CHAPTER III
INTERNATIONAL DIMENSIONS OF RIGHT TO PRIVACY

3.0 Introduction

In every corner of the Western world, writers proclaim "privacy" as a supremely important human good, as a value somehow at the core of what makes life worth living. Charles Fried declared without our privacy, we lose "our very integrity as persons,\(^1\) Many others have since agreed that privacy is somehow fundamental to our "personhood."\(^2\) It is a commonplace, moreover, that our privacy is peculiarly menaced by the evolution of modern society, with its burgeoning technologies of surveillance and inquiry. Commentators paint this menace in very dark colours: Invasions of our privacy are said to portend a society of "horror,"\(^3\) to "injure us in our very humanity,"\(^4\) or even to threaten "totalitarianism,"\(^5\) and the establishment of law protecting privacy is accordingly declared to be a matter of fundamental rights.\(^6\) It is the rare privacy advocate who resists citing Orwell when describing these dangers. At the same time, honest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define.\(^7\)

Judith Jarvis Thomson writes, "Nobody seems to have any very clear idea what it is."\(^8\) Not every author is as sceptical as Thomson, but many of them feel obliged to concede that privacy, fundamentally important though it may be, is an unusually slippery concept. In particular, the sense of what must be kept "private," of what must be hidden before the eyes of others, seems to differ strangely from society to society. This is a point

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4 Charles Fried, supra note 1, at 475.
6 See especially the recent Charter of Fundamental Rights of the European Union, Arts.7-8, 2000 O.J. (C 364), 10.
8 Judith Jarvis Thomson, The Right to Privacy, in Philosophical Dimensions of Privacy: An Anthology, at 272, 286
that is frequently made by citing the literature of ethnography, which tells us that there are some societies in which people cheerfully defecate in full view of others, and at least a few in which the same is true of having sex.9 But the same point can be made by citing a large historical literature, which shows how remarkably ideas of privacy have shifted and mutated over time.10 Anyone who wants a vivid example can visit the ruins of Ephesus, where the modern tourist can set himself down on one of numerous ancient toilet seats in a public hall where well-to-do Ephesians gathered to commune, two thousand years ago, as they collectively emptied their bowels.11

If privacy is a universal human need that gives rise to a fundamental human right, why does it take such disconcertingly diverse forms? This is a hard problem for privacy advocates who want to talk about the values of "personhood", harder than they typically acknowledge. It is a hard problem because of the way they usually try to make their case: Overwhelmingly, privacy advocates rely on what moral philosophers call "intuitionist" arguments.12 In their crude form, these sorts of arguments suppose that human beings have a direct, intuitive grasp of right and wrong-an intuitive grasp that can guide us in our ordinary ethical decision making. Privacy advocates evidently suppose the same thing. Thus, the typical privacy article rests its case precisely on an appeal to its reader's intuitions and anxieties about the evils of privacy violations. Imagine invasions of your privacy, the argument runs. Do they not seem like violations of your very personhood? Since violations of privacy seem intuitively horrible to everybody, the argument continues, safeguarding privacy must be a legal imperative, just as safeguarding property or contract is a legal imperative. Indeed, privacy matters so much to us that laws protecting it must be a basic element of human rights.

This kind of argument can certainly make a powerful impression on first reading, since it is true that we can all imagine some violation of our privacy that seems very

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11 James Q. Whitman, supra note 10.
horrible. This is especially so when the writings in question are composed by scholars with a real literary gift, like Fried. Nevertheless, no matter how anxiety-inducing it may be to read these authors, their arguments only carry real weight if it is true that the intuitions they evoke are shared by all human beings. Yet all the evidence seems to suggest that human intuitions and anxieties about privacy differ. We do not need to refer to the practices of exotic ancient or modern cultures to demonstrate as much: It is true even as between the familiar societies of the modern west. In fact, we are in the midst of significant privacy conflicts between the United States and the countries of Western Europe—conflicts that reflect unmistakable differences in sensibilities about what ought to be kept "private."

To the Europeans, indeed, it often seems obvious that Americans do not understand the imperative demands of privacy at all. The Monica Lewinsky investigation, in particular, with its numerous and lewd disclosures, led many Europeans to that conclusion. But the Lewinsky business is not the only example: There are plenty of other aspects of American life that seem to Europeans to prove the same thing. Some of the things that bother French and German observers involve what Americans will think of as trivialities of everyday behaviour. For example, visitors from both countries are taken aback by the ill-bred way in which Americans talk about themselves. As a French article warns visitors to the United States, America is a place where strangers suddenly share information with you about their "private activities" in a way that is "difficult to imagine" for northern Europeans or Asians. Americans have a particularly embarrassing habit, continental Europeans believe, of talking about salaries. It is "normal in America," an Internet site informs German tourists, for your host at dinner to ask "not just how much you earn, but even what your net worth is"—topics ordinarily quite off-limits under the rules of European etiquette. Talking about salaries is not quite like defecating in public, but it can seem very off-putting to many Europeans nevertheless.

But it is not just a matter of the boorish American lack of privacy etiquette. It is also a matter of American law. Continental law is avidly protective of many kinds of

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13 James Q. Whitman, supra note 10.
14 Ibid
15 James Q. Whitman, supra note 10.
"privacy" in many realms of life, whether the issue is consumer data, credit reporting, workplace privacy, discovery in civil litigation, the dissemination of nude images on the Internet, or shielding criminal offenders from public exposure. To people accustomed to the continental way of doing things, American law seems to tolerate relentless and brutal violations of privacy in all these areas of law.

These are clashes in attitude that go well beyond the occasional social misunderstanding. In fact, they have provoked some tense and costly transatlantic legal and trade battles over the last decade and a half. Thus, the European Union and the United States slid into a major trade conflict over the protection of consumer data in the 1990s, only problematically resolved by a 2000 "safe harbour" agreement. Europeans still constantly complain that Americans do not accept the importance of protecting consumer privacy. Those tensions have only grown in the aftermath of September 11. Something similar has happened with regard to discovery in civil procedure: American law allows parties to rummage around in each other's records in a way that seems obnoxious and manifestly unacceptable to Europeans. The result, in recent decades, has been a seething little war over discovery. The circulation of the nude photos of celebrities on the Internet has produced another such conflict, with Europeans acting alone to penalize Internet service providers.

For sensitive Europeans, indeed, a tour through American law may be an experience something like a visit to the latrines of Ephesus. Correspondingly, it has become common for Europeans to maintain that they respect a "fundamental right to privacy" that is either weak or wholly absent in the "cultural context" of the United States. Here, Europeans point with pride to Article 8 of the European Convention on Human Rights, which protects "the right to respect for private and family life," and to the European Union's new Charter of Fundamental Rights, which demonstratively features articles on both "Respect for Private and Family Life" and "Protection of Personal Data."

By the standards of those great documents, American privacy law seems, from the European point of view, simply to have "failed." 17

But it is not just that Europeans resent and distrust the American approach to privacy: The reverse is also true. Anyone who has lived in the United States knows that Americans can be just as obsessively attached to their "privacy" as Europeans, sometimes defending it by resort to firearms. As for American law, it too is obsessed with privacy.

Evidently, Americans and continental Europeans perceive privacy differently. Privacy advocates sometimes try to downplay these differences. The felt need for privacy, they insist, is in fact universal, and the only real difference is that American protections are the product of piecemeal legislation, less systematically developed than European protections as yet, but nevertheless evolving in a European direction. 18 There is certainly some truth in this: There are indeed important resemblances between the systems on either side of the Atlantic. Any proper account of comparative privacy law will have to explain many similarities as well as many differences.

Nevertheless, when all is said and done, it is impossible to ignore the fact that Americans and Europeans are, as the Americans would put it, coming from different places. An effort is made to explain this fact before proclaiming universal norms of privacy protection.

3.1 International and Regional Human Rights Treaties

The right to privacy is included in most international and regional human rights instruments. This right is usually framed in general terms as a right to respect for private or family life, protection of the home and non-interference with correspondence. None of the major human rights treaties expressly include protection of personal information as an aspect of the right to privacy. Nonetheless, it is increasingly argued that the principles of

data protection are incorporated within the broader right to privacy in these treaties. If correct, this has significant practical consequences. First, it means that the state parties to these treaties that do not have national data protection laws, or that are not bound by international data protection instruments, may nonetheless have obligations to guarantee the protection of their citizens' personal information. Second, even in those countries that have data protection laws or that are bound by international instruments, it may result in a supplemental or higher standard of protection for personal data. Third, it makes the enforcement mechanisms of the human rights treaties available to persons whose data is unfairly or unlawfully processed. As we will see below, this is of particular advantage to persons covered by the European Convention on Human Rights, which has a more robust enforcement mechanism than the other treaties.

3.1.1 The Universal Declaration 1948

The cornerstone of all modern human rights instruments is the Universal Declaration on Human Rights 1948. Article 12 of the Declaration sets out express protection for the right to privacy. It states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The Universal Declaration is not a legally binding treaty. Rather it is a General Assembly resolution adopted to provide "a common understanding" of human rights and fundamental freedoms and to set "a common standard of achievement" with respect to these rights and freedoms. Despite this status, the Declaration is not devoid of all legal significance. In the years since its passage it has been transformed into a document of far greater legal force than ordinary General Assembly resolutions. At a minimum, it is regarded as the authoritative interpretation of the phrase "human rights and fundamental freedoms" contained in the UN Charter which member states are obliged to promote and

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20 Ibid., at 248-49.
22 Ibid., Preamble.
Another more common view is that the Declaration itself, or at least some of its provisions, have reached the status of customary international law or general principles of law and, as such, is binding on all states.

3.1.2 The International Covenant on Civil and Political Rights 1966

For the purposes of this paper, however, the debate on the legal status of the right to privacy as proclaimed by Article 12 of the Declaration is largely academic. A near identical provision is contained in Article 17 of the International Covenant on Civil and Political Rights which states:

1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

As a multilateral treaty, the Covenant is directly binding on its member states. As of December 2003, there were 151 parties to the Covenant meaning that the right to privacy contained therein has been near universally adopted.

In 1988, the Human Rights Committee, the body created by the Covenant to oversee its implementation and enforcement, issued a general comment on the scope of Article 17. In the view of the Committee, Article 17 imposes not only a negative obligation on state parties not to "arbitrarily" or "unlawfully" interfere with privacy, but also a positive obligation on state parties to implement measures to protect individuals from violations of their privacy by both private and public actors. In the words of the Committee:

This right is required to be guaranteed against all such interferences and attacks

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25 Ibid., at 42-3; Eide et al., *supra note* 23, at 7-8.
26 999 U.N.T.S. 171 (adopted Dec. 1966; entry into force March 1976). As of December 2003 there were 151 parties to the Covenant.
whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.\textsuperscript{28}

In addition, the Committee strengthened the force and broadened the scope of the provision by distinguishing the concepts of "arbitrary" and "unlawful" interference. In its view, an "unlawful interference" is one that is not authorized by law, whereas an "arbitrary interference" is one that although authorized by law nonetheless violates the Convention. It explains:

The concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.\textsuperscript{29}

In terms of the substantive scope of the provision the Committee clearly expressed the view that the protection of the article extends to individual's personal information. Articulating the basic data protection principles of collection limitation, confidentiality, purpose specification, accuracy and access the Committee stated that:

Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.\textsuperscript{30}

\textsuperscript{28} Ibid., para. 1.
\textsuperscript{29} Ibid., para. 4.
\textsuperscript{30} Ibid., para. 10.
Unfortunately, there is no legally binding mechanism for individuals to enforce their rights under the Covenant. Under the Optional Protocol to the Covenant, the Human Rights Committee is entitled to receive and consider complaints from individuals claiming to be victims of breaches of the Covenant. However, the final decisions of the Committee on the merits of these complaints do not impose direct legal obligations on the state party concerned and there is no enforcement mechanism or sanctions for non-compliance with the findings and recommendations of the Committee. Nonetheless, the individual communication procedure imposes at least an indirect obligation upon state parties. Under the Covenant itself, state parties agree to remedy violations of the rights set out therein. Thus, it can be argued that once the Committee has identified a violation of the Covenant the State Party concerned has an obligation under the Covenant to provide a remedy for it. The individual communication mechanism can also provide further guidance on the scope of the rights contained in the Covenant. In the case of data protection, however, there have been no useful decisions of the Committee.

3.1.3 The European Convention on Human Rights 1950

The European Convention on Human Rights was adopted by the Council of Europe in 1950 and entered into force in 1953. All member states of the Council of Europe are parties to the Convention. The Convention is enforced by the European Court of Human Rights, which has the power to determine individual and inter-state complaints.

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33 Communication No. 450/1991, July 26, 1993, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), Annex XIII, 210 -213. The Communication was declared inadmissible as the applicant had failed to exhaust all domestic remedies. However, the Committee also noted that the disclosure was based on lawful regulations and that applicant had failed to establish any evidence of an arbitrary or unlawful interference with his right to privacy or an unlawful attack upon his honour and reputation.
34 E.T.S. No. 005 (adopted, entry into force Nov. 4, 1950, entry into force Sept. 3, 1953). As of December 2003 there were 44 parties to the Convention.
alleging violations of the Convention. Decisions of the Court are only binding on the state parties to the case. However, as authoritative interpretations of the rights and obligations contained in the Convention, these decisions have a broader applicability to all member states.

Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life. It provides:

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.

The framing of the article in terms of a “right to respect” suggests that not only are states required to abstain from interferences with the individual’s private and family life, home and correspondence, but that they are also under a “positive obligation” to enact measures to protect these rights. There is an open question of whether this positive obligation also extends to ensuring protection against interference by private parties. The article itself does not contain any express reference to protection from private parties, however, the European Court has suggested that this obligation may exist in certain circumstances. In the case of X and Y v. Netherlands, the Court observed that

35 Until 1998 there were two oversight mechanisms: the European Commission of Human Rights and the Court. Applications were initially considered by the Commission which, upon determining admissibility, issued a report on the merits of a case and attempted to reach friendly settlements of breaches. If no settlement could be reached the Commission would refer the case to the court for a full judicial determination. Protocol 11, which came into force in November 1998 replaced the two-tiered system with a single full time court. Protocol 11 also made the right of individual petition automatically available, whereas previously it was conditional on acceptance by state parties. Admissibility of cases is first determined by a Judge Rapporteur. If he or she finds the case inadmissible it is referred to a panel of three judges for final determination. Decisions on the merits are made by seven-judge Chambers. There is a limited right of appeal of those decisions to the Grand Chamber of 17 judges if it is shown that “the case raises a serious question affecting the interpretation or application of the Convention or Protocols thereto, or a serious issue of general importance.”

"these [positive] obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."\(^{37}\)

Similar to many other articles of the Convention, Article 8(2) contains a limitation clause describing permissible interferences with the right to privacy. Any interference must be "in accordance with the law," and "necessary in a democratic society" in order to further one of the listed goals (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). It is firmly established, as regards the Convention as a whole, that the listed restrictions to its provisions are exhaustive and that no further limitations may be implied.\(^{38}\) Furthermore, the European Court has broadly interpreted the condition that restrictions be "in accordance with the law" as requiring not only that a law exist but also that it must be accessible, reasonably precise, and not allow for the unfettered exercise of discretion.\(^{39}\) With regard to the condition that restrictions be "necessary in a democratic society" in order to achieve one of the enumerated goals, the Court has determined that states enjoy a "certain but not unlimited" margin of appreciation.\(^{40}\) While the measure taken need not be shown to be "indispensable," the Court does require that it correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued."\(^{41}\) In view of these strict conditions, it is often argued that Article 8 even with its limitations provides better protection than the vague wording of Article 17 of the CCPR.\(^{42}\)

There is no general interpretation of the scope of Article 8 equivalent to General Comment 16 of the Human Rights Committee on the right to privacy under the International Covenant. What interpretation there is, therefore, comes from the European Court of Human Rights on a case by case basis. Over the years, the court has had

\(^{37}\) March 26, 1985, Series A, No. 91, para. 23.
\(^{39}\) Ibid., at 218-21.
\(^{40}\) Silver v. The United Kingdom, March 25, 1983, Series A, No. 61, para. 97.
\(^{41}\) Ibid.; see generally, Merrills and A.H. Robertson, supra note. 38, at 221-28.
occasion to develop a substantial body of case law on article 8. Within the realm of information privacy, most cases have focused on the legality of searches, surveillance, interception of communications and interference with private correspondence. While related, these cases do not raise classic data protection issues and are thus not analyzed here. There is, however, a smaller but significant body of cases involving maintenance of files and records where the question of incorporation of data protection principles into the scope of the article have been squarely addressed.

In Leander v. Sweden,\textsuperscript{43} the applicant was refused employment at a naval museum on the basis of information contained in a secret police file, to which he was refused access, classifying him as a security risk. The Court held that "both the storing and release of such information, which were coupled with a refusal to allow Mr Leander an opportunity to refute it" constituted a prima facie breach of Article 8(1).\textsuperscript{44} The language employed by the Court makes it clear that there were at least two grounds of interference with the applicant's right to privacy. The first was the mere storage of his personal information. The second was the disclosure of this information. There are divergent views on whether the Court regarded the denial of access in this case as itself constituting a separate interference or as simply increasing the harm caused by the collection and disclosure.\textsuperscript{45} In any event, as we will see later, the Court has found in later cases that denial of access may amount to a breach of the Convention.

That the mere compilation and retention of a file may constitute an invasion of privacy has been confirmed by subsequent case law. In Chavene Jullien v. France,\textsuperscript{46} the applicant sought to have her name deleted from a register maintained on persons suffering from psychiatric illnesses. The Commission found that the storing of this information amounted to an interference with applicant's right to privacy under article 8(1) but that this interference was justified under article 8(2). In Amann v. Switzerland,\textsuperscript{47} the Court held that the storing of information concerning the "private life" of an

\textsuperscript{43} [1987] ECHR 9248/81; (1987) 9 EHRR 433
\textsuperscript{44} Ibid., para. 48. The Court continued, however, to find the interference justified under Article 8(2) as it had a valid basis in law fulfilled a pressing social need (protection of national security) and contained adequate and effective guarantees against abuse.
\textsuperscript{45} See Bygrave, supra note 19, at 263-64.
\textsuperscript{46} (1991) Appl 14461/88, 71 DR 141
\textsuperscript{47} [2000] ECHR 27798/95.
individual amounted to an interference with the right to privacy even if the records collected were of a business or professional nature. The Court emphasized that this broad interpretation corresponded with the meaning of the phrase “private life” in the Council of Europe’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. It continued that “the subsequent use of the stored information has no bearing on [the] finding” that there had been an interference nor was there any need to show that the applicant had been inconvenienced by the storage.

The Court has also addressed the issue of non-consensual disclosure of lawfully collected information. The case of Z v. Finland arose out of the seizure, and admission into the record, of applicant’s medical files during a criminal case against her husband for knowingly exposing others to the risk of HIV infection. The domestic court ordered that her medical records would be kept confidential for a period of 10 years only and publicly revealed her identity and HIV status. This information was subsequently published in the press. In its ruling, the Court issued a sweeping statement on the inclusion of data protection principles within the scope of the right to privacy:

> The protection of personal data, not least medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention.

Consequently, the Court concluded that the limiting of the confidentiality order to 10 years and the failure to prevent the disclosure and publication of applicant’s identity and HIV status was an unjustifiable violation of her right to privacy. Non-consensual disclosure of medical records was also at issue in the case of MS v. Sweden. Here the applicant’s medical records were released by a hospital to social insurance authorities in order to assess her compensation claim for a work related injury. The court held that although the applicant’s records remained confidential, they had been disclosed “to

48 Id., para. 65.
49 Id., paras. 69-70.
51 Ibid., para. 95.
another public authority and therefore to a wider circle of public servants."53 It continued that as the purpose of the disclosure was unrelated to the purpose for which the information was initially collected, the applicant could not be deemed to have consented to that disclosure and it thus constituted an interference with the applicant's right to privacy. In this case, however, it found the interference to be justified under Article 8(2) as it was in accordance with the law and proportionately pursued the legitimate aim of protecting the economic wellbeing of the country.54

The Court has also ruled on the rights of individuals to access personal information relating to them. In Gaskin v. the United Kingdom,55 the applicant was denied access to confidential records held by local authorities concerning the years he spent in the authority's child-care system. There was no procedure in place for the applicant to challenge this denial. The Court held that by failing to provide the applicant with a means to gain access to this information, the UK had breached its "positive obligation" to secure respect for his private and family life. Similarly, in Rotaru v. Romania56 the application sought access to secret files kept on him by the Romanian Intelligence Services, which he claimed contained information that was false and defamatory. The Court ruled that both the storing and use of the information by the public authority and the refusal to allow an opportunity for it to be refuted amounted to an interference with the applicant's right to privacy.57 The Court continued that this interference could not be deemed to be "in accordance with the law" for although it had a basis in law, that law was not sufficiently precise and did not provide adequate and effective safeguards against abuse.58

This case law firmly shows that the principles of collection limitation non-disclosure, confidentiality and access are included within the scope of Article 8. Furthermore, it suggests that state parties not only have a negative obligation not to breach these principles but may also have a positive obligation to enact measures to

53 Ibid., para. 35.
54 Ibid., paras 37-44.
56 [2000] ECHR 28341/95; 8 BHRC 449.
57 Id., para. 49.
58 Id., paras 47-63.
ensure that these rights are respected. To what extent the positive obligations of article 8 
require states to protect individuals from the data processing by private actors has not 
been conclusively determined. As one commentator points out, however, the fact that the 
Human Rights Committee has inferred a similar obligation into Article 17 of the 
International Covenant on Civil and Political Rights and the fact that there is common 
agreement among Council of Europe states that such activities must be regulated by law, 
suggests that the European Court would read such an obligation into the article where the 
issue to come before it.59

3.1.4 The American Declaration of the Rights and Duties of Man, 1948

The American Declaration of the Rights and Duties of Man contains three 
provisions relating to privacy. Articles V, IX and X respectively provides:

a. Every person has the right to the protection of the law against abusive 
attacks on his honor, his reputation, and his private and family life;
b. Every person has the right to the inviolability of his home; and 
c. Every person has the right to the inviolability and transmission of his 
correspondence.

The American Declaration was adopted by the newly created Organization of 
American States in May 1948. Like the Universal Declaration on Human Rights, the 
American Declaration was not originally intended to have any legal effect but over the 
years its status has gradually changed.60 The Inter-American Court of Human Rights has 
held that the Declaration “defines the human rights referred to in the Charter…and is for 
[member states of the Organization] a source of international obligations related to the 
Charter of the Organization.”61 The Inter-American Commission on Human Rights is 
charged with promoting and ensuring respect for human rights as set out in the 
Declaration.62 It has developed a procedure to receive and consider individual complaints

59 Bygrave, supra note 19, at 259.
60 See generally Buergenthal, supra n. 24, at 226-28.
alleging violations of any of the rights in the Declaration. Decisions of the Commission on the merits of these petitions are not legally binding upon the parties, nor may these petitions be referred to the Inter-American Court of Human Rights (looked at below).

3.1.5 The American Convention on Human Rights 1969

The American Convention on Human Rights supplements the privacy protections in the Declaration. Article 11 of the Convention provides:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

The Convention was adopted in November 1969 and entered into force in July 1978. As of December 2003, twenty-four of the Organization’s thirty-five members had ratified the Convention. Supervision and enforcement of its provisions are carried out by the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights. The Commission is entitled to receive inter-state and individual complaints alleging breaches of the Convention. Conclusions and Recommendations of the Commission on these complaints are not legally binding upon the states. The Commission may, however, refer cases of non-compliance to the Inter-American Court.

The Court has advisory and contentious jurisdiction. Only state parties and the Commission may refer cases to the Court. In addition, an inter-state dispute may only be heard brought before the Court where both parties recognizes the jurisdiction of the Court.

66 In respect of inter-state complaints, the competence of the Commission is dependent on an explicit recognition by the state parties involved.
To date, there have not been any decisions of the Commission or of the Court dealing with the issue of the protection of personal data. However, it is possible that they would follow the interpretations of the Human Rights Committee or the European Court on Human Rights, were the issue to arise.

3.2 The Right to Privacy in the United States of America

The transformation of privacy and autonomy concerns into constitutionally cognizable rights is a relatively new occurrence in the United States. Over the last several decades, the courts have wrought a revolution in autonomy rights. The tension between individual claims to deference with regard to personal choices and community claims to regulate behaviour for the good of all provides the central theme in the historical development of these rights. The competing traditions of liberty maximization and majoritarian democratic principle have shaped this dialectic.

Unlike Britain, the United States has adopted "privacy" as a useful legal construct. The right of privacy provides United States citizens both a substantive right and a procedural mechanism with which to challenge intrusive government regulations. However, the experience of the United States demonstrates that mere recognition of the right of privacy is insufficient to justify important autonomy interests. Procedural regularity and clarity in defining the privacy right are integral to its effective vindication by courts. The British system's approach to privacy, although seriously flawed, possesses both virtues: Privacy rights are clearly defined and the legal process of enforcing those rights is strictly circumscribed. However, certainty and procedural regularity should not outweigh the ultimate goal of vindicating liberty. Britain's reticence to adopt a right of privacy is based on the faulty assumption that a "right of privacy" cannot be predictably and uniformly applied by Courts. The history of privacy law in the United States demonstrates that tradition could provide a solution to the problem of inclusive rights at the cost of certainty. Tradition could effectively delimit the scope of privacy rights

67 Malone v. Metropolitan Police Commissioner, [1979] 1 Ch. 344, 372-73 (Ch.)
without unduly limiting them. An examination of the American experience with privacy law will amply demonstrate that the British concern for legal certainty need not be sacrificed in order to more effectively protect the liberties of the people.

The broad language of the Constitution ostensibly protects individual liberty from governmental encroachment. Concurrently the Constitution contains a strong infusion of a democratic principle that implies majoritarian choice making. Forced to disentangle these contradictory constitutional norms, the Court has referred to community tradition as a means of validating claims of autonomy. The use of tradition, however, risks a pernicious contamination of liberty by allowing majoritarian impulses to regulate unpopular behaviour. Even though United States' privacy law utilizes a different institutional paradigm, it suffers from the same malady of the British regime-too much concern for majoritarian preferences, and not enough concern for the competing (majoritarian) value of individual liberty.

In the United States, privacy rights primarily are vindicated by the federal judiciary, rather than the Congress. Although the role of Congress in the development of privacy rights has been far less important than Parliament's role in Britain, Congress has enacted some laws that implicate privacy interests. In the 1960s and 1970s, technological advances in information collection and transmission greatly increased the potential for government invasion of individual privacy rights. In response, Congress enacted laws that created rights and duties with respect to the gathering, maintenance, and dissemination of information about individuals; however, these laws did not focus on individual autonomy. The task of vindicating autonomy claims remained with the federal judiciary.

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69 Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (Justice Scalia says that the existence of laws prohibiting an act excludes that act from protection under the due process clause; clause protects only "important traditional values").
In the 1920s, the Supreme Court began to develop a distinct privacy doctrine. The Court considered deference to individual choice making a legitimate object for judicial protection. In the 1960s and 1970s, early precedents from the 1920s were used to expand the right of privacy into a shibboleth capable of overpowering state and federal laws. However, in the 1980s, the Court re-examined its use of the right of privacy and its earlier precedents. Today privacy law in the United States is at a crossroads. The Court ultimately must choose between older cases that emphasize individual rights (placing the burden on the state to justify regulation of individual behaviour) and new decisions that emphasize the community's interest in self-regulation through democratic institutions (placing the burden of proof on the individual to affirmatively establish why the government cannot act as it has). Although the existence of the right of privacy is not in immediate danger, the contemporary Court could severely restrict the scope of the right. The recent developments in United States privacy law demonstrate that the recognition of a right of privacy did not resolve all problems. How a "right" is implemented may be as important as whether the right is recognized in the first place.

3.2.1 The Development of the Right of Privacy in the United States

State legislatures or the federal Congress could have assumed primary responsibility for the development of U.S. privacy law. Instead, the federal judiciary, insulated from the rigors of partisan politics, has assumed the task of protecting privacy rights from the directly elected majoritarian governmental branches. Invoking the tradition of liberty reflected in the Bill of Rights and fourteenth amendment, the Supreme Court required that government justify its actions when challenged by those adversely affected by state laws.

1. The Use of the Tradition of Liberty in Early Privacy Case Law

In the 1920s, the Supreme Court used the liberty clause of the fourteenth amendment to vindicate privacy interests as a legitimate expectation of the citizenry. *Meyer v. Nebraska*\(^71\) and *Pierce v. Society of Sisters*\(^72\) established that parents have a

\(^71\) 262 U.S. 390, 399-400 (1923)
\(^72\) 268 U.S. 510, 534-35 (1925)
privacy interest in raising their children. Noting that the people of the United States believed that the education and upbringing of children was largely the responsibility of parents, the Court recognized and validated a community tradition of deference to parents in the rearing of their children. Thus, the Court looked to the tradition of community deference to parents raising their children rather than examining the traditional way in which children were raised. Drawing upon traditions of liberty enshrined in American society through the Constitution, the Supreme Court determined that an individual family's claim to be left alone trumped the state legislature's determination that the parents were raising their children improperly. Meyer and Pierce accurately drew a line between the vindication of individual autonomy and the regulation of behaviour by the community for the good of all.

3.2.2 Griswold & Privacy as a General Constitutional Right

Meyer and Pierce established a principle that exploded into new prominence in the 1960s. Building upon the intellectual foundation established by Meyer and Pierce, the Court greatly expanded the scope of the right of privacy. Toward this end, the Court characterized privacy as a penumbra created by express textual provisions of the Bill of Rights and the fourteenth amendment. Alternatively some members of the Court cast the notion of privacy as a particular kind of liberty interest, implicitly, if not explicitly, protected under the ninth or fourteenth amendment.73

Griswold v. Connecticut74, the landmark case of 1965, represented a major expansion of the constitutional protection of privacy. The case raised the question of whether a state could regulate the intimate details of the marital relationship.

Griswold involved a challenge to a ban by Connecticut on the use of contraceptive devices and the dissemination of information or instruction on the use of such devices. Even though the statute had not been strictly enforced, it still stood as an impediment to effective family planning counselling and practice. Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and a physician,

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74 381 U.S. 479, 484-86 (1965)
provided counseling and instruction to married couples on various means of contraception. The Court struck down the Connecticut statute, finding that it unduly interfered with the marital relationship. In deciding Griswold, the Court looked beyond the literal language of the Constitution's text to ensure that states did not arbitrarily infringe upon basic autonomy interests.  

Regardless of the precise source of the right of privacy, Griswold established that individuals could make claims of privilege against some state regulations. In Griswold, the promise of Meyer and Pierce came to fruition with a full-fledged constitutional privacy doctrine. Although the right of privacy clearly does not always override state regulations, courts began to listen to arguments based on claims of autonomy. 

3.2.3 Autonomy Rights Are Correctly Vindicated Through the Modern Right of Privacy

The development of the right of privacy in constitutional adjudication reflects the Court's frank recognition that the Constitution guarantees individuals protection from undue governmental regulation of private life, despite the community's concern for its own security and well-being. Yet the Court realized that some liberty interests are too destructive to the community's existence to be countenanced. Thus, in the privacy cases, the Court utilized the tradition of liberty in the United States in order to limit the right of privacy and affirm the community's right to regulate for the good of all its members.

In the abortion cases, the Court applied the test of community deference to individual liberty suggested by Meyer and Pierce. These cases reflect a balancing of interests: the individual's right to make reproductive choices versus the community's interest in the protection of potential life. However, the Court may be shifting away from

75 By utilizing the ninth amendment to predicate a principle of deference toward individual autonomy, supra note 26 at 486-99, Justice Goldberg's concurring opinion resurrected the amendment in modern Constitutional law: "The Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." Ibid. at 492. He noted that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.
76 Ronald J. Krotoszynski, Jr., supra note 20, p. 1437.
77 Supra note 26.
Meyer, Pierce, and Griswold. The most recent privacy cases reflect a disturbing trend toward the vindication of majoritarian moral choices, rather than the tradition of liberty set forth in Meyer and Pierce. In cases involving sodomy and parental rights, the Court has utilized a new and potentially dangerous test—the tradition of community approval of a particular lifestyle. This new test reflects an infusion of majoritarian choice making into what should be an analysis of the scope of individual autonomy.79

1. The Abortion Decision's Test: Community Traditions of Autonomy in Moral Decision making.

*Roe v. Wade*80, the controversial decision that granted women a constitutional right to abortion, reaffirmed the constitutional right of privacy established in *Griswold*. Roe also set forth a balancing test to resolve conflicts between individual privacy and legitimate state interests. The Court held that only a "compelling state interest" could justify an invasion of the "right of privacy."81 Although the Court referred to other constitutional amendments to support its holding, the majority secured the privacy interest from state intervention primarily through the fourteenth amendments liberty provision in connection with the ninth amendment privacy interest.

Thus, a majority of the Court finally accepted a specific formulation of a general right of privacy. *Roe* completed the process that began in the 1920s with *Meyer and Pierce*. The federal Constitution created limits upon both the federal and state governments; governmental power was cabined by the vesting of residual power in the individual citizens. According to the Court, invasive state regulations could not unduly burden legitimate autonomy interests.

*Roe's* approach to privacy survives today. Although *Webster v. Reproductive Health Services*82 directly challenged the Roe decision, it did not repudiate the privacy interest recognized in Roe. Webster involved a Missouri law seemingly inconsistent with the Supreme Court's opinion in Roe. Although the Supreme Court sustained several key

79 Ronald J. Krotoszynski, Jr., *supra note* 20, p. 1438.
80 410 U.S. 113, 152-54 (1973)
81 *Ibid.* p. 155
82 109 S. Ct. 3040, 3058 (1989)
portions of the law, the Court expressly declined to overrule Roe. Therefore, Webster leaves intact the fundamental interest/compelling state interest balancing test for analysing privacy claims, but recognizes a greater state interest in the foetus than the Court accorded in Roe.

Abortion provides an example of the dilemma introduced by "undesirable" conduct that arguably falls within the domain of individual liberty. Abortion generally is not seen as a desirable experience, but rather as an unfortunate event to be avoided. When a court inquires as to whether the state should regulate abortion the outcome often hinges on the manner in which the court poses the question. If the court asks, "Does the community advocate abortion as a valuable activity?" It will arrive at negative response. In contrast, if the Court asks whether the community approves of the state encroaching upon individual privacy by limiting access to abortion, a different answer is both possible and likely. If one acknowledges that the United States people and their Constitution adhere to a basic tradition of individual liberty, then the court must choose the second formulation of the question. Of course, asking the second question does not mean that an individual's privacy claim will prevail- it merely requires the state to justify its intrusion into the individual's private life.

2. The Competing Test: Requiring Community Sanction for a Given Activity.

Contrary to the early trend to protect individual choice in sexual and reproductive matters, the court in Bowers v. Hardwick\textsuperscript{83} held that the right of privacy under the liberty clause of the fourteenth amendment did not protect individuals who wished to engage in private homosexual sodomy. The Courts seemed to require that the activity in question have community sanction before it would be accorded protection as a privacy interest. The Court noted that because "24 states and the District of Columbia" had laws prohibiting sodomy, such conduct could not meet the test of being "deeply rooted in this Nation's history and tradition." This test suggests that an individual must legitimize a claim of privacy by demonstrating the community's acceptance of a particular behaviour,

\textsuperscript{83} 478 U.S. 186, 190-91 (1986).
rather than demonstrating the community's tolerance of individual choice in the area. When courts vindicate liberty interests, neither the community nor the court necessarily sanctions a particular behaviour. Rather, decisions recognizing an individual's right of privacy merely demonstrate the community’s willingness to allow individuals to make their own moral decisions.

A more recent case, *Michael H. v. Gerald D*[^85^], further illustrates this trend. In *Michael H.*, a natural father established a relationship with his adulterously conceived child. The biological mother and her husband subsequently sought exclusive parental rights to the child—an outcome permitted by California law which conclusively presumed that children born to a married couple were the offspring of the couple. The plurality opinion of the Court, written by Justice Scalia, found that Michael H. had no constitutionally protected privacy interest in his relationship with the child. Justice Scalia admonished that “our cases reflect 'continual insistence upon respect for the teachings of history and solid recognition of the basic values that underlie our society.'” He later noted that “our traditions have protected the marital family.” The Court, finding no accepted liberty interest, did not even engage in the fundamental interest/compelling state interest balancing. Justice Scalia explained: “In an attempt to limit and guide interpretation of the due process Clause, we have insisted not merely that the interest de-nominated as a 'liberty' be 'fundamental'... but also that it be an interest traditionally protected by our society”. Justice Scalia argued that tradition always has favoured the nuclear marital family and that "adulterous fathers" have never had protected parental rights.

Justice Scalia opined that “we refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”[^86^] This formulation of the question ensures that the community's moral preferences, rather than a tradition of deference to individual decision-making, will control the adjudication of privacy claims. From the standpoint of the protection of privacy, a better way to use tradition in *Michael H.* would have been to ask whether the community has recognized

[^84^]: Id. at 198 n.2 Interestingly, Justice Powell, in concurring with the opinion, noted that the Georgia law had not been enforced “for several decades.” If this was so, one might ask whether the community tradition was accurately reflected in the statute.


[^86^]: Ibid. at 127-28 n.6.
the interest of both the natural parent and the child in maintaining a mutual relationship regard less of whether the parental relationship is coextensive with a marital relationship. This approach emphasizes liberty, but not at the expense of community values. The difference between asking the individual liberty question and the Court's approach in *Michael H.* appears in the zone of protected autonomy that emerges from the answer. In *Michael H.,* the Court extended toleration only as far as contemporary morals sanction a particular behaviour. Such liberty is no liberty—it is merely the freedom to conform.87 Freedom entails the right to make bad choices as well as good choices.

As the Supreme Court's most recent pronouncement on privacy, *Michael H.* appears to represent a reshaping of the right. In particular, footnote 6 of the plurality opinion seems to depart from earlier privacy decisions.88 Justice Scalia's requirement that the most specific level of a relevant tradition control the privacy analysis does not square with the holdings of *Meyer and Pierce.* The most specific level at which a tradition could be identified in Meyer and Pierce would have been the particular type of instruction at issue. History is replete with examples of state regulation of school curricula and mandatory attendance at accredited institutions. In Meyer and Pierce, the Court looked to a broader tradition to the tradition of deference to parents in raising their children. Thus *Michael H* represents a marked departure from the Court's earlier approach to privacy rights. Indeed, *Michael H.* attempts to complete the shift away from *Meyer, Pierce,* and *Griswold* that began with Bowers.89

3. The Correct Use of Tradition Is Essential to Vindicating Legitimate Autonomy Interests.

*Bowers* and *Michael H* demonstrate the importance of asking the relevant question if the Court wishes to use community values as a touchstone for protecting liberty interests. Bowers asked whether the community historically approved of "behaviour" X." A different question is whether the community traditionally has classed

87 Michael H., 491 U.S. at 141 (Brennan, J., dissenting) (fourteenth amendment and the nature of our society require toleration of "someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies").
88 Michael H., 491 U.S. at 127-28 n.6 (1989).
89 Ronald J. Krotoszynski, Jr., supra note 20, p. 1442
"X" as a decision left to the individual. The Court in Meyer and Pierce used this second question to develop a balancing test.

In the case of homosexual sodomy, Americans generally do not advocate either the act or the lifestyle of those who engage in it. But the answer to the question of whether most Americans would want the state to regulate sexual behaviour in the bedrooms of America is far more ambiguous. The historic lack of enforcement of the sodomy statutes suggests that the states have higher priorities than eliminating sodomy. Yet the existence of laws criminalizing sodomy must in some way reflect community sentiments. The community may believe that without an officially stated disapprobation of an undesirable behaviour, the behaviour may become commonplace. Hence, the statement of disapproval operates to create a tendency toward the community's idea of virtue. The prohibition is not intended to coerce virtue: Some laws are meant to be positive commands binding upon all, whereas some are mere predatory statements of a community's moral norms.

A law may or may not reflect community tradition regarding a particular matter. Some legal thinkers suggest that legislative inaction reflects the continuing approbation of the community in regulating private behaviour. Yet, for a variety of reasons, such as a desire to avoid the taint of any association with a controversial question, a legislature may fail to repeal predatory laws even though this failure to act causes a result that does not represent general community thought on a given matter. Courts can and should look to the existence of laws prohibiting conduct in their attempt to divine tradition. However, even if a law prohibiting a certain course of action exists, the courts must also look to whether the history of the enforcement of the law confirms its use as the dispositive source of the community's traditions. Tradition can legitimize privacy claims—essentially claims of autonomy-against the community, even if the community disapproves of the protected behaviour. Because the right of privacy lacks a clear constitutional mandate, the use of a tradition of individual liberty as a legitimating

90 Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 523-28 (1986);
91 In Poe v. Ullman, the Supreme Court refused to reach the merits on a challenge to Connecticut's ban on the distribution, sale, or provision of birth control because the law had fallen into desuetude. 367 U.S. 497, 507 (1961)
touchstone is a desirable, persuasive, and perhaps, necessary approach. There is a danger, however, that the Court will ask the wrong question when it seeks to delineate the contours of the American community's "tradition" on a given matter. Thus, how the Court asks the question prefigures the ultimate resolution.  

A separate but related problem arises because of the changing nature of tradition. By definition, tradition is determined by reference to the prior practices of the relevant community group. Conceivably, the use of the tradition of liberty as an exclusive test might result in shifting privacy rights that would undermine the persuasiveness of precedent and that would erode the legal force of court decisions. This problem is easily surmounted: Privacy rights should move in only one direction—to ward greater levels of protection. Thus, over time, the court should "ratchet up" the number of liberty interests recognized, but should not "ratchet down" the sphere of protected personal autonomy, even if the contemporary community's values are shifting. The application of the ratchet approach requires a reviewing court to resolve two issues: is the interest claimed one of the class already recognized, and if not, should it be recognized as a legitimate autonomy claim. If the Court determines that conduct falls within a tradition of community deference to individual liberty, then it will strike down attempts at reregulation, thus precluding a future change in tradition, absent constitutional amendment. Alternatively, the Court should examine traditions of community deference as a primary test for validating yet unrecognized claims of privacy. If such a tradition is not present—as is the case with illicit drugs—the Court would then consider whether the behaviour was so fundamentally annexed to notions of "liberty" that it commands constitutional protection under the language of the fourteenth amendment. In applying the second step, the court should look to whether the states have traditionally regulated the conduct and also to whether such regulations have been consistently enforced. The use of this two step process would re-solve the problems inherent in the use of tradition as a constitutional test. The court's renewed use of tradition as a means of determining privacy claims could be a welcome development. Since the first privacy cases, American privacy law has lacked both procedural regularity and substantive consistency. Tradition offers a rational  

92 Ronald J. Krotoszynski, Jr., supra note 20, p. 1444
93 Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1977)
means of cabining the scope of the right; procedural regularity (predictable application of clearly articulated tests) is a matter of self-discipline on the part of the courts. The measure of liberty afforded United States citizens by the right of privacy is and remains a function of both substance and process.94

3.3 The Right to Privacy in the European Union

In general, most countries in continental Europe recognize some type of right of privacy or right of personality. Most common is a protection for a person's name and likeness. Very often, however, other characteristics are also protectable, though they may not be specifically mentioned in a statute. These traditional rights are personal, privacy rights. Most countries grant them with the sole intent to protect people from intrusion into their private lives, libel and hurt feelings. Since they are based on this rationale, the rights are tied to the person, and therefore generally not assignable nor descendible. Some countries have however, also recognized the need to protect the commercial value in a person's persona. This is today only an emerging right and principles for how it should be applied and what it can cover are far from established. To understand what is going in this area in Europe right now, it is interesting to look at the different approaches that have been taken there. By comparing the legal status in a few different countries it may be possible to determine whether or not a common right, similar to the Right of Publicity, could be possible for the countries of the European Union. Though the status of rights of this kind varies from country to country, there are some common rules that apply to most European countries.

3.3.1 General rules for protection of privacy within the EU

For the countries that are part of the Council of Europe and that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms95, there is an obligation to protect certain rights and freedoms of its citizens96. Article 8 of

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94 Ronald J. Krotoszynski, Jr., supra note 20, p. 1446
the Convention contains a very broad protection for the individual’s right to privacy and it states that:

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 in accordance with the law and is necessary in a democratic society and in the interests of national security, public safety and 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 rights and freedoms of others97.

Article 13 guarantees that each country should provide its people with an effective remedy before a national authority, in case of a breach of the articles of the Act. This makes the countries directly responsible for the enforceability of the rules and ensures that they actually implement them in their legislation98. The extent to which the rights have to be protected are not expressed however, and as long as there are remedies available, affording at least some degree of protection to the people, the State has probably fulfilled its obligation under the Act99. If there is doubt, whether or not a State has provided its citizens with sufficient remedies, the European Court of Human Rights in Strasbourg can try an individual’s complaint of a breach committed by his own country. The rights in the Act are not absolute and sometimes they have to be balanced against one another. This is often the case with Article 8 and Article 10. The latter grants all individuals the right to freedom of speech and holds that:

1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder

97 Supra note 47. Article 1.
99 Supra note 48 at 338.
or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\textsuperscript{100}

One of the problems with the privacy right granted in the ECHR is that it applies only to the relationship between and individual and the state. The duty to protect privacy, in accordance with the Convention has, however, sometimes been interpreted as invoking a duty upon the State and the courts of that State to ensure that the rights are also enforced between private parties. An application of the Articles in this way has been called the "horizontal effect" or the "indirect horizontal effect".\textsuperscript{101} As will be described later, this issue has been heavily debated in countries such as England and the significance of this will be further developed later on.

For the member countries of the European Union, there is a set of rules establishing a certain right of privacy for the citizens of the States. These rules are set forth in a European Directive from 1995, also known as the European Data Protection Act.\textsuperscript{102} The Data Protection Act requires that all member countries enact laws that shall "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data".\textsuperscript{103} The purpose behind the rule is to protect people from having private information about them gathered and distributed without their permission "amongst commercial, governmental, or private information miners".\textsuperscript{104} The personal data, that can be protected, includes "any information relating to an identified or identifiable natural person".\textsuperscript{105} Whenever a person can be directly or indirectly identified, through physical appearance or other factors that refer to him, he is an identifiable person. Because of this broad definition, it is reasonable to assume that a person's image that is transmitted electronically constitutes

\textsuperscript{100} \textit{Supra} note 47. Article 10.
\textsuperscript{101} \textit{Lauren B. Cardonsky, Towards a meaningful right of privacy in the United Kingdom, 20 B.U. Int'l L.J. 393, 404 (2002).}
\textsuperscript{102} \textit{Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Hereafter called the EU Data Protection Directive.}
\textsuperscript{103} \textit{Ibid} Article 1(1)
\textsuperscript{105} \textit{Supra} note 54. Article 2(a)
"personal data". The EU Data Protection Directive could apply to some cases where you have a claim based on the American notion of a right of privacy or publicity. Whenever a celebrity or private person finds that his name, image or other characteristics have been collected, processed and used for commercial purposes through an electronic transmission, they could have a claim under the Act.

There are however, limitations to the right in the Act itself that limit its applicability. Following Article 1(1) where the right is granted, Article 3 holds that the rule does not apply to non-automatic data processing or to processing by natural persons. It is the collection and processing of data that is being focused on in the Act and not the subsequent use of it. Therefore, by adopting another way of gathering and using information, a company's intrusion into someone's privacy and appropriation of data may fall outside the frame of this right. In addition to the given limitations, there is also an exception for processing with a journalistic purpose. This ensures a free flow of information in certain situations and has a strong resemblance with other rules attempting to balance a right of privacy with the right to freedom of speech or information. Due to the restrictions on what kind of use is covered by the Act, there is only some degree of protection for people's privacy through the rules. In all instances, the Act appears to be concerned only with protection of the individual's privacy and nothing indicates that there is room to recognize a proprietary interest in the data.

The implementation and application of the rules above differ from country to country. Very often the rules granted in European Acts, such as those mentioned above, are excessive as the countries themselves have already well-developed rules to protect the same interests. This makes it difficult to identify a general, homogenous right in the countries within the EU. In order to determine, whether or not it would be possible to harmonize regulations in this area and what they would look like, it is important to look

108 Supra note 54. Article 3.1-3.2.
110 Ibid at 629
at the development in the individual countries. To understand what is going in this area and where the countries are heading, it is also essential to keep in mind the different approaches that have been governing in each country. By comparing the legal status in a few different countries and how it has come about, the possibility of establishing a common right, similar to the American Right of Publicity, will be explored below.

3.4 The Right to Privacy in the Great Britain

The right of privacy does not receive explicit recognition in English law. To the extent that privacy rights exist implicitly in Britain; they are formulated quite differently than in the United States. Indeed, a popular treatise on privacy in Britain does not discuss freedom of choice in the areas of sexuality, reproduction, or familial/parental relations. Although British law does address these issues, they do not fall within the rubric of privacy. As a result, privacy rights in Britain are a "patch-work affair."

Early judicial decisions and legislation lacked any notion of privacy. This reflects, in part, a reservation of authority to make laws regulating any aspect of community life. Additionally, British Governments resist any legal restrictions on the exercise of their powers. Britain has also declined to adopt domestically the right of privacy guaranteed by the European Convention on Human Rights. Although article 8 guarantees British citizens a right of privacy, Britain remains the only signatory to the European Convention on Human Rights, without a law of privacy. Thus, under domestic law, the individual citizen has no guaranteed right to seek redress against intrusive government activity.

British citizens have seized upon the concept of privacy as a potential means to obtain judicial relief from unduly burdensome majoritarian commands. Citizens have lobbied Parliament for the creation of a statutory right of privacy, argued before the domestic British courts for the enunciation of a common law right of privacy, asked the British judiciary to apply article 8 of the European Convention on Human Rights and Fundamental Freedoms domestically, and ultimately, travelled to Strasbourg, France to obtain a hearing before an international human rights court. Unfortunately, these efforts

112 Ronald J. Krotoszynski, Jr., supra note 20, p. 1403
to carve out an effective institutional process to guarantee privacy interests have largely been unsuccessful. Some external body may have to force parliamentary action. For instance, the Court of Justice of the European Community effectively could compel the British government to recognize a right of privacy. But, in the absence of external pressure, the prospects for reform are bleak.¹¹³

3.4.1 Statutory Privacy Rights in Britain

The primary source of legal rights in Britain is statutory law. "Generalized rights" are not the norm in English law, and the courts tend to hew narrowly to established doctrines and to statutes adopted by Parliament. Respect for the supremacy of Parliament, fear that rapid change in the law will create uncertainty, and a tendency to maintain a positivist jurisprudential outlook preclude British judges from developing social policy. These same factors also discourage judges from using broad, nebulous legal constructs—such as privacy—to decide cases and implement rights.¹¹⁴

A. Unsuccessful Attempts to Create a Statutory Right of Privacy

Perhaps the most disturbing characteristic of the British approach to privacy is the historical lack of parliamentary and judicial interest in the protection of privacy rights. Although Parliament historically has approached privacy as a matter of relations between private persons and between private persons and the press, in recent years, back bench members of Parliament have introduced several bills that would recognize a more generalized notion of privacy.

In response to parliamentary support for a privacy act in the late 1960s, Parliament created the Committee on Privacy, chaired by Kenneth Younger. The Younger Committee's mandate extended only to private and quasi-private interference with individual privacy; specifically, it did not extend to governmental intrusions. Nevertheless, the committee's survey on the public's perception of privacy concluded that:

In identifying privacy with the state of being let alone to do as one wished, most respondents appeared to have been thinking primarily of the dangers of

¹¹³ [Ibid]

¹¹⁴ Jörg Fedtke et al., Concerns and ideas about the developing English Law of Privacy (and how knowledge of foreign law might be of help), 52 Am. J. Comp. L. 133, 152-153 (2004).
interference with their liberty by a possible totalitarian government, an aspect of privacy which lies outside our terms of reference, and only secondarily of preserving their privacy as a valued element in the quality of life from interference by non-governmental bodies and their fellow citizens.\textsuperscript{115}

The Younger Committee reviewed the subject for three years before concluding that Britain needed neither a general right of privacy nor a specific tort action for the invasion of privacy. The Committee found that a general right of privacy against governmental and private interests were incompatible with the concept of society. The "right to be let alone" was viewed as unreasonable in a community dedicated to common goals and purposes.\textsuperscript{116} The Younger Committee's conclusions dove-tail with the ambivalence of some British commentators to an American-style right of privacy--both groups found that the benefits conferred by privacy construct are dubious at best.

The Younger Committee hearings and report stimulated much de-bate, but no legislative action. Despite this setback, the privacy debate continued in Britain. In the 1988-89 session of Parliament, M.P.s John Browne and Tony Worthington introduced bills to guarantee a right of privacy and a right of reply, both to run only against the press.\textsuperscript{117} In response, the Government constituted a second committee on privacy. The Committee on Privacy and Related Matters (the Calcutta Committee) issued its final report in June 1990. But once again the privacy committee's terms of reference limited its investigations to non-governmental intrusions of privacy.\textsuperscript{118}

The Calcutta Committee concluded that tort law did not need a right of privacy cause of action. The difficulty in defining privacy did not lead to the rejection of the tort.

\textsuperscript{115} Report of the Committee on Privacy, 1972, CMND. No. 5012, at 2-3 [hereinafter YOUNGER REPORT] (suggesting that the commuter on the rush-hour train experiences privacy as anonymity, whereas his ancestors travelling on the open road experienced privacy as solitude). The Committee Report also noted that notions of privacy varied from person to person.

\textsuperscript{116} Ibid at 10.


\textsuperscript{118} The Calcutta Committee Report noted: A number of those who submitted evidence to us argued that our terms of reference were too narrowly drawn; some urged us to extend our inquiries to include official secrets, data Protection computer hacking, and telephone tapping. While we recognize that all these issues may be relevant to individual privacy they do not generally concern intrusion by the press.
Rather, the uncertainty with regard to the effect of such a tort on the ability of the press to function produced the committee's rejection.

The current Government does not appear ready to address the fundamental problem with British law: the lack of a right of privacy that can be asserted against the state. The Calcutta Committee Report merely provides additional evidence and an interesting example of this shortcoming.

B. Explicit Recognition and Rejection of Privacy Rights by Parliament

Despite the lack of a written constitution and the failure of Parliament to enact privacy legislation, British citizens are not entirely without remedies for invasions of privacy. In many respects, a different approach rather than any difference in substance separates Britain and the United States with regard to privacy rights. Although Parliament has never enacted a Privacy Act, it indirectly has created distinct privacy rights in a number of areas. In some cases, these parliamentary laws grant broader coverage for individual freedom of action than the American "right of privacy."

Britain's approach demonstrates that a majoritarian body sometimes can adequately resolve the tension between individual liberty and community. In contexts in which a majoritarian consensus exists, Parliament has granted autonomous decision making to the individual. Sodomy, prostitution, abortion, and data protection provide several examples.119

a) Statutory recognition of autonomy interests

Parliament has recognized several autonomy interests by statute. First, in contrast to many states in the United States, the British Sexual Offences Act allows homosexual sodomy in the home provided that the act is not engaged in for monetary gain.120 The British approach to the problem of prostitution provides a second illustration. Rather than criminalize payment for sexual favours, the British regulate only public solicitation and

119 Ronald J. Krotoszynski, Jr., supra note 20, p. 1407
120 Sexual Offences Act, 1967, ch.60 S. 1. Conversely the Supreme Court of the United States refused to grant the act of sodomy constitutional protection. Bowers v. Hardwick, 478 U.S. 186 (1986). Although Britain legalized consensual homosexual conduct, the British approach is not terribly deferential to the individual interests when determining whether or not to occupy a given field legislatively.
pimping. Prostitution itself is not illegal; Britain has recognized that it is unrealistic, and perhaps unsafe, to maintain a prudish attitude in light of society's long practice. Abortion, however, provides the best example of an area in which Parliament has acted to secure an autonomy interest commonly associated with the right of privacy. Theoretically, the right to abortion enjoys less protection in Britain than in the United States. Whereas in the United States a "right of privacy" protects a woman's "fundamental liberty" to decide whether or not to abort her foetus, the British Abortion Act generally criminalizes abortion in Britain. In practice, however, the Act's exception clause swallows the whole by allowing legal abortions for the physical and mental well-being of the mother or of existing children and for deformed foetuses. By liberally construing this provision, the courts, with Parliament's tacit approval, effectively have created abortion on demand.

Pro-life advocates in Britain have challenged this interpretation of the Act. In Royal College of Nursing of the United Kingdom v. Department of Health and Social Security, the House of Lords rejected a petition by pro-life nurses arguing that a literal reading of the statute's requirement for "termination by a registered medical practitioner" required doctors to personally administer a drug resulting in miscarriage in eighteen to twenty hours. Royal College is just one example of unsuccessful efforts to restrict de facto abortion on demand. The de facto statutory right to an abortion also has been protected against challenges based on the Infant Life Protection Act and against challenges by fathers and other outsiders. The message to be gleaned from these cases is that only the state has standing to enjoin an abortion operation.

121 Street Offenses Act 1959. One of the ironies of this policy is that men cannot be punished for paying for sex, while women can still go to jail for solicitation.
123 Ryan, Rights That Go Awry, London Times, Aug. 23, 1990, at 8, col. 2 (David Steel's Abortion Act "was a classic piece of compromise legislation. It declared abortion criminal except in some situations." The result allows abortions in the same circumstances which the U.S. Supreme Court granted women a constitutional right to an abortion in Roe v. Wade, 410 U.S. 113 (1973).
124 1981 App. Cas. 800 (H.L.)
125 Ibid at 806-07 (CA) Lord Denning on the Court of Appeal had rigidly applied the provision as the nurses requested, commenting that he doubted Parliament would amend the law so as to allow de minimis supervision.
The British government's position seems to be that abortion does not implicate a sufficient governmental concern to justify a government proscription against it. However, Parliament's deference to a woman's decision whether to have an abortion has not led to general discussions of rights of privacy. Rather, British citizens appear to rely on a principle of governmental self-restraint coupled with a notion of liberty vesting in the citizenry—that which Parliament does not prohibit is permitted.\textsuperscript{127} Thus, privacy is "protected" via indifference or deliberate inaction. However, no procedure exists to prevent Parliament from legislating in areas that impinge on privacy: Individual autonomy is subject to summary abrogation by parliamentary fiat. A final example of the protection of limited privacy interests by statute is the Data Protection Act of 1984, which regulates the collection and dissemination of computer data.\textsuperscript{128} The Act guarantees an individual the right to access a computer database that contains information about him. Parliament accomplished this goal by requiring firms collecting personal information on computer databases to comply with registration and reporting requirements. The Act, although comprehensive within its area of application, contains an exception for the government when "national security" is implicated. Similar to acts passed by the United States Congress in the late 1960s and early 1970s, the Data Protection Act protects personal information—furthering privacy—but it does not directly relate to individual autonomy. The Data Protection Act, the Abortion Act, and the Sexual Offences Act are examples of Parliament's willingness to protect privacy in certain cases.

b) Parliament sometimes fails to protect some privacy interests where the powers of government are directly in question:

When the government wishes to restrict an individual's freedom, or to shield itself from public scrutiny, British law grants individual citizens little recourse. Although Parliament has been quite permissive on privacy issues relating to abortion, homosexuality, and prostitution, it has been somewhat Neanderthal in the areas of official government secrets and search and seizure law. The following examples illustrate this problem. With regard to search and seizure, the Police and Criminal Evidence Act grants

\textsuperscript{127} Ronald J. Krotoszynski, Jr., \textit{supra} note 20, p. 1409

\textsuperscript{128} Data Protection Act, 1984, ch. 35, Ss. 1-3.
broad power to arresting officers to search houses without a warrant.\textsuperscript{129} Although section four of this Act limits searches to the subject matter of the entry, this is of little consolation to one whose bedroom is ransacked.\textsuperscript{68} Thus, privacy in the home is tenuous under the present state of the law—and is always subject to complete revocation by Parliament.

Even when Parliament acts to protect privacy, parliamentary reforms are often minimal. In 1985, responding to \textit{Malone v. Metropolitan Police Commissioner},\textsuperscript{130} Parliament adopted the \textit{Interception of Communications Act},\textsuperscript{131} which protected some privacy interests through procedural reforms. Prior to the 1985 Act, judicial review of government wiretaps was not required before the government could monitor private conversations. The 1985 Act, however, did not create or recognize a right of privacy in the citizenry. Rather, the Act redrew the rules relating to the interception of private communications by government officials. The Act required judicial supervision of wiretaps and delimited the circumstances in which such a warrant could be issued.\textsuperscript{132} The \textit{Interception of Communications Act} vindicates the individual's privacy interest only in the most limited contexts. The Act shows that Parliament can protect privacy in limited contexts against arbitrary government action when required to do so. It also illustrates that privacy, as a general matter, will remain largely unprotected.

\subsection{3.4.2 The Role of the British Judiciary in Securing Privacy Rights:}

In contrast to United States courts, the British courts consistently refuse to recognize or create a right of privacy in any context. British judges believe it is "no

\begin{itemize}
\item \textsuperscript{129} Police and Criminal Evidence Act, 1984, Ch. 60, S. 17. In contrast, in the United States a general search may not be conducted absent a warrant describing the items to be taken. Even in the United States there are exceptions—such as the "plain sight" rule—to the prohibition against general searches.
\item \textsuperscript{130} [1979] 1 Ch. 344 (Ch.)
\item \textsuperscript{131} Interception of Communications Act of 1985, ch. 56.
\item \textsuperscript{132} Government agents are immune from liability, provided that they were acting in a matter authorized pursuant to section two of the Act, which provides that:
\begin{enumerate}
\item The Secretary of State shall not issue a warrant under this section unless he considers that the warrant is necessary-
\begin{enumerate}
\item in the interests of national security;
\item for the purpose of preventing or detecting serious crime; or
\item for the purpose of safeguarding the economic well-being of the United Kingdom.
\end{enumerate}
\end{enumerate}
Additionally, a Commissioner provides governmental oversight and has the duty to inform the Prime Minister of any suspect interceptions by the government. Finally, the courts are charged with ensuring compliance with the Act.
\end{itemize}
function of the courts to legislate in a new field. Because the British courts see legal reform as the prerogative of Parliament, it would be anomalous for them to unilaterally create a right of privacy.

1. The British Judiciary Will Not Recognize a Right of Privacy in the Common Law

British citizens, in light of Parliament's inaction, have attempted to circumvent the legislature by petitioning the British courts to create a common law right of privacy. Without fail, the courts have refused to do so. One route sought to secure a common law right of privacy was through the extension of the torts of breach of confidence and trespass. For instance, in *Director of Public Prosecutions v. Withers*, Lord Simon declined to recognize the tort of invasion of privacy. Although he admitted that the tort arguably could be derived from the tort of breach of confidence, the Lord believed that court action would be inappropriate because Parliament was studying the issue. Ultimately, Parliament took no action, and in the late 1970s the issue of a common law right of privacy remained before the courts.

Article 8 of the ECHR presented a second route to a common law right of privacy through judicial action. However, the courts rejected article 8 as a source for establishing a common law right of privacy. The *Malone case* effectively foreclosed the development of a common law right of privacy in domestic British law. Malone expressed the judiciary's determination to avoid the creation of a general right of privacy:

No new right in the law, fully-fledged with all the appropriate safe-guards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right. . . . One of the factors that must be relevant in such a case is the degree of particularity in the right that is claimed. The wider and more

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133 Malone, (1979) 1 Ch. at 372. However, there is popular sentiment for the creation of such a right by the domestic British courts.

134 1975 App. Cas. 842, 862-63 (H.L.).

indefinite the right claimed, the greater the undesirability of holding that such a right exists.\textsuperscript{136}

Although much English case law, as well as provisions of the European Convention on Human Rights and the U.N. Declaration of Human Rights, was argued in support of a common law right of privacy, Sir Megarry concluded, "I can find nothing in the authorities or contentions that have been put before me to support the plaintiff's claim based on the right of privacy."\textsuperscript{137}

One last example illustrates that the British courts will defer to Parliamentary commands, no matter how invasive to individual privacy. \textit{Regina v. Inland Revenue Commission, ex parte Rossminster} provides an example of this phenomenon.\textsuperscript{138} \textit{Rossminster} involved government searches to enforce criminal tax fraud and answered the basic question of how far the government could go to collect its revenues. According to the House of Lords, the government could go quite far indeed: The Lords found that the government may search homes and businesses with very general warrants. The House of Lords simply gave effect to a broadly crafted law duly adopted by Parliament. Because the law did not require that a warrant issued under the act specify the authority under which it was issued or the items which could be seized, no such requirements would be implied by the House of Lords. Thus, as long as the government's activity is expressly authorized by Parliament, no claim of privacy under the common law (guaranteed primarily by the tort of trespass) may stand in the way of state action based on the authorization.\textsuperscript{139}

2. The Recognition of the Notion of Privacy by the British Courts via Statutory Interpretation: Although the judiciary refused to recognize a general right of privacy absent legislative authority, it will not protect government officials from liability for illegal conduct in the absence of express parliamentary approval. The British

\textsuperscript{136} Malone, [1979] 1 Ch. at 372-73.
\textsuperscript{137} \textit{Ibid} at 375. With respect to article 8 in particular, the court observed that the domestic courts of England do not have jurisdiction to adjudicate the claims that arise under the ECHR and that the ECHR is not part of the domestic law of Britain.
\textsuperscript{138} 1980 App. Cas. 952 (C.A.).
\textsuperscript{139} \textit{Supra note} 90, p. 976. Despite the contemporary British courts unsympathetic view toward the creation of a general privacy right, individual judges have been quite impressed with the arguments advanced in favour of such a right. In particular, Lord Denning, Master of the Rolls, was quite ready to recognize a privacy right in \textit{Rossminster}. He wrote: "A good end does not justify a bad means. The means must not be such as to offend against the personal freedom, the privacy and the elemental rights of property".
judiciary applies a notion of privacy as a general principle of statutory construction. Principles of statutory construction can provide some modicum of protection for privacy interests.

_Morris v. Beardmore_ provides an example of British courts applying this notion of privacy. In Morris, a gentleman involved in an accident left the scene of the incident and returned home. Over two hours later, local police arrived at his home and asked to speak with him. When Mr. Morris refused, the police broke into his house and demanded that he submit to a breathalyzer test (that he failed). The House of Lords decided the question as whether the police conduct was justified under a general statute for the enforcement of drunken driving laws. The Lords decided in favour of Morris based on a principle of statutory construction: Parliament is required to expressly authorize official tortuous conduct in order to pre-empt otherwise applicable common law liability for government officials.

In this case, Lord Edmund-Davies nearly articulated a general notion, although not a “right”, of privacy: “To reject the appeal would entitle a constable who, in deliberate violation of the householder's rights, forcibly invades his privacy [to conduct a search].... I cannot accept that Parliament contemplated anything of this sort.” Lord Edmund Davies recognized that parliamentary in action, by itself, does not justify undue interference with privacy interests that otherwise are protected albeit indirectly through tort law.

Other opinions in _Morris_ were equally solicitous toward a notion of privacy. For instance, the speech of Lord Scarman in _Morris_ is intriguing for its similarities to American judicial privacy law:

I have deliberately used an adjective with which has an unfamiliar ring to the ears of common law lawyers. I have described the right of privacy as “fundamental.” I do so for two reasons. First, it is apt to describe the importance attached by the common law to

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140 _Malone v. Metropolitan Police Comm'r_, [1979] 1 Ch. 344, 380-81 (Ch.)
142 Lord Diplock held “The presumption is that in the absence of express provision to the contrary Parliament did not intend to authorize tortious conduct; and this presumption, in my view, owes nothing to the European Convention on Human Rights ....”. The Lords did not want to rest their holding on the ECHR, because to do so would make the ECHR operational at the domestic level.
143 _Moore v. City of East Cleveland_, 431 U.S. 502 (1976)
the privacy of the home. . . . Secondly, the right enjoys the protection of the European Convention for the Protection of Human Rights and Fundamental Freedoms... which the United Kingdom ratified....

Yet Lord Scarman spoke only in the context of a case in which Parliament’s intent was ambiguous. If Parliament had expressly authorized the objectionable police conduct, then the reliance on private tort law to protect Morris’ privacy would be unavailing. Such references to privacy as a “fundamental right” indicate sympathy among the British judiciary for privacy concerns. Nevertheless, the judiciary remains un-willing to undertake unilateral action to protect privacy. The ultimate result, to American eyes, is unsatisfactory. British courts lament that privacy concerns are legitimate, but only apply the notion of privacy at the margins.

The courts vindicate privacy interests only when Parliament has affirmatively endorsed the interest or has left some ambiguity in an authorization of intrusive conduct. If privacy concerns are legitimate, then the courts should have a greater role in securing them. The common law is not static; if the courts can create an action for trespass; they could also create a right to be let alone.

3.4.3 The European Convention on Human Rights and Fundamental Freedoms As a Source of a Right of Privacy

The failure of British domestic law to recognize a right of privacy does not foreclose its existence altogether. The European Convention on Human Rights guarantees a right of privacy to individual citizens against the governments of signatory states, which include Britain. Because Parliament has refused to give the ECHR domestic effect, British Courts do not vindicate the individual autonomy rights recognized under the ECHR.

144 Ibid p 464
145 Ronald J. Krotoszynski, Jr., supra note 20, p. 1415.
146 Article 25 of the ECHR limits the jurisdiction of the European Commission to the individual complaints of those seeking to vindicate rights guaranteed by the ECHR brought against states that recognize the authority of the Commission.
1. Practice and Procedure under the European Convention on Human Rights and Fundamental Freedoms: Following the end of World War II, the nations of Western Europe wanted to create an inter-national framework to safeguard certain basic human freedoms against government infringement. Acting under the auspices of the Council of Europe, a convention was drafted in 1950 and the European Convention on Human Rights and Fundamental Freedoms (ECHR) became effective on September 3, 1953. Today, the Council of Europe consists of the twenty-one post World War II democracies of Western Europe. The ECHR creates two bodies independent of the regular agencies of the Council of Europe: the European Commission on Human Rights and the European Court of Human Rights. Together with the Council of Ministers, these bodies handle the day-to-day administration of the ECHR.

The ECHR, unlike many human rights conventions, effectively secures the rights guaranteed under its provisions. Although the European Court cannot force member states to comply with its decisions, compliance with its judgments is the norm.

Article 1 of the ECHR requires that signatories' domestic laws be consistent with the substantive guarantees of the ECHR. Signatories can comply with article 1 either by incorporating the treaty directly into their domestic laws or by recognizing parallel rights under domestic law. In fact, all but six signatories give domestic effect to the treaty itself. Britain has not incorporated the ECHR itself, and has not created domestic law analogues to all the rights guaranteed by the ECHR. Britain's failure to give domestic effect to the ECHR or provide domestic law alternatives means that an individual may argue rights under the ECHR before the European Court of Human Rights in Strasbourg, but that Britain's domestic courts are not required to consider any arguments directly arising under the ECHR.

2. Privacy Rights Protected by the ECHR: Article 8 of the ECHR secures a right of privacy in the home, family, and correspondence. Specifically, article 8 of the ECHR provides:

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(1) Everyone has a 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.

The European Court of Human Rights has given article 8 a broad reading. Article 8 has been used to vindicate privacy rights in the home, family rights (including a right of parental access), abortion and other reproductive rights, and certain freedoms from the disclosure of information. Many of the cases arising under article 8 have been brought against Britain, and all of these involved official government actions that were sanctioned by domestic statute or common law, but that arguably were inconsistent with Britain's article 8 obligations.

In applying the substantive provisions of article 8(1), the European Court allows the signatory state to justify facially inconsistent statutes or common law, if possible, under article 8(2). The article 8(2) exceptions clause allows the state to interfere with privacy rights under three conditions: the interference must be prescribed by law; the law must be sufficiently clear so that a citizen can observe its dictates; and finally, the law must be "necessary in a democratic society." The court tends to use the practices of the signatory states to determine whether a given practice meets this last criterion. However, state practices cannot override the express provisions of the ECHR. The Court narrows the "margin of appreciation" granted to member states when regulated activity implicates core privacy rights. Article 8 does not confer an absolute right of privacy. It does, however, provide substantial protection to individual autonomy.

3. Article 8 in the Domestic Courts of Britain: The United Kingdom does not give domestic effect to the ECHR. British constitutional theory allows the use of international treaties only to interpret ambiguous parliamentary enactments and to clarify the common law. International treaties, including the ECHR, are not

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automatically incorporated into domestic British law. Lord Denning provided a succinct restatement of the status of the ECHR in English law:

The position, as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it. Furthermore, when Parliament is enacting a statute or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the convention and intended to make the enactment accord with the convention, and will interpret them accordingly. But I would dispute altogether that the convention is part of our law.152

Thus, the supremacy of Parliament has led to problems concerning the incorporation of the ECHR in Britain—problems that arise because domestic law does not independently secure all ECHR rights.153 At best, privacy serves as a canon of statutory construction; this canon is insufficient to meet the requirements of article 8.

One argument for the domestic incorporation of article 8 of the ECHR is that the article represents a codification of customary international law. Customary international law,154 through incorporation by the practice of sovereign nations, is a part of the domestic law of England. If a treaty represents the codification of pre-existing norms of international behaviour, or if a treaty later comes to represent the current standard of customary international law, then rights under such a treaty would be justifiable in domestic British courts.155 Thus, article 8 of the ECHR, if a codification of customary international law, would be incorporated into English law.

There are two competing doctrines concerning the incorporation of international law into domestic British law: the incorporation theory and the transformation theory.

The incorporation theory holds that as international law changes, British law changes with it, even if cases exist that apply the old rule. This theory reflects a monist account of law—there is only one law that operates on all persons.156

The transformation theory holds that changes in international law must be incorporated either by parliamentary action or by the House of Lords. Under the transformation approach, Britain does not automatically adopt changes in customary international law. This theory reflects a dualist theory of law—municipal law and international law are totally separate systems. International law applies only to states, and thus cannot alter domestic law. Under this theory, only if the domestic government ratifies article 8 of the ECHR will it apply internally relating to private persons.

In Trendex Trading Corp. v. Central Bank of Nigeria157, the Court of Appeal adopted the incorporation theory. Two judges opined that changes in international law were directly assimilated into British law, even if such changes conflicted with earlier cases decided by the Court of Appeal or House of Lords. Lord Denning reasoned that because international law embodies no doctrine of case precedent, and because English law requires the domestic courts to apply international law, domestic law must reflect changes in international law, even if these changes are inconsistent with earlier domestic precedents. Given the incorporation theory of international law, it is theoretically possible that the ECHR and article 8 could be incorporated into English law without parliamentary action by arguing that the ECHR reflects customary principles of international law. However, the requirements necessary for success in this endeavour are difficult to satisfy.158 A plaintiff must show that respect for privacy has achieved strict observation in the practice of nation states. Although some obligations—such as the prohibition on torture create binding norms of behaviour on states, privacy has not yet reached this level of recognition and the domestic courts have not found the argument that the ECHR (either in whole or in part) embodies customary international law persuasive.

A more successful argument for the recognition of article 8 by the British domestic courts is the principle of legitimate expectation.\textsuperscript{159} The principle derives from an administrative law concept similar to the right to be heard under the due process clause of the United States Constitution and the private contract law notion of promissory estoppel. Legitimate expectation covers rights not necessarily recognized at law, but rights that have a reasonable basis in the law. Thus, there is no legal right to the vindication of the interest, but rather a willingness by courts to allow the vindication of reasonable expectations when those expectations are not inconsistent with statutory law.\textsuperscript{160}

A legitimate expectation may arise from the actions or statements of a public authority. In recent years, litigants have argued that based on current government policy, they have a “legitimate expectation” of domestic protection of their article 8 rights. The results have been largely disappointing.

\textit{Chundawadra v. Immigration Appeal Tribunal}\textsuperscript{161} illustrates the argument that the principle of legitimate expectation sometimes requires the explicit incorporation of article 8 into domestic law. \textit{Chundawadra} presented the novel argument that he had a “legitimate expectation” that the Home Secretary would take article 8 into account in assessing his immigration status. The immigration statutes in question included a requirement that the person deciding the case consider the “public good,”\textsuperscript{162} and \textit{Chundawadra} argued that the "public good" included Britain's compliance with its international obligations.

After laboriously examining the presents cope and history of legitimate expectation, the Court of Appeal unflinchingly rejected its application to rights arising under article 8 on the facts presented. The court concluded that because Parliament had not incorporated article 8 into British domestic law, an individual could not maintain a legitimate expectation that public authorities considered article 8.

\textsuperscript{159} \textit{Schmidt v. Secretary of State for Home Affairs}, [1969] 2 Ch. 149, 170 (C.A.)
\textsuperscript{160} Quoting Ng Yuen Shiu, [1983] 2 App. Cas. at 636 (P.C.)
\textsuperscript{161} [1988] Imm. A.R. 161.
\textsuperscript{162} Immigration Act, 1971, ch. 77, S. 3(5) (b).
Not all the Lords were so quick to reject the legitimate expectation argument. Lord Slade's concurrence would have reserved the determination of the outcome if the Secretary of State had a clearly established policy of considering the ECHR in exercising his discretionary statutory authority. He believed that it was possible for a legitimate expectation to arise when a governmental agency, exercising discretionary decision making power, had an established policy of considering article 8 in the decision making process.163

Although Lord Slade's observation appears promising, it does not significantly alter the status of the ECHR in British domestic courts: absent parliamentary reference to article 8, the article and privacy are only considered by the courts when they construe ambiguous statutes. The courts have held that a government minister is not required to consider the treaty obligations of the United Kingdom when exercising discretionary authority.164 Yet a decision maker could adopt a unilateral policy requiring the consideration of article 8 or any other provision of the ECHR. Under these circumstances, the doctrine of legitimate expectation would allow the consideration of article 8 by the domestic courts. Legitimate expectation demonstrates one way to incorporate article 8. However, the incorporation of article 8 in this manner not only will be piecemeal, but also will be subject to parliamentary reversal by statute.

4. The Interaction of the European Court and the British Domestic Courts: Attempts to Vindicate Article 8 Rights

Because of the difficulties encountered in vindicating article 8 rights in the domestic courts of Britain, some British citizens have sought relief in the European Court of Human Rights by arguing a breach of the right of privacy protected by article 8. As a consequence, the European Court, domestic British courts, and Parliament have worked together to bring British law into compliance with article 8. Custody and correspondence matters present two types of cases that demonstrate not only that Britain is not fulfilling its obligations under article 8, but also that the European Court can be a necessary alternate forum for British citizens to pursue their autonomy claims.

163 Ronald J. Krotoszynski, Jr., supra note 20, p. 1425.
Although British citizens may pursue their claims in the European Court, from a national perspective, this is hardly an ideal forum. The process allows a foreign tribunal to scrutinize the act of the British Parliament for violations of basic human rights. British cultural values may be unduly discounted by allowing a foreign tribunal to judge the correct line between individual right and community prerogative in Britain. However, if the British government will not police itself, the European Court is authorized to assume this responsibility.

In response to European Court decisions, Parliament has reacted positively in some instances by bringing British law into compliance with article 8. Although courts are willing to enforce privacy claims when authorized by Parliament, the courts will not independently apply article 8. The social costs engendered by this system are high.

a) An example of the British legal system and the European Court interacting: custody cases and article 8: In cases involving parental rights, the ECHR and article 8 have been used to defend against government actions. These cases arise under the protection of privacy in the family life contained in article 8(1). Problems occur because of the inherent conflict between parental rights and the state's interest in protecting children from unfit or abusive parents.

In *R. v. United Kingdom*, the European Court found that the discretion given to British local authorities to decide custody matters, coupled with the lack of effective judicial review, constituted a violation of article 8. Because the hearings in question set in motion a process that could result in the total severance of all parental rights, the European Court found that article 8 required meaningful participation by custodial parents informed of the possible consequences of the local authority's action. The court also held that the local authority's decisions must be subject to timely judicial review. Although article 8(2) authorized interference with parental rights of access, the court held that the right to be heard and participate in such hearings was essential to meeting the "necessity" prong of the article 8(2) exceptions clause. Thus, the case was as much about procedural fairness as it was about parental rights.

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166 Ronald J. Krotoszynski, Jr., supra note 20, p. 1426.
In the wake of *R. v. United Kingdom*, Parliament reformed its custody laws to bring British law into compliance with article 8. However, the courts remained unwilling to consider independently article 8. Despite the existence of clear precedents from the European Court, the British judiciary continues to apply unambiguous parliamentary enactments without regard to privacy interests; however, if Parliament itself takes article 8 into consideration when passing a statute, the courts will directly address the privacy claims. A recent case, *In re K.D.*, illustrates the judiciary's willingness to address privacy claims when authorized to do so by Parliament. The case presented the issue of whether a clearly unfit mother could continue to exercise parental rights. The court denied the teenage mother access to her children until she severed contact between her boyfriend and the children. In approaching this problem, the Law Lords often referred to the principles embodied in article 8 in an attempt to resolve the conflict between English law and the requirements of the ECHR.

The reason the Lords considered article 8 was, in part, due to *R. v. United Kingdom*, the custody case in which Britain was found to have violated article 8. The mother's barristers presented legislative history to the House of Lords that indicated parliamentary concerns similar to, if not coextensive with, rights guaranteed under article 8. Although the Lords found that the procedures used in the custody hearing complied with English law and the duties imposed by article 8, references to article 8 is, in itself, surprising. The House of Lords felt it necessary to address article 8 directly, even though it could not bind the Lords.

The congruence of article 8 and domestic law on the delineation of parental rights legitimated judicial reference to the article. Because British statutory and common law characterized parental access as a fundamental interest, the Law Lords were not precluding parliamentary decision making by independently giving effect to a legal provision of the ECHR. Thus, the ECHR may be relevant in modifying or applying domestic law—especially if the article 8 right in question is squarely addressed under statutory law.

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168 [*1988*] 1 App. Cas. 806 (H.L.).
Although some privacy rights are vindicated by the domestic British courts, *R. v. United Kingdom* is emblematic of the social cost created by the British system. The system forced the parent to go through time consuming (and largely useless) appeals in the domestic courts before permitting recourse to the European Court. The British judiciary views this as a necessary evil. Judicial deference preserves the necessity of parliamentary reforms and creates an impetus for parliamentary action. If legislative reform is more thorough and more effective than piecemeal judicial reform, and then there is nothing problematic with this approach. However, this argument presupposes that Parliament will vindicate minority autonomy interests. This premise is open to question: Why should a democratic, majoritarian body respond to the autonomy demands of distinct insular minorities? The question of Parliamentary sensitivity to unrepresented groups remains unanswered.

*In Re K.D. and R. v. United Kingdom* do not incorporate the ECHR as a whole. Only if a right already exists under domestic law may provisions of the ECHR and the case law interpreting it be considered by a British court applying domestic law. This mode of interpretation gives some provisions of the ECHR the status of a principle of construction-as tools of statutory interpretation. The Law Lords will harmonize domestic law and obligations under the ECHR, but they will not allow the ECHR to pre-empt conflicting domestic legal norms.\(^\_1\)\(^\_6^9\)

b) An example of article 8 precipitating unilateral reform: the correspondence cases

Like parental rights, the ability of individuals to communicate with each other without government surveillance is an important aspect of privacy that is necessary for a free society. British domestic courts also have refused to vindicate article 8 rights to privacy for personal correspondence absent express or implicit parliamentary authorization. However, the interaction between the European Court and the British legal system that occurred (and is still ongoing) in the custody cases is absent in the correspondence cases. In *Boyle and Rice v. United Kingdom*,\(^\_1^7^0\) the European Court held that the United Kingdom's practice of opening prisoners' mail addressed to their legal

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169 Ronald J. Krotoszynski, Jr., *supra note* 20, p. 1429.
representatives constituted a breach of article 8. The British government reformed its policies before the decision was handed down, more or less admitting that its prior practice was not in compliance with article 8. Thus, the European Court and article 8 can precipitate the complete reform of a given area of the law.

c) Parliamentary reaction to cases from the European Court is a poor means of securing compliance with article 8:

The cases presented in this subsection illustrate the effect that the ECHR can have on British domestic law. Without pressure from the European Court, modification of the custody laws and prison rules might never have occurred. Although the domestic courts can cite inconsistencies with domestic law and the ECHR, they will not ascribe any legal consequences to this conflict absent a parliamentary command. Parliamentary action inevitably follows decisions from the European Court: But why should reform wait on a decision from the Strasbourg court? A review of the article 8 claims on the merits by the British domestic courts prior to review by the European Court makes sense. The British domestic courts are in the best position to interpret their own laws, provided the laws are consistent with article 8. Additionally, the financial expense and embarrassment of defending a suit before the European Court could be avoided if most claims were decided on the merits in the domestic courts. The present system works, insofar as it brings about reform, but it fails to the extent that it discourages the aggressive litigation of human and political rights.171

3.4.4 The Future of a Right of Privacy in Britain

1. The European Economic Community Adoption of Article 8 in the Commercial Context: Article 8's future as a source of domestic privacy rights is not yet completely determined. Just as the Treaty of Rome (which established the EEC) assumed greater significance with the passage of time, so too could the ECHR. Consider Lord Denning's prophetic observation about the role of the Treaty of Rome in the early 1970s:

171 Ronald J. Krotoszynski, Jr., supra note 20, p. 1430.
"When we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back...." Very few people could have foreseen the complete commercial integration of Europe, which is almost a reality. Likewise, although the ECHR, a charter of basic human rights, does not yet have the ubiquitous presence of the Treaty of Rome, the day when the ECHR directly displaces domestic laws may one day arrive. Although it is far from a certainty, the ECHR and the institutions implementing it may also become a source of British domestic law in the same way as the Treaty of Rome.

A more limited implementation of the principles of the ECHR may already have arrived. The European Economic Community's Court of Justice uses the principles reflected in the ECHR, and article 8 in particular, as a source of guidelines for permissible community action. Fundamental rights form an integral part of the general principles of law that the Court of Justice protects.

Thus, privacy interests are "fundamental rights" recognized and protected in commercial affairs by the EEC. The indirect importation of article 8 in the commercial context by the EEC presents a plausible stimulus to further parliamentary action. As the commercial integration of Europe continues, the ECHR may take on greater significance in the United Kingdom through EEC law (but only in the commercial context). Eventually, a dichotomy in the domestic rights of individuals may develop between their commercial lives-as governed by EEC law-and their private lives, as governed by British domestic law. Individuals conceivably could enjoy greater protection in the board room than in the bedroom. At that point, Parliament would have to consider the wisdom of continuing to refuse to incorporate the ECHR into domestic law.

1. A Final Comment on Privacy in Great Britain:

Great Britain's international obligation under the ECHR to vindicate certain privacy interests cannot be dismissed or ignored. Some legally cognizable privacy rights-particularly as against the government-is necessary for Great Britain to fulfil its

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obligations under the ECHR and the Universal Declaration of Human Rights. Parliament's refusal to allow the domestic courts to entertain arguments premised on article 8 ensures the breach of this obligation. Apparently, securing the rights guaranteed under the ECHR is a lower priority for Parliament than maintaining its traditional prerogative of plenary legislative authority.

Perhaps Britain should continue to abjure individual justice in favour of the greater good of reliable Parliamentary reform. But from an American perspective, this solution seems harsh if not unjustifiable. If a society truly believes in liberty, then it must support liberty for all. The institutional framework of government must provide distinct subgroups with the opportunity to be heard. Further, if the majority elects to vest rights (as Britain has in acceding to the ECHR), it should ensure that claims to those rights are vindicated regardless of the status of the person who makes the claim.

3.5 The Right to Privacy in France

Although the development of a Right of Privacy began as early as 1858 in France, when the first privacy tort was first recognized, it is in the last 30 years that the protection has developed and expanded rapidly. Today the concept of a Right to Privacy is not only well established but also broad in its scope.

3.5.1 Protection for Privacy under the French “personality rights”

The French right to privacy is one out of a whole bundle of “personal rights”, including the right to protect one’s honour and reputation, the right to one’s image, etc. Even though France is a civil law country, the notion of a right to privacy was first recognized by the courts in a number of cases. Originally, there was no separate right of privacy and in the cases where a right of privacy was first recognized, the claims were based on different tort principles. The first case in which an application of a tort was

174 Supra note 67
175 Ronald J. Krotoszynski, Jr., supra note 20, p. 1432.
178 Supra note 128 , pp.1231-1232
stretched to protect a privacy interest was the Rachel affair.\textsuperscript{179} In this case the court gave the family of a deceased actress the right to prevent sketches of the actress, on her deathbed, from being sold to third parties. The sketches had been drawn based on private photographs that the artist had acquired from the photographer. What is interesting about this case is how the court seemed to disregard the criteria of negligence and recklessness in the tort, as it stated that the right to oppose the publication is absolute. Another noteworthy point in the holding is that the court granted the right to all individuals, regardless of whether they are celebrity or not.\textsuperscript{180} The basis for the claim in this case, though sought to protect a privacy interest, was the right of image, which will be discussed later on.

The real development in case law began in the 1950's and in 1954; a significant case was settled by the French courts. The Marlene Dietrich case which gave Marlene Dietrich one of the largest damages ever awarded in a privacy case, also brought along other important changes in the French right of privacy. Dietrich had filed a law suit against publishers of a series of articles that were supposedly based on her life. The court found for the plaintiff and stated that "[T]he recollections of each individual concerning her private life are part of her moral property; ...no one may publish them, even without malicious intent, without the express and unequivocal authorization of the person whose life is recounted"\textsuperscript{181}. This statement made it clear that the story of one's life belongs to the individual and cannot be published without his consent. Furthermore, the court had now started moving the right of privacy closer to a property right.\textsuperscript{182}

After developing the right of privacy, "droit de la personnalité", in case law for over a century and after a considerable increase in cases based on this principle, legislation recognizing the right was finally introduced in 1970 in the Code civil, article 9.\textsuperscript{183} Article 9 states that "[e]ach individual has the right to require respect for his private life [or privacy]". More support for privacy rights can be found in Article 226-1 of the French Criminal Code. This article holds that a person who violates the intimacy of one's

\begin{itemize}
\item \textsuperscript{179} Supra note 59, p.38
\item \textsuperscript{180} Supra note 128, p.1233.
\item \textsuperscript{181} Supra note 59, p.39.
\item \textsuperscript{182} Supra note 128, p.1238.
\item \textsuperscript{183} French Civil Code
\end{itemize}
privacy, "by fixing, recording or transmitting, through any device, the image of a person in a private place, without their consent, to penalties of imprisonment of one year and a fine of £300,000". To balance this right against interests of the public, there are three exceptions established in French case law which protect certain acts from Right of Privacy claims. These exceptions are: (1) photographs taken in a public place; (2) uses involving freedom of speech and news information and (3) parody. France has ratified the European Convention on Human Rights but as there already exists a strong protection for privacy in French law it appears as if it is generally article 10, protecting freedom of expression, that is being applied. With this principle incorporated, the French courts are, at least to some extent, forced to find a balance the interest between the public and private individuals.

What the right of privacy encompasses is not specifically defined, instead there is an enumeration of the different categories of information that is private. The categories of private information cover family life, sexual activity and sexual orientation, illness, death, and even private leisure. As opposed to the situation in the U.S. there is no distinction made between celebrities and non-celebrities. The Court de cassation, France's highest court has expressed its position with the following words: "each individual, whatever his status, his birth, his wealth, his present or future position, has the right to require respect for his privacy". The protection granted may be stronger when it comes to anonymous individuals but there is no exception for people who happen to be famous. What can be a problem for celebrities is the fact that only private facts are protected. In other words, information regarding one's professional or public life cannot be protected. Therefore, when a person is involved in something that involves the public or that could be of interest for the public, he may not be able to prevent that information from being used. This is very similar to the American exception for information that is "newsworthy".

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184 Supra note 129, p. 516.
185 Supra note 128, p. 1254.
186 Ibid p. 1253
3.5.2 Property rights in the Right of Image

In recent years the French courts appear to have started to acknowledge a property interest and a "quasi-property" right in a person's image. Originally, the right of image was considered as only a small part of the right to privacy. However, from the time France adapted its rules on privacy to comply with international standards, such as those set forth in the ECHR the right of image seems to have taken on a role of its own. As with the right of privacy, the right of image was first developed in case law. The previously mentioned case, involving the actress Rachel, is one example of how this right was first recognized. While it is today an established principle, used in the French courts, it has yet not been recognized in statutory law. Thought it has derived from French tort principles, just like the right of privacy, it is today not dependent on the tort requirements to be applicable. The right of image has been developed and stretched out and today it covers such characteristics as a person's voice as a sound image. Also, the situations to which the right applies has changed. The right of privacy, as well as the right of image, has traditionally been viewed as negative rights meaning that they give the owner of the right the possibility to protect his persona from being exploited. It's a right that is an inherent part of a person that can be used to prevent exploitation. With time however, some doctrinal writers claim that also a positive right has emerged for the right of image.

The new, positive right is not found inherent in the person but is based on the view that a person's image is a commodity. The right thereby allows the owner alone to exploit the commercial value of it. The right of image has therefore in the legal doctrine been claimed to be split in two and include both a right to image and a right over/of image. The latter being the positive right. It has been debated whether or not the right over ones image can exist and be applied independently or if it has to be connected to the right to one's image. It appears as if the trend is moving towards an application of

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188 Supra note 129, p. 515.
189 Supra note 139, p. 683.
190 Supra note 129, p. 512.
191 Supra note 139, pp. 684-685.
the right even in situations where there is no privacy interest to protect and merely an interest in the commercial value of the image. A good example of this is the Papillon case from 1970\textsuperscript{192}.

In this case an author had written a book about a former convict, known to the public as Papillon. The author had based the book on documents he had obtained from the court that had sentenced him to life imprisonment. Papillon then brought an action against the publisher. The court did not find the publication of the book to infringe Papillon's right to privacy as the documents were public and the picture was taken in a public situation. Nevertheless, the court held that the photo on the cover, which had been used without Papillon's consent, was an infringement of his right of image.

Another case showing the same tendency by the courts is the Alain Delon case\textsuperscript{193}. Here, a comedian sued a tabloid that had published his picture along with a story on him. In the lower court his claim of illegitimate use of his image and private life was rejected but the Cour de Cassation reversed this judgment and held that when the lower court ruled based on the moral damage alone, it failed to take into consideration "the commercial prejudice suffered in the form of injury to Delon's career\textsuperscript{194}". The more often we find cases in which a right of image has been violated, without it ever touching privacy concerns, the clearer it becomes that the right of image has now been allowed to protect mere property interests while the right of privacy still only protect the personal, moral interest of individuals.

Though the French right of privacy does not discern between famous and anonymous individuals, the French courts seem to make a distinction when it comes to the right to image. Only those who have commercially exploited their image, prior to the unauthorized use, can succeed with a claim of infringement of their right of image, without addressing any privacy concerns. A property right in one's image does therefore only seem to exists here however. While it may be essential to have exploited one's persona commercially, in order to receive protection, a person who has successfully

\textsuperscript{194} Supra note 139, p.685.
exploited this value is usually granted lower damages. The courts seem to reason that the less a persona has been exploited, the more valuable it is. Whether or not such an assumption is true is probably left to be determined.

3.5.3 Legal rationale for protection of a commercial interest

It is clear to see that the new French right of image has a close resemblance with the American Right of Publicity. Even the reasoning behind the new right is similar to the rationale behind the Right of Publicity. As one French court expressed it:

"In the artistic field, fame stems from talent, work and lengthy, painstaking efforts along one's career ... a capital . . . the person enjoying it is the only one to decide how and when to exploit it . . . . Everybody is entitled to oppose any impairment of his or her persona, any prejudice to the representation which he or she may legitimately expect that people or the public will have of him or her."

Just as with the Right of Publicity in the U.S., the right of image has grown out of the right of privacy. Today, this right protects proprietary values and not only the personal interest of the individual. Furthermore, other aspects, such as a person's voice can fall under this right and it generally applies to celebrities more than to non-celebrities. The distinction between protection for a privacy interest and publicity interest, under the right of image, is not very clear in France but one can often tell from the amount of damages awarded, what interest the French courts are trying to protect. The higher the commercial value of the persona is the higher are the monetary damages. Also, in the past, cases involving personality and privacy rights were often resolved using specific relief rather than damages. Injunctions, for example, have been very common. As this new, parallel property right has developed, monetary damages are becoming increasingly more common and higher in amounts.

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195 Supra note 129, p. 535.
197 Supra note 66, p.174
198 Supra note 128, p. 1225.
3.5.4 Transferability and descendibility of the new commercial right

Transfers of a Right of image are possible and the only thing that is required is consent of the owner of the right. Anyone can therefore bargain for the right to use the image in different contexts\(^{199}\). When it comes to descendibility, the situation is not as clear. Privacy rights were in the past considered descendible in case law but this view has now been overruled\(^{200}\). Personality rights are considered personal and as such they protect only the individual that they are tied to. Once the owner of the right passes away, he takes these rights with him. This reflects the view of privacy rights protecting a moral right rather than a commercial interest. The new right of image however, appears to protect both interests. An individual’s right to prevent his image from being used in a context that brings him embarrassment is looked after and in recent case law, so is the proprietary interest a person has in his persona. As the value of the right is not only of personal nature but has actual monetary value, it has been accepted to pass on to the heirs of the deceased individual.

Gradually, the French courts seem to move towards recognition of the right of image as being a descendible right. One of the earliest cases where the heirs of a right of image were compensated for unauthorized use involved the famous actor Raimu\(^{201}\). Here, an advertising company had used a caricature of the deceased actor in a promotional campaign. The widow brought a law suit for “invasion of privacy and damage to the image, fame, and memory of her deceased husband”\(^{202}\). As in most cases involving the right of image where the plaintiff is an heir, the court did not grant her any compensation for damage to dignity. Nonetheless, it did award her damages to compensate her “for her lost share of the profits made from the advertising use of her husband’s image”\(^{203}\). In its’ holding, the court was very clear about its position regarding descendibility: “The right to one's image has a moral and patrimonial character; the patrimonial right which allows the

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\(^{199}\) Supra note 129, p.532.  
\(^{200}\) Supra note 66, p.177.  
\(^{202}\) Supra note 129, p.537.  
\(^{203}\) Supra note 153.
contracting of the commercial exploitation of the image for monetary compensation, is not purely personal and passes on to heirs\textsuperscript{204}.

3.6 The Right to Privacy in Germany

In Germany, following the World War II, there was a desire to reinstate important values in society, such as human dignity and personal freedom\textsuperscript{205}. As these values had been severely abused during the Nazi regime the German legislators now chose to protect them by incorporating them as fundamental parts of the new Federal Constitution of 1949 (Grundgesetz)\textsuperscript{206}.

3.6.1 The German Right of Privacy: a “right of personality”

Article 1 of the Constitution imposes a duty on all state authorities to respect and protect “the dignity of man”. In Article 2 everyone is said to have “the right to the free development of his personality in so far as it does not infringe the rights of others or offend against the constitutional order or the moral code”. On top of this, there are also rules in the German Civil Code, the Burgerliches Gesetzbuch\textsuperscript{207}, that have been used by the courts to protect certain aspects of personality.

Section 826 states that: "A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage". Furthermore, paragraph 1 of Article 823 provides:

\begin{quote}
"A person is obliged to pay compensation for either negligently or intentionally violating the life, health, freedom, property or any other right of another where:

(i) There has been an act that has violated an interest and caused damage;

(ii) The violation of the right is unlawful and not justified;

(iii) It was caused by intentional or negligent fault."
\end{quote}

\textsuperscript{204} Ibid.
\textsuperscript{206} Grundgesetz. Hereafter called GG.
\textsuperscript{207} Burgerliches Gesetzbuch 12 Hereafter called BGB.
The enumeration of protected right ends with "or any other right", which leaves it open for the courts to make their own interpretation of what can be protected. Based on this Section of the BGB and Article 1 and 2 of the Constitution the German Federal Court, Bundesgerichtshof (BGH), has developed a "general right of personality" known as "allgemeines Persönlichkeitsrecht"\textsuperscript{208}. The starting point for this development came in 1954 with the famous Schacht decision. In this case a lawyer wrote the editor of a newspaper asking for corrections of an article that linked his client to the Nazis. The letter was later published in the same newspaper without the lawyers consent. The publication of the letter was neither defamatory nor violating any copyright but the plaintiff based his claim on a right of personality. Prior to this case such a right had never been recognized but here the German Federal Court created it by holding that "the general personality right must be regarded as a constitutionally guaranteed fundamental right\textsuperscript{209}.

The extent of this new right was not defined in this case but in later decisions the contours of the right have become clearer. Under the "general right of personality" one can find a number of different rights such as the right to one's image, the right to one's name and the right to oppose publication of private facts. There is no specific Right of Privacy recognized in German law but privacy rights are covered by this "general right of personality"\textsuperscript{210}. Some of the rights protected under this principle are also protected by specific provisions in the law such as Section 22 of the Kunsturhebergesetz (KUG ) granting a right to one's image. The other rights of personality however, are only protected by the general principle established by the courts. Originally, the enumerated rights that exist in the legislation were supposed to be exhaustive and limit the scope of applicability\textsuperscript{178}. With time a need for interpretations and expansion became apparent and the courts have therefore had to fill in the gaps themselves when found to be necessary. This way, new rights and new elements of the pre-existing rights have been able to develop\textsuperscript{211}.

\textsuperscript{208} \textit{Supra note} 157, p.17
\textsuperscript{209} \textit{Supra note} 139, p.689.
\textsuperscript{211} \textit{Supra note} 59, p.50.
Originally, the protection offered by the Grundgesetz only applied to the relationship between an individual and the State. In more recent case law however, the "general right of personality" has been given "horizontal effect" and thus applies to relationships between private individuals. The remedies available for infringements of these rights range from counter-statements and injunction to damages. For a very long time the German courts would not award damages in cases involving personality rights as these rights were considered extra patrimonial, without any actual value. The codifiers had rejected the idea of granting monetary compensation for injuries that were no pecuniary. In section 253 of the BGB the position becomes clear through the statement: "[f]or an injury which is not an injury to property, compensation in money may be demanded only as provided by law". Furthermore, section 847 of the BGB defines the type of non-pecuniary injuries that could be compensated with monetary damages. These are limited to injuries to body or health, deprivation of freedom and corruption of a woman. In 1958 however, a change in this position began to develop.

3.6.2 The development of a commercial personality right

The case in which a pecuniary value was first recognized in personality rights was the "Gentleman Rider" case. In this case an amateur show jumper sued for compensation for the humiliation he had suffered as his picture had been used in an advertisement for an aphrodisiac improving sexual potency. The court could not find any pecuniary injury but awarded damages to the plaintiff based on a fictitious license agreement to use his image. The court's basis for this interpretation was that by violating a personality right there had been immaterial damage that could be compensated for through the award of damages. It appears also as if the court found that without the availability of damages, the protection for these fundamental rights would in some instances be illusory. The protection of the commercial aspects of personality rights has been very limited as the German Courts have been very determined to protect the interests of the public. As in France, England and the U.S. there are situations when the

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212 Supra note 157, p.45.
213 Supra note 139, p.690
214 Supra note 59, p.51.
215 Supra note 139, p.690
216 Supra note 157, p.20.
personality rights have to stand back in favour of another interest and a balance has to be found between the right of the individual and the rights of the public. The principles that can override the personality rights are the right to free speech right to information, freedom of the press, etc. In Germany these principles have often been given priority over the interest of a private individual, even when the violation seems motivated by a commercial interest rather than mere information of the public.

One case where this attitude became obvious involved one of Germany's famous soccer players. The image of the soccer player had been used in a calendar sold to the public, for the distributor's own commercial gain. The soccer player tried to stop the distribution of the calendar and was thereafter sued by the distributor. In spite of the distributor's clear commercial motive and the possible loss of the defendant's own commercial prospects, the court held that "the use of the image was connected to the informational needs of the calendar, rather than for strictly commercial ends". The same conclusion was reached in a case from 1988 where the famous German tennis player Boris Becker sued the distributor of a tennis instructional book, which had his picture on its dust jacket.

The German courts are still very protective of public interests but have gradually started recognizing the commercial interest a person may have in his own persona. By recognizing that, they have also granted it a stronger protection. In 1999, the daughter of Marlene Dietrich sued for damages because of the unauthorized use of her mother's image in the advertisement for a musical about her life. The two main issues dealt with in this case concerned the protectability and inheritability of personality rights. The lower courts had rejected the protection of a simply commercial interest but the BGH overturned these rulings and held that patrimonial interests were also protectable, especially for famous individuals. This commercial interest was, according to the court, to be protected regardless of whether or not there was any moral injury.

217 Supra note 162, p.489.
218 Oberlandesgericht (OLG) (Court of Appeal) Frankfurt, NJW, 42 (1989), 402.
219 Supra note 139, p.693.
Furthermore, unlike compensation for moral injury, compensation for commercial value was not to be dependent on the "the severity of the violation of the right"\textsuperscript{220}. The statements made by the court thereby made the commercial interest of individuals an absolute right just like any other right of personality. In order to find a proper balance between the rights of the individual and the rights of the public, the life of a private person has been divided into three spheres, each granted different degrees of protection. The three spheres are 1) the intimate, 2) the private, and 3) the individual. While the intimate sphere cannot be compromised at all, the individual sphere, dealing with a person's professional life, etc, will most likely have to give in favour of public interest. Most of the balancing will therefore take place when dealing with information in the private sphere. Here, the status of a person has great impact on the outcome. Public persons will be granted less protection for their privacy than anonymous individuals\textsuperscript{221}. This distinction between individuals seems to be expressed in a statement by the Federal Constitutional Court:

"there is no protection of the private sphere against public attention if a person has agreed to the publication of particular matters which are usually regarded as private, for example by entering into exclusive contracts concerning press coverage of events taking place in the private sphere\textsuperscript{222}.

Though famous person's may not have as strong protection for their privacy, they are still protected by the personality rights and not exclude from this general provision as celebrities are in the U.S. Also, in Germany there is also a difference in the treatment of permanent public figures, such as famous politicians or scientists and those who only receive public attention for a limited time, such as victims of crime\textsuperscript{223}. The people in the latter category are granted a stronger protection but the permanent public figures may be able to regain a stronger protection as their fame diminishes. The protection for the moral interest in the rights of personality applies to all people to different extents but the

\textsuperscript{220} BGHZ 143, 214 (1999) (Marlene Dietrich).
\textsuperscript{221} Supra note 139, p.691.
\textsuperscript{222} Supra note 59, p.54.
\textsuperscript{223} Supra note 66, p.146.
commercial interest, that has only recently been granted protection, seems to only apply those who have actively exploited the value of their persona.

3.6.3 Transferability and descendibility of a proprietary personality right

The second question dealt with in the Dietrich case was the inheritability of personality rights. As in most other countries recognizing privacy rights, the German rights of personality are considered absolutely personal and they are therefore not transferable, nor inheritable. At the death of an individual his personal rights cease to exist. For at least a limited time after a person’s death however, he is still protected from serious distortions of his persona. The protection only allows the heirs to make defensive claims to prevent or repair moral injury and not for claims of compensation in damages. In the Dietrich case, the court recognized a patrimonial value in the actress’s image. Such values, the court argued, are not highly personal but are more similar to a proprietary right and can thereby be inherited by a person’s heirs.\(^{224}\)

3.6.4 German policy supporting protection for the commercial interest in a persona

The policy behind allowing inheritability here seems to be the Labour Theory, which may also serve as the general basis for the “right of personality”. The value in a famous persona is considered to be created by that person through hard work. As such, it would not be fair to take this value away from him and his heirs at his death, for anyone to exploit freely thereafter. The BGH expresses this position by holding that:

“Besides this, it seems unfair to surrender the financial value created by the achievements of the deceased and embodied in his picture, his name or his other personality features after his death to the clutches of just any third party, instead of giving this financial value to his heirs or relations or other persons who were close to him when he was alive.”\(^{225}\)

It appears as if the commercial interest and the personal interest in information that is protected by the “general right of personality” are difficult to coincide. The desired

\(^{224}\) Ibid, p.176

\(^{225}\) Supra note 172.
characteristics for the right to the economic value do not fit with the right to keep information private or secret. The personal or moral aspects of a person's identity are inherent in the person and will live on for as long as the person does. The commercial value however, only exists for some people and is considered to be generated by efforts made by those people. As such, it might be worthy of protection for all times or at least for a few decades. With these two different views, the legal theories that apply are probably not the same and they have very distinct, contradicting standpoints.

3.7 The Right to Privacy in Italy

In Italy, the development of a Right to Privacy seems to have been strongly influenced by the progress abroad, particularly the development in the United States. This is obvious as the legal meaning, as well as the English word for privacy has been imported into Italian law. As will be discussed below, the same pattern can be observed regarding the Right of Publicity, which is an emerging and expanding concept in Italy today.

3.7.1 Italian Privacy Rights

The most fundamental source of law in Italy is the Italian Constitution. In addition to the Constitution there are five distinct Codes that make up the Italian body of law. Under Articles 6-10 of the Italian Civil Code and Articles 96 and 97 of the Italian Copyright Law, a number of personality rights are protected. These rights are similar to the privacy rights in other countries and include the right to one's name, to pseudonym and to one's image. Rights protected by statute are very specific about what they protect, and they are therefore called "typical rights." "Typical rights" are based on interests that the legislators have found worthy of protection and the language of the Articles makes it clear that it is only these interests and nothing else that is protected under them.

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This does not mean however, that other rights of personality are left without any possibility of receiving recognition and protection by the courts. In Italy, the judges have been granted freedom to engage in judicial creation when they find it necessary to resolve legal matters that no law applies to. This creation of new principles is performed through "reasoning by analogy" upon the already existing legal rules and general principles. Depending on whether it is a legal rule or general principle that has been used as basis for the analogy, this type of practice is known "analogia legis" or "analogia iuris"230.

3.7.2 The Italian Right of Publicity

Based on this given freedom, or this power, the courts have developed a new sort of rights; so called "un-enumerated rights". These are rights that the judges have found both worthy of, and in need of, protection. They also have similarities with the enumerated "typical rights", both in their nature and in their economic and social functions231. One of the "un-enumerated rights" is the Italian Right of Publicity, which was first recognized in the case Dalla v. Autovox.232 Dalla, a famous Italian singer, sued a company producing audio equipment for misappropriation of his persona. In its advertisement the company had placed the two most distinctive elements of the singer's appearance; a woolen cap and a pair of small round glasses on a poster. Dalla did not base his claim on an infringement of his right to name nor an infringement of his right to image or portrait because neither his name nor his picture had been used on the poster233. Instead, the singer argued that by using the cap and the glasses in the advertisement the company had "misappropriated the commercial value of his personal identity"234. The company had not misappropriated Dalla's image but had used other indicia allowing the public to identify the singer. Using its freedom to reason by analogy the court thereby found the rules for right of image to be applicable to the case. As there had not really been an infringement of the right of image but rather of the artist's commercial value of his persona, the court held that the infringement was actually of Dalla's Right of Publicity. This was the first time an Italian court protected a person's identity when there

230 Supra note 179, p.548.
231 Supra note 181, p.110.
233 Supra note 179, p.549.
234 Supra note 181, p.109.
had been no misappropriation of name or image and also the first time the Right of Publicity was recognized. Following this case, the courts have continued to uphold the idea of protecting the commercial value of a person's identity through an extension of the right of image.235

3.7.3 Requirements for a cause of action under the right

From the cases invoking such an application of the right of image, some conclusions can be drawn regarding the requirements for a Right of Publicity claim. For there to be a valid cause of action the case has to involve a public figure and not just any anonymous individual, the defendant has to have appropriated identifying characteristics of the plaintiff, the use has to have spurred by commercial gain and it must have caused immediate damage for the person being exploited.236 The protection for privacy and publicity is not absolute and must be balance against the interest of the public. On the international level, Italy has ratified the ECHR and must thereby protect such rights as the freedom of speech. Furthermore, Italy has its own national regulations protecting these interests. In a law from 1941 one can find this balance regarding the use of a person's image:

"The reproduction of the portrait is justified by his [or her] notoriety or his [or her] holding of public office, or by the needs of justice or the police, or for scientific, didactic, or cultural reasons, or when reproduction is associated with facts, events and ceremonies which are of public interest or have taken place in public."237

3.7.4 Transferability and descendibility of the Right of Publicity

When it comes to transferability and descendibility, there appears to be no established principle in Italian law. In the legal doctrine it has been argued that the characteristics protected by the Right of Publicity are separable from the celebrity for commercial purposes and therefore, the Right of Publicity should be transferable.238


236 Supra note 179, p.557.


238 Supra note 179, p.562.
Regarding the descendibility of the Right of Publicity on the other hand, there appears to exist three different dominant views. One view completely opposes descendibility, a second holds that the right ought to survive the death of the owner but cease to exist after the same time as a normal copyright. The third view, similar to what has sometimes been argued in the American legal doctrine, stresses that the right can only be descended to the heirs if the owner himself has commercially exploited his persona while still alive.

Though it seems unclear which view will prevail in court, the development of the Italian Right of Publicity has closely followed the progress of the American right and therefore it is likely that it will take after the governing view in the U.S.\footnote{Supra note 181, p.15.}

3.7.5 Legal theories behind the new right

In addition to what has already been mentioned, the Italian Right of Publicity is similar to the American one in many aspects. Besides being created through judicial interpretation of privacy rights and sharing some traits with the American protection, there are also parallels in the legal reasoning behind the right\footnote{Supra note 179, p.555.}. The Italian right of Publicity is intended to grant people the right to be left alone and to protect the personal dignity and autonomy of individuals. It also seeks to prevent unjust enrichment and consumer confusion—two of the most prominent rationale's behind the American Right of Publicity. The right is also intended to protect a person's identity from being diluted by excessive exploitation. This is the same argument that has been used in case law the United States, one example being the Zacchini \textit{v. Scripps- Howard Broadcasting case}\footnote{Ibid.}.

3.8 The Right to Privacy in the Netherlands

In the Netherlands, there is no specific right of privacy recognized in the law. There are however, rules that can protect a person's identity in the Dutch Copyright Act,
the Auteurswet. Other rules that may apply in some cases can be found in the Dutch Trademark Law.\footnote{Benelux Convention on Trade Marks, 704 L.N.T.S. 342.}

3.8.1 Protection of identity

When it comes to publicity interests, it is the right to portrait and name in the Auteurswet that is of particular significance. In the Act, three articles concern the use of portraits, Article 19, 20 and 21. In Article 21, the privacy of individuals who have not consented to their picture being taken and used is being protected.\footnote{Fritz Oppenoorth, Facets of Dutch Portrait Law, 28 Copyright world 38,39 (1993).} Factors that may cause a use to be considered unlawful are privacy, danger, dishonour, etc. These factors have been defined in court rulings and based on them; one can conclude that commercial value has not been a factor in the court’s opinion. The consideration for people’s privacy is obvious in case law and the Supreme Court has in one case supported its decision by referring to the protection of privacy granted in the ECHR.\footnote{HR 1 juli 1988, NJ 1988,1000.} Although there is no specific Right of Publicity in Dutch law, case law below shows that the need for protection of commercial interests in different aspects of the persona has already received some recognition by the courts. As Dutch judges are permitted to interpret the legal rules as they see fit, in order to reach just decisions, the introduction of a concept similar to the American Right of Publicity is not unlikely in the future.\footnote{Supra note 195, p. 38.}

3.8.2 Characteristics and criteria of the Dutch Portrait right

Though several of the rules mentioned above could be used to prevent the use of someone’s name or portrait, they may also fail to apply, due to their specific requirements. One example of this is present in the \textit{Ja zuster/nee zuster} judgement.\footnote{HR 16 januari 1970, NJ 1970,220 (Ja zuster/nee zuster).} In this case, famous TV-personalities had been imitated and sold as dolls on key rings. The court established that though the personalities would be definitely be associated with these dolls by the general public the use was not unlawful. The dolls constituted depictions of the actors but not portraits as the law requires for a cause of action since
"one cannot talk of a portrait if the face depicted on an object does not correspond with the facial features of the person portrayed\textsuperscript{247}. A change in this attitude is emerging however and in a later case the Supreme Court held that "for a portrait it is not necessary that the person looking at it should know the person depicted, nor that the person looking should recognize the person depicted, nor that the person looking should be able to get a (clear) representation of the depiction of the face\textsuperscript{248}". In case law, other features than the face have not been considered sufficient to make a person recognizable and to fall under the regulations for portraits\textsuperscript{249}. A photograph of the marathon skater Yep Kramer was used in an advertisement for gas boilers. The District Judge argued that not only the facial features in the picture but also the characterizing posture of the skater, made him identifiable by people who saw the advertisement. It appears as if today any image or object making someone identifiable can be considered a "portrait"\textsuperscript{250}. The use of lookalikes has not yet been considered to fall within the frame of the portrait regulation however\textsuperscript{251}.

3.8.3 Protection of the commercial interest in an identity

The Dutch rules do not only protect privacy interests but also seeks to protect the commercial values in people’s identity. This is obvious from the requirements set up for a violation of the portrait right. In order to prohibit the use of someone’s portrait, the plaintiff has to show the court a "legitimate reason", a reasonable interest\textsuperscript{252}. This interest may be either a privacy interest or commercial interest. The privacy interest is, as mentioned earlier, supported by Article 8 of the ECHR. The commercial interest is supported by the rationale that achievements deserve protection from exploitation\textsuperscript{253}. The first case where this principle was established involved the singer Teddy Scholten\textsuperscript{254}. The court held that a famous singer, such as Scholten, may have a desire to exploit her portrait through, for example, licensing agreements. Such an interest was considered reasonable

\textsuperscript{248} HR 30 oktober 1987, NJ 1988, 277 (Naturiste).
\textsuperscript{249} Sub District Court Harderwijk, 19 May, 1991, p. 1001, No. 3507.
\textsuperscript{250} Supra note 195, p. 38.
\textsuperscript{251} Supra note 199, p. 15.
\textsuperscript{252} Supra note 195, p. 43.
\textsuperscript{253} Supra note 199, p. 17.
and legitimate for a cause of action. It was not until 1979 that the Supreme Court settled a case regarding the commercial interest in a portrait, and at that time two criteria were laid down. First of all, there had to be "popularity acquired in the exercise of their profession" and second; "a commercial exploitation of that popularity" (by the unauthorized user). With time, the requirement of having acquired popularity through one's profession has been somewhat compromised and now people who are famous for other reasons appear to have a chance of protection as well.

3.8.4 Issues of transferability, descendibility and underlying legal theories

For the use of a person's name, the situation is the same as for the use of his portrait and whatever does not fall under Copyright law may be covered by other regulations such as the Dutch Trademark law, which sometimes can fill the gaps. It has been argued in the legal doctrine however, that the development of the commercial rights is being held back by the close connection to the personality rights, as they both constitute actionable "reasonable interests". One of the problems that arise because of the two rights falling under the same principle, is the issue of transferability and descendibility. As the personality rights are being denied transferability, due to their personal nature, so are the commercial rights. This is the consequence even though the same underlying rationale does not apply to both interests. Remedies available for infringements of the right to portrait and name are such as a prohibition of use and damages equal to the price for a license.

In conclusion, the monetary value of a person's identity and the need to protect that value is obviously recognized in the Netherlands, even though there is no explicit Right of Publicity. The existing laws may not cover all the aspects of an individual's identity but there appears to be a development in that direction. For there to be a right of publicity similar to the one in the U.S., it may however be necessary to separate the personal and commercial interests under two different principles of law.
3.9 The Right to Privacy in Sweden

In Sweden, there is no specific Right of Privacy or Right of Publicity. There are, nevertheless, several rules in the legislation that will protect both of these interests. Regulations governing how marketing and advertisement is to be conducted can be found in the Marketing Act. The rationale behind this Act is however to prevent consumer confusion and not to protect the interests of those used in the advertisements. There are also established rules for photographs, Trademarks and for Copyright. These can all be used in certain situations when it comes to personal data and the commercial use of it. Protection of privacy and publicity interests is however not their main purpose and their applicability is therefore very limited. For protection of privacy and publicity concerns there are instead two other laws that will be applied primarily; the Act on Use of Name and Picture in Marketing and the Personal Data Act. Both of these Acts aim at protecting people’s privacy but there are slight differences between them. The Personal Data Act is an implementation of the European EC Directive on Data Protection (Directive 95/46/EC). The intention is to prevent any unauthorized gathering, processing and publication of personal data. Any information closely related to an individual could probably fall under this Act but not all uses are covered by it. Several exemptions exist to the rules. If there is a violation of this Act, a person is entitled to damages for the injury inflicted on him and for the violation of his personal integrity but not for the commercial value that has been misappropriated.259

3.9.1 The Right to one’s Name and Picture

The Act on Use of Name and Picture in Marketing on the other hand is based on the Intellectual Property Acts. The definition of the Act’s purpose is to:

“protect an individual’s integrity as well as to provide the individual with the right to decide to what extent his/her name and picture may be used in marketing and afford him a reasonable compensation for such use”260.

259 Supra note 199, pp.295-296.
260 Ibid, p.293.
The last part of this definition resembles the American Right of Publicity in that it does not only protect people's integrity but also guarantees them compensation in case of a misappropriation. One Swedish case addressing this issue is NJA 1999 s 749. Here, the picture of a famous Swedish actor had been published on the back of a men's magazine.

The court awarded the actor 125,000 SEK (equal to about $16,000), 50,000 as general damages and 75,000 as equitable compensation for the use of his picture. Even though this case concerned a celebrity, the rules apply to anonymous individuals equally. In its judgment, the court had to balance the right of the actor with the publisher's freedom of press. Freedom of press as well as freedom of speech are two of the public's interests that the courts need to take into consideration when looking at these situations. Sweden has ratified the ECHR and has national rules protecting these fundamental principles\(^{261}\).

3.9.2 Applicability and scope of the Act on Use of Name and Picture

As the name of the Act indicates, it was originally only applied to the name and picture of individuals. Today, however, an increasing number of identifying characteristics are covered by the Act and nicknames as well as jersey numbers of famous athletes fall in the same category\(^{262}\).

3.9.3 Protection for the commercial interest in an identity

When awarding damages, the court will look at the personal injury suffered but it can also grant the plaintiff fair compensation for the unauthorized use. Furthermore, when the court finds the unauthorized use to be made with negligence or intent, circumstances that are of other than economic character can be also taken into account. The commercial value of the persona is consequently recognized as deserving protection and will be estimated from person to person. Celebrities will thereby, in general, receive higher amounts of damages than an anonymous individual. Nonetheless, the Act appears to only apply to cases where a person has been used in marketing. Other forms of uses

\(^{261}\) Tryckfrihetsförordning (1949:105) and Yttrandefrihetsgrundlag (1991:1469).
\(^{262}\) Supra note 199, p.294.
fall outside the scope of this Act. Legal experts have however suggested that the Act should deal with all kinds of uses and that the name of it should simply be The Act on Use of Name and Picture.²⁶³

It appears as if the Swedish legislators have set out to protect both the privacy and commercial interests of people but the present rules, though still developing, are not yet as broad and generous as the American Right of Publicity.

3.10 Conclusion

A right very similar to the American Right of Publicity seems to be developing in Europe. Though this progress appears to take place simultaneously in most countries within the EU, the rules are different from country to country and in the individual countries there are still unresolved questions regarding the emerging right. This lack of clear and harmonized rules is the main problem for the Right of Publicity in the U.S. For the countries within the European Union the best solution would therefore be a clearly defined set of harmonized rules protecting the commercial right in a persona. Not only would this solve questions of the scope and applicability of the right on the national level but it would simplify the legal processes on an international level. Today, as a result of the ongoing globalization, a celebrity in one country is often famous also in other parts of the world.

For the celebrity to be able to protect his identity from being exploited there needs to be rules protecting it in those other countries where there may be a possibility of making a profit from it. The European countries have been influenced by the development of the Right of Publicity in the U.S. to different extents but in general most countries follow the American model. There is however, reluctance in many countries to fully adapt the view and the arguments behind the Right of Publicity for their own rules. Because of this, it seems appropriate to give the European right its own name, unrelated to the American right. The “right of persona” would be an appropriate name for the new

²⁶³ Malin Thomgren, Kränkning av personlig integritet i media – en skadeståndsrättslig och immaterialrättslig aspekt, Examensarbete, Juridiska fakulteten vid Lunds Universitet, 55, (2005), see also http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/3346D2230C190786C1257019005A09DE/
right as it defines what is being protected and leaves the word publicity out, so that this does not necessarily have to be an element of the right protected.

To avoid problems in developing a new commercial right, the best solution seems to be to separate it altogether from privacy rights and develop a completely separate set of rules for the Right of Persona. Looking at the different rules that could serve as basis for the new right, the Intellectual Property rights appear have the closest resemblance with the characteristics desirable in a European Right of Persona. Using Intellectual Property rules as a parallel and basis for the new right also serves the purpose of giving it several advantageous characteristics that other rules, such as general property rules, will not.

In order to avoid problems with determining who has a cause of action, all people ought to be protected under this new right. This will not only make it easier for the courts but it will also fill two purposes of the right; it will both grant protection for every individual who has a valuable identity and it will prevent others from trying to go around the rules and exploit the identity of those who are not obviously famous or who have not tried to exploit their own persona. Such behaviour cannot be desirable in society. In order to properly satisfy the purpose of the right, the rules should allow transferability and descendibility. Only that way can the owner of the right fully take advantage of the value inherent in his persona. Also, damages ought to include monetary damages, injunctions and other types of specific relief. That way, the courts can choose how to best protect the interests of the owner of the right. Having established the scope and the characteristics of the Right of Persona it becomes obvious what legal theory or theories can be used to backup these rules. The most appropriate theory currently applied is that of Unjust Enrichment. This theory does not only comply with the desirable elements in a Right of Persona but it also aims to protect the same interest. The core of the right of persona is not to protect consumers or to promote certain behaviour in society but to give the rightful owner of a value the right to exploit it and to prevent others from doing the same. There are certainly other theories that may also support a Right of Persona but as of today, the Unjust Enrichment appears to be the most prominent one.
It is obvious that protection for the commercial aspects of a persona is a concept that is becoming acknowledged by more and more countries throughout the world. Thereby, the need to recognize a right for this interest is also increasing. To provide the best protection for people within the European Union, harmonized rules are essential. In this article the most beneficial characteristics of a new Right of Persona have been discussed. Though they may be recommendable, not all of them would necessarily have to be imposed on the member states. In order to make it easier to implement a Right of Persona, only a minimum degree of protection needs to be forced upon the different countries. As long as this minimum of protection is met in the national rules, each country should be allowed to apply its own rationale for the right and allow its courts to make their own assessments of damages, etc.

The Right of Publicity in the U.S. is likely to have a strong influence on the European Right of Persona but in order to create the most ideal new right for the European Union it is important not to copy too much from the American development.

The American Right of Publicity is still in a developing stage itself and there are many uncertainties regarding the right that still need to be addressed and clarified by the American courts. Once a Right of Persona or a right of similar character is established in Europe, the next step will be to conform the rules of both systems to make them compatible. With the whole world as their market, athletes, actors and entertainers of today need protection for their identity to be established universally. By conforming the European rules we will be one step closer to meet this need and to protect an interest that is starting to receive recognition all over the world.