to determine the extent to which this right is recognized or for how long, if at all, it has received judicial protection.

It should be noted that the recognition and protection of a right of privacy on the Continent has been due, largely, to the Reception of Roman Law into this area, which through the *de-*

⁷² Swiss Code of Obligations (Obligationenrecht) Art. 41 (2).

⁷³ Andenaes, J., *Privatlivets Fred*, Norsk Rikskringkasting (1958).

lict of injuria has provided an adequate basis for the recognition of such a right. In addition to the *injuria delict* the concept of *Personlichkeitsrecht*, and the idea of a tort *contra bonos mores* have done much to place a person's privacy on a high plane of judicial protection throughout most of the Continent.

Summary

It would appear that although ancient precedent would support the recognition of a right of privacy, much of the Western World has been somewhat slow in according it full stature as a right, particularly in England and much of the British Commonwealth.

On the Continent the development and recognition of this right has frequently taken place under the title of a copyright infringement or an act involving moral injury. Even though it is often treated with other actions, the right of privacy, itself, has a distinctive quality of separateness, and is not considered "parasitic" as it is in England.

The most common difficulty in tracing the development of the right of privacy in other than the Anglo-American legal world, apart from a language barrier, is the failure of Continental countries to give it a specific title. One reason for the nebulous aura surrounding the right of privacy on the Continent, insofar as precise nomenclature is concerned, is the prevailing practice of the Civilian system to avoid categorizing legal rights and duties or civil wrongs, thereby avoiding many of the problems of a semantic nature encountered in the Anglo-American system. This attitude of the former system may give considerable flexibility to the administration of justice but allows little latitude for the indulgence of a penchant for strict terminology. The lack of a proper name for the right of privacy on the Continent does not prevent judicial protection of an individual's private life where the intrusions are of such a nature as to prevent a defamation or other ordinary action from being successful.

Jurisprudence which is guided by broad general principles, and not reduced to "pigeon-holing" causes of action, provides a more fertile field for the growth of rights, particularly privacy, which has a rather neuter quality as far as the law is concerned though it may be quite real to an individual. The right of privacy appears to elude attempts at

strict classification ("pigeon-holing") cutting, as it does, across and into many areas of legal classification, but frequently falling short of the quantum required to place it in a particular category of established rights.

Where the right of privacy has been recognized in some American jurisdictions, particularly New York, Oklahoma, Utah and Virginia, and has been given effect by statute but limited in its scope to unauthorized appropriation of personality for trade and advertising purposes, one can hardly resist commenting on the relative unimportance given to lofty social values by these states, which have reduced a right of privacy to a base value of the market-place. This right should transcend the market place and be placed in its proper perspective within the class of the great constitutional rights to which it belongs, being as it is, an essential of liberty.

In one of the earliest and landmark American cases establishing a right of privacy, the Supreme Court of Georgia in *Pavesich v. New England Life Insurance Co.*,⁷⁴ properly stated the high position a right of privacy should occupy when it said that:

When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist.

At this time there is little doubt that the right of privacy is well established in most American jurisdictions. In Europe the situation is much the same. There the concept of "Fault" and "Moral Injury" affords the proper climate for its further development and continued protection. The fact that Continental countries have difficulty in tacking down the concept to a particular category of right, and even, sometimes, to a particular article in their Code, is, after all, inconsequential.

Only in England is the right slow to come into its own, but the increasing awareness of the English Bench and Bar that there should be such a right would appear to be the harbinger for future recognition and protection. However, due to a certain traditional reluctance on the part of the English judges to blaze new trails in this area, it is more likely that the first breakthrough of this right will come from Parliament.

⁷⁴ 122 Ga. 190, 195, 50 S. E. 68 (1905).