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# When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States

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# When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States

*James Gordley\**

## I. INTRODUCTION

No one thinks it odd that a Minnesota court should be guided by a decision in Wisconsin. The reason, some might say, is that Minnesota and Wisconsin are both applying the same system of legal rules: the common law. The meaning of a rule is shaped by its place in the larger system of rules and by the traditions that formed that system. If that is so, one might expect little guidance by looking to the rules of a foreign legal system.

Instead, however, one might think a Minnesota court should consult a Wisconsin decision simply because both courts are facing the same problem. History and tradition might explain why the problem happens to be the same, but so long as it is, Minnesota judges should care about what those in Wisconsin do for the same reason that engineers at Boeing should care about what engineers at Airbus do. There is no one right way to design an airplane. Each design may have advantages and disadvantages. In the end, the engineers at Boeing may make a different trade-off between fuel economy and speed, or capacity and comfort, than those at Airbus, but they are still facing a common problem and will understand the trade-offs better if they know what each other is doing.

Elsewhere, I have argued that even when one compares the private law of common and civil law systems, most of the problems are similar.<sup>1</sup> The differences in laws represent a range of possible solutions. When that is so, it seems clear that jurists in one country should be guided by what those in other countries do. That is so even when, as in the building of airplanes, there is no single right solution, and when there are different possible ways to trade off advantages and disadvantages.

In this article, I would like to show why jurists in different legal systems should seek each other's guidance even when

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1. James Gordley, FOUNDATIONS OF PRIVATE LAW PROPERTY, TORT, CONTRACT AND UNJUST ENRICHMENT (2006).

discrepancies in their law are glaring. The most glaring of all, perhaps, is the protection granted to honor, dignity, and reputation. The French protected this right since the nineteenth century, the Germans since 1954—and only then, their courts claimed, because their new democratic Constitution spoke of the “worth” of a human being. The English have protected such rights only recently and then, supposedly, because of a “breach of confidence.” American courts have reached results unthinkable in France or Germany. For example, the U.S. Supreme Court has held that a magazine has a constitutional right to ridicule a public figure grossly and obscenely,<sup>2</sup> and to release the name of a rape victim while her assailant is still at large.<sup>3</sup> In France, in contrast, a journalist was held liable for writing an article that called a television commentator a “kosher pork butcher.”<sup>4</sup> A newspaper was held liable for revealing that a judge had taken a vacation for “nervous depression.”<sup>5</sup> In Germany, the German army and its soldiers recovered when a journalist called the army a “murder machine.”<sup>6</sup> The wife of a Hohenzollern recovered for publicity given to her divorce.<sup>7</sup>

We will consider three reasons why the law in these countries might simply not be comparable, in which event one country could not learn from or be guided by the law of another. First, rules protecting honor, dignity, and reputation might have meaning only in relation to other rules of the same national legal system. If that is so, even jurists in civil law countries such as France and Germany could not seek guidance from each other’s law since each has a different system of law embodied in its own national code.

A second reason is that one could not compare common law rules protecting honor, dignity, and reputation with those of civil law jurisdictions such as France and Germany. The traditions are too different; consequently, the jurists of one system could not seek guidance from those of the other.

A third reason is that the United States is different. Because of its unique traditions, it faces problems different from those of other nations. A look at other nations’ laws would not be helpful.

Any one of these reasons could explain why the protection of honor, dignity, and reputation is different in the United States than it is elsewhere. Moreover, any one of them could explain why

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2. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

3. *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

4. *Cour d’appel*, Paris, 15 Feb. 1988, J.C.P. 1988, II, 2111.

5. *Cass.*, 2<sup>e</sup> ch. civ., 27 Apr. 1988, *pourvoi* no. 86-13.303 (retrieved from Lexis data bank).

6. *Bundesgerichtshof*, 19 Jan. 1989, JZ 1989, 644.

7. *Oberlandesgericht*, Hamburg, 26 Mar. 1970, NJW 1970, 1325.

jurists in some nations could not learn from the law of others. Their problems would be so different that it would not be like Boeing learning from Airbus. It would be like Boeing trying to learn from Yamaha.

My claim is that if we examine each of these possibilities in turn, we will see that most often, the problems are the same. That does not mean the answers should be. It does mean we can learn from foreign law. Moreover, we will see why we can learn from foreign law even when the problems are different.

## II. COMPARISON AMONG CIVIL LAW SYSTEMS

In the mid-twentieth century, the idea that each nation's law formed a "system" was widely accepted among comparative lawyers, although they were unclear as to what a "system" meant: Did it mean rules that were logically coherent, or rules that reflected a "national spirit" or common ideals, or rules that reflected common methods and values? Many have dated the emergence of comparative law to the work of these twentieth century scholars who defined their task as the comparison of legal "systems."<sup>8</sup> The archetypal work was by René David: *Les Grands Systèmes de Droit Contemporains*.<sup>9</sup> According to David, "[e]ach law constitutes in fact a system: it employs a certain vocabulary, corresponding to certain legal concepts; it uses certain methods to interpret them; it is tied to a certain conception of social order which determines the means of application and the function of law."<sup>10</sup>

A kindred idea was that these systems were embodied in civil codes. The code supposedly represented, not merely an enactment of the legislature, but a logical and coherent response to whatever legal problems had to be answered. This view prevailed in France even though, as I have shown elsewhere, it was a nineteenth century innovation very different from the view of the drafters.<sup>11</sup> But it fit very well with the ideas that influenced the comparative study of law in the mid-twentieth century. If each civil code embodied a different systematic approach to law, then the job was to study, not particular rules, but their place in the system.

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8. René David & John E.C. Brierley, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 3 (2d ed. 1978).

9. René David, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (7th ed. 1978).

10. *Id.* at 20.

11. James Gordley, *Myths of the French Civil Code*, 42 *AM. J. COMP. L.* 459 (1994).

I am skeptical of this whole approach. The contents of the German or French codes seem to me a collage of solutions, some more coherent, some less, produced over the centuries and cobbled together by committees of drafters subject to their own idiosyncracies. As I said earlier, most of them address common problems.

In any event, there is no way one can explain the protection of honor, dignity, and reputation in France and Germany as elements of a system enshrined in their codes.

The French Civil Code never mentions them. The Code simply says, in articles 1382 and 1383, that anyone who causes another a *dommage*—a harm—must pay if (as French commentators rightly interpret these provisions) he has done so intentionally or negligently. Admittedly, the drafters were familiar with the Roman law of *iniuria*, which protected dignity. Yet, they never discussed it so far as one can tell from Fenet's compilation of their deliberations. Toullier<sup>12</sup> and Duranton,<sup>13</sup> the first commentators on the Code, do not mention the protection of honor, dignity, or reputation. They simply say that anyone who is at fault for actions which are injurious or harmful to another must pay damages. In their leading treatise, Aubry and Rau explained that "any right can be the matter of a delict—it matters little that this right concerns an external object, or one which is bound up (*se confonde*) with the existence of the person to whom it belongs."<sup>14</sup> In a footnote, they added: "Consequently, for example, the honor and reputation of a person can be the matter of a delict."<sup>15</sup> Without much argument, their position became standard among French commentators and courts.

Baudry-Lacantinerie and Barde dissented later in the century, although by then, as they acknowledged, the weight of authority was against them. In part, they directed their attack, not only against compensation for loss of dignity or reputation in particular, but also against any compensation for *dommage simplement morale*, or harm that was merely non-pecuniary and non-physical. The role of pecuniary damages, they claimed, can only be to "reestablish the wealth [*patrimoine*] of the person who obtains them by the amount by which this wealth was unjustly diminished." But even if the plaintiff should recover for non-

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12. Charles Toullier, 11 LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE No. 117 (4th ed. 1824).

13. Alexandre Duranton, 13 COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL Nos. 704–08 (3d ed. 1834).

14. Charles Aubry & Charles Rau, 4 COURS DE DROIT CIVIL FRANÇAIS No. 444 (4th ed. 1869).

15. *Id.* at n.4.

pecuniary harm, he should not recover for affronts to his honor, dignity, or reputation. "It is scandalous that one can regard, as a matter of justice, the most sacred affections [and] the sufferings most worthy of respect."<sup>16</sup> One cannot say, then, that the protection of dignity, which the Code never mentions, is in some way part of a "system" embodied in the Code and intelligible in terms of its other provisions.

This account of nineteenth century French law is much different than the one given by James Whitman in his article, "The Two Western Cultures of Privacy: Dignity Versus Liberty."<sup>17</sup> In his story, in earlier centuries when societies were "sharply hierarchical," "only persons of high social status could expect their right to respect to be protected in court. Indeed, well into the twentieth century . . . only high status persons could expect their 'personal honor' to be protected in continental courts."<sup>18</sup> The honor of low status persons was protected on the Continent due to a process of "leveling up," which occurred in the nineteenth and twentieth centuries: that is, they were accorded the respect previously accorded only to high status persons.<sup>19</sup>

Here we must be clear about the issue we are discussing. Whitman may be perfectly right that in France and other European countries there has been a "leveling up" in which ordinary people are treated with a respect once reserved for the upper class, while in the United States, there has been a "leveling down" in which everyone is treated as ordinary people once were. I have thought about that remark while living in Europe following rules of etiquette unknown in California, where while eating at a premier restaurant, the waiter felt it acceptable to slap me on the back and say, "Hang in there, big guy." Whitman is certainly right that at one time lower class people would not have had their rights protected in court. Even Voltaire, when he was beaten by the servants of a nobleman he had offended, found that his nobly-born friends would not help him find redress.

Those observations are an important contribution to understanding the way law impacted society. But they should not be confused with a description of how the law supposedly in force changed. It was against the law in Voltaire's time to beat people up, just as it was against the law in the post-bellum South to lynch

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16. Gabriel Baudry-Lacantinerie & Louis Barde, 4 *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, LES OBLIGATIONS* No. 2871 (3d ed. 1908).

17. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004).

18. *Id.* at 1165.

19. *Id.* at 1166.

black people. Those things happened, and it matters that they did. But the question I am asking is at what point did French law formally protect the honor, dignity, and reputation, even of lower class people? And the answer is: not only during the nineteenth century, but well before. We will see in the next section that this protection was formally accorded even to persons of humble status by the Roman action for *iniuria*, which had been accepted for centuries in France and Germany. As we have just seen, whatever may have happened in 1791, the drafters of the French Civil Code neither mentioned nor discussed such a right. When nineteenth century jurists first considered the matter, they deemed the violation of such a right a *dommage* for which one could recover under articles 1382 and 1383. They drew no distinctions as to the social class of the plaintiff. When opposition emerged, it was later, and on the ground just described: that money could not compensate for the loss of honor, and it was squalid for the plaintiff to ask for compensation. That argument was rejected by most jurists. Whitman's story is not concerned with when French law formally protected the honor and dignity of lower class people. It concerns the importance attached to the protection of honor in French society. He begins by speaking of enthusiasm for the protection of everyone's honor manifested at the time of the French Constitution of 1791. He describes a series of dramatic cases involving honor and reputation, and sometimes property, that arose in the nineteenth century.<sup>20</sup> But that seems to describe how honor was regarded, not the point at which its protection was formally recognized as a legal right.

It would be even harder to describe German law in terms of a system enshrined in the German Civil Code. As just mentioned, there was a Roman civil action protecting dignity—action for *iniuria*—which had been recognized since Roman law had been received in Germany in the late fifteenth and early sixteenth centuries. In 1872, however, the Criminal Code of the newly unified German state provided a criminal sanction for attacks on honor and reputation. As part of the criminal action, compensation could be awarded to the victim, but only for pecuniary damage.<sup>21</sup>

One purpose of the new provisions of the Criminal Code was to abolish an older remedy: a court order requiring the defendant to retract his statement or apologize for having made it. Jurists pointed out that it might be difficult to compel the defendant to do

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20. *Id.* at 1174–80.

21. Strafgesetzbuch § 188 (repealed).

so, and compelling him might do little to ameliorate the situation of the plaintiff.<sup>22</sup>

That left open the question whether, once the Criminal Code was in place, a plaintiff could only recover if he had suffered pecuniary damages as specified in the Code, or whether he could still bring a civil action for *iniuria* for monetary compensation for a loss of dignity or reputation. German jurists argued over that question.<sup>23</sup>

During that argument, some jurists made the same claim that Bauderie-Lacaninerie and Barde had made in France. A loss of honor and good reputation could not be made good by the payment of money.<sup>24</sup> It was squalid even to seek compensation for a loss of this kind. Consequently, Hartmann claimed that French law was “absolutely foreign” to the “feelings of the German people.” “It contradicts the deepest German sensibilities to measure the most sacred feelings in base mammon and to compensate every violation of those feelings with a monetary payment.”<sup>25</sup>

The drafters of the first version of the German Civil Code, like the majority of French jurists, disagreed. Their draft provided, in a provision which was the ancestor of what is now § 823, that a plaintiff could recover damages for injury to his “honor” (*Ehre*) just as he could for injury to other enumerated rights such as life, health, freedom (meaning freedom of movement), and property. Proponents of this position argued that it was necessary to fill the gaps left by the German Criminal Code.

While the argument continued, a majority of the committee that produced the final draft disagreed. According to the official report of the debates:

The majority, on the contrary, was of the view that the practical result would be that through this proposal all the inconveniences would be reintroduced against which the statute on the abolition of the *actio iniuriarum* had been aimed. If the main purpose is not the procurement of a payment of damages but the restoration of honor, one would be drawn to the conclusion that a declaration

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22. Reinhard Zimmermann, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 1090 (1990).

23. For example, there was no civil action according to Aloys Brinz & Philipp Lotmar, 2 *LEHRBUCH DES PANDEKTEN* § 338 (2d ed. 1879). There was a civil action according to Heinrich Dernburg, 2 *PANDEKTEN* § 137 (4th ed. 1894).

24. Zimmermann, *supra* note 22, at 1090–92.

25. G. Hartmann, *Der Civilgesetzenentwurf, das Aequitätsprincip und die Richterstellung*, 73 *ARCH. CIV. PRAXIS* 309, 364 (1888).



concerning one's honor, a retraction, or an apology would have to be made.<sup>26</sup>

The argument, then, was that if one wished to protect honor, one would have to do so by means of a remedy that had already been legislatively rejected: a court-compelled retraction or apology. A payment of money would not accomplish that objective. The reason, presumably, was either that money could not restore honor, or that it was squalid to ask for money when one's honor was offended.

At any rate, the final version of the German Civil Code made it as clear as possible that one could not recover damages for a loss of dignity or reputation except in certain special cases, such as when one's credit was hurt. Section 823(1) says that the plaintiff can only recover for injury to the "life, body, health, freedom, ownership or similar right [*sonstiges Recht*] of another." Injury to "honor" (*Ehre*) had been deleted from the original version of this provision and was not supposed to be included as a *sonstiges Recht*. Section 823(2) says that the obligation to make compensation also rests "on a person who infringes a statute intended for the protection of others." As we have just seen, people are protected against defamation and insult by the German Criminal Code (*Strafgesetzbuch*). But to prevent them from recovering damages in tort, the drafters added in § 253: "In the case of harm that is not economic, compensation in money can be demanded only in the cases specified by statute." The Criminal Code provided for recovery only for pecuniary loss, and the Civil Code provided for "fair compensation in money for non-economic harm" only "in the case of injury to body or health or in the case of deprivation of liberty."<sup>27</sup>

So it remained until the highest German court for civil cases, the *Bundesgerichtshof*, chose to overturn the provisions of the Civil Code by invoking the post-war German Constitution (*Grundgesetz*). The Constitution provided in Article 1(1): "The worth of a human being is unassailable. It is the duty of all state power to attend to it and protect it." It provided in Article 2(1): "Each person has the right to the free development of his personality [*Persönlichkeit*] insofar as he does not injure the rights of others and does not violate the constitutional order or moral law." The *Bundesgerichtshof* held that these constitutional rights would lack adequate protection if a plaintiff could recover only if

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26. PROTOKOLLE DER KOMMISSION FÜR DIE ZWEITE LESUNG DES ENTWURFS DES BÜRGERLICHEN GESETZBUCHS 641 (1898).

27. Bundesgesetzbuch § 847, ¶ 1.

he had suffered pecuniary loss. To that end, in 1954, the Court declared that a plaintiff could recover damages for violation of his *Persönlichkeit*—his “personality”—which it construed to encompass honor, dignity, and reputation. It recognized *Persönlichkeit* as a “similar right” within the meaning of § 823(1) of the German Civil Code even though the drafters had been perfectly clear that it was not. The Court held that a newspaper had violated a person’s right by attributing a position to him that was not his own but had been represented as such by his lawyer.<sup>28</sup>

The Court’s argument was that the provisions of the Civil Code must be trumped because of the importance of honor, dignity, and reputation in the new democratic constitution. Like James Whitman, I find it hard to take that argument seriously. But again, he and I tell a different story. His is the story of nineteenth century German thinkers who considered the protection of honor and dignity in terms of “philosophical ideas that are both vague and grandiose, and are not obviously easy to translate into law.”<sup>29</sup> Confronted with that difficulty, German jurists turned instead to the Roman action for *iniuria*.<sup>30</sup> But their work was shaped as well by that of the philosophers, in particular, those in the Hegelian tradition.<sup>31</sup>

Again, our accounts may differ because we are asking different questions. Whitman describes how German intellectuals regarded the protection of honor and dignity. I am concerned with what the law was. I do not see any Hegelian influence on the German jurists of the *Pandektenschule* who discussed the action for *iniuria*. Nor do I see much of German philosophy in the arguments that inspired the limitations of the Criminal Code, the debate as to how far it changed civil law, the decision of the first drafting committee to protect honor in the Civil Code, or the final decision not to protect it. Those who drafted the Criminal Code thought honor should not and could not be protected by a judicially compelled retraction or apology. Those who drafted the final version of the Civil Code thought it could not be protected by awarding damages, and, in any case, it would be squalid for the plaintiff to ask for them. Nor do I see a gradually increasing respect, so far as the law was concerned, for the honor of persons of lower status. The Criminal Code granted protection to persons of lower status. The Civil Code denied it to persons of higher status. And the reason was not that honor was deemed of less importance in 1900 when

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28. Bundesgerichtshof, 25 May 1954, BGHZ 13, 334.

29. Whitman, *supra* note 17, at 1182.

30. *Id.* at 1183.

31. *Id.* at 1183–84.

the Code was enacted than in 1954 when the *Bundesgerichtshof* intervened. It was that the *Bundesgerichtshof* was willing to trump the decision of the drafters of the Code as to how honor should be protected. The point on which Whitman and I do agree is that the decision to override the Code had nothing to do with a new respect for honor inspired by the democratic constitution.

In any event, German law became much like the law of France. There is a uniform action for damages in tort that protects, not only property and person, but a collage of interests which the French describe as *dommage morale*, which includes the right to a private life; there is a similar action in Germany to protect the right to *Persönlichkeit*. Whatever else these rights include, they encompass protection of one's dignity and reputation, sometimes even if the defendant has lost his reputation because the plaintiff told the truth about him.

Here, the important point is not that the French and Germans now protect honor, dignity, and reputation in much the same way. From 1900 until 1954, the Germans did not protect them by an action for damages, while the French had done so since the early nineteenth century. Rather, the important point is that the reason for the earlier difference and the present similarity is not to be found in a systematic view of law embodied in the French and German Codes or a new view of human worth embodied in the present German Constitution. Honor, dignity, and reputation were always valued. The question was whether a damage award could compensate for their loss, and whether it would be squalid for the plaintiff to seek one. It just happened that the question was answered one way by a majority of French jurists and the first German drafting committee, and the other way by a minority of French jurists and a majority of the second German drafting committee. Since the value of honor, dignity, and reputation was never called into question, the protection accorded by German law since 1954 really reflects a disagreement with the drafters of the Code over whether an action for damages is appropriate—the question that French and Germans had argued over since the nineteenth century.

The argument is now over. Both the French and the Germans seem well pleased with the protection their law affords. But it should have been an international argument. Jurists of both countries were confronting precisely the same problem. Hartman should have been reading the French jurists, not dismissing anything they had to say as reflecting non-German values. The German drafters should have given weight to how the problem had been resolved in France. Had they done so, they might have reached a different conclusion, one which would not be overruled a half

century later by the *Bundesgerichtshof*. The *Bundesgerichtshof* should have understood the argument that had influenced the drafters. It might then have written an opinion that would be more honest and more useful. It would have been more honest because it would have acknowledged that it was disagreeing with the drafters, not on the importance of honor, dignity, and reputation, but on how they should be protected. It would have been more useful because it would have laid the groundwork for a discussion that I have argued is long overdue: the respect owed to a provision inserted in a code because it happened to appeal to the majority of a drafting committee a century ago.<sup>32</sup>

### III. COMPARISON AMONG COMMON LAW AND CIVIL LAW SYSTEMS

Civil law and common law protected honor, dignity, and reputation quite differently. Could it not be that this historical difference cast a shadow over later law, whether or not this difference was embodied in the French and German codes? Or that this difference is reflected in traditions that are still alive? If so, again, we might expect that common and civil lawyers can learn little from each other. American and English lawyers might simply not be facing the same problem as those in France and Germany.

The history was indeed different. It does explain why Anglo-American and Continental jurists in the nineteenth and twentieth centuries approached the problem from different starting points. But it does not explain the ending points in the twentieth and twenty-first centuries. Indeed, the English in particular are now facing many of the same problems as the French and Germans.

#### A. *Starting Points*

Before codification, Continental countries that adopted Roman law, or, as in northern France, Roman tort law, recognized a Roman law action to protect people against offenses to honor, dignity, and reputation: the action of *iniuria*. English law did not. It recognized a patchwork of forms of action, none of which directly addressed the protection of honor and dignity. It recognized actions in slander and libel to protect reputation, but these were qualified by myriad technical rules unknown on the Continent.

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32. James Gordley, *The Future of European Contract Law on the Basis of Europe's Heritage*, 1 EUR. REV. CONT. L. 163 (2005).

### 1. Civil Law

According to the Roman sources, the plaintiff could recover for *iniuria* if the defendant beat the plaintiff's slave<sup>33</sup> or entered his house without permission.<sup>34</sup> He could recover if someone attacked him by composing or reciting a song,<sup>35</sup> or by assembling people at his house to raise a loud and offensive clamor.<sup>36</sup> The defendant was liable for *iniuria* if he "accosted" a woman, which meant, according to the jurist Ulpian, that he used "smooth words to make at attempt upon [her] virtue."<sup>37</sup> He was also liable for using base language<sup>38</sup> or for following a woman "assiduously."<sup>39</sup> He was liable for maligning the defendant, for example, by presenting a petition about him to the emperor.<sup>40</sup> Initially, whether truth was a defense was not so clear. Nevertheless, despite a Roman text seemingly to the contrary,<sup>41</sup> most Continental jurists concluded it was actionable to tell an unpleasant truth about someone else unless the public interest required it.<sup>42</sup>

In the eighteenth century, Continental jurists were still discussing the limits of *iniuria* in a similar way: by itemizing cases in which an action would lie. Reinhard Zimmermann gives some examples from eighteenth century Germany:

It could be injurious to taunt his person with his natural impediment by calling him a cripple, or a hunchback. To refer to someone, ironically, as a "bonus patiens vir" (and thus suggesting that he was a cuckold), to state emphatically "ego saltem scortator non sum" (and thus insinuate that a particular other person is a fornicator), to use obscene language, particularly in the presence of a virgo, to address a clergyman "du pfaff," or to use the familiar "du" when talking German to persona honorabilis. These are all cases of verbal injuries. Pulling faces, putting

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33. DIG. 47.10.15.34.

34. *Id.* at 47.2.21.7.

35. *Id.* at 47.10.15.27.

36. *Id.* at 47.10.15.2.

37. *Id.* at 47.10.15.20.

38. *Id.* at 47.10.15.21.

39. *Id.* at 47.10.15.22.

40. *Id.* at 47.10.15.29.

41. *Id.* at 47.10.18 pr. ("It would not be fair [*bonum aequum*] for one who defames a pernicious person to be condemned, for the wrongs of such a person ought to be observed and made known.").

42. Gordley, *supra* note 1, at 218, 243-44.

out one's tongue at another or kissing a woman against her will are examples of *iniuriae reales*.<sup>43</sup>

These societies were, of course, hierarchical. To an extent, that was reflected in the conduct that was considered insulting, as in the passage just quoted, in which it was an insult for a lower class person to use the familiar pronoun "du" when speaking to *persona honorabilis*. Moreover, it may have been impossible as a practical matter for a lower class person to obtain redress in the courts. But that does not mean that by law, the honor of humble persons was not protected. On that point, again, I differ from Whitman. Although one Roman text said that no *iniuria* could be suffered by a slave,<sup>44</sup> another said that "*iniuria* to the slave should not be left unavenged by the praetor, especially if it occurred by beating or torture, for it is obvious that the slave himself feels these things."<sup>45</sup> Medieval jurists agreed that the slave could be the victim of *iniuria* although they differed as to the protection the law afforded him.<sup>46</sup> From the Middle Ages to the eighteenth century, jurists sometimes included cases in which the victims lack social status. According to Accursius, not only is it *iniuria* to try to make a chaste woman unchaste, as a Roman text said,<sup>47</sup> but also to try to make an unchaste woman still less so.<sup>48</sup> To judge from the texts he cited, he also had in mind the relatively unchaste of the lower classes.<sup>49</sup> Bartolus included the case of a land owner who caught a rustic fellow in his vineyard and beat him. Bartolus took it for granted that the rustic could normally recover for *iniuria* and asked whether he could still recover if he had previously agreed that the vineyard owner could beat him if he were found there. He could, according to Bartolus, because such an agreement "contains something immoral [*turpe*], namely, that the owner could commit a

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43. Zimmermann, *supra* note 22, at 1065–66 (footnotes omitted).

44. J. INST. 4.4.3.

45. DIG. 47.10.15.35. According to another text, one may not do *iniuria* to another person's slave. CODE JUST. 9.35.1. The point of this last text, according to Cinus, was that "because a slave is considered as nothing [*Quia servi nihil esse putanter*] there was doubt as to whether he could suffer or commit *iniuria*, which is removed by this law." Cinus de Pistoia, *In Codicem Commentaria* to CODE JUST. 9.35.1 (1578).

46. It was not clear whether the slave had an action in his own name. Nevertheless, Accursius, one of the greatest jurists of the thirteenth century, concluded that he did as a matter of natural law, whatever the civil law might be. *Glossa Ordinaria* to J. INST. 1.4.3.

47. DIG. 47.10.10.

48. *Glossa Ordinaria* to DIG. 47.10.10.

49. DIG. 11.3.1, which says that to corrupt a slave is to make a good slave bad or a bad one worse.

wrongful act."<sup>50</sup> Sixteenth century examples of *iniuria* included maligning the skill of carpenters<sup>51</sup> or the private lives of seemingly pious humble women (*mulierculae*) who live on alms.<sup>52</sup> A prostitute could not complain if someone said she admitted a man at night, but that was because she habitually did so, and so had no reputation to lose.<sup>53</sup> Children and madmen could recover for *iniuria*, and the jurists do not suggest that they must be upper class children or madmen.<sup>54</sup>

In any event, a change in how the action was conceived began in the sixteenth century. The Roman jurists and medieval civilians, for all their subtlety, were not philosophers. They discussed *iniuria* without trying to define the rights protected. In the sixteenth century, a group known to historians as the "late scholastics" tried to systematize Roman law, organizing it into doctrines and explaining the doctrines by philosophical principles. The principles were those of their intellectual heroes, Aristotle and Thomas Aquinas. Aristotle had said that distributive justice entitles each citizen to a fair share of "honor or wealth, or anything else that can be divided amongst members of a community who share in a political system . . . ." Commutative justice preserves that share. If one citizen is involuntarily deprived of resources by another, commutative justice requires the person who did so to compensate the victim.<sup>55</sup> The late scholastics concluded that the action for *iniuria* was only an instance of this principle. One person had deprived another of honor and so must make it up. Another instance was the Roman *lex Aquilia*, which entitled one to compensation when his property or (as medieval jurists interpreted it) his person had been harmed by another's fault. In theory then, there was a unified action in tort, based on fault, protecting whatever belonged to the plaintiff including his honor, and based on the Aristotelian concept of commutative justice.

This general principle, shorn of its Aristotelian terminology, was accepted by Hugo Grotius, the influential seventeenth century

50. Bartolus de Saxoferrato, COMMENTARIA CORPUS IURIS CIVILIS to DIG. 47.10.1.5 No. 3 (1615).

51. Martinus Azpilcueta, COMMENTARIA DE DETRACTIONE, FAMA ET EIUS RESTITUTIONE Nos. 458-59, f. 8r (1594).

52. Domenicus de Soto, De IUSTITIA ET IURE LIBRI DECEM lib. 5, Q. 10, a. 2 (1553).

53. *Id.* at lib. 4, Q. 6, a. 3.

54. Azpilcueta, *supra* note 51, at No. 466, f. 9r; Iohannes Brunnemann, COMMENTARIA IN QUINQUAGINTA LIBROS PANDECTARUM to DIG. 47.10.3 (1762); Wolfgang Lauterbach, COLLEGIUM THEORETICO-PRACTICUM to DIG. 47.10 § 1, VIII (1793).

55. NICOMACHEAN ETHICS vii, at 1130(b)-1131(a).

jurist who founded the so-called Northern Natural Law School. He said:

[F]rom . . . a fault, if damage is caused, an obligation arises by the law of nature, namely that the damage should be made good . . . . Damage . . . is when a man has less than what is his . . . . Things which a man may regard as his by nature are life, not indeed to throw away but to keep, his body, limbs, fame, honor, his own acts.<sup>56</sup>

This general principle was borrowed by the French jurist Robert Pothier,<sup>57</sup> whence it passed into articles 1382 and 1383 of the French Civil Code, although, as we have seen, without mentioning specific types of damage. It passed into the German Civil Code where, as we have already described, the drafters decided that offense to honor was not among the harms against which one should be protected.

In Continental history, then, there had been since Roman times a tradition of protecting honor, dignity, and reputation by a distinct action for *iniuria*. Since the sixteenth century, there had been a tradition of assimilating this protection to that of other rights such as person and property. Culpable violation of them called for compensation.

## 2. *Common Law*

Traditionally, English common law was entirely different. The law was not organized around concepts like tort, let alone commutative justice, but around writs or forms of action. Absent an applicable writ, the plaintiff, however meritorious his case, could not recover before the royal courts. Much judge-made and unsystematized lore grew up concerning when each writ would lie, but it was not the product of systematic thought. The writs were not a list of rights deemed worthy of protection; they were a list of actions that had traditionally been allowed before the common law courts.

Unlike the Roman action for *iniuria*, none of these writs squarely addressed the general problem of protecting honor and dignity.

It is true that, traditionally, the plaintiff could sue for assault and battery for physical contact even if it did not result in harm. Such conduct could often be insulting. Sometimes courts said they

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56. Hugo Grotius, *DE IURE BELLI AC PACIS LIBB RI Tres* 1–2 (1646).

57. Robert Pothier, *TRAITÉ DES OBLIGATIONS* Nos. 116, 118 (1761).



were protecting the plaintiff against insult. A judge did so in an eighteenth century American case:

[T]he insult is more to be considered than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of a hand, or the skirt of a coat, yet these are clearly within the legal definition of Assault and Battery, and among gentlemen, too often induce dueling, and terminate in murder.<sup>58</sup>

Nevertheless, it was a long time before protection against insult or offensive conduct became the standard explanation of liability. Hilliard in 1861 spoke of "an angry, rude, insolent or revengeful touching,"<sup>59</sup> Addison in 1876 of touching "in a rude or violent manner,"<sup>60</sup> and Burdick in 1908 of the "touching of another in anger."<sup>61</sup> None of them mentioned offense or insult expressly. In 1926, Clark said that the defendant was liable because of "the very great importance attached by the law to the interest of personal security."<sup>62</sup> Seavy said in 1942 that a "very slight interference is sufficient" because the interest "in bodily integrity" is one of the "most highly protected."<sup>63</sup> But Salmond in 1916, Harper in 1933, and Prosser in 1941 gave a different reason: the law was protecting the defendant against "insult" or "offensive touching."<sup>64</sup> Their view became orthodox. It passed into the First and Second

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58. *Republica v. De Longchamps*, 1 U.S. 111, 114 (1784) (holding the defendant liable for striking the cane of the French ambassador; although the court claimed to apply the law of nations, it was clearly thinking in terms of the common law action of assault and battery).

59. Francis Hilliard, 1 *THE LAW OF TORTS OR PRIVATE WRONGS* 201 (2d ed. 1861). See Francis M. Burdick, *THE LAW OF TORTS: A CONCISE TREATISE ON THE CIVIL LIABILITY AT COMMON LAW AND UNDER MODERN STATUTES FOR ACTIONABLE WRONGS TO PERSON AND PROPERTY* 268 (2d ed. 1908) ("touching of another in anger") (quoting *Cole v. Turner*, (1704) 6 Mod. 149, 87 Eng. Rep. 907); Thomas M. Cooley, 1 *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 162 (1880) ("Injury . . . done . . . in an angry or revengeful or rude or insolent matter").

60. C.G. Addison, 2 *A TREATISE ON THE LAW OF TORTS* 4 (C.G. Wood ed., 1876).

61. Burdick, *supra* note 59.

62. George L. Clark, *THE LAW OF TORTS* 10 (1926).

63. Warren Seavy, *Principles of Torts*, 56 *HARV. L. REV.* 72, 81 (1942).

64. Fowler Vincent Harper, *A TREATISE ON THE LAW OF TORTS: A PRELIMINARY TREATISE ON CIVIL LIABILITY FOR HARMS TO LEGALLY PROTECTED INTERESTS* 38 (1933); William L. Prosser, *HANDBOOK OF THE LAW OF TORTS* 44-45 (1941); John W. Salmond, *THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES* 383 (4th ed. 1916).

Restatement of Torts.<sup>65</sup> As a leading English treatise puts it, “the interest that is protected by the law of assault and battery is not merely that of freedom from bodily harm, but also that of freedom from such forms of insult as may be due to interference with his person.”<sup>66</sup>

As to reputation, in the 1500s, English courts began to give an action against one who made disparaging statements about another, or rather two actions, slander for oral statements and libel for written ones. Initially, actions for libel were brought before the Court of Star Chamber where, as in Continental law, truth was not a defense.<sup>67</sup> For reasons that are obscure, when the common law courts took over cases of libel, they changed that rule. Truth was a defense. The common law courts also developed a technical set of rules governing the plaintiff’s recovery. The defendant need not be at fault. Fault, at the time, was not a basis for liability even in cases of physical injury. But the harshness of that rule was mitigated by placing a series of obstacles in the plaintiff’s path. Certain spoken words (cases of so-called slander *per se*) were actionable without the need to prove damages: traditionally, those claiming the plaintiff had a loathsome disease, or had committed a crime, or which could injure him in his trade or profession. Libel was actionable without proof of special damages, although there is a long standing argument over whether this was so generally, or only when the statement was defamatory on its face (so called libel *per se* as distinguished from libel *per quod*).<sup>68</sup> The courts then recognized an elaborate series of privileges to protect defendants who had made a statement, not officiously, but in circumstances that served some interest deemed worthy of protection.

### *B. A Possible Ending Point*

One cannot understand the current differences in the way civil and common law jurisdictions protect honor, dignity, and reputation without recognizing the difference in how they were traditionally protected. But that is not to say we can explain the

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65. RESTATEMENT (SECOND) OF TORTS §§ 2.1–2.2 (1976); RESTATEMENT OF TORTS §§ 2.1–2.2 (1934).

66. R.F.V. Heuston & R.A. Buckley, SALMOND AND HEUSTON ON THE LAW OF TORTS 133–34 (19th ed. 1987) (citing *Collins v. Wilcock* (1984) 1 W.L.R. 1172, 1177 (Q.B.)).

67. *De Libelis Famosis*, (1605) 77 Eng. Rep. 250.

68. Compare William Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960) (plaintiff must prove special damages only in cases of libel *per quod*), with Laurence W. Eldridge, *The Spurious Role of Libel Per Quod*, 79 HARV. L. REV. 733 (1966) (all libels actionable without proof of special damages).

current differences by the historical ones. Quite contrary, I think that if all that had been at stake was the protection of honor, dignity, and reputation, civil and common law jurisdictions would have arrived at much the same place, albeit by different routes. That seems to be happening in England.

To accord the same sort of protection as Continental law, Anglo-American lawyers would have to simplify the rules of slander and libel. They are endeavoring to do so in ways that need not be described here. More significantly, they would have to supplement the traditional actions by others that protect the plaintiff's honor and dignity even if his reputation has not been compromised, and which protect his reputation even against a truthful statement.

In England, that change is well underway. The extent to which it has succeeded in the United States will be discussed in the next section.

English courts are now protecting defendants against truthful but derogatory statements by an action for breach of confidence. In 1988, in *Stevens v. Avery*,<sup>69</sup> the plaintiff had told another woman about her own lesbian relationship with the victim of a murder. That woman informed a newspaper, which published the story. The plaintiff sued the woman she had informed as well as the editor and publisher of the newspaper. The defendants argued that an action for breach of confidence would lie only in the case of a pre-existing relationship like that of an employer and employee, a doctor and patient, or a priest and penitent. The court rejected that argument and held the defendants liable because the information had been received with the understanding it was to remain confidential.

That limitation on the action was abandoned in 2004 in *Campbell v. MGN Ltd.*<sup>70</sup> Lord Nicholls claimed that in England there is "no over-arching all-embracing cause of action for 'invasion of privacy.'" But he said that the plaintiff could recover even if information had been imparted to no one in confidence. "The essence of the tort is better encapsulated now as the misuse of private information." The plaintiff, a celebrity, had sued a newspaper that had described her narcotics addiction and published pictures and descriptions of how she was being treated for it. She did not recover, but primarily because she was a celebrity and had lied to the public about her addiction. The court thought the newspaper had the right to set the record straight.

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69. [1988] 1 Ch. 449.

70. [2004] UKHL 22.

After *Campbell*, however, what does matter is not an abuse of confidence but rather, as in France and Germany, whether there was a “misuse of private information.” At that point, the problem becomes the same in England as in France and Germany: what information to consider private.

One can think of three potential stopping points. One might think that the information or images disseminated must, as in *Campbell*, lower the plaintiff in the esteem of others. If the English stop there, then an action for “breach of confidence” will be much like an action for slander or libel except that truth will not be a defense and there will be no maze of special rules. But we do not know that the English will stop there.

The Germans have gone further. A German statute provides that one cannot use a person’s picture unless the image depicts contemporary history; is incidental to the portrayal of a landscape, gathering, or procession; or is of an important artistic nature.<sup>71</sup> What matters is that a person is portrayed without his consent, not that he is disparaged, although in the cases just mentioned, that right can be trumped.

Some French courts and the European Court of Human Rights have gone still further. French decisions have held, for example, that one cannot use a picture of a celebrity even if it was taken in a public place and was not disparaging, unless the picture shows him conducting his professional life.<sup>72</sup> Thus, a newspaper was held liable for publishing a photograph of a famous singer in a public place accompanied by a woman without implying there was any close personal relationship between them. In a similar case, German courts reached a different conclusion. Princess Caroline of Monaco sued when various German publishers printed pictures of her in a secluded part of a restaurant with a well-known actor, in public with her children, and in public on horseback, riding a bicycle, skiing, and leaving a restaurant. The *Bundesgerichtshof* held that she could not be shown in the secluded place. The German Constitutional Court (*Bundesverfassungsgericht*) held it might also be improper to show her with her children. But to show her in public engaged in ordinary activities, such as practicing sports and leaving a restaurant, was permissible since she was a figure of contemporary history. The European Court of Human

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71. *Kunsturhebergesetz* [Law on the Rights of Authors to Works of Art and Photography], Jan. 9, 1907 RGBl. 1, 7, §§ 22–23 (F.R.G.).

72. Cass., 2<sup>e</sup> ch. civ., 8 July 1981, arrêt no. 1.013, pourvoi nos. 80-12.286, 80-13.079, translated in James Gordley & Arthur Taylor von Mehren, *AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW: READINGS, CASES, MATERIALS* 269–70 (2006).

Rights, however, held that even these photographs could not be published. They did not concern her public position and were of no legitimate concern to the public.<sup>73</sup>

Where to stop is not clear, although the problem of where to stop is the same. It would be odd if the English tried to solve that problem without looking to what the French, the Germans, and the European Court of Human Rights have to say. Indeed, in his opinion in *Campbell*,<sup>74</sup> Lord Nicholls noted that England has enacted a law forbidding public authority from violating a right protected by the European Convention on Human Rights.<sup>75</sup> Article 5 of the Convention provides that "Everyone has the right to respect for his private and family life." That was the provision applied by the European Court of Human Rights in the case just described. Lord Nicholls said that because of this enactment, the European Convention must be taken into account in interpreting English law. If that is so, the question of whether the English should seek guidance from abroad, despite the differences in their past, has been settled in the affirmative.

#### IV. COMPARING AMERICAN AND FOREIGN LAW

The same could have been said of the United States if all that mattered had been the scope of the "right of privacy" recognized in America in the twentieth century. While American courts would not be bound to follow the European Convention on Human Rights, the question of when to protect honor, dignity, and reputation would be much the same as abroad.

The claim that American courts should protect a right to privacy dates to a celebrated article written in 1890 by Warren and Brandeis.<sup>76</sup> Warren's wife, a Boston society matron, had become upset when a newspaper published the details of her daughter's wedding.<sup>77</sup> Warren and Brandeis argued there should be an action against those who disseminated private information of no concern to the public.

American courts then recognized a right to privacy in quite heterogeneous cases. William Prosser claimed that, in effect, the courts had recognized four distinct torts:

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73. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 1.

74. *Campbell v. MGN Ltd.* [2004] UKHL 22.

75. Human Rights Act, 1998, c. 42 (UK).

76. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

77. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 407 (1960).

Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>78</sup>

Prosser described, accurately enough, four types of cases in which American courts have given relief. A plaintiff had recovered for intrusion into seclusion when the defendant used a "hearing device" to listen in on her private conversations in her own apartment.<sup>79</sup> A reformed prostitute<sup>80</sup> and a reformed thief<sup>81</sup> recovered for the disclosure of embarrassing private facts when newspapers exposed their past lives. A plaintiff recovered for having been placed in a false light when a magazine gave a fictitious, though not derogatory, account of his experiences when he and his family were held hostage by criminals.<sup>82</sup> Plaintiffs have recovered for appropriation of their name or likeness when, without their consent, their picture was used in advertisements<sup>83</sup> or their name was signed to a telegram urging veto of pending legislation.<sup>84</sup>

All four new torts were recognized in the Restatement of Torts for which Prosser acted as Reporter. In drafting its provisions, he confronted the problem as to where the line should be drawn: what could a plaintiff legitimately regard as private? In the case of the tort he had previously referred to as "disclosure of embarrassing private facts," the Restatement broadened the grounds for recovery. The facts revealed need not be embarrassing but must merely concern the "private life of another."<sup>85</sup> That would protect the type of privacy called for by Warren and Brandeis: nothing embarrassing had happened at the wedding. The limit he imposed on recovery for this tort as well as for intrusion into seclusion and placing the plaintiff in a false light was that the act must be "highly

78. *Id.* at 389.

79. *Roach v. Harper*, 105 S.E.2d 564 (W. Va. 1958).

80. *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931).

81. *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34 (Cal. 1971).

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

83. *Pavesich v. N. Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

84. *Hinish v. Meier & Frank Co.*, 113 P.2d 438 (Or. 1941).

85. RESTATEMENT (SECOND) OF TORTS § 652D (1976).

offensive to a reasonable person."<sup>86</sup> Perhaps that language reflects his own confusion about where the line should be drawn. Perhaps it reflects his awareness that he was proposing formal recognition of new torts, and must do so in a way that would cause the least controversy.

In addition, the courts imposed another limit on recovery. An official comment to the Restatement explained that in the case of appropriation of another's name and image, "the rule stated is not limited to commercial appropriation." It is enough if the defendant uses it for "his own purposes and benefit."<sup>87</sup> Yet, as Richard Epstein has observed, "[t]he courts have uniformly held that the right of publicity does not prevent newspapers from using anyone's name or likeness in an ordinary news story."<sup>88</sup> For example, a woman did not recover when the defendant published her picture in a story called "After the Sexual Revolution" without naming or commenting on her,<sup>89</sup> nor did a couple who were in an affectionate but not amorous pose when their picture was taken in a public place and used in a human interest story.<sup>90</sup>

These are not the same solutions as those we have seen in foreign countries. They do show, however, that American courts, like the English, were capable of breaking out of the confines set by the traditional causes of action. Actions for slander and defamation required that a statement be untrue and derogatory. To allow recovery for the revelation of embarrassing private facts eliminated the first of these requirements. To allow recovery for putting plaintiff in a false light, derogatory or not, eliminated the second. Moreover, while the solutions may be different, the problem is the same as the one the Europeans have had to face. Where should the line be drawn? What should a person have the right to consider private? Had that been all that had happened, Americans should be interested in how Europeans confront the same problem. It is significant that James Whitman, who thinks, as we will see, that American and European law differs because Americans "have their own . . . values,"<sup>91</sup> does not think that in these cases the values are different. He acknowledges the parallel between the right to privacy, as we have just described it, and the

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86. *Id.* (disclosure of private information); *id.* § 652B (intrusion into seclusion); *id.* § 652E (false light).

87. *Id.* § 652C cmt. b.

88. Richard A. Epstein, *CASES AND MATERIALS ON TORTS* 1186 (7th ed. 2000).

89. *Tropeano v. Atlantic Monthly Co.*, 400 N.E.2d 847 (Mass. 1980).

90. *Gill v. Hearst Publ'n Co.*, 253 P.2d 441 (Cal. 1953).

91. Whitman, *supra* note 17, at 1211.

Continental protection of honor, dignity, and reputation.<sup>92</sup> He even describes American protection of those rights as a “continental transplant,”<sup>93</sup> although he cannot mean that Prosser, and the judges whose decisions Prosser described, were consciously imitating Continental law (although for all we know, Warren and Brandeis may have been). In short, had nothing else happened, Americans would be confronting the same problem as Europeans and therefore should be interested in what Europeans have to say.

But that is not all that happened, and consequently, Whitman is right that American law is different. American courts have recognized a public right to disclosure that trumps private rights, a right that goes far beyond the occasional remarks abroad about the importance of freedom of expression. In *Hustler Magazine v. Falwell*,<sup>94</sup> the U.S. Supreme Court held Hustler Magazine had the right to ridicule the Reverend Jerry Falwell grossly and obscenely. In *Cox Broadcasting Corp. v. Cohn*,<sup>95</sup> it held that a newspaper had the right to reveal the name of a deceased rape victim that was publicly disclosed in judicial proceedings. In *Oklahoma Publishing Co. v. District Court*,<sup>96</sup> it held that a newspaper could, in defiance of a pre-trial order, publish the name and picture of an eleven-year-old charged with delinquency by second degree murder. The Court noted that no objection had been made to the presence of the press in the courtroom.<sup>97</sup> In *Florida Star v. B.J.F.*,<sup>98</sup> the Court held that a newspaper had the right to divulge the name of a rape victim while her assailant was still at large, even though the victim had given this information to the police, who, seemingly by accident, had left it where reporters could find it. None of these cases would have been decided the same way in Europe.

At first glance, one might imagine that the reason for the difference is that the U.S. Supreme Court has blinders on because its most important duty is to interpret the Federal Constitution. The First Amendment protects freedom of speech, but the Constitution never mentions honor, dignity, and reputation or even, like the German Constitution, the worth of a human being. One might imagine that the Supreme Court is protecting the one value it can see, given its institutional role. It does not have the responsibility, as state courts do, of developing private law

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92. *Id.* at 1202–03.

93. *Id.* at 1204.

94. 485 U.S. 46 (1988).

95. 420 U.S. 469 (1975).

96. 430 U.S. 308 (1977).

97. *Id.* at 311.

98. 491 U.S. 524 (1989).



coherently to safeguard other rights worthy of protection, such as honor, dignity, and reputation. One cannot be certain how much the nine members of the Supreme Court really know about private law. Thus, one might imagine that, because of institutional blindness, the Justices place a right they feel bound to safeguard ahead of others whose importance they do not fully understand.

I do not think this is a good explanation. In other situations, the Supreme Court has been ingenious at discovering and protecting rights the Constitution never mentions, such as a right to "privacy" that does not help the rape victim but does prohibit laws against birth control and abortion. Had the Court so wished, it could have found constitutional grounds for protecting "privacy" in its normal sense.

Moreover, these differences in American law did not arise simply because the Supreme Court decided to impose its opinion on the states. One can see the same tendencies in state court decisions. For example, simply as matter of common law and leaving the Constitution aside, state courts held that newspapers can intrude into what would otherwise be a right to privacy as long as the matter is "newsworthy." They interpreted "newsworthiness" so as to permit much more than Continental courts would tolerate. It was "newsworthy" to describe the whereabouts and activities of a one-time child prodigy who years before had dropped out of public and academic life, become a recluse, and shunned publicity.<sup>99</sup> It was "newsworthy" to print pictures of a woman clad only in a dishtowel who was escaping from her estranged husband who had kidnapped her at gunpoint and forced her to disrobe.<sup>100</sup> As mentioned earlier, and in stark contrast to Germany and France, American courts have uniformly held that a newspaper may use anyone's name or likeness in an ordinary news story. That is so even despite a comment in the Restatement that use of a name or likeness is actionable provided it is to the defendant's "benefit or advantage," whether or not it is to his commercial benefit. Those cases were decided without invoking the Federal Constitution. But some state courts have been willing to give the Constitution at least as wide an interpretation as the Supreme Court. In *Howell v. New York Post Co.*,<sup>101</sup> a photojournalist trespassed on the grounds of a private psychiatric facility and took a picture of the plaintiff standing next to a woman who was the subject of the newspaper article because she had attracted considerable attention in a child

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99. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940).

100. *Cape Publ'ns, Inc. v. Bridges*, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982), writ denied, 464 U.S. 893 (1983).

101. 612 N.E.2d 699 (N.Y. 1993).

abuse case and was now recovering. Learning that the plaintiff was included in the picture and that the newspaper was planning to publish it, the hospital's medical director telephoned and objected that to do so would jeopardize the patient's recovery. Her hospitalization had remained a secret from all but her immediate family. The highest court in New York held that the newspaper had a constitutional right to print the picture without even cropping it to remove the image of the plaintiff. Had it done so, the court said, "the visual impact would not have been the same . . . ." Whitman explains the difference by saying:

The correct concept of personhood is not what is at stake here. What is at stake are two different core sets of values: On the one hand, a European interest in personal dignity, threatened primarily by the mass media; on the other hand, an American interest in liberty, threatened primarily by the government.<sup>102</sup>

That statement can be only half true. As we have seen, Whitman himself regards the right to privacy as recognized in American tort law as protecting much the same right to personal dignity as Continental law. So the reason for the difference is not that the protection of personal dignity is a core value recognized in Europe but not in the United States. The difference must be that in addition, American law also recognizes some countervailing value, strong enough often to trump the protection of dignity. Whitman correctly identifies this value as "liberty" in the sense of freedom of expression.

Freedom of expression can be valued for two reasons: either because it protects the right of a person to dissent or otherwise express himself, or because it protects the right of others to hear what he has to say. In the cases described, courts must be protecting freedom of expression for the second reason. It would be odd to think a photographer's or journalist's interest in self-expression is compromised because he cannot print a photograph of an inmate in a mental institution or disclose the name of a rape victim.

If that is so, we can interpret American protection of freedom of expression in two ways. I will argue that in either case, Americans can learn from European law. But there is a difference in what they will learn.

By one interpretation, while Europeans and Americans both value freedom of expression, American courts are engaged in what religious Jews have described to me as "fencing the Torah."

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102. Whitman, *supra* note 17, at 1219.

Europeans are not. Fencing the Torah, as it has been explained to me, means that since God made rules that man cannot fully understand, doubts are to be resolved by interpreting the rules strictly. If we are in doubt as to whether turning on an electric light on the Sabbath is like making a fire, we should assume that it is. By this interpretation, when an American court is in doubt as to whether the right to free expression is infringed, it will not balance the significance of the infringement against the harm done to the plaintiff's dignity. It will protect freedom of expression. According to this view, American law is not different because Europeans and Americans value different kinds of freedom of expression. It is because when doubts arise, Americans will resolve them so as to protect freedom of expression.

That is the explanation the Supreme Court gave for its decision in *Hustler Magazine v. Falwell*.<sup>103</sup> The defendant published a satire in which the Reverend Falwell claimed to have had his first sexual experience in an outhouse with his mother. The Court agreed that the publication was in extremely bad taste. But it claimed that it could not distinguish it from the cartoons of Thomas Nast, which were once influential in discrediting dishonest politicians who belonged to the "Tweed Ring" in New York.

At first sight, that statement might seem as absurd as a claim that one cannot distinguish the Venus de Milo from a Playboy centerfold, or Michelangelo's David from a man exposing himself on the street. In my view, however, the Court had a legitimate point. The portrayal of Falwell did offend Protestants. Catholics were offended by the cartoons Nast drew of Catholic politicians kissing the Pope's foot. When one reads the invective—much of it in bad taste, much of it unfair—that has marked American election campaigns, political discussions, and protests throughout history, one can see why a court would not try to draw lines.

But if that is the goal, then it seems that the Europeans have much to learn from the Americans, and the Americans from the Europeans. In one German case, a newspaper was held liable for calling the German army a "murder machine." According to the *Bundesgerichtshof*, "the defendant is free to discuss critically the celebration of the oath of the German army and in so doing he may use sharp and polemical expressions and overstated poster-like value judgments but nevertheless that does not justify vituperation, abuse and defaming as is the case here."<sup>104</sup> The Court seems to have an excessive confidence in its own ability to tell the difference between overstated poster-like value judgments and

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103. 485 U.S. 46 (1988).

104. *Bundesgerichtshof*, 19 Jan. 1989, JZ 1989, 644.

vituperation. It might be better not to try. In a later case, the German Constitutional Court reached the opposite result on similar facts.<sup>105</sup> The defendant displayed a bumper sticker that read "Soldiers are Murderers." The Court said that one could read the word "murderer" to mean, not one who commits murder within the meaning of the criminal law, but "as any killing of a person which is unjustified and accordingly to be disapproved . . . ." Thus, it turns out that one must not only distinguish "overstated poster-like value judgments" from "vituperation." One must also distinguish mere vituperation from social criticism, even though the same words might be read either way. The problem is illustrated by another German case in which a female prisoner had her sentence lengthened for violating the dignity of her guards, *inter alia*, by calling them "shit bulls" (*Scheissbullen*).<sup>106</sup> The court of first instance (*Landgericht*) held that this was not an insult, for one could read her statement as a criticism of German prison conditions and the guards' role in maintaining them. Had she said, as a more cultivated person might, that conditions were bad and they were in part responsible, her freedom of expression would be protected. Could that not be what she meant by calling them "shit bulls?" The intermediate appellate court (*Oberlandesgericht*) overturned that decision. It said the words must be read as abuse of the guards and not "simply as an expression of dissatisfaction . . . ." Thus German courts seem excessively confident about their ability to distinguish mere abuse from social criticism. Perhaps when lines are so subtle and hard to draw, they ought not to try. That was the point the U.S. Supreme Court made in *Falwell*.

On the other hand, if what really is at stake is the difficulty of drawing lines, then Americans have a great deal to learn from Europeans. Before a court refuses to protect honor, dignity, or reputation, the line ought to be at least one that is difficult to draw. Turning on a light on the Sabbath bears some resemblance to making a fire, but stepping into the sunshine to read a book does not. European courts say that they are protecting the public's right to know about matters of legitimate public concern. The character of politicians and of public figures like Falwell is of legitimate public concern. But why should the public be concerned about the name of an eleven-year-old accused of a crime, the habits of a recluse, the background of reformed prostitutes and thieves, or the identity of a rape victim? How is the public enlightened by seeing a picture of a woman escaping clad only in a dishtowel or by the "visual impact" of a person of no public importance recovering in

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105. Bundesverfassungsgericht, 28 Aug. 1994, NJW 1994, 2943.

106. Oberlandesgericht, Oldenburg, 31 July 1989, JR 1990, 1217.

a mental hospital? If the American courts are worried about the difficulty of drawing lines in ambiguous situations, then they should ask whether the situation is indeed an ambiguous one in which lines are hard to draw. In the cases just mentioned, it is hard to see any way in which the people's understanding of public issues or issues of concern to themselves could be advanced.

To explain these decisions, one would have to say the problem is not simply one of drawing lines, a problem that Europeans and Americans would both face if their courts were trying to protect freedom of expression in the same sense. One would have to say that Europeans are protecting freedom of expression in a different sense. The question European courts ask is the one just stated: Does the statement or image in question contribute to people's understanding of public issues or issues of concern to themselves? When that question can be answered in the affirmative, they are willing to allow publication of material that they would otherwise forbid. For example, when the author of a history of the German occupation of the Franche Comte named the mistress of a collaborator, the highest French court upheld his right to do so, although it would not have done so had the name been mentioned in the popular press rather than a work of history.<sup>107</sup> Similarly, the highest French court held a popular magazine liable for publishing "numerous details relative to the private life of [Charles] Chaplin and his family," although it would not have done so had the same facts appeared in an historical study.<sup>108</sup> It noted that the defendant "has never claimed . . . the character of a scientific and critical publication and did not present the article as an historical study." Again, while German courts normally do not allow the press to disclose a person's past criminal record, they did in the case of a Nazi who allowed children to be deported to a concentration camp for medical experiments. The court said: "In informing, instructing and supporting the shaping of public opinion, the press has a legitimate interest in reporting concretely the facts that are essential for evaluating a former period of time . . . ."<sup>109</sup>

Some American courts have also paid attention to whether a disclosure contributes to knowledge of a matter of public importance. In *Sipple v. Chronicle Publishing Co.*,<sup>110</sup> a newspaper had disclosed that the plaintiff was a homosexual. He had drawn

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107. Cass., 1<sup>e</sup> ch. civ., 20 Nov. 1990, arrêt no. 1492, pourvoi no. 89-12.580, translated in Gordley & von Mehren, *supra* note 72, at 294.

108. Cass., 2<sup>e</sup> ch. civ., 14 Nov. 1975, arrêt no. 729, pourvoi no. 74-11.278, translated in Gordley & von Mehren, *supra* note 72, at 291.

109. Oberlandesgericht, Frankfurt, 6 Sept. 1979, NJW 1980, 597.

110. 154 Cal. App. 3d 1040 (Cal. Ct. App. 1984).

national attention when he struck the arm of a would-be assassin who had attempted to shoot President Gerald Ford, possibly saving the President's life. In denying recovery, the court held the disclosure was "newsworthy" because it did educate people as to a matter of public importance. It discredited the stereotype of homosexual men as lacking in courage. In contrast, in another California case, *Diaz v. Oakland Tribune*,<sup>111</sup> a newspaper was held liable for disclosing that the plaintiff was a transsexual. The disclosure was not newsworthy because of its lack of "social value." The article was not meant to educate the public about transsexuality, and it contained a snide remark about how the women at the plaintiff's high school might want to make other shower arrangements. In another case, *Haynes v. Alfred A. Knopf, Inc.*,<sup>112</sup> Judge Posner took the question of educational value seriously. The plaintiff's identity and past history of drunkenness and adultery had been described in a serious study of the experience of African-Americans moving north between 1940 and 1970. The author described their experience by telling the story of individual families. The information about the plaintiff had been given to him by the plaintiff's ex-wife. In denying recovery, Posner stressed that "[n]o detail of the book . . . is not germane to the story that the author wanted to tell, a story not only of legitimate but of transcendent public interest." He noted that merely using fictitious names would not protect the identity of the plaintiff unless the author also changed the details. But "then he would no longer have been writing history. He would have been writing fiction." In these cases, American courts seem to be protecting the same type of freedom of expression as the Europeans. What matters is whether the disclosure educates or informs people of matters of public interest or importance to their own affairs.

Nevertheless, as we have seen, many American courts have protected freedom of expression in a different sense. The interest protected is the public's right to know about matters of no concern to themselves. Thus we have finally come to an instance in which the problems that these American courts and the European courts are addressing are not the same, since the problem of how to protect one sort of freedom of expression is not the same as how to protect the other.

If that is so, American courts can still learn from foreign law, but the lesson is considerably different. By looking at foreign law, these courts can learn that freedom of expression can have more

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111. 139 Cal. App. 3d 118 (Cal. Ct. App. 1983).

112. 8 F.3d 1222 (7th Cir. 1993).

than one meaning: that one can protect one kind of freedom of expression without protecting the other. They will no longer imagine that decisions follow from some abstract unitary principle about freedom of speech and the press.

Having done so, they can then ask whether the sort of freedom of expression that they protect, and European courts do not, should really be protected. Suppose one thought it should be. The argument would have to be that rights to honor, dignity, and reputation, which would otherwise be respected, should be sacrificed because the people find it gratifying to know the name of a rape victim or the identity of an eleven-year-old defendant, to experience the "visual impact" of a picture of a recovering celebrity surrounded by friends, or to see a woman escaping captivity clad only in a dishtowel. It would have to be argued that people's gratification in learning about such matters should trump the rights that could otherwise be asserted by the rape victim who incidentally changed her residence to avoid a series of harassing phone calls; by the eleven-year-old whose record is now in a newspaper database open to public access instead of sealed in court records; by the mental patient whose recovery was jeopardized; and by the woman who did not want public distribution of a photograph in which she was largely naked. The reason for trumping these rights would not be to inform or educate people or to help them to live their lives. The reason would be that people find such matters interesting.

Few people and few courts would find that argument persuasive. The decisions just mentioned seem to be the result of a failure to distinguish different kinds of freedom of expression, and, consequently, to distinguish the reasons each might be worthy of protection. If the study of foreign law can teach us to draw these distinctions, it can teach us a valuable but different lesson. The lesson is that we are wrong.