Why is there no Common Law Right of Privacy?

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This is a case study of the conditions under which Australian judges change the common law. It is written in the belief that 'the real focus of attention of contemporary lawyers should be upon the extent of legal creativity, its proper occasions and the techniques that may be used to achieve and justify it'.[1] *By means of a comparative survey, it will be shown that one of the chief forces driving the development of the common law is constitutional law, at least in the area under study here, namely privacy.*

INTRODUCTION

The Australian common law experienced many changes introduced by judges in the last two decades of the 1900s. The doctrine of privity was modified, at least in relation to insurance contracts.[2] The distinction between mistakes of fact and mistakes of law in the law of restitution was abandoned.[3] Native title was invented.[4] Liability for the escape of dangerous non-natural substances

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This article contains a number of references to German sources. They are cited in a manner to conform with German conventions. Some of the more frequent uncommon abbreviations for sources used in this article include:
BVerfG(E): (decisions of the) Federal Constitutional Court of Germany
RG(Z): (decisions of the) Supreme Court (in civil matters)
BGH(St): (decisions of the) Federal Supreme Court (in criminal matters)
BGH(Z): (decisions of the) Federal Supreme Court (in civil matters)
BFHE: decisions of the Federal Finance Court
BAGE: decisions of the Federal Labour Court
KG, OLG: Court of Appeals
LG: Supreme Court
AG: Local Court

1 Kirby, "In Praise of Common Law Renewal: A Commentary on PS Atiyah's 'Justice and Predictability in the Common Law'" (1992) 15 *University of New South Wales Law Journal* 462, 482. The citing of these remarks is not meant to imply any disagreement on the author's part with the recent remarks of Gleeson CJ that 'the quality which sustains judicial legitimacy is not bravery, or creativity, but fidelity': speech to the Australian Bar Association Conference, New York, 2 July 2000, available on the High Court's website <http://www.hcourt.gov.au> at 14 August 2000. Extracts from this speech, together with a commentary, may be found in Young, 'Pure Lawyers and Creationists' (2000) 74 *Australian Law Journal* 493, 493–4.

2 *Trident General Insurance v McNiece Bros* (1988) 165 CLR 107.

3 *David Securities v Commonwealth Bank* (1992) 175 CLR 353.

4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

from land, previously a small realm of its own, became part of the vast empire of negligence.[5] Battery manslaughter was abolished,[6] and the implied consent to sexual intercourse derived from the relationship of marriage was declared dead.[7] This list could easily be extended.

Similarly, Australian constitutional law changed considerably in those two decades despite the lack of any change to the express words of the Constitution since 1977. Decades of refusal to reconsider the constitutionality of the states' taxes on alcohol and tobacco gave way to a declaration of unconstitutionality.[8] The interpretation of s 92 was changed and placed on a rationally defensible basis.[9] Discrimination by the states against residents of other states was finally recognised as obnoxious to the spirit of the Australian federation and not as something that was to be saved at any cost, including, if necessary, at the cost of twisting the words of the Constitution.[10] The interpretation of Common-wealth powers, and, more generally, the permissible methods of interpretation were hammered out in a series of cases.[11] An immunity from laws that unduly restrict communication about governmental and political matters was identified in the Constitution,[12] joining the separation of powers and the *State Banking*[13] doctrines as the third judicially approved general implication from the terms of the Constitution. At the intersection of public and private law, this immunity was found to affect the common law of defamation so as to widen the availability of the defence of qualified privilege.[14]

Again, the list could easily be extended. Looking at these two lists, and at possible additions, from the perspective of comparative law, there is, however, one notable omission: there is still no 'right of privacy' properly so called in the Australian common law.[15] By this I mean a right of privacy enforceable not principally against the government as part of the public law, but against newspapers, television stations and indeed all private persons: a private-law right of privacy such as exists in the United States and Germany. There is still no broad principle in the common law to stop newspapers or television stations, or indeed anyone else, from finding out and publishing true details of people's private lives which they would prefer to keep private. It is still, generally speaking, permissible at common law to publish photographs of people without their consent – although in Victoria, s 7 of the *Surveillance Devices*

5 *Burnie Port Authority v General Jones* (1994) 179 CLR 520.
6 *Wilson v R* (1992) 174 CLR 313.
7 *R v L* (1991) 174 CLR 379.
8 *Ha v New South Wales* (1997) 189 CLR 465.
9 *Cole v Whitfield* (1988) 165 CLR 360.
10 *Street v Queensland Bar Association* (1989) 168 CLR 461.
11 The unanimous decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, with its emphasis on text-based interpretation, was doubtless the most important of the cases in this area.
12 *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.
13 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
14 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
15 The 'common law' includes the doctrines of equity, both in this sentence and for the rest of this discussion.

Act 1999, and in Western Australia s 6 of the *Surveillance Devices Act 1998* provide some protection here.[16] In short: at common law, the dicta in *Victoria Park Racing & Recreation Grounds v Taylor*[17] rejecting a right of privacy remain good law, and there is no sign of their being overruled.[18] Thus, it is possible, for example, for telecommunications companies to use the photographs of otherwise anonymous citizens in their advertising and for decades-old criminal records, and even details of criminal charges that did not result in convictions, to be published in the newspapers.

The need for a right of privacy is all the greater given that the media are now – thanks to the changes in defamation law in the 1990s — able to take advantage of the extended defence of qualified privilege. The media are also still able, in many jurisdictions, to take advantage of the common-law defence of justification (that is, truth) without the need, imposed by statute in some states,[19] to prove the public interest or public benefit of the publication. And even the recently introduced *Privacy Amendment (Private Sector) Bill 2000*, which proposes to extend the Commonwealth's *Privacy Act 1988*[20] to the private sector (beyond its existing coverage of credit reporting agencies), would create nothing much more than a right to the privacy of data held by private agencies. The Bill would cover neither the journalistic activities of the media — which are to be expressly exempted – nor other privacy interests which do not fall within the Bill's coverage in the first place, such as the right to one's own image, name and private life.

16 See also the *Workplace Video Surveillance Act 1998* (NSW).

17 (1937) 58 CLR 479, 495–6, 517, 521; see also at 502, 507–9. Despite the dicta about privacy in this case, it is of interest that it dealt with issues which, in the United States, are dealt with under a heading other than privacy: *International News Service v Associated Press* (1918) 248 US 215; 63 L Ed 211; *Rudolph Mayer Pictures v Pathe News* (1932) 255 NYS 1016; *National Exhibition Co v Teleflash* (1936) 24 F Supp 488; *Twentieth Century Sporting Club v Transradio Press Service* (1937) 300 NYS 159; *Pittsburgh Athletic Co v KQV Broadcasting Co* (1938) 24 F Supp 490; *Loeb v Turner* (1953) 257 SW (2nd) 800; *National Exhibition Co v Fass* (1955) 143 NYS (2nd) 767; Cooper, 'Impersonation and Wrongful Use of Name and Likeness' (1986) 6 *Communications Law Bulletin* 16, 17; Gordon, 'Right of Property in Name, Likeness, Personality and History' (1960) 55 *Northwestern University Law Review* 553, 587–8; Nimmer, 'The Right of Publicity' (1954) 19 *Law & Contemporary Problems* 203, 211, 220; Richardson, 'Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory versus Law' (1994) 19 *Melbourne University Law Review* 673, 675; and cf *Moorgate Tobacco v Philip Morris [No 2]* (1984) 156 CLR 414.

18 The High Court of Australia last dealt with the status of the case in 1984, and, although *Moorgate Tobacco v Philip Morris [No. 2]* (1984) 156 CLR 414 did not concern a right of privacy, the court, per Deane J, stated that *Victoria Park* was still good law: at 444–6. The case has therefore been treated as upholding *Victoria Park's* refusal to recognise a right of privacy: *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 706–7.

19 In Victoria, Western Australia, South Australia and the Northern Territory, the common law applies, and thus truth is a complete defence. Public interest or benefit — which are not the same, but at least protect privacy to some extent — in addition to truth is required by statute in New South Wales, Queensland, Tasmania and the ACT. See Gillooly, *The Law of Defamation in Australia and New Zealand* (1998), 104–17. For an example of a case in which privacy was protected in New South Wales using the law of defamation, see *Chappell v TCN Channel Nine* (1988) 14 NSWLR 153.

20 For other statutes with limited coverage cf *Aged Care Act 1997* (Cth) s 87; *Copyright Act 1968* (Cth) Part IX; *Privacy and Personal Information Act 1998* (NSW); *Invasion of Privacy Act 1971* (Qld); *Health Records (Privacy and Access) Act 1997* (ACT).

That is not to say that the Australian common law contains no protection at all of the right of privacy. A modern society could hardly function without some degree of protection of privacy. As we shall see, various common-law rules can be called in aid when protection of privacy is required.

However there is, in the Australian common law, no over-arching general concept of privacy as an interest recognised as worth protecting for its own sake as exists in the law of the United States and Germany, and may possibly soon exist in England. The protection of privacy is, with us, merely a by-product of the protection of other interests which the legal system does recognise. The occasional judicial dictum about 'the common law's protection of privacy'[21] cannot hide the fact that the common law does not protect privacy as such. It would be more accurate to say, as some judges have said after *Victoria Park*, that the common law recognises no right of privacy but sometimes protects it as part of its protection of other interests.[22]

The following analysis is offered not merely as a means of contrasting Australian law with the law of other jurisdictions. But it will first of all be shown that the law of privacy in Germany and the United States was spectacularly reformed by means of judicial decisions, and that such a development is still possible in England. Moving on from that, the question is posed whether we in Australia can hope that Australian judges too will engage in spectacular reforms and introduce a law of privacy. Or are there some ingredients in the other countries that are missing in Australia that explain why Australia stands out? If this last question can be answered positively, we shall be able to identify at least some of the factors which guide the judicial function of law-making in this country.

DEFINING THE LIMITS OF JUDICIAL CHANGE

It must be possible to explain, at least to some extent, why Australian law, unlike the law of other comparable countries, and despite the far-reaching changes in other areas of the common law and in constitutional jurisprudence, still contains no general concept of privacy.

This question is an important one, with relevance not just to those advocating or opposing a right of privacy. As Doyle CJ[23] and other

21 *Grollo v Palmer* (1995) 184 CLR 348, 367.

22 *Re X* [1975] Fam 47, 58; *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 357–8; *10th Cantanae v Shoshana* (1987) 79 ALR 299, 300; *Kaye v Robertson* [1991] FSR 62, 66, 70–1; *Khorasandjian v Bush* [1993] QB 727, 744; *Cruise v Southdown Press* (1993) 26 IPR 125, 125; *R v Central Independent Television* [1994] Fam 192, 204; *R v Khan* [1997] AC 558, 581; Kentridge, 'Freedom of Speech: Is it the Primary Right?' (1996) 45 *International and Comparative Law Quarterly* 253, 256. As far as the English cases are concerned, they may no longer be accurate representations of English law after the *Human Rights Act 1998* comes into force. This point will be dealt with below.

23 Doyle, 'Implications of Judicial Law-Making' in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996), 95.

writers[24] have pointed out, there is comparatively little work on the occasions upon which judges will change the law, or are justified in doing so, especially in the Australian context.

The acceptance by virtually everyone connected with the legal system of the proposition that judges make law – and indeed must do so simply by engaging in the activity of judging – has, as Doyle CJ has pointed out, not been accompanied by a similar acceptance by those not connected with the legal system of the legitimacy of this function as long as it is confined within certain – or rather, uncertain – limits. Nor has it been accompanied by a coherent explanation by the courts of the limits of their law-making role or of the reasons why, in particular cases, it is appropriate or inappropriate for them, rather than the legislature, to make new law. Thus, Doyle CJ has asked, with good reason, whether it would have been better for the High Court of Australia to leave the introduction of native title to parliament, spurred on, if thought necessary, appropriate and desirable, by urgings of the court.[25]

I do not propose to provide a definitive list of the conditions under which it is appropriate for the courts to make law. It is, however, worth asking a more focussed question: why the changes of the 1980s and the 1990s were not accompanied by the introduction of a general right of privacy. My investigation is, in other words, empirical, and not normative: rather than laying down the law about changing the law, I attempt to identify the reasons why one particular change has not taken place, while others have. Similarly, the author's preference for a legislatively sanctioned general right of privacy and beliefs about whether the introduction of such a right by the judges would be beyond the scope of their authority are — as normative rather than experiential views — not relevant to the investigation conducted here.

There are, of course, limits to what can be done empirically. It is not possible to explain everything. It might be said, for example, that Australia, in the early 1990s, enjoyed[26] or suffered from[27] — depending on one's point of view — a particularly activist High Court. However, the reasons why, for example, Mason CJ in the late 1980s suddenly cast aside his earlier judicial conservatism[28] are not susceptible to complete explanation, except, perhaps, in psychological terms, and I am not equipped to give such an explanation.

24 *Woolwich Building Society v Inland Revenue Commissioner* [1993] AC 70, 173–4; *Torrens Aloha v Citibank* (1997) 72 FCR 581, 582; Kirby, *Judicial Activism* (Bar Association of India Lecture, New Delhi 6 January 1997, unpublished), 8; Lindell, "'Judge & Co': Judicial Law-making and the Mason Court" (1998) 5 *Agenda* 83, 93. For attempts at drawing a line in the sand see, eg, Cappelletti, 'The Law-making Power of the Judge and its Limits: A Comparative Analysis' (1981) 8 *Monash Law Review* 15; Dawson, 'Do Judges Make Law? Too Much?' (1996) 3 *The Judicial Review* 1; Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1; Lücke, 'The Common Law as Arbitral Law: A Defence of Judicial Law-making' (1983) 8 *Adelaide Law Review* 229.

25 Doyle, above n 23, 86–94. Cf also Kirby, 'Courts and Policy: the Exciting Australian Scene' (1993) 19 *Commonwealth Law Bulletin* 1794, 1805–7.

26 Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, 228.

27 Fraser, 'False Hopes, Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213.

28 *Miller v TCN Channel 9* (1986) 161 CLR 556, 579; Doyle, above n 23, 90–1.

It is nevertheless sensible to ask why, despite the activism of the 1990s there is still no general right of privacy at common law. First, however, it is necessary to outline as briefly as possible the extent to which the existing Australian common law already protects privacy so that the prospects for a fully-fledged right of privacy can be assessed.

THE COMMON LAW'S EXISTING PROTECTION OF PRIVACY

There are one or two areas of the Anglo-Australian common law in which sub-areas of privacy do seem to be protected not as a mere by-product of the protection of other interests, but for their own sake. Thus, the writer of letters[29] and manuscripts[30] has a right to prevent them being published without his or her permission. The law of breach of confidence can also be used to protect secrets learnt by another during a personal relationship, whether it be a relationship of marriage[31] or a lesbian relationship.[32] The same applies to contracts with an implied condition of confidence, such as those with banks,[33] medical practitioners,[34] pharmacists,[35] lawyers[36] or even gymnasium owners.[37] Wards of court are also protected against the disadvantage that would otherwise flow from every detail of their lives being decided by a public official who sits in

29 *Pope v Curl* (1741) 2 Atk 342; 26 ER 608; *Thompson v Stanhope* (1774) Amb 737; 27 ER 476; *Perceval (Lord) v Phipps* (1813) 2 V & B 19, 28–9; 35 ER 225, 229; *Gee v Pritchard* (1818) 2 Swans 402, 415–16, 424–5; 36 ER 670, 674–5, 678; *Hopkinson v Burghley (Lord)* (1867) LR 2 Ch App 447; *Andrew v Raeburn* (1874) LR 2 Ch App 522; *Lytton (Earl) v Devey* (1884) 54 LJ (NS) 293, 295; *Labouchere v Hess* (1898) 77 LT (NS) 559, 562; *Thurston v Charles* (1905) 21 TLR 659; *MacMillan & Co v Dent* [1907] 1 Ch 107.

30 *Queensberry (Duke) v Shebbeare* (1758) 2 Eden 329, 330; 28 ER 924, 925; *Macklin v Richardson* (1770) Amb 694, 697; 27 ER 451, 452; *Southey v Sherwood* (1817) 2 Mer 435, 439–40; 35 ER 1006, 1008; *Abernethy v Hutchinson* (1825) 3 LJ Ch (OS) 209, 217–19; 1 H & Tw 28, 35–41; 47 ER 1313, 1316–18; *Albert (Prince) v Strange* (1849) 1 H & Tw 1; 47 ER 1302; *Turner v Robinson* (1860) 10 Ir Ch 121, 132; *Nicols v Pitman* (1884) 26 Ch D 375; *Caird v Sime* (1887) 12 App Cas 326; *Gilbert v Star Newspaper* (1894) 11 TLR 4; Steel, 'A Non-material Form of Copyright: The Strange History of Lecturers' Copyright' (1998) 4 *Australian Journal of Legal History* 185, 196, 205, 219–20.

31 *Argyll (Duchess) v Argyll (Duke)* [1967] 1 Ch 302. For a case in which the element of confidence was lacking, see *In the Marriage of Gibb* (1979) 5 Fam LR 694.

32 *Stephens v Avery* [1988] 1 Ch 449; *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39, 51.

33 *Loyd v Freshfield* (1826) 2 Car & P 325; 172 ER 147; *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461; *Australia & New Zealand Bank v Ryan* (1968) 88 WN (Pt 1) (NSW) 368; *Federal Commissioner of Taxation v Australia & New Zealand Banking Group* (1979) 143 CLR 499; *Barclays Bank v Taylor* [1989] 1 WLR 1066; *Winterton Constructions v Hambros* (1992) 39 FCR 97, 114–15; *Robertson v Canadian Imperial Bank of Commerce* [1994] 1 WLR 1493; *Christofi v Barclays Bank* [2000] 1 WLR 937; Laster, 'Breaches of Confidence and of Privacy by Misuse of Confidential Information' (1989) 7 *Otago Law Review* 31, 42–4.

34 See, eg, *Slater v Bisset* (1986) 69 ACTR 25, 28–30; *Re C* [1990] Fam 39, 48, 55.

35 *R v Department of Health; ex parte Source Informatics* [2000] 2 WLR 940.

36 *Parry-Jones v Law Society* [1969] 1 Ch 1; *Brayley v Wilton* [1976] 2 NSWLR 495; *Crowley v Murphy* (1981) 34 ALR 496; *Rogerson v Law Society of the Northern Territory* (1993) 88 NTR 1.

37 Fenwick and Phillipson, 'Confidence and Privacy: A Re-examination' [1996] *Cambridge Law Journal* 447, 449–50 (victim of the breach of contract/confidence here was the late Diana, Princess of Wales).

public.[38] This protection is, moreover, available against third parties to the confidence, such as the media.[39]

All this is understandably subject to the overriding defence of justification in the public interest, which may be applied, for example, when the mentally incompetent are in need of appropriate medical treatment and the only way of ensuring this is to break a confidence imparted by them.[40] Furthermore, those (such as pop stars) who have sought out favourable publicity may have to put up with being seen in an unfavourable light as well,[41] although there must surely be limits to this principle in the nature of a requirement of proportionality which have not yet found expression in the cases. Otherwise, insignificant conceits could open up the entire field of a plaintiff's life to the examination of the press.

However, as mentioned earlier, the common law generally protects privacy only as a by-product of protecting interests which it legally recognises. As a consequence the common law does not define privacy, a concept for which it has no use,[42] and thus what amounts to the incidental protection of privacy is also not defined. Despite this, those who have concerned themselves with the common law's incidental protection of privacy are more or less agreed about the extent of it, or in other words about what doctrines of the common law do indeed have something to do with privacy,[43] and no attempt is made here to

38 See, eg, *P v P* [1985] 2 NSWLR 401; *Re Z* [1997] Fam 1.

39 *G v Day* [1982] 1 NSWLR 24; *X v Y* [1988] 2 All ER 648; *Falconer v Australian Broadcasting Commission* [1992] 1 VR 662; Burrows, 'Media Law' [1998] *New Zealand Law Review* 229, 249; Fenwick and Phillipson, above n 37, 451–2; Gurry, '*G v Day*' (1983) 14 *Melbourne University Law Review* 325; Laster, above n 33, 47–51; Richardson, above n 17, 689–97.

40 *W v Edgell* [1990] 1 Ch 359.

41 *Woodward v Hutchins* [1977] 1 WLR 760; *Lennon v News Group Newspapers* [1978] FSR 573; *In the Marriage of Gibb* (1979) 5 Fam LR 694, 704; *Khashoggi v Smith* (1980) 124 Sol Jo 149.

42 Cf *TV 3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720, 727–8.

43 Bailey, *Human Rights: Australia in an International Context* (1990), Ch. 10; Bingham, 'Should there be a Law to Protect Rights of Personal Privacy?' [1996] *European Human Rights Law Review* 450, 453–4; Brittan, 'The Right of Privacy in England and the United States' (1963) 37 *Tulane Law Review* 235, 256–61; Burns, 'Privacy and the Common Law: A Tangled Skein Unravelling?' in Gibson (ed), *Aspects of Privacy Law: Essays in Honour of John Sharp* (1980); Cram, 'Beyond Calcutt: The Legal and Extra-Legal Protection of Privacy Interests in England and Wales' in Kieran (ed), *Media Ethics* (1998), 99–102; Dworkin, 'The Common Law Protection of Privacy' (1967) 2 *University of Tasmania Law Review* 418; Frazer, 'Appropriation of Personality — A New Tort?' (1983) 99 *Law Quarterly Review* 281, 284–94; Gibson, 'Common Law Protection of Privacy — What to do until the Legislators Arrive' in Klar (ed), *Studies in Canadian Tort Law* (1977); Gounalakis and Glowalla, 'Reformbestrebungen zum Persönlichkeitsschutz in England' *Archiv für Presserecht* 1997, 771, 772–3; Jacob and Jacob, 'Protection of Privacy' (1969) 119 *New Law Journal* 157; Katz, 'Sex, Lies, Videotapes and Telephone Conversations: The Common Law of Privacy from a New Zealand Perspective' [1995] *European Intellectual Property Review* 6; Law Reform Committee (South Australia), *Interim Report of the Law Reform Committee of South Australia to the Attorney-General Regarding the Law of Privacy* (1973), 5–7; McQuoid-Mason, *The Law of Privacy in South Africa* (1978), 49–57; Neill, 'The Protection of Privacy' (1962) 25 *Modern Law Review* 393, 394–6; Pannam, 'Unauthorised Use of Names or Photographs in Advertisements' (1966) 40

dissent from their view. There have already been sufficient attempts to defin privacy, and discussions whether a definition is possible at all.[44]

As the last paragraph implies, the common law's incidental protection o privacy is a subject which has occupied a number of scholars already Accordingly, the treatment of this topic here can be kept relatively brief Perhaps the most obvious area of incidental privacy protection is the law o defamation, although this area also perfectly illustrates the incidental nature o the common law's protection: for the law of defamation protects the individ ual's good name and reputation *in* the world, not his or her privacy *from* the

Australian Law Journal 4; Paton, 'Broadcasting and Privacy' (1938) 16 *Canadian Bar Review* 425, 428–437; Pember, *Privacy and the Press* (1972), 42–56; Seipp, 'English Judicial Recognition of a Right to Privacy' (1983) 3 *Oxford Journal of Legal Studies* 325, Skala, 'Is There a Legal Right to Privacy?' (1977) 10 *University of Queensland Law Journal* 127, 133–8; Stallard, 'The Right of Publicity in the United Kingdom' (1998) 18 *Loyola of Los Angeles Entertainment Law Journal* 565; Storey, 'Infringement of Privacy and its Remedies' (1973) 47 *Australian Law Journal* 498, 503–5; Todd (ed), *The Law of Torts in New Zealand* (1991), 757–64; Wacks, *Privacy and Press Freedom* (1995), Ch 3, Winfield, 'Privacy' (1931) 47 *Law Quarterly Review* 23; Younger Committee, *Report of the Committee on Privacy* (Cmnd 5102 (1972)), 287–307. On Scottish law, see Kilbrandon, 'The Law of Privacy in Scotland' (1971) 2 *Cambrian Law Review* 35; Seipp, above n 43, 366–7.

[44] Archard, 'Privacy, the Public Interest and a Prurient Public' in Kieran (ed), *Media Ethics* (1998), 84; Baxter, 'Privacy in Context: Principles Lost or Found?' (1977) 8 *Cambrian Law Review* 7, 8–9; Brittan, above n 43, 235; Calcutt Committee, *Report of the Committee on Privacy and Related Matters* (Cmnd 1102 (1990)), 6–7, 48–9; Dworkin, 'The Younger Committee Report on Privacy' (1973) 36 *Modern Law Review* 399, 400; Emerson, 'The Right of Privacy and Freedom of the Press' (1979) 14 *Harvard Civil Rights-Civil Liberties Law Review* 329, 339; Frazer, above n 43, 295–7; Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475, 482–3; Gross, 'The Concept of Privacy' (1967) 42 *New York University Law Review* 34, 34–6; Kimbrough, 'Right of Privacy' (1940) 138 *American Law Reports* 22, 24–5; Kimbrough (2), 'Right of Privacy' (1944) 168 *American Law Reports* 446, 448; Laster, above n 33, 60–1; Löffler, 'Persönlichkeitsschutz und Meinungsfreiheit' *Neue Juristische Wochenschrift* 1959, 1, 3; Markesinis, 'Our Patchy Law of Privacy — Time to do Something about it' (1990) 53 *Modern Law Review* 802, 806–7; Markesinis (2), 'The Calcutt Report must not be Forgotten' (1992) 55 *Modern Law Review* 118, 118; McQuoid-Mason, above n 43, 91–100; Parent, 'Privacy, Morality and the Law' in Cohen (ed), *Philosophical Issues in Journalism* (1992), 92–6; Redmond-Cooper, 'The Press and the Law of Privacy' (1985) 34 *International and Comparative Law Quarterly* 769, 771; Samuels, 'Privacy: Statutorily Definable?' (1996) 17 *Statute Law Review* 115; Seipp, above n 43, 328–35; Shipley, 'Right of Privacy' (1949) 14 *American Law Reports* (2nd) 750, 755; Storey, above n 43, 499–500; Swanton, 'Protection of Privacy' (1974) 48 *Australian Law Journal* 91, 91–2; Swanton, 'Towards a Definition of Privacy' [1975] *Justice* 13, 13; Thompson, 'The Right of Privacy as Recognised and Protected at Law and in Equity' (1898) 47 *Central Law Journal* 148, 148; Thomson, 'The Right to Privacy' (1975) 4 *Philosophy & Public Affairs* 295, 295, 304 fn 1, 310, 312–3; Todd (ed), above n 43, 755–6; Wacks, 'The Poverty of Privacy' (1980) 96 *Law Quarterly Review* 73, 75–7; Winfield, above n 43, 24; Yang, 'Privacy: A Comparative Study of English and American Law' (1966) 15 *International and Comparative Law Quarterly* 175, 176–7; Younger Committee, above n 43, 17.

world.[45] And, as was noted above,[46] the common law knows nothing of the concepts of public interest or public benefit in knowing the truth: publishing the truth is enough, at common law, to exempt from liability for defamation. And needless to say, the law of defamation, by its own lights, applies only when an assertion of fact or an expression of opinion is present. Spying on someone or taking unauthorised photographs of them cannot by themselves be defamatory.

Despite those restrictions, there are some privacy cases in which innuendoes can be found that are defamatory. The classic example of this is the well-known case of *Tolley v J S Fry & Sons*,[47] in which the House of Lords found a defamatory imputation in the implication that an amateur golf player might have received money to promote a product, which would be inconsistent with his status as a gentleman. Thus, the plaintiff's right to prohibit the use of his name without his consent was protected. It is much less likely, however, that anyone today would think less of the few remaining amateur sports players of high standard — let alone of professional players — for associating themselves with the commercial world, provided that the product or service promoted is in itself unobjectionable.[48]

In this area, therefore, the extent of protection available under the common law has, as a result of changes in society rather than in the law, been decreasing rather than increasing in recent years. It is only when the accusation or innuendo is truly inconsistent with the professional honour of the person concerned — for example, an accusation of cheating or incompetence — that defamation may occur. But already we are at the borders of the realm of privacy.

45 Anonymous, 'Defamation, Privacy and the First Amendment' [1976] *Duke Law Journal* 1016, 1032–8; Calcutt Committee, above n 44, 25; Chemerinsky, 'In Defence of Truth' (1991) 41 *Case Western Reserve Law Review* 745, 753; Craig and Nolte, 'Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort' [1998] European *Human Rights Law Review* 162, 164; Emerson, above n 44, 333; Nimmer, 'The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 *California Law Review* 935, 958–9, 966; Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 407; Schauer, 'Reflections on the Value of Truth' (1991) 41 *Case Western Reserve Law Review* 699, 704–13, 724; Wade, 'Defamation and the Right of Privacy' (1962) 15 *Vanderbilt Law Review* 1093, 1094; Yang, above n 44, 175–6, 185; Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291, 321–4; Zimmerman, 'False Light Invasion of Privacy: The Light that Failed' (1989) 64 *New York University Law Review* 364, 387, 393–4; cf also Winfield, above n 43, 24; for counter-arguments cf Davis, "What Do We Mean by 'Right to Privacy'?" (1959) 4 *South Dakota Law Review* 1, 8–9; Gilles, 'All Truths are Equal, but are Some Truths more Equal than Others?' (1991) 41 *Case Western Reserve Law Review* 725, 732–6.

46 See above n 19.

47 [1931] AC 333.

48 *Henderson v Radio Corporation* (1960) 60 SR (NSW) 576, 602–3; *Pacific Dunlop v Hogan* (1989) 23 FCR 553, 566; *Honey v Australian Airlines* (1989) 11 ATPR 50,484, 50,486; (1990) 18 IPR 185, 193.

The related but much rarer tort of malicious falsehood was used in *Kaye v Robertson*[49] to protect the plaintiff, the actor Gordon Kaye of *Allo Allo* fame, from the publication of a photograph of him taken without any real consent on his part while he was recovering in hospital from an accident. But even here the protection depended on the somewhat dubious idea that the plaintiff was in the position of a trader with respect to the story of his accident and extended only to prohibiting the publication of the photograph together with the assertion that the plaintiff had authorised its taking.

Another tort, nuisance, can also be used to protect privacy in so far as privacy can be associated with interests in land and, of course, provided that the elements of the tort are established. Thus there is no nuisance when the mere possibility of looking into a neighbour's property — whether it consists of a house or a racecourse, as in *Victoria Park* — is created,[50] but actually spying on one's neighbour can, if the spying reaches a certain level of persistence, be actionable.[51] The same applies to constantly telephoning a person and thus disturbing the privacy of the home,[52] provided that the person so disturbed has an

49 [1991] FSR 62.

50 *Knowles v Richardson* (1670) 1 Mod 55; 86 ER 727; 2 Keble 611, 642; 84 ER 384, 404; *Cherrington v Abney* (1709) 2 Vern 646; 23 ER 1022; *Chandler v Thompson* (1811) 3 Camp 80; 170 ER 1312; *Cross v Lewis* (1824) 2 B & C 686, 689, 691; 107 ER 538, 539–40; *Turner v Spooner* (1860) 30 LJ Ch (NS) 801, 803; *Tapling v Jones* (1865) 11 HLC 290, 305, 317; 11 ER 1344, 1350, 1355; *Atkinson v Long* (1885) 2 QLJ 99, 102; Neill, above n 43, 394–5; Seipp, above n 43, 336–7; Winfield, above n 43, 28. For cases in the law of landlord and tenant, cf *Browne v Flower* [1911] 1 Ch 219, 227–8; *Kelly v Battershell* [1949] 2 All ER 830, 836; *Owen v Gadd* [1956] 2 QB 99, 107.

51 *J Lyons & Sons v Wilkins* [1899] 1 Ch 255, 267, 271; *Torquay Hotel v Cousins* [1969] 2 Ch 106, 119; *Hubbard v Pitt* [1976] QB 142, 174–7, 180, 183, 188–9; *Bernstein of Leigh (Baron) v Skyviews & General* [1978] 1 QB 479, 489 (for a case very similar to this in German law, with the same result, see OLG Oldenburg, NJW-RR 1988, 951); *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20, 62–4; *Khorasandjian v Bush* [1993] QB 727, 742–4; *Raciti v Hughes* (1995) 7 BPR 14,837; Dworkin, above n 43, 423–4; Magnusson, 'Recovery for Mental Distress in Tort, with Special Reference to Harmful Words and Statements' (1994) 2 *Torts Law Journal* 126, 167–8. For a recent English statute in this area, cf *Protection from Harassment Act 1997*. On Scottish law see the Act of 1997 and *Graham v Keith* [1936] SC 29.

See also the case of the Balham dentist: *Victoria Park Racing & Recreation Grounds v Taylor* (1937) 58 CLR 479, 504, 520–1; *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 708; *Raciti v Hughes* (1995) 7 BPR 14,837, 14,840; Dworkin, above n 43, 423; Paton, above n 43, 427; Seipp, above n 43, 337; Todd (ed), above n 43, 758–9; Winfield, above n 43, 27. On privacy and railways, cf *Re Penny* (1857) 7 El & Bl 660; 119 ER 1390; 26 LJQB (NS) 225; *Buccleuch (Duke) v Metropolitan Board of Works* (1870) LR 5 Ex 221, 237. The law in India (*Prasannakumar v Secretary of State* [1934] AIR (Calcutta) 525; Winfield, above n 43, 29–30, 40 fn 85; cf also Seipp, above n 43, 369), the USA (Kacedan, 'The Right of Privacy' (1932) 12 *Boston University Law Review* 600, 613–4; Thompson, above n 44, 151) and Ireland (*Re Ned's Point Battery* [1903] 2 IR 192; cf also *Blundell v The King* [1905] 1 KB 516, 523–4) differs from English law. For an early dictum from Queensland, see *Atkinson v Long* (1885) 2 QLJ 99, 102.

52 *Stoakes v Brydges* [1958] QWN 9, 10; *Alma v Nakir* [1966] 2 NSWR 396.

interest in the land and is not just a licensee.[53] This is an excellent illustration of the merely incidental protection of privacy by the common law: another, legally recognised interest must be established by the plaintiff.

Similarly, the law of trespass can be used to eject the media from property on which they are attempting to interview, film or record the occupants.[54] But trespass is available only to those entitled to possession and not to licensees, and not against those invited by co-owners or others entitled to invite on to the land in question.[55] An injunction is available only where damages are an inadequate remedy, and at least one court has held that damages will usually be adequate.[56] In any case, trespass cannot be used against the media once they have left the property concerned and are filming, for example, from across the road. It has even been held that, at common law, telephone tapping by the authorities[57] as distinct from private persons[58] is not tortious or criminal in any way. (This position has however been reversed by statute).[59] Similarly, it is not illegal to pretend to be a person (such as a bank officer) entitled to personal information about others unless a crime or tort is committed, for example fraudulent conversion.[60]

The right not to have one's own picture used without consent is protected in a similarly patchy way. If a picture or other image is not defamatory[61] or sold

[53] *Hunter v Canary Wharf* [1997] AC 655, 691–2, 696–8, 707, 725 (overruling *Khorasandjian v Bush* [1993] QB 727 and not following *Motherwell v Motherwell* (1976) 73 DLR (3rd) 62, which was however cited with approval in *Raciti v Hughes* (1995) 7 BPR 14,837, 14,840–1); Piotrowicz, 'Private Lives and Private Nuisance in English Law: *Khorasandjian v Bush*' (1993) 1 *Torts Law Journal* 207; Prescott, '*Kaye v Robertson*: A Reply' (1991) 54 *Modern Law Review* 451, 456; Singh, 'Privacy and the Media after the *Human Rights Act*' [1998] *European Human Rights Law Review* 712, 714.

[54] *Lincoln Hunt Australia v Willesee* (1986) 4 NSWLR 457, 460–5; *Emcorp v Australian Broadcasting Commission* [1988] 2 Qd R 169, 172–9; *Rinsale v Australian Broadcasting Commission* (1993) 15 ATPR 62,377, 62,379–82; Aberdeen, "Media 'Walk-Ins': Privacy Invasion or Public Interest" [1986] *Australian Current Law* 36,057, 36,058; Burrows, 'Media Law' [1996] *New Zealand Law Review* 342, 361–2; Burrows, above n 39, 252–3; Handley, 'Trespass to Land as a Remedy for Unlawful Intrusion on Privacy' (1988) 62 *Australian Law Journal* 216, 217–21; Hudson, 'Consumer Protection, Trespass and Injunctions' (1988) 104 *Law Quarterly Review* 18, 19–20; Hurst and White, *Ethics and the Australian News Media* (1994), 120; Katz, above n 43, 12–18; Koomen, 'Under Surveillance: Fergie, Photographers and Infringements on Freedom' (1993) 17 *University of Queensland Law Journal* 234, 235–9.

[55] *Coles-Smith v Smith* [1965] Qd R 494, 501–3; *Greig v Greig* [1966] VR 376, 377; Handley, above n 54, 221–2; Koomen, above n 54, 239.

[56] *Lincoln Hunt Australia v Willesee* (1986) 4 NSWLR 457, 464.

[57] *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372–5, 381.

[58] *Francome v Mirror Group* [1984] 1 WLR 892; Katz, above n 43, 8; Wacks, above n 43, 67–71.

[59] *Telecommunications (Interception) Act 1979*; see Barry, 'An End to Privacy' (1960) 2 *Melbourne University Law Review* 443, 443–6; Cowen, *The Private Man* (1972), 33–4; **Magnusson, 'Privacy, Surveillance and Interception in Australia's Changing Telecommunications Environment' (1999) 27 *Federal Law Review* 33, 44–58. State Acts, such** as the *Surveillance Devices Act 1999* (Vic), are also relevant here.

[60] *DPP v Withers* [1975] AC 842, 862–3, 872; Baxter, above n 44, 19.

[61] *Monson v Tussauds* [1894] 1 QB 671; *Dunlop Rubber Company v Dunlop* [1921] 1 AC 367 (for the result in this case, cf Winfield, above n 43, 32); *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 708; Anonymous, 'Is this Libel? — More about Privacy' (1894) 7 *Harvard Law Review* 492, 492–3.

in breach of contract or confidence,[62] there is generally no protection.[63] Admittedly Laws J (now Laws LJ) in England[64] has suggested that publishing a photograph taken without the consent of the person depicted and showing a private activity could by itself amount to a breach of confidence, but there are problems with this suggestion: if there is no communication in confidence, how can publication be in breach of it?[65] A similar suggestion by Young J in New South Wales[66] may be criticised for the lack of non-American precedent cited in its support. The obiter dicta of these two judges have, at all events, not been the subject of appellate consideration. Similarly, the law of passing off cannot offer full protection of the right to one's photograph or name, despite the removal of the requirement that plaintiff and defendant must be operating in the same field[67] and the extension — at least in Australia — of the tort to cover any assertion of a connexion between a product and a person who is carrying on any sort of trade or occupation.[68] Even with this extension, the tort does not cover non-commercial situations nor those in which the plaintiff is an ordinary person and not carrying on any sort of trade or occupation[69] — although it would, admittedly, now be available in the *Tolley* situation even if the assertion that the golfer endorsed the product is no longer defamatory.[70]

62 *Tuck & Sons v Priester* (1887) 19 QBD 629, 635, 638; *Pollard v Photographic Co* (1888) 40 Ch D 345, 349–50; *Stedall v Houghton* (1901) 18 TLR 126; *Williams v Settle* [1960] 1 WLR 1072; *Creation Records v News Group Newspapers* (1997) 39 IPR 1; Fenwick and Phillipson, above n 37, 449.

63 *Corelli v Wall* (1906) 22 TLR 532, 533; *Palmer v National Sporting Club* [1905–10] Macgillivray's Copyright Cases 55; *Newton-John v Scholl-Plough (Australia)* (1985) 11 FCR 233; *Honey v Australian Airlines* (1990) 18 IPR 185; *Cruise v Southdown Press* (1993) 26 IPR 125.

64 *Hellewell v Chief Constable of Yorkshire* [1995] 1 WLR 804, 807. It is interesting to note that His Lordship appears to have been the plaintiff in a case involving privacy, *Laws v Florinplace* [1981] 1 All ER 659.

65 Cram, above n 43, 102; Younger Committee, above n 43, 297. Less cautious: Phillipson and Fenwick, 'Breach of Confidence as a Privacy Remedy in the *Human Rights Act* Era' (2000) 63 *Modern Law Review* 660, 671–2.

66 *Bathurst City Council v Saban* (1985) 2 NSWLR 704, 708. His Honour repeated his suggestion in *Raciti v Hughes* (1995) 7 BPR 14,837, 14,840.

67 *Annabel's (Berkeley Square) v Schock* [1972] FSR 261, 269; *Lyngstad v Anabas Products* [1977] FSR 62, 66–7; *Lego System Aktieselskab v Lego M Lemelstrich* [1983] FSR 155, 186–8; *Nice and Safe Attitude v Piers Flook* [1997] FSR 15, 20–1; Corones, 'Basking in Reflected Glory: Recent Character Merchandising Cases' (1990) 18 *Australian Business Law Review* 5, 7; Frazer, above n 43, 290 fn 50; Hylton and Goldson, 'The New Tort of Appropriation of Personality: Protecting Bob Marley's Face' [1996] *Cambridge Law Journal* 56, 58–9; Phillips and Coleman, "Passing Off and the 'Common Field of Activity'" (1985) 101 *Law Quarterly Review* 242.

68 *Henderson v Radio Corporation* (1960) 60 SR (NSW) 576; *Hutchence v South Seas Bubble* (1986) 64 ALR 330, 339–40; *10th Cantanae v Shoshana* (1987) 79 ALR 299, 300–1, 313, 318–19; *Hogan v Koala Dundee* (1988) 20 FCR 314, 323–7. *Wickham v Associated Pool Builders* (1988) 12 IPR 567 appears to have been decided *per incuriam*: Corones, above n 67, 17; Harvey, 'The Medium is the Message' (1996) 1 *Media & Arts Law Review* 182, 189; Simpson, 'The Price of Fame Revisited' (1989) 63 *Australian Law Journal* 281, 282.

69 *Anderson v Fisher Broadcasting* (1986) 712 P (2nd) 803, 813; *10th Cantanae v Shoshana* (1987) 79 ALR 299, 300; Cooper, above n 17, 16; Harvey, above n 68; Pannam, above n 43.

70 *10th Cantanae v Shoshana* (1987) 79 ALR 299, 313.

Finally, there are some areas of adjectival law in which the need for privacy is also taken into account. Thus the use of documents obtained by discovery or other compulsory process is restricted in the interests of those who were forced to reveal them.[71] The police can make only reasonable uses of documents and photographs obtained or made pursuant to coercive powers,[72] and then only after giving the person affected notice so that he or she can make known any objections that he or she might have to that course.[73]

In short, the protection of privacy in Australian common law is patchy and inconsistent, because there is no overall concept of privacy in the common law which could be used to fill in the gaps — for example, to protect licensees, as well as owners and lessees, against harassment by telephone calls — and to give a common theme to such protection of privacy as the common law does allow. In this, Australian law compares unfavourably, as we shall now see, with the law of Germany and the United States, and possibly also with the law of England, which may be in the throes of giving birth to a right of privacy despite the restrictions in the cases decided to date.

PRIVACY IN GERMANY

German privacy law was once in the same position as Anglo-Australian law, and, indeed, at least one German commentator on personality and privacy rights favourably compared the law of England in the nineteenth century with the law of Germany.[74] But German law has since moved on. The German Civil Code (BGB), which came into force on 1 January 1900, gives little clue to these developments, for the law of privacy — or personality rights, to use the term employed in German law — has been developed by the German courts mostly since World War II without any change in the BGB itself. There is a prohibition on developing the law regardless of the provisions of the written law in German criminal law,[75] but not in German civil law; and the Federal Constitutional Court has confirmed that the judges were within the Constitution when they developed the general right of the personality in German law independently of the BGB.[76]

The general right of the personality is called thus to distinguish it from the various specific personality rights that are codified. Thus the Law on Artistic

71 *Home Office v Harman* [1983] AC 280 (but this rule has been abolished in England: see *Bibby Bulk Carriers v Consulex* [1989] 1 QB 155, 158–9); *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 208–12. Cf also *Bunn v British Broadcasting Corporation* [1998] 3 All ER 552, 556.

72 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 810–11; *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25, 36–7.

73 *Marcel v Commissioner of Police* [1992] Ch 225, 259, 261, 266–7; *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25, 36–7.

74 Kohler, 'Das Individualrecht als Namenrecht' *Archiv für bürgerliches Recht* 5, 77, 89; Kohler (2), 'Das Ideale im Recht' *Archiv für bürgerliches Recht* 5, 161, 263–4; Kohler (3), 'Das Recht an Briefen' *Archiv für bürgerliches Recht* 7, 94, 107.

75 See the German Basic Law, Art 103 II, and § 1 of the Criminal Code.

76 This occurred in 1973 in the *Soraya* case: BVerfGE 34, 269.

Creations of 1907 (which, with certain exceptions, prohibits the unauthorised publication of photographs of people), the law of defamation (§§ 185 onwards of the Criminal Code in combination with § 823 II of the BGB) and the law on protection of one's name (§ 12 BGB) are all personality rights found in the written law. But where gaps exist, they are filled by the general right of the personality, giving a unifying concept to this area of the law, and providing, as we shall see, a remedy that would otherwise be unavailable.

Immediately before and after the enactment of the BGB, however, the German courts denied that there was any such thing as a general right of the personality. They restricted privacy rights to what they could find in the statutes themselves. Thus, the photographers who barged into Bismarck's home shortly after his death in 1898 to take a photograph of his corpse could be prevented from publishing the photograph only because they had committed an unlawful entry into the house and the old pre-BGB German-Roman law provided a remedy for cases in which use was sought to be made of illegally obtained materials — the *condictio ob injustam causam*.[77] Neither the letters of Richard Wagner[78] nor — after the BGB had come into force — those of Friedrich Nietzsche[79] were protected against publication by the recipients, unless an infringement of copyright could be established. In this respect, German law compared very unfavourably with English law, which, as we have seen, was able to prohibit publication of private letters. Copyright law was again the only form of protection for an artist who found his pictures of naked women in a suburban house adorned modestly with clothes by the owner of the picture; the court specifically refused to accept the idea of a general right of the personality extending to the integrity of artists' works.[80] And only the law of defamation protected a woman who was spied upon by a detective on suspicion of infidelity;[81] only the criminal law protected one whose letters were opened and read by third parties.[82] The concept of a breach of the right to privacy was, at this time, unknown to the law.

The written laws that did exist were interpreted narrowly. As was mentioned above, the Law on Artistic Creations — enacted in 1907 because of the furore involving the photographing of Bismarck's corpse[83] — did provide some protection for those photographed, but it contained an exception for 'pictures relating to current events' (§ 23 I 1) which was interpreted widely so that anyone who was well-known had little chance of receiving protection. Although the law did not say 'pictures of people involved in current events', it was interpreted almost as if it did, so that personalities as diverse as the Weimar Republic's first President (pictured with one of his ministers on the

77 RGZ 45, 170.
78 RGZ 41, 43.
79 RGZ 69, 401.
80 RGZ 79, 397; see also RGZ 102, 134, 140–1; RGZ 123, 312, 320.
81 OLG Hamburg, GRUR 1901, 210, 210.
82 RGZ 97, 1. See also RGZ 115, 461, 417; BGHZ 73, 120, 123.
83 Seifert, 'Postmortaler Schutz des Persönlichkeitsrechts und Schadenersatz — zugleich ein Streifzug durch die Geschichte des allgemeinen Persönlichkeitsrechts' *Neue Juristische Wochenschrift* 1999, 1889, 1889.

beach)[84] and a well-known football player[85] received no protection under the law.

This restrictive interpretation began to change a few years after full democracy was introduced after the revolution of 1918, and oddly enough one of the first beneficiaries was the former Kaiser Wilhelm II. He was considered to come within the law even though it was not a picture of him at all that was in question, but a representation of him on the stage.[86] And, in the same case, the idea was first mooted of balancing the interests of the public and those of the depicted person when deciding whether a breach of privacy by publishing a photograph was justified in the circumstances. This procedure was, as we shall see, to form the core of the post-War jurisprudence on this topic.

The *Reichsgericht*, the highest civil court, even toyed with the idea that infringements of personality rights might be *contra bonos mores* and thus, under § 826 BGB, tortious if committed intentionally.[87] And the Court of Appeals at Kiel broke ranks with other courts and called for the recognition of a general right of the personality,[88] even though it was not really able to provide a convincing justification or basis for this opinion in the existing law.

That was where matters stood when the Nazis took over, and it need hardly be said that there was no further talk of personality rights until they had been defeated. Nazism was oriented towards groups (such as the race and the nation) rather than individuals and thus was not hospitable to the idea of general rights of the personality.[89]

Immediately after the War, voices in favour of an increased legal protection of the personality began to make themselves heard, and their principal argument was, of course, the total disregard for the rights of the personality in the 'Third *Reich*' and the need for a stronger protection of human rights in liberated Germany.[90] And these voices received a considerable boost when the Basic Law of 1949, which remains today the German Constitution, was enacted, for it provided:

84 AG Ahrensböck, JZ 1920, 296.

85 RGZ 125, 80.

86 KG, JW 1928, 363, 364–5. The fact that the former Kaiser received legal protection but the President of the Weimar Republic did not may also reflect the hankering after the Monarchy by many judges of the time.

87 RGZ 115, 416; Gottwald, *Das allgemeine Persönlichkeitsrecht: ein zeitgeschichtliches Erklärungsmodell* (1996), 38–46; Gutteridge, 'The Comparative Law of the Right to Privacy' (1931) 47 *Law Quarterly Review* 203, 209–11; Reinhardt, *Das Persönlichkeitsrecht in der geltenden Rechtsordnung* (1931), 20; Smoschewer, 'Das Persönlichkeitsrecht im allgemeinen und im Urheberrecht' *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 3, 119, 121–5; Winfield, above n 43, 28.

88 JW 1930, 78, 80.

89 Gounalakis and Rösler, *Ehre, Meinung und Chancengleichheit im Kommunikationsprozeß: eine vergleichende Untersuchung zum englischen und deutschen Recht der Ehre* (1998), 103; Lücke, 'The Common Law: Judicial Impartiality and Judge-made Law' (1982) 98 *Law Quarterly Review* 29, 82.

90 Coing, 'Das Grundrecht der Menschenwürde, der strafrechtliche Schutz der Menschlichkeit und das Persönlichkeitsrecht des bürgerlichen Rechts' *Süddeutsche Juristenzeitung* 1947, 641, 643. See also Gottwald, above n 87, 60–3; Hubmann, *Das Persönlichkeitsrecht* (2nd ed, 1967), 90–2.

> Art 1 (1) Human dignity is inviolable. To respect and protect it shall be the duty of all state authority.
>
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
>
> Art 2 (1) Everyone shall have the right to the free development of his or her personality in so far as he or she does not violate the rights of others or offend against the constitutional order or good morals.[91]

Only three years after the adoption of this Constitution, the *Bundesgerichtshof* (Federal Supreme Court), successor of the *Reichsgericht* as the supreme civil court, reversed the pre-War rulings. It recognised a general right of the personality to fill in the gaps in the specific personality rights guaranteed by statute and to provide an overall unifying concept for all personality-related rights. This was despite the lack of any corresponding change in the BGB itself.

The occasion for this was the *Schacht* case[92] which involved a letter written to a weekly journal on behalf of Hjalmar Schacht, who had been President of the *Reichsbank* (the State Bank) both before the Nazi years and for some of them. Acquitted at the Nuremberg trials, he continued life after the War as a banker, and it was this that the article in the journal dealt with. Schacht took exception to some of it and had his lawyer send a letter to the journal demanding the publishing of two corrections. The journal published the letter, shorn of all the legalistic phrases demanding a retraction, under 'letters to the editor', as if it represented the private personal opinion of the lawyer. The lawyer sued, and the court held, reversing earlier authorities, that the journal had infringed the lawyer's general right of the personality by attributing to him opinions he did not hold. The court said that 'the general personality right must be regarded as a constitutionally guaranteed freedom' having regard to Articles 1 and 2.[93] The journal had committed what in the United States would be known as a 'false light' privacy infringement, as the discussion of US law below will make clear.

Following on from this case, it has been recognised that the general right of the personality is a 'miscellaneous right' under § 823 I of the BGB and thus enjoys the full protection of the civil law. Similar conclusions have since been reached in cases involving the publication of fake interviews in the press,[94]

91 Translation based on that in Hucko, *The Democratic Tradition: Four German Constitutions* (1987), 194.

92 BGHZ 13, 334. For an English translation, see Markesinis, *A Comparative Introduction to the German Law of Torts* (3rd ed, 1994), 376–380; and see 410–11.

93 BGHZ 13, 334, 338; translated in Markesinis, above n 92, 378.

94 BVerfGE 34, 269, 282–3; BGHZ 128, 1. Cf BVerfGE 54, 148, 153–8; BVerfGE 82, 43, 51–2; BVerfGE 82, 236, 269; BVerfGE 97, 125, 149; BVerfG (Kammer), NJW 1989, 1789; BVerfG (Kammer), NJW 1993, 2925; BGHZ 128, 1, 7–8, 10; BGH, NJW 1965, 685, 686 (and see further on this case BVerfGE 34, 269); Markesinis, 'Privacy, Freedom of Expression and the Horizontal Effect of the *Human Rights Bill*: Lessons from Germany' (1999) 115 *Law Quarterly Review* 47, 57, 60.

mis-quotations,[95] and — most recently — the incorrect attribution to well-known people of links with the Scientology organisation.[96]

The law can also cover the unauthorised publication of private thoughts as well as the secret tape-recording of public or private utterances.[97] Thus, a private telephone conversation even between two leading politicians cannot be published if that would infringe the right of privacy which even politicians have. In cases such as this, in which there is some room for the view that the public might have a right to know what is going on, the courts carry out a balancing procedure in which they attempt to take into account all relevant considerations and to decide which set of interests has the greater weight.[98]

In the case involving the two leading politicians,[99] the facts were not dissimilar from the Australian affair involving the interception of a telephone conversation between Messrs Kennett and Peacock in the mid-1980s and the publication of the transcript.[100] In the German case, the politicians concerned were in fact the then Opposition Leader, Dr Helmut Kohl, and Dr Kurt Biedenkopf, then general secretary of the opposition party and now Premier of Saxony. Because there is no law of privacy in Australia, the Australian politicians had no clear legal recourse, but the German Federal Supreme Court was able to prohibit the reproduction in similar circumstances. Even leading politicians, it thought, were entitled to a degree of privacy and to conduct private conversations. For the same reason, and by undertaking the same balancing procedure, demonstrations outside the private homes of politicians can also be prohibited,[101] and photographs of Princess Caroline of Monaco — admittedly not a politician, but someone who is in the public spot-light and who must therefore put up with some degree of public interest in her activities — cannot be published if they are taken during a private dinner in a restaurant as opposed to on a public street.[102]

The trend of German law is summarised well by Professor Markesinis QC:

> First, freedom of expression will, on the whole, prevail over the right of privacy where the publication, broadcast, etc aim at educating and informing

95 BVerfGE 54, 208, 216–218. (For the result of this case, see BGH, NJW 1982, 635).

96 BVerfGE 99, 185, 194–6.

97 BVerfGE 34, 238, 247–8; BVerfGE 91, 125, 137–8; BVerfG (Kammer), NJW 1999, 1951, 1952; BGHSt 10, 202, 205; BGHSt 27, 355, 357; BGHSt 31, 296, 299; BGHZ 27, 284; BGHZ 80, 25, 42–3; BAGE 41, 37, 42–3; KG, NJW 1956, 26, 27; OLG Cologne, NJW 1979, 661 (no recording even in a public meeting); OLG Düsseldorf, BB 1956, 481; Hubmann, 'Der zivilrechtliche Schutz der Persönlichkeit gegen Indiskretion' *Juristenzeitung* 1957, 521, 527; Leinveber, 'Grundfragen der zivilrechtlichen Persönlichkeits- und Ehrenschutzes' *Gewerblicher Rechtsschutz und Urheberrecht* 1960, 17, 21 with further references; Nipperdey, 'Das allgemeine Persönlichkeitsrecht' *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 30, 1, 13–14 with further references; Siegert, 'Die außergerichtlichen Tonbandaufnahmen und ihre Verwertung im Zivilprozeß' *Neue Juristische Wochenschrift* 1957, 689, 689–90.

98 An excellent summary of the process is offered by Markesinis, above n 92, 412–3; Markesinis, above n 94, 58–63. Cf also Craig and Nolte, above n 45, 174–7.

99 BGHZ 73, 120.

100 On this, see Hurst and White, above n 54, 127–30.

101 OVG Koblenz, NJW 1986, 2659, 2660; BVerfG (Kammer), NJW 1987, 3245 (demonstration outside the house of the sister of the East German leader; the sister lived in West Germany).

102 BGHZ 131, 332.

> the public rather than pursuing mere sensationalism or trying to satisfy the public's taste for gossip. Secondly, the chances of success of a privacy claim tend to decrease as the public profile of the plaintiff increases. But even public figures can seek protection of their privacy in appropriate circumstances.[103]

The next of the leading cases dealt with the remedies available for a breach of personality rights. In the *Gentleman Equestrian* case,[104] a photograph of an equestrian was used in conjunction with advertising for a medicinal product that could be used for a variety of purposes, including sexual ones. The outraged gentleman sued, claiming that his personality rights had been infringed by the unauthorised publication of his photograph. The situation — which in England and Australia might still be actionable as defamation under the *Tolley*[105] principle,[106] and possibly also as passing off — was also already covered in Germany by the Law on Artistic Creations,[107] but now that the personality had been recognised as an area generally protected by the law this statute could be seen as merely an instance of the more general right of the personality.[108]

All this was fairly uncontroversial, and indeed built on other post-War cases,[109] but the controversial step came with the remedy granted to the gentleman equestrian. The court thought that he would not have granted permission for his photograph to be used for advertising under any circumstances at all, and so he could not be compensated on the basis that the advertiser had been unjustly enriched by not having paid the licence fee that the gentleman

[103] Markesinis, above n 92, 412. Cf also Calcutt Committee, above n 44, 16; Craig and Nolte, above n 45, 175; von Gamm, 'Persönlichkeitsschutz und Massenmedien: Neuere Entwicklungen der Rechtsprechung' *Neue Juristische Wochenschrift* 1979, 513, 514, 516; Markesinis, above n 94, 62–3; Malmström (ed), *Right of Privacy and Rights of the Personality: A Comparative Survey* (1967), 216.

[104] BGHZ 26, 349. For an English translation, see Markesinis, above n 92, 380–6. The reference to § 2 of the Law on Artistic Creations at 'I' of the translated reasons is a printing error; the original report refers to § 22.

[105] See above n 47.

[106] Cf *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 443, 447; (1995) 38 NSWLR 404.

[107] OLG Freiburg, GRUR 1953, 404, 404.

[108] See also BVerfGE 35, 202, 224; BGHZ 131, 332, 336; BGH, NJW 1985, 1617, 1618; BGH, VersR 1993, 66, 66–7; BGH, WRP 1995, 613, 614; BGH, VersR 1995, 841, 842; OLG Karlsruhe, NJW-RR 1999, 1700, 1700; OLG Koblenz, NJW 1997, 1375, 1375; LG Berlin, NJW 1996, 1142, 1142; LG Berlin, NJW 1997, 1373, 1374; Bergmann, 'Publicity Rights in the United States and in Germany' (1999) 19 *Loyola of Los Angeles Entertainment Law Journal* 479, 503 fn 224; Ehmann, 'Zur Struktur des allgemeinen Persönlichkeitsrechts' *Juristische Schulung* 1997, 193, 199; Osiander, *Das Recht am eigenen Bild im allgemeinen Persönlichkeitsrecht: Aspekte für Medienschaffende* (1993), 105–22.

[109] For other (earlier and later) cases to the same effect, see BVerfGE 97, 125, 154–5; BVerfG (Kammer), NJW 1999, 2358, 2359; BGHZ 20, 345; BGHZ 30, 7; BGHZ 49, 288; BGHZ 81, 75; BGH, NJW 1961, 558; BGH, NJW 1971, 698; BGH, NJW 1979, 2203; BGH, NJW 1979, 2205; BGH, NJW-RR 1987, 231, 231; BGH, NJW 1997, 1152; OLG Hamburg, NJW-RR 1999, 1701, 1702; OLG Munich, ZUM 1985, 452, 455; LG Düsseldorf, WRP 1980, 46, 47–8.

rider would otherwise have demanded.[110] Other traditional remedies, such as retraction, correction or the publication of a reply, were obviously not appropriate. So the court decided to award damages of 10,000 DM for non-material loss, and declared that such damages were available for serious breaches of the general right of the personality.

This was a clear breach of § 253 BGB, which prohibited damages for non-material loss except in the cases allowed by law. There were only two cases allowed in the BGB. The first was in § 1300, which permitted (until its repeal in 1998) a 'previously untouched engaged woman who has permitted her fiance to have sexual intercourse with her to demand an appropriate monetary compensation even for non-material loss' in certain cases in which the engagement is broken off. That was obviously of no use to the gentleman equestrian. However, § 847 allows recovery for non-material loss in cases of injury to the body or health of the plaintiff or in cases of false imprisonment (as well as to women who have been persuaded to take part in sexual intercourse in a variety of criminal or fraudulent ways). The court in the *Gentleman Equestrian* case held that the unauthorised use of one's photograph was the mental equivalent of false imprisonment and thus came within § 847.

This was a highly unconvincing analogy, which led some commentators to suggest that the judges responsible for drawing it should be charged with perverting the course of justice.[111] A considerable number of lower courts refused to follow the Federal Supreme Court's reasoning[112] — this is possible in a system like the German which, as we shall see below, lacks a doctrine of strictly binding precedent except in certain very closely defined circumstances.

It was pointed out by the opponents of the *Gentleman Equestrian* ruling that § 253 had been adopted precisely because the legislator of 1900 had thought that paying money for breaches of non-material rights such as the right to personal honour was inconsistent with the very concept of personal honour.[113]

110 This reasoning was however flawed, as the German law of unjust enrichment does not require the plaintiff to have suffered a loss, but merely the defendant to have suffered an unjustified gain. However, this has no effect on the authority of the case: Steffen, 'Schmerzensgeld bei Persönlichkeitsverletzung durch Medien: Ein Plädoyer gegen formelhafte Berechnungsmethoden bei der Geldentschädigung' *Neue Juristische Wochenschrift* 1997, 10, 13.

111 Schwerdtner, 'Persönlichkeitsschutz im Zivilrecht' in Karlsruher Forum, *Schutz der Persönlichkeit* (1997), 31; Stark, *Ehrenschutz in Deutschland* (1996), 170 fn 91.

112 OLG Frankfurt, NJW 1962, 2062; OLG Karlsruhe (ZS Freiburg), NJW 1962, 2062; OLG Munich, VersR 1963, 1086, 1084; see also BGH, VersR 1964, 292, 293 no 1; OLG Frankfurt, NJW 1966, 254, 256; OLG SchlH, JZ 1963, 573, 575–6; Fromm, Comment *Neue Juristische Wochenschrift* 1966, 254, 255.

113 Bußmann, 'Der Anspruch auf Ersatz des immateriellen Schadens bei Verletzung des Persönlichkeitsrechts' *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 37, 1, 3–4; Kaufmann, 'Dogmatische und rechtspolitische Grundlagen des § 253 BGB' *Archiv für die civilistische Praxis* 162, 421, 424–36; Mugdan (ed), *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* (1979), Vol 2 1297; see also Gounalakis, 'Persönlichkeitsschutz und Geldersatz' *Archiv für Presserecht* 1998, 10, 16; Hartmann, 'Der Civilgesetzentwurf, das Aequitätsprinzip und die Richterstellung' *Archiv für die civilistische Praxis* 37, 309, 363–5. For a historical analysis, see von Bar, 'Schmerzensgeld und gesellschaftliche Stellung des Opfers bei Verletzungen des allgemeinen Persönlichkeitsrechts' *Neue Juristische Wochenschrift* 1980, 1724, 1724, and for an early criticism, see Kohler (2), above n 74, 257–9.

Thus, § 253 was not a mistake by the legislator or an unintentional gap in the law that needed filling, but a prohibition on doing precisely what the courts had done.[114] If new remedies were required, the legislator should introduce them.[115] If the judges did so, they breached the separation of powers, which is a constitutional principle of no less importance than the protection of the personality.[116]

The highest courts continued to support the granting of non-material damages in these cases, although they abandoned the idea of a mental false imprisonment and said simply that § 253 of the BGB had been superseded by the right of personality contained in Articles 1 and 2 of the Basic Law and by the need to give effect to that right by providing remedies that were effectual.[117] The resistance gradually died down. After the Federal Constitutional Court had held — in a case[118] noticeable for confining itself to commonplaces and not dealing with the matter at hand in a very detailed way at all[119] — that this example of judicial law-making did not contravene the Constitution's delimitation of the judicial function, as judicial functions had always included some law-making, all resistance became useless.[120]

[114] Hartmann, 'Persönlichkeitsrecht und Schmerzensgeld' *Neue Juristische Wochenschrift* 1962, 12, 14; Hartmann (2), 'Persönlichkeitsrecht und Schmerzensgeld' *Neue Juristische Wochenschrift* 1964, 793, 794, 798; Kaufmann, above n 113, 435; Kuner, Comment *Betriebsberater* 1962, 1393, 1393; Larenz, 'Das "allgemeine Persönlichkeitsrecht" im Recht der unerlaubten Handlungen' *Neue Juristische Wochenschrift* 1955, 521, 523; Larenz (2), Comment *Neue Juristische Wochenschrift* 1958, 827, 828; Löffler, 'Die Grenzen richterlicher Rechtsfindung beim immateriellen Schadensersatz' *Neue Juristische Wochenschrift* 1962, 225, 226–7; Münzel, 'Schmerzensgeld für seelische Unlustgefühle' *Neue Juristische Wochenschrift* 1960, 2025, 2027; Rötelmann, Comment *Neue Juristische Wochenschrift* 1962, 736, 737; see also Krey, 'Zur Problematik richterlicher Rechtsfortbildung' *Juristenzeitung* 1978, 361, 365–6. For counter-arguments cf OLG Hamburg, MDR 1960, 1008, 1010; Coing, 'Zur Entwicklung des zivilrechtlichen Persönlichkeitsschutzes' *Juristenzeitung* 1958, 558, 560.

[115] OLG Karlsruhe, BB 1962, 1392, 1392; Resolution of the 45th German Legal Conference in Ständige Deputation des Deutschen Juristentages (ed), *Verhandlungen des 45. DJT* (1965), Vol II C127; Bötticher, 'Die Einschränkung des Ersatzes immateriellen Schadens und der Genugtuungsanspruch wegen Persönlichkeitsminderung' *Monatsschrift für deutsches Recht* 1963, 353, 353; Giesen, Comment *Neue Juristische Wochenschrift* 1971, 801, 802; Hartmann, above n 114, 14; Kaufmann, above n 113, 423; Larenz (2), above n 114, 828; Löffler, 'Der Bundesgerichtshof wechselt die Begründung für den immateriellen Schadensersatz bei Persönlichkeitsverletzung' *Archiv für Presserecht* 1962, 209, 211; Löffler, above n 114, 225; Schultz, 'Blick in die Zeit' *Monatsschrift für deutsches Recht* 1962, 956, 957; Ulmer, Comment *Gewerblicher Rechtsschutz und Urheberrecht* 1963, 493, 494.

[116] Hartmann (2), above n 114, 797; Löffler, above n 115, 210; Löffler, above n 114, 227–8. For a counter-argument, see Bötticher, above n 115, 360.

[117] BVerfG (Kammer), NJW 2000, 2187, 2187; BGHZ 35, 363, 367; BFHE 78, 23; OLG Hamburg, MDR 1960, 1008, 1010; OLG Hamburg, NJW 1962, 2062; OLG Hamburg, NJW 1967, 2314, 2315; Larenz (2), above n 114, 828; Löffler, above n 114, 226–7.

[118] BVerfGE 34, 269.

[119] Krey, 'Gesetzestreue und Strafrecht: Schranken richterlicher Rechtsfortbildung' *Zeitschrift für die gesamte Strafrechtswissenschaft* 101, 838, 862; Larenz and Canaris, *Methodenlehre der Rechtswissenschaft* (1995), 250; Schwerdtner, 'Der zivilrechtliche Persönlichkeitsschutz' *Juristische Schulung* 1978, 289, 291; Seitz, 'Prinz und die Prinzessin — Wandlungen des Deliktsrechts durch Zwangskommerzialisierung der Persönlichkeit' *Neue Juristische Wochenschrift* 1996, 2848, 2849.

[120] Baston—Vogt, *Der sachliche Schutzbereich des zivilrechtlichen allgemeinen Persönlichkeitsrechts* (1997), 13 with further references; Ehmann, above n 108, 202; Larenz and Canaris, above n 119, 258–9; Schwerdtner, above n 119, 295; Stark, above n 111, 170.

Damages in these cases are now an accepted part of the legal landscape, and a change in the written law would be required to abolish them.[121] All attempts to change the BGB so as to recognise in the written law this form of non-material damages or the general right of the personality have however failed, chiefly because of the resistance of the media even to a codification of existing judge-made law.[122]

In another controversial decision,[123] which, because it is relatively recent, cannot yet be described as irreversible and which has provoked some opposition,[124] the courts have decreed that punitive damages — a concept not generally known in German law, which considers punitive measures to be the exclusive province of the criminal law[125] — can be awarded for particularly persistent breaches of personality rights. These damages are meant to deter from future violations and thus take into account not just the plaintiff's material and non-material loss, but also the community's need for a means of deterrence against invasions of privacy. The result is a windfall for the plaintiff which is not justified by the loss actually suffered.

The courts do, however, still lean towards § 253 by requiring that damages for non-material loss not be granted if other remedies provided for by law are sufficient, and by requiring that the defendant should have committed a severe breach of the right of the personality if they are to be granted at all. All the circumstances of the case — both the objective facts and subjective fault attributable to the defendant — are relevant in deciding this.[126]

121 Mertens in *Bürgerliches Gesetzbuch: Kommentar ('Soergel')* (12th ed, 1990–1998), commentary to § 253 para. 7.

122 For one failed draft, see Malmström (ed), above n 103, 174, 226–34.

123 BGHZ 128, 1, 16. See further BVerfG (Kammer), NJW 2000, 2187.

124 Gounalakis, above n 113, 11–12, 14; Gounalakis and Rösler, above n 89, 89–98; Seitz, above n 119, 2848; Soehring, 'Die Entwicklung des Presse- und Äußerungsrechts 1994–1996' *Neue Juristische Wochenschrift* 1997, 360, 372–3. For defences of the court's decision see Forkel, Comment *Juristenzeitung* 1997, 43, 45; Körner, 'Zur Aufgabe des Haftungsrechts — Bedeutungsgewinn präventativer und punitiver Elemente' *Neue Juristische Wochenschrift* 2000, 241; Prinz, 'Der Schutz der Persönlichkeitsrechte vor Verletzungen durch die Medien' *Neue Juristische Wochenschrift* 1995, 817, 820; Prinz, 'Geldentschädigung bei Persönlichkeitsrechtsverletzungen durch Medien' *Neue Juristische Wochenschrift* 1996, 953, 956–7 (urging the courts to go further); Stark, above n 111, 175–6; Steffen, 'Persönlichkeitsschutz und Pressefreiheit sind keine Gegensätze: Ein Schmerzensgeld sollte den Medien weh tun' *Zeitschrift für Rechtspolitik* 1994, 196, 197.

125 BGHZ 118, 312, 334–45 (no enforcement of American punitive damages in German law); BVerfGE 91, 335, 334; Hay, 'From Rule-Orientation to 'Approach' in German Conflicts Law: The Effect of the 1986 and 1999 Codifications' (1999) 47 *American Journal of Comparative Law* 633, 640–1; Stiefel and Stürner, 'Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe' *Versicherungsrecht* 1987, 829.

126 BVerfGE 34, 269, 274–5; BGHZ 35, 363, 369; BGHZ 95, 212, 214–5; BGH, Ufita 37 (1962), 110, 118; BGH, Ufita 37 (1962), 120, 122; BGH, VersR 1964, 292, 293; BGH, NJW 1965, 685, 686; BGH, NJW 1965, 1374, 1375–6; BGH, NJW 1969, 1110, 1111; BGH, VersR 1970, 670, 671–2; BGH, NJW 1971, 698, 699–701; BGH, NJW 1971, 885, 886; BGH, VersR 1974, 758, 759; BGH, GRUR, 1974, 797, 800; BGH, NJW 1985, 1617, 1619; KG, NJW 1990, 1996, 1996; OLG Cologne, NJW 1987, 2682, 2684; OLG Cologne, NJW 1989, 720, 721; OLG Düsseldorf, NJW 1980, 599, 600–1; OLG Frankfurt, NJW 1966, 254, 256–7; OLG Hamburg, NJW 1962, 2062, 2063; OLG Hamburg, AfP 1971, 41; OLG Karlsruhe, VersR 1989, 65, 65–6; OLG Oldenburg, NJW 1983, 1202, 1203; OLG Stuttgart, NJW 1982, 652, 653; OLG Stuttgart, NJW 1983, 1203, 1204; OLG Stuttgart, NJW 1983, 1204, 1204–5; LG Berlin, NJW 1996, 1142, 1143–4; Hartmann, above n 114, 13, 15.

The mature German right of the personality consists thus of various statutes, the general right of the personality filling in the gaps, and the possibility of damages for non-material loss granted in direct contravention of the Civil Code. The last two ingredients are based wholly on constitutional provisions that have been carried over into private law.

Modern German privacy law can thus cover everything from an attempt to broadcast the details of a crime while the criminal's rehabilitation is still in progress[127] to photographs of Princess Caroline in a restaurant having dinner with a friend;[128] from the publication of the lists of former secret police spies in East Germany[129] to the publication of details of the editing methods of a tabloid, obtained by an investigative journalist working with the tabloid under cover;[130] and from the publication of the salaries of famous footballers[131] to the assertion that a famous person is more closely involved with Scientology than he really is.[132] In all these cases, a balancing process is used to determine whether privacy rights or the right of free speech is to take precedence on the facts of the case.

PRIVACY IN THE UNITED STATES

The United States is, of course, a co-inheritor of the common law with Australia. Until 1890, only the patchy protection of privacy through the protection of other interests, as outlined above in relation to the Anglo-Australian common law, existed in the United States.[133]

In 1890, however, a famous article[134] by Warren and Brandeis (later Brandeis J) was published in the 'Harvard Law Review'. The article attempted a synthesis of the patchy protection of privacy in the common law. It argued that the protection was not really patchy, and that the common law should now be understood as recognising a general right of privacy towards which earlier cases had been groping. Moreover, the recognition of

127 BVerfGE 35, 202. See further BVerfG (Kammer), NJW 2000, 1859.

128 BGHZ 131, 332.

129 BGH, VersR 1994, 1116, 1117. Cf also BVerfG (Kammer), NJW 1999, 3326; LG Berlin, NJW 1997, 1373, 1374. In accordance with the balancing process outlined above, it is permissible to publish the name of someone who holds a public office (such as Premier of the State of Brandenburg) if the need for public information outweighs the privacy rights of the person concerned: BGHZ 139, 95, 107; BGH, NJW 1999, 2561; OLG Hamburg, NJW 1999, 3343, 3344.

130 BVerfGE 66, 116; BGHZ 80, 25; BGH, NJW 1981, 1366.

131 AG Berlin-Mitte, NJW 1995, 2639.

132 BVerfGE 99, 185, 194–6.

133 *Restatement (Second) Torts*, 376–7; Anonymous, 'The Right to Privacy' (1891) 3 Green Bag 524, 525; Barron, "Warren and Brandeis, 'The Right to Privacy' (1890) 4 Harv LR 193: Demystifying a Landmark Citation" (1979) 13 *Suffolk University Law Review* 875, 885–6; Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962, 972; Kacedan, above n 51, 610–13; Keeton, *Prosser and Keeton on the Law of Torts* (5th ed, 1984), 849; Kimbrough, above n 44, 99–100, 102; Leebron, 'The *Right to Privacy's* Place in the Intellectual History of Tort Law' (1991) 41 *Case Western Reserve Law Review* 769, 777–8; McQuoid-Mason, above n 43, 35; Pember, above n 43, 48–52, 55–6, 68; Prosser, above n 45, 389; Yang, above n 44, 180.

134 Warren and Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

such a right was necessary in what was then the modern age, owing to the complete disregard of the ordinary decencies by certain sections of the media. The authors also dealt briefly with defences such as publication in the public interest, privilege and consent. Their discussion sparked off a debate in various American journals,[135] which was conducted, as one might expect given the terms of the article, as a debate about whether the precedents did or did not justify the existence of a stand-alone right of privacy in the common law.

The first court of final resort to deal with this problem, the Court of Appeals of New York, rejected the argument from precedent. In light of what was said above about the 'patchy' protection of privacy through other interests in the Anglo-Australian common law, this is not really surprising. The case — *Roberson v Rochester Folding Box Co*[136] — involved the unauthorised use of the plaintiff's picture in advertising together with the execrable, but not defamatory pun 'flour of the family'. The plaintiff claimed to have suffered psychologically because of this, owing to others' teasing. She claimed damages. Four of the seven judges rejected her claim on the grounds that the common law knew nothing of a right of privacy. The recognition of any such right could, they said, lead to floods of litigation. If any such right was to be created, the legislator should do it. The three dissenting judges thought that a new rule should be created for the new technology involved in photography and that analogies with already existing cases of breach of confidence and publication of letters and manuscripts were permissible.

The storm of protest that resulted from the majority's decision[137] led to the publication by one of the majority judges of a defence of his decision and to the overruling of it by the legislature, at least in relation to the use of unauthorised photographs in advertising; the legislature did not introduce a more general right of privacy.[138] But the battle for a common-law right of privacy went on, and it met with success in the next state in which the question was considered, Georgia.

Pavesich v New England Life Insurance Co[139] involved very similar facts: mis-use of the plaintiff's image without consent in advertising. Cobb J, for a unanimous Supreme Court of Georgia,

> conceded that the numerous cases decided before 1890 in which equity has interfered to restrain the publication of letters, writings, papers, etc, have all been based either upon the recognition of a right of property, or upon the fact that the publication would be a breach of contract, confidence, or trust.[140]

But the Supreme Court felt able to recognise the right of privacy as a natural human right translated into the civil law by means of constitutional law.

[135] The two most significant contributions to this debate are Hadley, 'The Right to Privacy' (1898) 3 *Northwestern Law Review* 1, 3–13, 18; Thompson, above n 44, 156.

[136] (1902) 64 NE 442.

[137] O'Brien, 'The Right of Privacy' (1902) 2 *Columbia Law Review* 437. See further Cowen, above n 59, 18; Hofstadter, *The Development of the Right of Privacy in New York* (1954), 11; Kimbrough, above n 44, 27–8; Larremore, 'The Law of Privacy' (1912) 12 *Columbia Law Review* 693, 694; Pember, above n 43, 65–6; Prosser, above n 45, 385.

[138] *New York Civil Rights Law* §§ 50, 51.

[139] (1905) 50 SE 68.

[140] (1905) 50 SE 68, 75.

Natural human rights included not only the right to free bodily movement, but also the right to be free from invasions of one's private life. And both the federal and the state Constitutions provided that citizens could not be unlawfully deprived of their liberty, which included their natural-law rights. Moreover, the First Amendment of the United States Constitution and the equivalent provision of the state Constitution did not protect speech that was the mental equivalent of a false imprisonment:

> As long as the advertiser uses him [the plaintiff] for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master.[141]

There is, it should be added, no evidence that the German courts of the 1950s, when they relied on an analogy with false imprisonment to justify damages for non-material loss, were aware of these lines from the decision of the Supreme Court of Georgia in 1905![142]

It is interesting that constitutional provisions should be cited in aid of the development of a right of privacy in tort many decades before a constitutional right of privacy enforceable against the state was discovered — or perhaps invented — in the United States Constitution by decisions such as *Griswold v Connecticut*.[143] It is, of course, important not to confuse the constitutional right developed in the 1960s and 1970s with the right of privacy in tort available against private persons and introduced to give effect to constitutional values in the manner just described.

It is very noticeable in *Pavesich* that the court did not adopt Warren and Brandeis' argument from the precedents until it had come to the conclusion that the right to privacy was established on the natural-law and constitutional basis just mentioned. To the limited extent that the court cited precedents, they were really nothing more than a prop for a decision already reached on other grounds.[144] That is certainly how the Supreme Court of Rhode Island saw the decision from Georgia when it refused to follow it and rejected a common-law right of privacy on the grounds that the natural law had no force in Rhode Island owing to the complete sovereignty of the state legislature, which, in that respect, was the inheritor of the sovereignty of the Imperial Parliament.[145] In other states, such as California[146] and Missouri,[147] the growing body of

141 (1905) 50 SE 68, 80.

142 Malmström (ed), above n 103, 80.

143 (1965) 381 US 479; 14 L Ed (2nd) 510. The best-known consequence of the constitutional right to privacy is the decision in *Roe v Wade* (1973) 410 US 113; 35 L Ed (2nd) 147. As can be seen below (n 174), nowadays constitutional rights other than the right to privacy can severely and unjustifiably restrict the individual's privacy, but these forces were not operating when the private-law right to privacy was created in the early 1900s.

144 Leovy, 'Torts — The Right of Privacy' (1939) 13 *Southern California Law Review* 81, 87; Malmström (ed), above n 103, 45; Moreland, 'The Right of Privacy To-day' (1931) 19 *Kentucky Law Journal* 101, 111–12; Pannam, above n 43, 10. See also Leebron, above n 133, 788–90; Pember, above n 43, 56–7.

145 *Henry v Cherry* (1909) 73 Atl 97.

146 *Melvin v Reid* (1931) 297 P 91, 93; Bloustein, above n 133, 992; Nizer, 'The Right of Privacy: A Half-Century's Developments' (1941) 39 *Michigan Law Review* 526, 536.

147 *Barber v Time* (1942) 159 SW (2nd) 291, 294.

precedent in favour of a right of privacy was of course important in their decisions to adopt the right; but they also relied to a large extent on constitutional and natural-law reasoning. Indeed, there was even a need for a decision to the effect that the constitutional and natural-law basis of the new tort did not prevent its modification by the legislature in the same way as other common-law rules can be modified.[148]

Over the years, the precedents in favour of a right of privacy gradually increased in number and the contrary view gradually lost ground. Although there was a time in the 1930s when the right of privacy seemed to be in retreat, and perhaps even headed for extinction,[149] the first *Restatement*'s support of it probably saved the day.[150] Today, all states other than North Dakota and Wyoming recognise some form of right of privacy,[151] although in the minority of states in which the courts *initially rejected* a right of privacy at common law, such as New York[152] and Rhode Island,[153] the right exists by statute only.[154] The right of privacy has been systematised — and the system recognised by the Supreme Court of the United States[155] — in Prosser's[156] ground-breaking[157] and almost[158] universally

[148] *Norman v City of Las Vegas* (1947) 177 P (2nd) 442, 446–8; Davis, above n 45, 18–19; Kimbrough, above n 44, 31–2; Kimbrough (2), above n 44, 450, 461–2; Schiffres, 'Invasion of Privacy by Use of Plaintiff's Name or Likeness for Non-Advertising Purposes' (1967) 30 *American Law Reports* (3rd) 203, 278; Shipley, above n 44, 755, 761–2.

See also *Peck v Tribune* (1909) 214 US 185, 190; 53 L Ed 960, 963; *Prudential Insurance Co of America v Cheek* (1922) 259 US 530, 538, 542–3; 66 L Ed, 1044, 1052–3; *Griswold v Connecticut* (1965) 381 US 479, 486, 523–6; 14 L Ed (2nd) 510, 516, 538–40; *Katz v United States* (1967) 389 US 347, 350–1; 19 L Ed (2nd) 576, 581; *Paul v Davis* (1976) 424 US 693, 712–13, 735 fn 18; 47 L Ed (2nd) 405, 420–1, 434 fn 18; Clark, 'Epilogue: When Privacy Rights Encounter First Amendment Freedoms' (1991) 41 *Case Western Reserve Law Review* 921, 927; Schopler, 'Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy' (1975) 43 L Ed (2nd) 871, 875–6; Zimmerman, above n 45, 298–9.

A similar conclusion was reached in Germany: OLG Munich, VersR 1963, 1086, 1087.

[149] *Bazemore v Savannah Hospital* (1930) 155 SE 194, 197. For further views from this period cf Kacedan, above n 51; Lisle, 'The Right of Privacy (A Contra View)' (1931) 19 *Kentucky Law Journal* 101, 137–8; Moreland, above n 144, 102–3, 122; Winfield, above n 43, 36–7; and see Prosser, 'Das Recht auf die Privatsphäre in Amerika' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 21, 401, 402.

[150] von Gerlach, 'Der Schutz der Privatsphäre von Personen des öffentlichen Lebens in rechtsvergleichender Sicht' *Juristenzeitung* 1998, 741, 743; Kimbrough, above n 44, 29; McQuoid-Mason, above n 43, 37; Prosser, above n 45, 386.

[151] O'Neil, 'Privacy and Press Freedom: Paparazzi and Other Intruders' [1999] 2 *University of Illinois Law Review* 703, 705.

[152] See above n 138.

[153] *General Laws of Rhode Island* § 9–1–28.1.

[154] See the lists in Neill, above n 43, 396 fn 20; Prosser, above n 45, 386–8; Zimmerman, above n 45, 365–7.

[155] *Zacchini v Scripps-Howard Broadcasting Co* (1977) 433 US 562, 571–573; 53 L Ed (2nd) 965, 973–4.

[156] (1960) 48 Cal LR 383. The essay has even appeared in a German-language version: Prosser, above n 149, 401.

[157] Bailey, above n 43, 271; Dworkin, above n 43, 421; Kalven, 'Privacy in Tort Law — Were Warren and Brandeis Wrong?' (1966) 31 *Law & Contemporary Problems* 326, 331. For earlier attempts at systematisation see Gordon, above n 17, 555; Green, 'The Right of Privacy' (1932) 27 *Illinois Law Review* 237; Leovy, above n 144, 86–7.

[158] Exceptions: Bloustein, above n 133; Gross, above n 44, 46–53; Laster, above n 33, 61; Parent, above n 44, 103–4; Swanton, above n 44, 94. Cf Bedingfield, 'Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy' (1992) 55 *Modern Law Review* 111, 112; Dworkin, above n 43, 433–4; Emerson, above n 44, 332; Frazer, above n 43, 295–6; Storey, above n 43, 500; Wacks, above n 44, 75–6.

accepted[159] analysis of it into four branches: the public disclosure of embarrassing private facts; 'false light' cases such as those involving the attribution of beliefs to an individual that he or she does not hold; intrusion (by eavesdropping, for example); and, finally, the commercial exploitation of the plaintiff's personality as in *Pavesich* and like cases.

It is not possible to present here all the complexities of the modern American law of privacy. A study of judicial change in the law requires only the presentation of the reasons why the right was introduced by judges into the common law in the first place. It is, however, worth mentioning one of the major problems of current American law: its lack of a balancing process along German lines for cases in which it can be argued that there is a real public interest in the information that is said to be published or to have been obtained in breach of the plaintiff's right of privacy.[160] Rather than balancing the interests involved in each individual case, the US courts apply rules which can lead to injustice in individual cases because of their inflexibility.[161] The fundamental reason for this is the primacy given in American law to freedom of speech under the First Amendment.[162]

159 *Restatement (Second) Torts*, 377; Barron, above n 133, 892; Brittan, above n 43, 235, Clark, above n 148, 922–3; Dworkin, above n 43, 422; von Gerlach, above n 150, 743, Leebron, above n 133, 808; Malmström (ed), above n 103, 46–7; McQuoid-Mason, above n 43, 37, 93; Pember and Teeter, 'Privacy and the Press since *Time v Hill*' (1974) 50 *Washington Law Review* 57, 62; Singh, above n 53, 713; Wade, above n 45, 1095; Yang, above n 44, 177–9; Zimmerman (2), above n 45, 365–6 (see also 382–3).

160 Belsey, 'Privacy, Publicity and Politics' in Belsey and Chadwick (eds), *Ethical Issues in Journalism and the Media* (1992), 85; Bloustein, 'Privacy, Tort Law and the Constitution Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?' (1968) 46 *Texas Law Review* 611, 622–3; Brittan, above n 43, 255; Cowen, above n 59, 27; Hadley, above n 135, 3; Eaton, 'The American Law of Defamation: Through *Gertz v Robert Welch* and Beyond An Analytical Primer' (1975) 61 *Virginia Law Review* 1349, 1402–1; Emerson, above n 44, 342; Hill, 'Defamation and Privacy under the First Amendment' (1976) 76 *Columbia Law Review* 1205, 1255–6; Kalven, above n 157, 335–6; Markesinis, above n 92, 421–2, McQuoid-Mason, above n 43, 39; Nizer, above n 146, 542–3; Swanton, above n 44, 96, 103; Taylor, 'Privacy and the Public' (1971) 34 *Modern Law Review* 288, 290–1; Wright, 'Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach' (1968) 46 *Texas Law Review* 630, 632; Zimmerman, above n 45, 350–4.

161 For an excellent recent discussion from an Australian perspective of the merits of the 'rules' and 'balancing' approaches, see Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 687–707. It is apparent from what follows that the present author favours the 'balancing' approach, but space does not permit a full discussion of this issue here. For a South African analysis unfavourable to the balancing approach, see Woolman, 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' (1997) 13 *South African Journal of Human Rights* 102.

162 BVerfGE 30, 173, 226; Anonymous, above n 45, 1027; Craig and Nolte, above n 45, 164–5, 168; Eberle, 'Public Discourse in Contemporary Germany' (1997) 47 *Case Western Reserve Law Review* 797, 874–5, 900; Fiss, 'Free Speech and Social Structure' (1986) 71 *Iowa Law Review* 1405, 1419; Kentridge, above n 22, 254–5, 258; Lücke, above n 24, 278–9; Markesinis, 'The Right to be Let Alone versus Freedom of Speech' [1986] *Public Law* 67, 80; Schauer, 'Social Foundations of the Law of Defamation: A Comparative Analysis' (1980) 1 *Journal of Media Law & Practice* 3, 13; Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219, 230.

A particularly vivid example is *Time v Hill*.[163] *Time* magazine had published a review of a play which allegedly reproduced the ordeal of the Hill family, which had been taken hostage by armed bandits a few years earlier. The Hill family sued for invasion of privacy, although because they sued in New York they could do so only under statute, and then only in a branch of privacy law that did not really encapsulate their complaint terribly well: the commercial exploitation of their personality in trade rather than simple invasion of their privacy by means of publication.[164] But it was not this that was fatal to their cause; the result would doubtless have been the same in the common-law states, as federal constitutional standards were applied.

Although certain of the details in the play were false, such as allegations of maltreatment of the Hill family by the bandits, and thus a defence of true information about newsworthy events[165] was not available, the court applied the 'actual malice' standard which had been announced for defamation law in *New York Times v Sullivan*.[166] This standard demands 'actual malice' if a suit in defamation is to succeed, which is interpreted as: knowledge of the falsity of an accusation, or recklessness (absence of belief) in relation to its truth; a belief in the truth of a report, however irrational, does not suffice to show 'actual malice'.[167] As the defendant thought that what it had written was true, the plaintiff was unable to establish 'actual malice' and thus failed.

The court left itself open to the justified criticism that it had applied a standard appropriate for the defence of reputation in the world to a case involving the right to privacy from the world.[168] In relation to privacy, true revelations about, for example, one's private life will often be much more distressing than false ones.[169] The Hill family simply wanted to be left alone and not to become the subjects of a media circus resulting from their ordeal.

In any case, many false statements about one's private life will be defamatory at common law. Truth, or belief in truth, has simply nothing to do with the right of privacy at all — the obvious exception being 'false light' cases, in which the light in which the plaintiff is shown must, of course, be false.[170]

163 (1967) 385 US 374; 17 L Ed (2nd) 456.

164 Swanton, above n 44, 94–5.

165 On which see Hofstadter, above n 137, 37–9.

166 (1964) 376 US 254, 279; 11 L Ed (2nd) 686.

167 See, eg, *Ocala Star-Banner v Damron* (1971) 401 US 295; 28 L Ed (2nd) 57 (gross negligence not sufficient for liability); *Harte-Hanks Communications v Connaughton* (1989) 491 US 657, 666–8; 105 L Ed (2nd) 562, 576–7.

168 Anonymous, above n 45, 1032–8; Calcutt Committee, above n 44, 25; Chemerinsky, above n 45, 753; Craig and Nolte, above n 45, 164; Emerson, above n 44, 333; Nimmer, above n 45, 958–9, 966; Schauer, above n 45, 704–13, 724; Wade, above n 45, 1094; Yang, above n 44, 175–6, 185; Zimmerman, above n 45, 321–4; Zimmerman (2), above n 45, 387, 393–4; see also Winfield, above n 43, 24; for counter-arguments see Davis, above n 45, 8–9; Gilles, above n 45, 732–6. Barendt, 'Privacy and the Press' in Drewry and Blake (eds), 'Law and the Spirit of Enquiry: Essays in Honour of Sir Louis Blom Cooper QC' (1999), 27–8, 33–6.

169 Davis, above n 45, 8; Law Reform Commission (Australia), *Unfair Publication: Defamation and Privacy* (1979), 109; Wacks, above n 43, 48; Wade, above n 45, 1106–7, 1109. A less convincing distinction is made by Warren and Brandeis, above n 134, 197–8.

170 Prosser, above n 45, 419; Schauer, above n 45, 700. But see Nimmer, above n 45, 962–4; Zimmerman (2), above n 45, 438–47.

Moreover, the courts appear to apply in at least some of these cases, includ ing *Time v Hill*, a test for the applicability of the 'actual malice' standard in *New York Times v Sullivan* which deviates from the current test, which is that the plaintiff must be either a public official or a public figure and must thus have willingly assumed the risk of publicity of his or her private life; otherwise it is not necessary for the plaintiff to show 'actual malice'.[171] The earlier, wider test — the mere existence of public interest in the matter concerned, regard less of the status of the plaintiff — was rejected in defamation law in *Gertz v Welch*.[172]

But this does not seem to have filtered through to all courts concerned with privacy claims. Thus it has been held that there is a privilege, independently of the privilege relating to public officials and public figures, for newsworthy information provided 'so that individuals may cope with the exigencies of their period',[173] and this phrase, which at first sight appears to be almost meaning less, is interpreted broadly. So the right of free speech includes a right to broadcast the names of the victims of rape,[174] who are surely the prime example of persons who have not willingly stepped forward into the limelight and assumed the risks of publicity. This extraordinary jurisprudence is made even more unacceptable by the fact that states can choose, if they wish, to keep details about offenders secret.[175] It seems that the American constitutional preference for free speech has largely emptied the right to privacy of content despite the initial recognition at the start of the twentieth century that even a private-law right of privacy also serves constitutional goals, those goals appear to have been largely forgotten, and preference is given to free speech as if it were the sole constitutional value worthy of protection. Accordingly, there are very few successful plaintiffs nowadays in American privacy law.[176]

PRIVACY IN ENGLAND

Privacy is, as was mentioned above, not a category that is currently recognised by English law. In the discussion of the patchy protection of privacy in Anglo Australian law above, many of the cases cited were English. And the outlook

171 *Wolston v Reader's Digest* (1979) 443 US 157, 166–7; 61 L Ed (2nd) 450, 459–60; Adair 'Free Speech and Defamation of the Public Person: The Expanding Doctrine of *New York Times Co v Sullivan*' (1967) 52 *Cornell Law Quarterly* 419, 427–9; Black, 'The Supreme Court: 1966 Term' (1967) 81 *Harvard Law Review* 69, 165; Gounalakis, *Privacy and the Media*, (2000) 37; Prosser, above n 45, 411; Schauer, above n 162, 8–9; Wright, above n 160, 637.

172 (1974) 418 US 323; 41 L Ed (2nd) 789.

173 *Campbell v Seabury Press* (1980) 614 F (2nd) 395, 397.

174 *Florida Star v BJF* (1989) 491 US 524, 533–40; 105 L Ed (2nd) 443, 455–9. For further references, see Bast, 'Publication of the Name of a Sexual Assault Victim: The Collision of Privacy and Freedom of the Press' (1995) 31 *Criminal Law Bulletin* 379.

175 *Los Angeles Police v United Reporting Publishing* (1999) 145 L Ed (2nd) 451, 460, 462–3

176 *Anderson v Fisher Broadcasting Co* (1986) 712 P (2nd) 803, 809–10; *Florida Star v BJF* (1989) 491 US 524, 550–1; 105 L Ed (2nd) 443, 466; Barron, above n 133, 880–1, 922; Markesinis, above n 92, 422–3; Markesinis, above n 162, 73; Pember and Teeter, above n 159, 69–70; Zimmerman, above n 45, 293. See, however, for counter-examples, Craig and Nolte, above n 45, 164–5. On the success rate in 'false light' suits, see Donaldson, 'False Light Invasion of Privacy — Neutral or Laudatory Depiction of Subject' (1988) 5 *American Law Reports* (4th) 502, 507–8; Zimmerman (2), above n 45, 366–7.

for the recognition of a right of privacy in English law seemed bleak when, in the early 1990s in *Kaye v Robertson*,[177] three Judges of the Court of Appeal confirmed that there was no such thing as a right to privacy. It seemed that any change would have to come, if at all, from Parliament — and Parliament's record of passing Bills designed to protect privacy is not a good one.[178]

Things have, however, moved on since the early 1990s. Lord Nicholls of Birkenhead has stated expressly, if obiter, that the creation of a right of privacy by the judges can no longer be ruled out.[179] Buxton LJ is also no longer willing to state that such a development is impossible — and that even without the influence of the *Human Rights Act 1998*.[180]

That Act, which is now in force,[181] incorporates the European Convention on Human Rights into English public law. This will affect English private law to a greater or lesser extent. The academic debate and public discussion on this issue continues.[182] The ultimate effect of the Act cannot be conclusively

[177] [1991] FSR 62, 66, 70–1.

[178] There has been a large number of attempts to introduce a general right of privacy into English or Australian law by legislation, all of which have failed. See Anonymous, 'The South Australian *Privacy Bill 1974*' (1974) 48 *Australian Law Journal* 457; Bingham, above n 43, 452; Brittan, above n 43, 261–5; Calcutt Committee, above n 44, 1, 19–20, 46, 48; Cowen, above n 59, 14–15, 23–5, 36–7, 49–50; Craig and Nolte, above n 45, 162; Dunstan, *Felicia: The Political Memoirs of Don Dunstan* (1981), 222; Law Reform Committee (South Australia), above n 43; Dworkin, above n 43, 430–1; Dworkin, above n 44; Frazer, above n 43, 310; Hurst and White, above n 54, 121; Law Reform Commission (Australia), above n 169, 113–16; Markesinis (2), above n 44, 119; McQuoid-Mason, above n 43, 54–5; National Heritage (Secretary of State for), *Privacy and Media Intrusion* (Cmnd 2918 (1995)), 1–2; Neill, above n 43, 898–9; Samuels, above n 44, 123–5; Seipp, above n 43, 345–350; Storey, above n 43, 506–9, 512; Swanton, above n 44, 97; Taylor, above n 160.

[179] *R v Khan* [1997] AC 558, 582–3; Lester, 'English Judges as Law-makers' [1993] *Public Law* 269, 284–6; Loon, 'Emergence of a Right to Privacy from within the Law of Confidence?: *Hellewell v Chief Constable of Derbyshire*' [1996] *European Intellectual Property Review* 307, 312; Samuels, above n 44, 122; Singh, above n 53, 714–15; Stallard, above n 43, 585. Cf also *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372; Bingham, above n 43, 453.

[180] Buxton, 'The Human Rights Act and Private Law' (2000) 116 *Law Quarterly Review* 48, 64–5. Somewhat less optimistic, but very amusing are the extra-judicial remarks of Lord Bingham of Cornhill LCJ: 'This is the argument favoured by those who believe that the Judges should receive a large injection of testosterone to bolster their flagging fertility. The prospects for procreation are, however, discouraging': Bingham, above n 43, 461. Perhaps, as is mentioned in the text, the Viagra of the *Human Rights Act 1998* will do the trick.

[181] The Act came into force in England on 2 October 2000: *Human Rights Act 1998 (Commencement No 2) Order 2000* (SI 2000 No 1857 (C 47)). On the position in Scotland, see s 57 (2) of the *Scotland Act 1998* and the definition of 'Convention rights' in s 126.

[182] Bamforth, 'The Application of the *Human Rights Act 1998* to Public Authorities and Private Bodies' [1999] *Cambridge Law Journal* 159; Buxton, above n 180; Hunt, 'The 'Horizontal Effect' of the *Human Rights Act*' [1998] *Public Law* 423; Leigh, 'Horizontal Rights, the *Human Rights Act* and Privacy: Lessons from the Commonwealth?' (1999) 48 *International and Comparative Law Quarterly* 57; Lester of Herne Hill (Lord) and Pannick, 'The Impact of the *Human Rights Act* on Private Law: the Knight's Move' (2000) 116 *Law Quarterly Review* 380; Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the *Human Rights Act*' [2000] *Public Law* 476; Phillipson, 'The *Human Rights Act*, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?' (1999) 62 *Modern Law Review* 824. Singh, above n 53; Wade, 'Horizons of Horizontality' (2000) 116 *Law Quarterly Review* 217.

judged in advance of the case law, as the Act contains no clear statement about the effect of the public-law rights imported into English law in private-law disputes. Admittedly, the House of Lords refused in *Reynolds v Times Newspapers*[183] to create a widened privilege in defamation law for discussion of governmental and political matters along the lines of the extended privilege in the United States[184] or Australia.[185] But their Lordships did not express any final view as to the effect of the Act on the private law, partly because it had not then come into effect, and partly because of the view that the common law of defamation in the area in question was in accordance with the Convention anyway.[186]

Although there is no judicial expression of opinion about whether English privacy law can be reconciled with the Convention, the lack of a general right to privacy in English law and the presence of such a right in the Convention suggests at least prima facie that it cannot. Article 8 of the Convention, as set out in Schedule I to the *Human Rights Act 1998*, states:

> ARTICLE 8
>
> RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Lord Nicholls of Birkenhead did, moreover, note in *Reynolds* that the common law was to be developed in accordance with the rights enshrined in the Act,[187] a position for which there are a number of precedents in the field of privacy in other countries.[188] It therefore now seems possible — but by no means certain — that English law will develop, either independently of the Convention or in reliance on it, a general concept of privacy, as Lord Nicholls of Birkenhead has suggested.

Similarly, judicial voices have been heard in Canada, even in those provinces which do not have provincial privacy statutes,[189] suggesting an

[183] [1999] 3 WLR 1010.
[184] *New York Times v Sullivan* (1964) 376 US 254; 11 L Ed (2nd) 686.
[185] See above n 14.
[186] [1999] 3 WLR 1010, 1026–7, 1039, 1045, 1059. See also *Derbyshire County Council v Times Newspapers* [1993] AC 534, 551.
[187] [1999] 3 WLR 1010, 1023.
[188] Leigh, above n 182, 64–71.
[189] For a recent case from Canada under a privacy statute which contrasts strongly with US law, see *JMF v Chappell* (1998) 158 DLR (4th) 430. On the privacy legislation, see generally Calcutt Committee, above n 44, 13, 88–92; Craig and Nolte, above n 45, 166; Gibson, above n 43, 343–8; Moen, ''Lifestyles of the Rich and Famous' — Personality Rights — A Canadian Perspective' (1995) 6 *Australian Intellectual Property Journal* 30, 34–6; Seipp, above n 43, 367.

independent tort of privacy separate from existing torts, such as nuisance, which would be based on assorted constitutional provisions.[190] On the other hand, it is noticeable that the *New Zealand Bill of Rights Act 1990* contains no right of privacy;[191] attempts to introduce a tort of infringement of privacy there are as yet in the very earliest stages, and success is by no means certain.[192]

WHY THE DIFFERENCE?

It is clear that, in Germany and in most states of the United States, a right of privacy has been developed by judicial decision alone, without any encouragement from the legislator. Such a development is now also possible in England. Why then, has no such development occurred in Australia? How can the difference be explained?

The most obvious explanation is the lack of, or reduced strength of, the doctrine of precedent in the United States and Germany. In Australia, dicta in the *Victoria Park* case, confirmed almost at the end of the period of High Court conservatism and legalism in 1984,[193] stand for the proposition that there is no common-law right of privacy. Commentators have, however, long remarked on the tendency in the United States to treat precedents in a somewhat freer way than in the Anglo-Australian world;[194] and although we must not fall into the trap of supposing that in England precedents are always followed, whereas in the United States they are constantly disregarded,[195] the difference is clear enough. The use of the analogy with false imprisonment in the United States as well as Germany is a quite extraordinary co-incidence, from which it would be dangerous to draw too many conclusions, but it too is an illustration of the more free-wheeling American approach to drawing analogies from existing rules to come up with new ones. It is hard to imagine Australian courts relying on such an analogy.

190 *Roth v Roth* (1991) 4 OR (3rd) 740, 756–9; *Aubry v Editions Vice-Versa* (1998) 157 DLR (4th) 577, 593–5 (civil law of Quebec); see also *Heath v Weist-Barron School of Television Canada* (1981) 34 OR (2nd) 126, 127–8 with further references; *Shaw v Berman* (1997) 144 DLR (4th) 484, 492; (1998) 167 DLR (4th) 576; *Gould Estate v Stoddard Publishing* (1998) 39 OR (3rd) 545, 554.

191 Section 21 of the Act does however contain a provision very similar to — indeed, more detailed than — s 8 of the *Canadian Charter of Rights and Freedoms*, on which the court in *Roth v Roth* (1991) 4 OR (3rd) 740, 756–9 partially relied to support its conclusion in favour of a right of privacy. This possible argument has not yet occurred to the courts of New Zealand.

192 *TV 3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720, 727–8. For earlier cases, see *Tucker v News Media Ownership* [1986] 2 NZLR 716, 733; *Bradley v Wingnut Films* [1993] 1 NZLR 415, 423. In both cases, the need for caution in this area was stressed. Somewhat more optimistic: Paton-Simpson, 'Privacy and the Reasonable Paranoid: the Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305, 309 n 30, 318–20.

193 See above n 18.

194 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 733; Brittan, above n 43, 243–4; Burns, above n 43, 23; Cappelletti, above n 24, 62–3; Devlin, above n 24, 6; Dworkin, above n 43, 431; Jaffe, *English and American Judges as Lawmakers* (1969), 63; Pratt, 'The Warren and Brandeis Argument for a Right to Privacy' [1975] *Public Law* 161, 162; Skala, above n 43, 138–40; Yang, above n 44, 188.

195 See on this misleading black-and-white thinking Kirby, above n 1.

In addition, as there is no general federal common law in the United States,[196] there are more courts at the apex of common-law jurisprudence which can be convinced of the need for a right of privacy: a failure in New York is offset by success in Georgia. Furthermore, by the time the High Court dealt with this matter in the *Victoria Park* case in 1937, there were already twentieth-century English precedents against a right to privacy which were cited by the court,[197] whereas the Supreme Court of Georgia — in contrast to the Court of Appeals of New York — treated the problem in the early 1900s as a new one thrown up by new technology on which there were no binding precedents.

> When a Court finds itself with a problem upon which it has no guideline it arrives at a point where judicial discretion is exceedingly valuable. The choice is to create something where nothing existed or to determine that nothing exists because nothing has existed. The English Courts and the American Courts

— or rather, some American courts —

> have taken different paths over the issue of privacy.[198]

In England, there is, however, still no precedent of the House of Lords[199] which rejects the idea of a right of privacy in the way in which the High Court has done in Australia. It is therefore open to the House of Lords simply to overrule decisions of the Court of Appeal such as *Kaye v Robertson*,[200] or to distinguish them on the basis that the legal context has changed owing to the *Human Rights Act 1998*.

In Germany, there is, as we have already seen, no doctrine of precedent on the Anglo-Australian model at all. Although of course the courts try to avoid unnecessary and pointless appeals by not deviating too often from the decisions of courts above them, a doctrine of precedent on Anglo-Australian lines is not something that is found in systems which are based on Roman law.[201] German courts, therefore, are not legally bound to follow decisions even of courts above them in the same hierarchy unless the law specifically says so and it so provides only in relation to the decisions of the Federal Constitutional Court,[202] in relation to the re-hearing of a matter remitted after an appeal from

196 *Erie Railroad Co v Tompkins* (1938) 304 US 64; 82 L Ed 1188.

197 *Sports & General Press Agency v 'Our Dogs' Publishing Company* [1916] 2 KB 880, 884, [1917] 2 KB 125; see also *Hickman v Maisey* [1900] 1 QB 752, 759.

198 Skala, above n 43, 139. Cf also *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 710.

199 The refusal of the Privy Council to hear an appeal in *Victoria Park* (Paton, 'Comment' (1938) 54 *Law Quarterly Review* 319, 319–20) does not, of course, count as a precedent in the English system: Cross and Harris, *Precedent in English Law* (4th ed, 1991), 101–2.

200 [1991] FSR 62.

201 *Apand v Kettle Chip* (1999) 88 FCR 568, 599–600; Young, 'Precedent in Roman Law' (2000) 74 *Australian Law Journal* 142.

202 § 31 I of the BVerfGG (Law on the Federal Constitutional Court). There is a controversy in German law about the precise extent to which decisions of the Federal Constitutional Court bind other courts; a distinction similar to that between ratio decidendi and obiter dictum is made: cf eg, Maunz and Zippelius, *Deutsches Staatsrecht* (29th ed, 1994), 370.

a higher court with directions as to the law,[203] and in relation to decisions of the rarely-convened Grand Senate of the Federal Supreme Court,[204] which meets occasionally to settle disagreements among the various divisions ('Senates') of that court.[205]

But, of course, the doctrine of precedent, while explaining why Australian courts beneath the High Court have not come up with a general right of privacy, can be only a partial explanation for the failure of the Australian High Court to do so. It may be conceded that litigants faced with apparently strong precedents are unlikely to want to waste their resources in what may well be futile litigation, but even this deterrent effect does not completely explain why the High Court has been deprived of the opportunity to re-consider *Victoria Park* in the last decade and a half. As is well known, the High Court can depart from its own decisions — and constantly did so in the 1980s and 1990s. Even if it assumed that the rejection of a right of privacy is part of the ratio of *Victoria Park* and not merely obiter dicta (and this issue is arguable both ways), it is only that case and one other that have rejected the idea of privacy.[206] That is at least arguably not a 'significant succession of cases' within the well-known criteria for overruling laid down in *John v Federal Commissioner of Taxation*.[207] The precedents, therefore, can be only a partial explanation.

Another ingredient is doubtless the influence of scholars on the law. In a country like Germany, in which Roman law was initially received through the universities, the influence of academics on the law has always been fairly strong. Many of the higher courts' judges are or once were university professors, or have PhDs.[208] The university has always been looked to as a source of law in practice, and Germany has had, for much longer than in common-law countries, a tradition of scholarly advocacy of change in the law which is independent of the activities of the courts and goes beyond mere systematisation of and commentary on the existing law. That was the main occupation of academics in the common-law world in the days in which most practising lawyers did not even read law at universities and the number of scholars was therefore very small indeed.[209]

[203] See, eg, § 565 ZPO (Ordinance on Civil Procedure), § 358 I StPO (Ordinance on Criminal Procedure).

[204] § 138 I 3 GVG (Law on the Constitution of the Courts).

[205] See further Foster, *German Law and Legal System* (1993), 55–6; Goodhart, 'Precedent in English and Continental Law' (1934) 50 *Law Quarterly Review* 40; Lücke, above n 89, 70 with further references.

[206] See above n 18.

[207] (1989) 166 CLR 417, 438. See also *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 554.

[208] There are approximately ten superior court judges in Australia who were once academics: McPherson, 'Dear Attorney-General: The Issues of Judicial Appointments and Education' (1999) 21:7 *Bulletin of the Law Society of South Australia* 8, 8. There are about 285 superior court judges in Australia: Doyle, 'Do Judges Make Policy? Should They?' (1998) 57:1 *Australian Journal of Public Administration* 89, 89. I do not have comparable figures for the higher courts in Germany, but the percentage of judges there who are (or were once) academics and/or have PhDs is much higher.

[209] Cf Jaffe, above n 194, 108; Lücke, above n 89, 56; Reid, 'The Judge as Law-maker' (1972) 12 *Journal of the Society of Public Teachers of Law (New Series)* 22, 28.

Even though the German courts almost unanimously rejected the general right of the personality until after World War II, that did not stop German academics from advocating its introduction or outlining the content of the right of the personality even before the courts had recognised it.[210] They kept the debate alive and ensured that the issue was not forgotten. When the right was introduced, use could be made of the scholarly elaboration of it. One searches in vain for any such advocacy and elaboration in Anglo-Australian law, at least until World War II.

In the United States, of course, the article by Warren and Brandeis had much to do with precipitating the debate about privacy, even if the precedential arguments in favour of the right which the article used were not really very influential in the end. But in the United States, too, the influence of scholars on the practical law was greater than it was in the Anglo-Australian world at that time.[211]

Things have changed here, too, in the last twenty or thirty years, as the House of Lords has recognised.[212] Academics now do most certainly go beyond systematising and commenting on the existing law. And the courts read what they write, and sometimes even take up the suggestions made; a striking example is the attention paid to the views of non-legal scholars in *Mabo v Queensland [No 2]*.[213] But a common-law right of privacy was rejected in *Victoria Park* in the 1930s, long before the influence of scholars began to wax. Academic advocacy of a judge-made law of privacy in Australia — as distinct from England — is virtually non-existent; the cause appears, owing to *Victoria Park*, to be regarded as lost. There are no Warrens or Brandeises waiting in the wings in Australia. Rather, their contemporary Australian equivalents concentrate on urging the legislator to introduce a right of privacy.[214]

A third reason for the lack of a right to privacy may be suggested. The introduction of a law of privacy would not be a simple or easy task, as was, for example, the abolition of the alleged immunity for husbands who commit rape. What remained after that ruling was simply the usual criminal liability of rapists. There was no need for the courts to develop any further rules; in fact, the law became simpler as it was no longer necessary to decide whether, for example, even an estranged husband was still entitled to the immunity.[215] The same may be said of removing the distinction between mistakes of law and

210 For advocacy of the concept of a general right of the personality by academics in Germany before the courts recognised it, cf Gareis, 'Recht am menschlichen Körper' in Juristische Fakultät zu Königsberg (ed), *Festschrift für Johann Theodor Schirmer* (1900), 84–5; von Gierke, *Deutsches Privatrecht* (1895–1917), Vol I 702–23, Vol III 887–8; Gutteridge, above n 87, 204; Keyßner, 'Das Recht am eigenen Bilde' *Deutsche Juristenzeitung* 1898, 486, 486; Kohler, above n 74; Kohler (2), above n 74; Kohler (3), above n 74; Müller, 'Bemerkungen über das Urheberpersönlichkeitsrecht' *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 2, 367, 370; Smoschewer, above n 87, 125–7.

211 Brittan, above n 43, 244–6; Jaffe, above n 194, 105–6; Skala, above n 43, 143–4.

212 *Kleinwort Benson v Lincoln C.C.* [1999] 2 AC 349, 372–3, 378.

213 (1992) 175 CLR 1, 107, 181. A more recent English example is *Arthur Hall v Simons* [2000] 3 WLR 543, 550, 560.

214 See, for a recent example, Paterson, 'Privacy Protection in Australia: the Need for an Effective Private-Sector Regime' (1998) 26 *Federal Law Review* 371.

215 See, eg, *R v Clarke* [1949] 2 All ER 448; *R v Miller* [1954] 2 QB 282; *R v McMinn* [1982] VR 53.

mistakes of fact in the law of restitution, which also reduced the complexity of the law.

The introduction of a law of privacy would, however, be a considerably more complicated task. As we have seen in our consideration of American law, there is the difficult question of defining the boundary between permissible free speech and impermissible prying. And the boundary shifts with different plaintiffs: politicians and public figures deserve less privacy than others. Then there is the question of the remedies that could be available for breach of privacy. Unlike German law, Anglo-Australian law has no difficulty with the idea of (punitive) damages for non-material loss; however, injunctions are generally available only if damages are not a sufficient remedy.[216] It is at least arguable that, in relation to threatened breaches of privacy, injunctions should be the primary remedy. Then it would be necessary to define whether invasion of privacy is a strict liability tort or not, the extent to which corporations can take advantage of it, whether it ceases at death or continues, and if so for how long — and so on. In short, the introduction of a right of privacy would not be a simple task.

If it is not a simple task, that makes it less suited to the courts, for at least three reasons: courts' decisions operate, at least in relation to transactions completed before judgment is delivered, retrospectively; courts are not democratically elected, and major changes in the law by them therefore run into problems of democratic legitimacy; and courts cannot really conduct investigations into the effects of changes they may be considering. Unlike the legislature, they cannot set up committees to hear all interested parties before making a change. In the area of privacy, in which many interests compete for consideration, this is precisely what would be desirable before any change is introduced.[217]

216 For a case relating to privacy in which this rule was confirmed, see above n 56.

217 *International News Service v Associated Press* (1918) 248 US 215, 264–7; 63 L Ed 211, 231–3; *DPP v Withers* [1975] AC 842, 863, 872; *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 373; *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 704, 731–3; *Northern Sandblasting v Harris* (1997) 188 CLR 313, 386, 400–3; *Levy v Victoria* (1997) 189 CLR 579, 603; *Heil v Rankin* [2000] 2 WLR 1173, 1190–3; Cappelletti, above n 24, 48–58; Dawson, above n 24, 6; Devlin, above n 24, 11–12; Doyle, above n 23, 86–7; Lane, 'Neutral Principles on the High Court' (1981) 55 *Australian Law Journal* 737, 738–741; Lücke, above n 89, 83–7; Lücke, above n 24, 228–31; Mason, 'The Judge as Law-maker' (1996) 3 *James Cook University Law Review* 1, 7–10; McHugh, 'The Law-making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 116, 120, 125; McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 48; Sackville, 'Continuity and Judicial Creativity — Some Observations' (1997) 20 *University of New South Wales Law Journal* 145, 158–9; Yeo, 'Judicial Law-making and Community Standards' (1999) 8 *Journal of Judicial Administration* 203, 211–12. There is, of course, no possibility that a new judge-made rule of Australian law could operate prospectively only: *Ha v New South Wales* (1997) 189 CLR 465, 503–4, 515; cf also *Torrens Aloha v Citibank* (1997) 72 FCR 581; *Kleinwort Benson v Lincoln CC* [1999] 2 AC 349; Atkinson, 'Law-making Judges' (1981) 7 *University of Tasmania Law Review* 33, 51–2; *R v Governor of Brockhill Prison*; ex parte Evans (no 2) [2000] 3 WLR 843, 846–7, 849, 855–7, 867–8. Devlin, above n 24, 10–11; Diplock, 'The Courts as Legislators' in Harvey (ed), *The Lawyer and Justice: A Collection of Addresses by Judges and Jurists to the Holdsworth Club of the University of Birmingham* (1978), 271, 277, 280–2; Kirby, above n 25, 1801–2; Lücke, above n 89, 44–5.

This is not an article about when the courts should change the law, as distinct from when they do change the law. But perceptions of what the courts should be doing influence what they actually do. And it is rightly perceived that a wide-ranging legislative role involving the introduction of many new rules at once is not generally an appropriate thing for a court to undertake. It is normally the legislature that introduces a whole series of new rules at the one time. If the courts were to do that, as they would have to do if they were to introduce a considered right of privacy, it would be a step that appeared to be very legislative in nature. While everyone in the legal system is used to the idea of the courts making law nowadays, there are still some things which it is appropriate for the legislature alone to do.

The doctrine of precedent, with its distinction between the binding ratio decidendi of a case and the merely persuasive obiter dicta, itself discourages the courts from straying too far from the issues involved in each case that comes before them. It discourages them from laying down a whole series of rules to govern future conduct which are not immediately required.

The list of recent judicial changes in the common law which introduced this discussion is noticeable for including almost exclusively abolitions of existing rules and assimilations of the law of one area to the law of another (escape of dangerous substances assimilated to negligence; liability of spouses assimilated to that of all others; mistakes of law assimilated to mistakes of fact). For the reasons just given, it is very rare for Judges to create whole new areas of law as distinct from altering, abolishing and assimilating existing rules. 'The Courts could never have created the Welfare State'.[218]

But again, this reason, while clearly important, cannot be conclusive. There are several examples of modern Australian courts developing quite complicated legal doctrines: the best recent examples of this are, perhaps, the *Free Speech*[219] cases and *Mabo [No 2]*.[220] So we need to seek other, supplementary explanations of the non-existence of a common-law right of privacy.

It seems fairly obvious that judges are more likely to change the law if they see severe defects in the existing law. Dissatisfaction with precedent is not difficult to discern in the judgment in *Mabo [No 2]*, and, together with advances in knowledge and scholarly advocacy of change, largely explains the change made in that case, despite its relative complexity.

Returning to privacy, it could be said in the 1930s that questionable methods of advertising involving breaches of privacy were more common in the United States than they are elsewhere.[221] That may well explain the difference between the recognition of the tort of invasion of privacy[222] in the United States and Australia's rejection of the tort in the 1930s. But the creeping 'Americanisation' of Australia means that our advertising methods, and our

218 Diplock, above n 217, 279.

219 *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Another example in constitutional law is the complicated doctrine resulting from *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

220 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

221 Winfield, above n 43, 38.

222 See, eg, Calcutt Committee, above n 44, 1.

media standards generally, are becoming harder to distinguish from those of the United States. In England, which has a public and media culture very similar in many ways to Australia's, the appalling infractions of privacy by the media have led to pressure to introduce a tort of invasion of privacy. In Australia, the unauthorised use of people's images in advertisements (such as was committed by a telecommunications company in advertisements in early 1999) and gross intrusions on privacy such as spying on married couples having arguments on their private property and publishing the pictures in the newspaper[223] have also occurred.

Nevertheless, there is no sign of any realisation in the High Court of the need to protect privacy in Australia to a greater extent than currently. In the *Free Speech* cases, for example, which provided an opportunity for judicial hints on this subject, there was nothing. All we have is the recent statement quoted above[224] about the 'common law's protection of privacy', which does not suggest a great deal of unhappiness with the current state of the law. While the incurably optimistic might read it as a spur to further development, it is equally possible that it is a sign of complacency, or simply a throw-away line that sounded good at the time. This might be contrasted with the obvious judicial dissatisfaction with the effect of the law of defamation on political speech immediately before the law was changed in the *Free Speech* cases of the 1990s[225] and the obvious defects of the doctrine of terra nullius in the light of expanding knowledge.

It cannot be that no Australian judges perceive the need for improvements in the law of privacy: Kirby J, for example, was Chair of the Australian Law Reform Commission when it dealt with this issue in comprehensive reports which recommended privacy legislation.[226] Nor could it be said that differences between the Australian law of defamation and the American or German law of defamation explain why there is no need for a right of privacy in Australia. As was noted above, the Australian common law of defamation does not provide an adequate degree of protection for privacy interests: it is confined — at least at common law — to false statements; it protects reputation in the world rather than from the world and thus has nothing to say about, for example, the use of a photograph in connexion with a product that is not in any way disreputable; it is reducing its coverage of sports players owing to changes in their professional status; and, finally, it is of no use when no assertion is made, for example, in relation to intrusion into one's private sphere by spying or taking photographs. The oddities of the common law of defamation render a comparison of it with German law beyond the scope of these reflections; here, it is sufficient to note that — in Australia as in Germany and the United States — the law of defamation is by no means a sufficient substitute for a properly thought-out law of privacy, whatever the individual differences

223 Mullaly, 'Privacy: Are the Media a Special Case?' (1997) 16 *Communications Law Bulletin* 10, 10–11 with further examples; see also Hurst and White, above n 54, Ch 5.

224 See above n 21.

225 *Coyne v Citizen Finance* (1991) 172 CLR 211, 218–19.

226 Law Reform Commission (Australia), above n 169; Law Reform Commission (Australia), *Privacy* (1983).

among the countries may be. In any case, the German law of defamation is to some extent stricter than the Australian. For example, it allows suits in defamation by large groups of people, such as when soldiers are defamed as a class.[227]

Given that there are defects in Australian privacy law which neither the tort of defamation nor other legal rules have removed, it may well be that some Australian judges do indeed perceive the need for improvements in the law of privacy, but consider that the legislature should make them. Or they may even — like some English judges[228] — see in the inaction of the legislature a sign that those with the ultimate responsibility for the state of private law have decided that the law should remain as it is and not be changed, by the legislature or anyone else.[229]

The final explanation offered here for the non-existence of a right of privacy in Australian law is the lack of any constitutional principle that might support such a right in the private law.

We saw above that, in the United States and Germany, constitutional provisions played an important part in the creation by the courts of a right of privacy in the private law. Although the right of free speech has recently tended to undermine the private-law right of privacy in the United States, that right would not have been created at all if constitutional considerations had not influenced the courts. In Germany, not only the recognition of the general rights of the personality, but also the right to damages for non-material loss were directly based on provisions of the Constitution. And if such a right comes into existence in England, it may well be because of the enactment of the *Human Rights Act 1998* and the consequent incorporation of a public-law right to privacy into English law. Canada, too, may be going down the same path.

In contrast to this, there is just no foothold whatsoever for a right of privacy in the Australian Constitution or those of the Australian states,[230] unless an extreme non-interpretivist position is taken which, as well as its many other defects which need not concern us here, would not be in accordance with the text-based method of interpretation re-established in *Lange v Australian Broadcasting Corporation*.[231] One searches in vain in Australian constitutional law for anything that could possibly be the equivalent of the German right freely to develop one's personality or the American reliance on natural-law thinking coupled with the innate freedom of the citizen. And there is — for good historical reasons: the lack of a revolution or a dictatorship in

227 For criticisms of this rule and comparisons with Anglo-American law, see Gounalakis, 'Soldaten sind Mörder' *Neue Juristische Wochenschrift* 1996, 481, 483–4; Gounalakis and Rösler, above n 89, 126–7; Mager, 'Meinungsfreiheit und Ehrenschutz von Soldaten' *Jura* 1996, 405, 409; Soehring, 'Die neuere Rechtsprechung zum Presserecht' *Neue Juristische Wochenschrift* 1994, 16, 16; Soehring, above n 124, 362.

228 *London Artists v Littler* [1968] 1 WLR 607, 615, 619–20; *Blackshaw v Lord* [1984] 1 QB 1, 26, 33–36, 41–2.

229 Cf *Moorgate Tobacco v Philip Morris [No 2]* (1984) 156 CLR 414, 445–6.

230 *Carbone v Police* (1997) 68 SASR 200, 209; Swanton, above n 44, 98–100. Whether a right to privacy could be developed on the basis of international instruments to which Australia is a party was discussed inconclusively in *'GS' v News* [1998] Aust Torts Rep 64,897, 64,913–64,915.

231 (1997) 189 CLR 520.

our past, coupled with the British heritage, which relies chiefly on parliament to protect our rights — no tradition of such broad, sweeping rights in Australian law either.[232] The advantages of this state of affairs have been listed elsewhere.[233]

It is not surprising that a constitutional law which contains such broad concepts as the right freely to develop one's personality should have a significant influence on private law. A constitutional law of that type contains — generally in a Bill of Rights — a large number of broad, sweeping statements that empower judges to give effect to values that appeal to them. Such statements contain the fundamental principles of the legal system; they delimit the state's authority over the citizen; they purport to express the basic values of the society which has adopted them. Such principles are the basic pre-conditions of the operation of the whole legal system, based as it is on the power of the state and the consent of the governed. And judges get used to applying these values in public-law disputes. Fortified and emboldened by that experience, they become used to the idea of applying them in private-law contexts as well.

Finally, of course, a constitutional law which contains such principles has a hierarchical position superior to that of the private law. The precise details of this may vary from country to country — the American 'state action' doctrine which conceives of judicial action to enforce private rights as an exercise of public power[234] is by no means universally accepted[235] — but, as a basic minimum, it is the case that no statute that is inconsistent with the constitutional guarantees can stand. In German law, it is accepted that guarantees of rights in

[232] *Duncan v Jones* [1936] 1 KB 218, 222; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 135–6; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 159–61; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 361–4; *Levy v Victoria* (1997) 189 CLR 579, 607; Aroney, *Freedom of Speech in the Constitution* (1998), 55–7, 161–4; Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249, 261–2; Aroney, 'The Gestative Propensity of Constitutional Implications' (1997) 13:1 *Policy* 26, 28; Barendt, 'Free Speech in Australia: A Comparative Perspective' (1994) 16 *Sydney Law Review* 149, 149–50; Boyle, 'Freedom of Expression as a Public Interest in English Law' [1982] *Public Law* 574, 574, 611; Bronitt and Williams, 'Political Freedom as an Outlaw: Republican Theory and Political Protest' (1996) 18 *Adelaide Law Review* 289, 290–1; Cass, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *Public Law Review* 229, 232–3; Craven, 'Beyond the Constitution: the High Court's Democratic Deficit' (1997) 13:3 Policy 7, 8; Dawson, above n 24, 8–9; Flahvin, 'Can Legislation Prohibiting Hate Speech be Justified in Light of Free Speech Principles?' (1995) 18 *University of New South Wales Law Journal* 327, 328; Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 *Public Law Review* 100, 100–8; Goldsworthy, 'The High Court, Implied Rights and Constitutional Change' (1995) 39:3 *Quadrant* 46, 48–9; Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581, 582; Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 68–9; Patmore, 'Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia: Three Possible Models' (1998) 7 *Griffith Law Review* 96, 98; Sadurski, 'Foreword' (1994) 16 *Sydney Law Review* 145, 145; Tobin, 'Defamation of Politicians, Public Bodies and Officials: Should *Derbyshire* and *Theophanous* Apply in New Zealand?' [1995] *New Zealand Law Review* 90, 101; Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 166.

[233] O'Callaghan, 'The United States Experience of Unfettered Speech and Unfair Trials: A Case Against an Australian Bill of Rights' (1998) 72 *Australian Law Journal* 957.

[234] *Shelley v Kraemer* (1947) 334 US 1; 92 L Ed, 1161.

[235] *Kruger v Commonwealth* (1997) 190 CLR 1, 147–8; *du Plessis v de Klerk* [1996] 3 S Af 850, 872.

the Constitution do influence the content of private law, even though they are not directly applicable in the private law[236] — but this is not a topic which can be further pursued here, especially as there are questions about whether the private law of privacy has been created by the German courts in accordance with the standard doctrine of the indirect influence of the basic rights on private law, or whether they have gone further than that in the case of privacy and allowed constitutional law to influence private law directly.[237]

Australian constitutional law is, by contrast, unlike German constitutional law. It could not — except in very limited areas, such as the impact of the *Free Speech* cases on defamation law — be described as bringing about change in the private law because of its broad general statements of principle on the basic rights of the citizen. This difference in constitutional law is the most powerful explanation for the difference between Germany and the United States, on the one hand, and Australia, on the other. It was constitutional law on which the Germans and Americans directly relied when they introduced a right of privacy. If Australian constitutional law did contain a foothold for such a right, not even the complexity of the task of constructing a new set of rules would necessarily have daunted the judges: it did not daunt them in the *Free Speech* cases, in which whole swathes of defamation law were reformed having regard to perceived constitutional requirements.

If this is right, an Australian common law of privacy is a long way off. Although questions of detail such as the status of the founders' intentions remain to be sorted out, the text-based method of interpretation of the Constitution seems firmly established.[238] If Australia is to have a fully-fledged law of privacy, it will have to be introduced by the legislator. And in a system in which the judicial role is restricted and the democratically elected legislature is considered to be the source of most new law, that is probably a good thing, too — even if it will be necessary to overcome the strong media lobby to reach the goal of a law of privacy. Balancing competing demands and interests — the interests of the media against those of the individual — is how democracy works.

In summary, it has been possible to establish some criteria which point towards judicial change of the law: advocacy of that change by scholars, and the weight given to their opinions in the legal order concerned; the state of the precedents; the degree of simplicity of the proposed change; the judicial perception of the failings of the existing law; and, most importantly, the constitutional principles which can be marshalled to support the change. None of these criteria is satisfied in relation to a change in the Australian common law to recognise a right of privacy. That largely explains why the judges have made no such change. Australians must look to their legislatures for the creation of a general right of privacy.

[236] The starting point is the Lüth judgment of 1958 (BVerfGE 7, 198), on which there is a vast amount of legal literature in German. An English translation may be found in Markesinis, above n 92, 352–8; and see the extremely helpful commentary at 365–70.

[237] BGHSt 10, 202, 205; BGHSt 14, 358, 359, 364; BGHZ 13, 334, 338; OLG Munich, NJW 1959, 388, 389; LG Munich, Ufita 20 (1955), 230, 233; Bußmann, above n 113, 5; Grimm, 'Persönlichkeitsschutz und Verfassungsrecht' in Karlsruher Forum, *Schutz der Persönlichkeit* (1997), 21–2.

[238] For a critical analysis of this method, see Stone, above n 161.