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English Judicial Recognition of a Right to Privacy

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ENGLISH JUDICIAL RECOGNITION OF A RIGHT TO PRIVACY

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I. INTRODUCTION

The average Englishman's habits of reserve and regard for his own privacy are legendary.[1] It is surprising, therefore, that English courts have, until very recently, shown great reluctance to recognize privacy as an interest worthy of legal protection in its own right.[2] The experience of other common law countries has not been the same; privacy law has flourished in the United States[3] and has gained a foothold in Australia[4] and Canada.[5] Moreover, a right to privacy has received international recognition in the Universal Declaration on Human Rights,[6] the International Covenant on Civil and Political Rights[7] and the European

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1 An opinion survey ranking privacy concerns most important among 'social issues' (including race and sex discrimination, free speech and free press) was conducted in 1971 for the Younger Committee. See *Report of the Committee on Privacy* (HMSO 1972) Cmnd 5012, Appendix E at 230 (Sir Kenneth Younger, Chairman) (hereinafter cited as 'Younger Committee'). For more impressionistic accounts from the past, see e.g. J. Gloag, *The Englishman's Castle* (1944) 4; Aïde, 'English Criticism of American Society' 8 *Our Day* 94, 101 (1891); Cobbe, 'The Love of Notoriety' 8 *Forum* 170, 174–75 (1889); Thomas, 'An Englishman's Castle' 4 *Household Words* 321, 323 (1851); 'The English, the Scots, and the Irish' *Eur Rev* (Oct 1824) 63. One social historian has identified the seventeenth and eighteenth centuries as the period of greatest advance in privacy interests at all levels of society. See L. Stone, *The Family, Sex, and Marriage in England, 1500–1800* (1977) 253–57, 395.

2 See e.g. *Malone* v *Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344, 357 (opinion of Sir Robert Megarry V-C citing 8 *Halsbury's Laws of England* 4th ed (1974) 557, para 843); *Re X (a minor)* [1975] Fam 47, 58 (opinion of Lord Denning MR) 'We have as yet no general remedy for infringement of privacy. . . .'; Younger Committee, *supra* n 1, para 83.

3 See e.g. 'Developments in the Law—The Interpretation of State Constitutional Rights' 95 *Harv L Rev* 1324, 1430–44 (1982) (ambit of privacy protection in State courts); *infra* 330–331.

4 See e.g. E. Campbell and H. Whitmore, *Freedom in Australia* 2nd ed (1973) 372–75; J. Fleming, *The Law of Torts* 5th ed (1977) 590–96; *infra* 368.

5 See e.g. D. Gibson ed, *Aspects of Privacy Law* (1980); Burns, 'Law and Privacy: The Canadian Experience' 54 *Can B Rev* 1 (1976); *infra* 367–368.

6 Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A, 3 UN GAOR, c 3 Annexes (Agenda Item 58) 535, 536–41, UN Doc A/811 at 71 (1948) (hereinafter cited as 'Universal Declaration'). Article 12 provides: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. . . .' See *infra* 350.

7 International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, GA Res 2200A, 21 UN GAOR, Supp (No 16) 52, UN Doc A/6316 (1966) (hereinafter cited as 'International Covenant'). Article 17 substantially repeats Article 12 of the Universal Declaration, *supra* n 6. See *infra* 350–351.

Convention on Human Rights.[8] Yet in England, Parliament has refused on a number of occasions to enact broad privacy protections,[9] and the courts have been slow to find a grounding for privacy in the common law and in constitutional principles as the American courts have done.[10] Judicial pronouncements in the past few years, however, have come closer and closer to recognition of a general privacy interest protected at common law as one of the rights of every English subject.[11] It is instructive to compare the state of American law on the verge of its acceptance of a right to privacy.

When, in 1890, Samuel D. Warren and Louis D. Brandeis published their now famous article entitled 'The Right to Privacy',[12] American courts had already recognized a legally protected interest in personal privacy in a number of contexts.[13] Doctrines of trespass, eavesdropping, defamation, unreasonable search and seizure, sanctity of the mails, and confidentiality of census information were among those extended by State and Federal courts to protect what they explicitly denominated the 'privacy' of the individual.[14] Warren and Brandeis wanted the courts to carry this existing protection one step further, to restrain the publication of truthful information of a personal nature (in particular of candid photographs) in the newspaper press.[15] The gradual extension of legal doctrines toward greater protection of privacy had stopped short at restraint of the newspapers because the

8 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Cmnd 8969 (1953) (hereinafter cited as 'European Convention'). Article 8(1) provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' See *infra* 351–353, 365–366.

9 See e.g. Right of Privacy Bill 1961, introduced 228 *Hansard HL* (5th ser) 716 (1961); Right of Privacy Bill 1967, introduced 740 *Hansard HC* (5th ser) 1565 (1967); Right of Privacy Bill 1969, introduced 787 *Hansard HC* (5th ser) 1519 (1969); *infra* 346–347.

10 See e.g. *Griswold* v *Connecticut* 381 US 479 (1965) (recognizing a 'penumbral' constitutional right to privacy), *Pavesich* v *New England Life Ins Co* 122 Ga 190, 50 SE 68 (1905) (recognizing a common law right to privacy in tort).

11 See e.g. *Harman* v *Secretary of State for the Home Dep't* [1982] 2 WLR 338, 351, 358, 363 (opinions of Lord Roskill, and Lord Scarman dissenting) dismissing appeal from *Home Office* v *Harman* [1981] QB 534, 557, 558 (opinions of Lord Denning MR and Templeman LJ), *Morris* v *Beardmore* [1981] AC 446, 462, 464–65, 465 (opinions of Lord Keith, Lord Scarman and Lord Roskill), *Inland Revenue Commissioners* v *Rossminster Ltd* [1980] AC 952, 997, 1019, 1022 (opinions of Lord Wilberforce and Lord Scarman, and of Lord Salmon, dissenting), *R* v *Grossman* (1981) 73 Crim App R 302, 308, 309 (opinions of Shaw and Oliver LJJ), *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1, 21 (Lord Denning MR dissenting in part), *R* v *Thornley* (1980) 72 Crim App R 302, 306 (opinion of Dunn LJ), *R* v *Crown Court at Sheffield, ex parte Brownlow* [1980] QB 530, 542 (opinion of Lord Denning MR), *R* v *Adams* [1980] 1 QB 575, 579–80, 583 (opinion of Cumming-Bruce LJ), *Thermax Ltd* v *Schott Industrial Glass Ltd* (1980) 7 Fleet Street R 289, 298 (opinion of Browne-Wilkinson J), *Lindley* v *Rutter* [1981] QB 128, 134 (opinion of Donaldson LJ). See also *R* v *Withers, The Times* 17 June 1971, at 1, col 2 (opinion of Roskill J). See generally *infra* 353–362.

12 Warren and Brandeis, 'The Right to Privacy' 4 *Harv L Rev* 193 (1890).

13 See Note, 'The Right to Privacy in Nineteenth Century America' 94 *Harv L Rev* 1892 (1981).

14 See ibid., 1895–909.

15 See ibid., 1893, 1909–10; Warren and Brandeis, *supra* n 12, 196, 206, 213.

competing interest of freedom of the press had a secure constitutional niche and zealous advocates of its own. A catalyst was needed, other than the steady pressure of litigants seeking to vindicate their invaded privacy, and the article by Warren and Brandeis provided that catalyst.

In England, however, scholarly legal periodicals did not have this creative effect. Spurred on by calls for the recognition of a right to privacy from Canadian[16] and Australian[17] legal writers, Percy H. Winfield contributed an article to the *Law Quarterly Review* in 1931[18] strongly urging the House of Lords to enunciate a general right of this kind in a case then before it, *Tolley* v *J. S. Fry & Sons Ltd.*[19] The Law Lords instead exercised their imaginations to devise a remedy in defamation for the plaintiff, who had been the subject of caricature in a newspaper advertisement.[20] Since the failure of the Winfield article, English legal writers have looked to Parliament rather than to the courts for the initiative in this field.[21] In Parliament, however, the organized power of the newspaper press has been the chief obstacle to enactment of a broad right to privacy.[22] A further obstacle has been the effort of some legal scholars to demonstrate the intellectual bankruptcy of the 'concept' of privacy.[23] Engendered in part by the alarm felt by English lawyers at the great breadth of privacy law in the United States, this attempt at obfuscation has not deterred recent English courts from building up piecemeal the broad right rejected in the *Tolley* case, by making frequent and explicit references to 'privacy' as the value they are concerned to protect.[24]

This article traces the treatment of privacy in the English courts from the

16 See Falconbridge, 'Desirable Changes in the Common Law' 5 *Can B Rev* 581, 602–05 (1927) proposing a common law 'right to privacy' protecting one's 'face, personal appearance, sayings, acts and personal relations' subject to some reservation in favour of the public interest.

17 See 'The Unauthorised Use of Portraits' 3 *Australian LJ* 359, 359 (1930) suggesting for *Tolley* v *J. S. Fry & Sons Ltd* a remedy 'against persons or corporations who, without authority, make use of another's name or portrait for advertising purposes'.

18 See Winfield, 'Privacy' 47 *LQ Rev* 23 (1931). The lack of a legal remedy for press invasions of privacy had been noted in lay periodicals. See e.g. Ervine, 'The Invasion of Privacy' 138 *Spectator* 937 (1927).

19 In the Court of Appeal, *Tolley* v *J. S. Fry & Sons Ltd* [1930] 1 KB 467, 478, Greer LJ announced his regret at having to overturn the jury award of damages, adding that 'the defendants in publishing the advertisement in question, without first obtaining Mr Tolley's consent, acted in a manner inconsistent with the decencies of life, and in so doing they were guilty of an act for which there ought to be a legal remedy'.

20 [1931] AC 333.

21 See e.g. Dworkin, 'Privacy and the Press' 24 *Mod L Rev* 185, 188–89 (1961); Yang, 'Privacy: A Comparative Study of English and American Law' 15 *Int'l & Comp LQ* 175, 188 (1966); *infra* 345.

22 See e.g. sources cited *infra* nn 167, 174 and 183. See also Press Council, *Policy Statement on Privacy*, quoted in *The Times* 12 April 1976, at 4, col 1 ('[A]ny attempt to legislate on privacy would be contrary to the public interest'); *infra* 345–347.

23 See e.g. Neill, 'The Protection of Privacy' 25 *Mod L Rev* 393 (1962); Wacks, 'The Poverty of "Privacy"' 96 *LQ Rev* 73 (1980). Professor Wacks' exposition of this argument can also be found in his book *The Protection of Privacy* (1980), 10–23.

24 See cases cited *supra* n 11; *infra* 353–362.

beginning of the nineteenth century to the present day. It attempts to set out the current status of judicial protection of privacy in England and to compare the experiences of the Scottish, Canadian, Australian, South African, and Indian courts with that of England's on the subject of privacy. First, however, the definitional difficulties posed by many legal scholars must be dealt with and a working definition of privacy must be proposed; Part II considers this problem of the definition of privacy. Part III then takes the history of privacy in the English courts up to the beginning of the twentieth century. In Part IV two proposed alternatives to judicial recognition—parliamentary enactment of a right to privacy and domestication of international protections—are briefly outlined. Part V traces the recent judicial initiatives approaching full recognition of a right to privacy, and Part VI provides an analytical and comparative overview of the English courts' protection of individual privacy.

II. THE DEFINITION OF PRIVACY

A. *The definitional quagmire*

Warren and Brandeis, in their 1890 article, had not thought it necessary to define exactly what they meant by a 'right to privacy', other than to equate it with Judge Thomas M. Cooley's formulation 'the right to be let alone'[25] and their own phrase, 'inviolate personality'.[26] Their aim was the narrower one of advocating what they termed 'the right to protect oneself from pen portraiture, from a discussion by the press of one's private affairs'.[27] This narrower right against the press was hedged about with many of the same limitations as was the right to reputation protected by the tort of defamation.[28] An American magazine editor, writing shortly before Warren and Brandeis, defined the interest in privacy more broadly as 'the value attached ... to the power of drawing, each man for himself, the line between his life as an individual and his life as a citizen, or in other words, the power of deciding how much or how little the community shall see of him, or know of him'.[29] This 1890 definition of privacy embodies the concept of individual control over information about oneself central to the now widely accepted formulation of Professor Alan Westin.[30]

Early discussions of the law of privacy in England showed equally little interest

25 T. Cooley, *Law of Torts* 2nd ed (1888) 29.

26 Warren and Brandeis, *supra* n 12, 205.

27 Ibid., 213.

28 Ibid., 214–18.

29 Godkin, 'The Rights of the Citizen. IV.—To His Own Reputation' 8 *Scribner's Magazine* 58, 65 (1890). Warren and Brandeis did quote in passing a similar notion expressed in an English decision of 1769: '[E]very man has a right to keep his own sentiments' and 'a right to judge whether he will make them public, or commit them only to the sight of his friends'. *Millar* v *Taylor* (1769) 4 Burr 2303, 2379, 98 Eng Rep 201, 242 (Yates J dissenting).

30 See A. Westin, *Privacy and Freedom* (1967) 7 ('Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others').

in sophisticated attempts at precise legal definition.[31] In suggesting that 'offensive invasion of the personal privacy of another is (or ought to be) a tort', Professor Winfield had defined 'infringement of privacy' as 'unauthorized interference with a person's seclusion of himself or of his property from the public'.[32] By mid-century, English lawyers had a wealth of American judicial definitions from which to choose,[33] as well as the formulation of the International Society of Jurists (this remarkably similar to Judge Cooley's).[34] The effort to deny the possibility of any coherent definition of privacy did not begin in England[35] until attention turned to the possibility of Parliamentary enactment of a statutory right.[36] Proposed statutory language proved much more susceptible to attack on definitional grounds than did the imagined pronouncements of future courts.

Sir Kenneth Younger's Committee on Privacy issued its Report in 1972 advising against enactment of a general right to privacy.[37] In assessing competing claims to privacy and to free flow of information, the Committee majority found one major difficulty to be the 'lack of any clear and generally agreed definition of what privacy itself is'.[38] By way of reply to this objection, Professor D. N. MacCormick pointed out that the enactment of a right 'is a fundamentally different procedure and process from the elucidation of a concept', and that, in any case, the difficulty of choice among alternative definitions is not a particularly good reason not to choose.[39] Since then, the project of formulating a coherent legal

31 See *infra* 331–333.

32 See Winfield, *supra* n 18, 24.

33 See Neill, *supra* n 23, 396–97.

34 See International Commission of Jurists, Conclusions of the Nordic Conference on the Right to Privacy 2–3 (1967), quoted in 'The Legal Protection of Privacy: A Comparative Study' 24 *Int'l Soc Sci J* 417, 420 (1972).

35 For the earliest American (and Australian) critiques, see e.g. Davis, 'What Do We Mean by "Right to Privacy"?' 4 *SD L Rev* 1 (1959); Dworkin, 'The Common Law Protection of Privacy' 2 *U Tas L Rev* 418 (1967); Kalven, 'Privacy in Tort Law—Were Warren and Brandeis Wrong?' 31 *Law & Contemp Problems* 326 (1966).

36 Compare 229 *Hansard HL* (5th ser) 625–30 (1961) (remarks of Lord Kilmuir LC) (definitional difficulties of the Right of Privacy Bill) with Winfield, *supra* n 18; Paton, 'Broadcasting and Privacy' 16 *Can B Rev* 425, 437 (1938); and 'Privacy and the Law' 228 *Law Times* 233 (1959) (discussions relatively innocent of definitional considerations).

37 See Younger Committee, *supra* n 1.

38 Ibid., para 658.

39 MacCormick, 'Privacy: A Problem of Definition?' 1 *Brit J L & Soc'y* 75 (1974). See also Baxter, 'Privacy in Context: Principles Lost or Found?' 8 *Cambrian L Rev* 7, 9 (1977) ('[I]t is not a definition which is needed but a general right, since otherwise the ingenuity of the modern invader of privacy cannot be taken into account . . . . [A] definition in the comprehensive sense is neither possible nor necessary.')

Another basis for the majority's conclusion was that Parliamentary legislation 'has not been the way in which English law in recent centuries has sought to protect the main democratic rights of citizens', in particular, the rights of free speech and assembly. Professor MacCormick took issue with the Committee on its analogy between 'liberties' such as free speech and the 'claim-right' of privacy, concepts differentiated by Wesley Hohfeld's analytical categories. MacCormick, 'A Note upon Privacy' 89 *LQ Rev* 23 (1973). MacCormick's attack drew a reply from minority member Norman Marsh, saying essentially that the Committee knew what they were doing. Marsh, 'Hohfeld and Privacy' 89 *LQ Rev* 183 (1973).

definition of privacy has been undertaken by very able scholars in American and Australian legal journals.[40] The problem that the Younger Committee saw as definitional—how to set limits on a right to privacy when it conflicts with other important interests—was really a problem of lawmaking in a new area. Legislators can provide guidance for the courts, and they occasionally do so in great detail; but legislators cannot expect total precision.[41] Nevertheless, the argument that privacy is incapable of definition, or at any rate not worth defining, has reappeared recently in a *Law Quarterly Review* article by Raymond Wacks entitled 'The Poverty of "Privacy"'.[42] Wacks urges that the concept 'be refused admission to English law',[43] and his reasons are worth examining in some detail.

Wacks finds the debate over contending definitions of privacy to be 'sterile' because scholars proposing definitions rarely agree on their premises or objectives, and 'futile' because where privacy is recognized, it simply means whatever the legislatures and courts say it means.[44] Neither of these objections goes to the impossibility of defining privacy; together, they would seem to indicate only that the confusion among legal scholars has not forestalled the continued use of the concept in courts and legislatures. Wacks relies more heavily on the argument that in America and in England privacy has become 'almost irretrievably confused' with a number of other legal concepts. On the constitutional level, the US Supreme Court has expanded the notion of privacy, in the area of sexual freedom, to be synonymous with individual autonomy 'or, indeed, with freedom itself'; moreover, the Court has characterized unreasonable searches, forced disclosure of membership in associations and prohibitions on the possession of obscene matter as invasions of privacy.[45] The common law tort of privacy in America has, according to Wacks, become confused with defamation and with the proprietary interest in one's name and likeness.[46] In England, privacy has become entangled with the action for breach of confidence—a protection of trade secrets as well as intimate personal details—and has been confused more generally with governmental claims to secrecy.[47] Finally, in both countries, computerized information collection has been labelled a privacy problem.[48] Wacks concludes that he would replace this overworked word with the phrase 'personal information'.[49]

The definitional argument put forward by Wacks is probably representative of the fears of many English lawyers opposed to legal recognition of a right to

40 See Gavison, 'Privacy and the Limits of Law' 89 *Yale LJ* 421 (1980); Benn, 'The Protection and Limitation of Privacy' (Parts 1 & 2) 52 *Australian LJ* 601, 686 (1978).

41 See e.g. H. L. A. Hart, *The Concept of Law* (1961) 124–25 (open texture of rules); W. Twining and D. Miers, *How to Do Things with Rules* (1976) 110–111 (same).

42 See Wacks, *supra* n 23.

43 Ibid., 74.

44 Ibid., 75–77.

45 Ibid., 79–81.

46 Ibid., 83–86.

47 Ibid., 81–83.

48 Ibid., 86–87.

49 Ibid., 88–89.

privacy.[50] It is the uneasy feeling that privacy law in the United States has run rampant and has intruded into older, settled categories of the law. It is not a jurisprudential argument that the word 'privacy' is somehow less capable of bearing definite legal meanings than, say, such overworked words as 'reasonableness' or 'property'.[51] It is also not a policy argument that people claiming invasions of their privacy are just using that vocabulary to camouflage underlying, illegitimate interests.[52] Wacks's argument appears to concede that people genuinely want privacy, and even that legal protection of individual privacy may be appropriate where it is incidental to relief for defamation or breach of confidence. But Wacks recoils at the twin prospects of, first, a wave of uncertainty as injuries that would have been remedied by an established doctrine such as defamation are brought to court under a new untested right to privacy, and secondly, a flood of unprecedented litigation as injuries that would not have been remedied at all under existing English law are brought to court for the first time. Such fear of the unknown has often been voiced before in opposition to proposed new remedies in the common law, remedies that seemed to burst the bounds of established legal categories.[53] The objection is a weighty one, but it does not go to the problem of definition as such.

B. *Toward a pragmatic legal definition of privacy*

As will be demonstrated in the main sections of this article, English courts since at least the mid-nineteenth century, and quite frequently of late, have made reference to a legally protectible interest in 'privacy' and even to a 'right to privacy' in limited contexts. No elaborate or technical definition of privacy is required to interpret and understand these judicial pronouncements. To the extent that the English judiciary had any theoretical framework for their discussion of privacy,[54]

50 See e.g. W. Pratt, *Privacy in Britain* (1979) 206–07 ('A concept flexible enough to comprise opposite ideas is not a likely subject for legislation.'); Taylor, 'Privacy and the Public' 34 *Mod L Rev* 288, 289–90 (1971).

51 See e.g. G. Paton in G. Paton and D. Derham, *A Textbook of Jurisprudence* 4th ed (1972) 531–36 (ambiguity of the term 'property' in modern English law).

52 This view has been taken in R. Posner, *The Economics of Justice* 232–34 (1981). For a response, see Englard, Book Review 95 *Harv L Rev* 1162, 1177 (1982).

53 See e.g. *Reynolds* v *Clarke* (1726) 1 Strange 634, 635, 93 Eng Rep 747, 748 (opinion of Lord Raymond CJ opposing the use of case for a trespass) 'We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion'; YB Mich 21 Hen 7, fo 30, pl 5 (1504) (argument of Pigot opposing the use of assumpsit for debt) '[O]ne can never have an action on the case where one can have another action at common law. . . .'; *Watkin's Case* (1425) YB Hil 3 Hen 6, fo 36, pl 33 (opinion of Martin J opposing the use of assumpsit for an unsealed covenant) '[I]f this action be maintainable . . . for every broken covenant in the world a man shall have an action of trespass . . .'.

54 On the difficulty of measuring the influence of contemporary economic and philosophical trends on the nineteenth century judiciary see P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 370–74 (influence of Mill's political economy and Benthamite utilitarianism at mid-century).

it was the philosophical debate begun by J. S. Mill and later developed by Stephen and Montague.[55] 'There is a limit to the legitimate interference of collective opinion with individual independence', wrote Mill in his essay *On Liberty*,[56] a limit he formulated elsewhere as 'a circle around every individual human being, which no government ... ought to be permitted to overstep', or 'some space in human existence thus entrenched around, and sacred from authoritative intrusion'.[57] By interference and intrusion Mill meant coercion as well as invasion of privacy, but even critics of Mill's broader principle of non-interference, among them James Fitzjames Stephen, conceded to Mill that '[l]egislation and public opinion ought in all cases whatever scrupulously to respect privacy'.[58] A pragmatic legal definition of privacy attempts to discover what that limit has been in different historical periods by reconstructing the different 'boundaries' asserted by litigants and judges in cases explicitly mentioning privacy as the interest protected.

Stephen, writing before he himself became a judge, recognized that '[t]o define the province of privacy distinctly is impossible'.[59] A claim to privacy, if it is to be treated seriously, must be accepted at face value. To purport to dig behind such a claim for the 'real' interest being protected—hypothesizing sexual prudishness in some cases, concealment of commercially valuable information in others, disdain for inquisitive social inferiors in still others—is a fundamentally misguided approach. An assertion of a privacy interest, if successful, will conceal forever the nature of the information sought to be kept private. Different people value their privacy to different degrees, and for different reasons.[60] It is possible, nevertheless, to find a general consensus on what facets of personal life are within the ambit of Mill's limit. As Stephen concluded, while precise definition is impossible, '[t]he

55 At a jurisprudential level, the debate remains very much alive in twentieth century England. See P. Devlin, *The Enforcement of Morals* (1965), H. L. A. Hart, *Law, Liberty and Morality* (1963).

56 J. S. Mill, *On Liberty* 63 (1st ed London 1859) (G. Himmelfarb ed 1974). Mill was quick to admit that 'the practical question where to place that limit—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done'. Ibid.

57 J. S. Mill, *Principles of Political Economy* 306 (1st ed London 1848) (D. Winch ed 1970). Mill may not have dared mention privacy explicitly after his editing of Jeremy Bentham's *Rationale of Judicial Evidence,* in which the concept is roundly traduced at prodigious length. See J. S. Mill, ed, *Rationale of Judicial Evidence* (London 1827), in J. Bowring, ed, *The Works of Jeremy Bentham* (1843) vol 6, 187, 351–80 [hereinafter cited as 'Works'].

58 J. Stephen, *Liberty, Equality, Fraternity* 160 (1st ed 1873) (R. White ed 1967). See also F. Montague, *The Limits of Individual Liberty* (1885) 196 '[A] public opinion which did not respect the privacies of life would make life intolerable to all men ...'.

59 J. Stephen, *supra* n 58, 160.

60 See e.g. 'The Taste for Privacy and Publicity' 61 *Spectator* 782 (1888); 'Secrecy' 60 *New Monthly Magazine* 224 (1840). The pragmatic approach to a definition of privacy recognizes that claims to privacy are never absolute, but are made for the very reason that some strong opposing interest is already in sight. This recognition avoids the philosophical objection that total and perfect privacy would be humanly intolerable.

common usage of language affords a practical test which is almost perfect upon this subject'.[61]

Three sets of 'boundaries', broadly construed, knit together the explicitly denominated 'privacy' interests asserted in the English courts over the course of the nineteenth century and up to the present day. The first of these are the physical boundaries around *private property,* in particular the dwelling house of every individual or family.[62] Such boundaries create a three-dimensional 'private space' given legal protection against some (but certainly not all) unwanted intrusions of outsiders. They are also barriers to the penetration of legal analysis: the interest in the privacy of private property may be asserted to prevent intruders from seeing something, from hearing something, or just from rendering the occupants uncomfortable. To the extent that the law respects these boundaries, the motive of concealment behind them is irrelevant. The amount of available legal protection will vary according to other factors, including the means of intrusion and the official or unofficial status of the intruder.

The second set of boundaries, those marking out *confidential communications,*[63] are less tangible than the physical boundaries of private property. Property in the contents of a literary work is a concept familiar to the common law, one capable of extension to the contents of a diary and a personal letter. A property basis for the protection of telephone conversations or face-to-face communication is more difficult to imagine. Grounded on a variety of legal doctrines, protections of confidentiality are sometimes dependent on the means of communications employed, sometimes on the relationship between the speakers. Like the protections of physical property, they are never treated as absolute barriers to disclosure.

Thirdly, and least tangible of all, are the boundaries around *personal information* concerning private individuals,[64] information that may be inchoate and unexpressed until reduced to gossip or dossier by the invasion of privacy. Again, the boundaries are permeable and the protections they afford are variously grounded. Information about which a person could not be compelled to testify may be given up by that person for statistical, financial, or medical purposes on the understanding, enforceable by law, that the information shall not be used for any other purpose. There is also some legal recourse if personal information is published broadly to the subject's embarrassment or annoyance, through extensions of the law of defamation and that of breach of confidence. As in the era of Warren and Brandeis, this set of boundaries is the focus of the greatest concern and the greatest uncertainty.[65]

It should be obvious that the three sets of boundaries just described can

61 J. Stephen, *supra* n 58, 160.

62 See *infra* 334–337, 353–357. The division into spheres of influence does not provide a complete solution. See J. Lucas, *The Principles of Politics* (1966) 182.

63 See *infra* 337–341, 357–359.

64 See *infra* 341–345, 359–362.

65 See Note, *supra* n 13.

sometimes offer overlapping protection to a unitary interest in privacy. Personal information may be communicated confidentially within the private property of the subject. If, for example, a husband communicates some matter of great delicacy concerning himself to his wife in the bedroom of their home, the law may afford protection from physical or mechanical eavesdroppers on the basis of private property, while it may allow the wife to refuse to testify to (and permit the husband to enjoin the wife from publishing) the confidential communication, and moreover it may shield the husband from forced disclosure himself on the basis of personal information. In evolving all of these legal protections, however, English courts have treated the categories as distinct ones, and have applied the language of privacy to all three.

III. THE NINETEENTH CENTURY ENGLISH LAW OF PRIVACY

A. *Private property*

For Sir William Blackstone, the core of the institution of property was the ability to exclude others,[66] and no other species of property was so well hedged about with legal guarantees of exclusiveness as the dwelling house.[67] At the outset of the nineteenth century, that bulwark of Parliamentary rhetoric,[68] the popular maxim 'an Englishman's house is his castle' summed up three lines of legal doctrine defending the householder against intruders. In its original application, the maxim embodied a broad privilege of self-defence for the occupant who met a felonious assault with deadly force.[69] According to Sir Edward Coke in *Semayne's Case,* a man's house was his castle 'as well for his safety as for his repose',[70] and therefore no sheriff executing a creditor's writ of attachment could break down the door to

66 W. Blackstone, *Commentaries on the Laws of England* (Oxford 1765–1769), vol 2, 4.

67 Blackstone, op cit, *supra,* vol 4, 223.

68 See 15 *Parl Hist Eng* 1307 (1763) (remarks of William Pitt). There is no official record of the much quoted version of this speech: 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!'; H. Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (London 1839) 1 ser, 41–42. See also A. Dalrymple, *Parliamentary Reform* 2nd ed (London 1792) 10–11 (continued veneration of the maxim in a time of conservative reaction to the French Revolution); W. Young, *The British Constitution of Government* 2nd ed (London 1793) (same). For an earlier objection to excisemen entering dwelling-houses, using much the same rhetoric, see 8 *Parl Hist Eng* (1733) 1317–18 (remarks of Sir John Barnard).

69 See YB Mich 21 Hen 7, fo 39, pl 50 (1499). On the dating of this case to 1499, see Baker, 'Introduction' in 2 *The Reports of Sir John Spelman* 168 (Selden Soc'y 94, J. Baker ed 1978).

70 *Semayne's Case* (1605) 5 Co Rep 91a, 91b, 77 Eng Rep 194, 195. Coke used the maxim on many other occasions, sometimes with stronger privacy overtones. See e.g. *The Case of the King's Prerogative in Saltpetre* (1606) 12 Co Rep 12, 13, 77 Eng Rep 1294, 1296 (Serjeants' Inn) (Royal ministers mining for this strategic resource could not dig under any houses) '[M]y house is the safest place for my refuge, safety and comfort, and of all my family; . . . and it is very necessary for the weal public, that the habitation of subjects be preserved and maintained'.

gain entrance.[71] By the 1760s and 1770s, moreover, the Court of Common Pleas was protecting the subject's castle against the king himself, by striking down general search warrants[72] and upholding large fines against revenue agents who committed unlawful trespass.[73]

The nineteenth century Englishman thus had legitimate recourse to physical violence in defence of the dwelling house, as well as a legal remedy in trespass. Violent self-help could only be justified when a threat to the occupants' physical safety was feared,[74] but the popular imagination took the law of self-defence much further in this regard,[75] to protection of 'the privacy and security that [made] possible all life, industry, and order'.[76] Courts applied the trespass remedy to all unwelcome intrusions, howsoever motivated.[77] Exemplary damages of £500 were awarded in one trespass case of 1814, for ungentlemanly conduct likened by the court to that of an intruder who 'walks up and down before the window of [one's] house, and looks in while the owner is at dinner'.[78] The high value placed by the

71 See *Burdett* v *Abbott* (1811) 14 East 1, 154–55, 104 Eng Rep 501, 560, aff'd, (1812) 4 Taun 401, 128 Eng Rep 384, *Ratcliffe* v *Burton* (1802) 3 Bos & Pul 223, 229, 127 Eng Rep 123, 126 (once the outer door is passed, a sheriff must still request the owner to open inner doors and chests before using force).

72 See *Entick* v *Carrington* (1765) 19 Howell St Tr 1029, 1066, 2 Wils KB 275, 291–92, 95 Eng Rep 807, 817–18, *Wilkes* v *Wood* (1763) Lofft 1, 18, 98 Eng Rep 489, 498, *Huckle* v *Money* (1763) 2 Wils KB 205, 207, 95 Eng Rep 768, 769.

73 See *Bruce* v *Rawlins* (1770) 3 Wils KB 61, 62, 95 Eng Rep 934, 934 (opinion of Lord Wilmot CJ) 'This is an unlawful entry into a man's house (which is his castle), an invasion upon his wife and family at peace and quietness therein, frightened and surprised by these defendants; who under pretence of information received, and colour of legal authority, demand the keys of, and search all the boxes and drawers in the house'; *Bostock* v *Saunders* (1773) 2 W Bl 912, 214, 96 Eng Rep 539, 540, overruled by *Cooper* v *Booth* (1785) 3 Esp 135, 170 Eng Rep 564, 1 TR 535, 99 Eng Rep 1238.

74 See *Meade's Case* (1823) 1 Lewin CC 184, 185, 168 Eng Rep 1006, 1006 (instructions of Holroyd J) 'A civil trespass will not excuse the firing of a pistol at a trespasser. . . .'; *R* v *Scully* (1824) 1 Car & P 319, 319–20, 171 Eng Rep 1213, 1213 (servant's shooting of trespasser in garden or yard only justified if servant's life endangered); *Dakin's Case* (1828) 1 Lewin CC 166, 167, 168 Eng Rep 999, 1000 (instructions of Bayley J) 'If the prisoner had known of the back-way, it would have been his duty to have gone out. . . .'); *Wild's Case* (1837) 2 Lewin CC 214, 214, 168 Eng Rep 1132, 1132 (instructions of Alderson B) 'A kick is not a justifiable mode of turning a man out of your house . . .'. For later cases moderating the householder's defence, see *R* v *Symondson* (1896) 60 JP 645, 646 (instructions of Kennedy J) 'You must not shoot a trespasser merely because he is a trespasser'; *R* v *Dennis* (1905) 69 JP 256, 256 'It may be an unlawful act if the person deliberately fires at the burglar'.

75 See e.g. *R* v *Moir* (1830) 72 Ann Reg 344, 347 (unsuccessful claim 'my land is my castle'); 'Shooting Burglars' 76 *Saturday Rev* 534, 534–35 (1893) (advice from Willes J).

76 J. Paterson, *Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person* (1877), vol 1, 355.

77 *Entick* v *Carrington* (1765) 19 Howell St Tr 1029, 1066, 2 Wils KB 275, 291, 95 Eng Rep 807, 817 (opinion of Lord Camden CJ) 'Our law holds the property of every man so sacred that no man can set his foot upon his neighbour's close without his leave. If he does, he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law'.

78 *Merest* v *Harvey* (1814) 5 Taunt 442, 443, 128 Eng Rep 761, 761 (opinion of Gibbs CJ).

law on 'the private repose and security of every man in his own house', as Lord Chief Justice Ellenborough phrased it in 1811,[79] was in large measure an expression of a legally recognized interest in privacy.

Visitors to England in the nineteenth century remarked at the overwhelming preference for single family dwellings, high garden walls, and heavy locks.[80] Even so, every house needed windows for light and air, and inevitably houses might be situated so that the activities of neighbours in front rooms and gardens were visible from adjoining property without any actual trespass. Householders who had long enjoyed freedom from curious eyes sought legal protection throughout the nineteenth century when neighbours opened windows overlooking them. A longstanding doctrine of 'ancient lights' had been applied to this situation. In a cryptically reported case of 1709, *Cherrington* v *Abney,*[81] the court announced that windows could not be altered to the prejudice of a neighbouring owner, 'if before ... they could not look out of them into the yard, ... for privacy is valuable'.[82] Still earlier, an equally cryptic report had provided the counterargument to be used by nineteenth century courts, 'Why may not I build up a wall that another may not look into my yard?'[83] The uncertain state of the law was discussed by LeBlanc J in *Chandler* v *Thompson,* an 1811 decision.[84] He had known of actions for privacy,[85] but had 'heard it laid down by Lord Chief Justice Eyre that such an action did not lie'.[86]

Litigants persisted with actions based on doctrines of ancient lights, nuisance, and easements of privacy, but by the 1860s the courts' attitude had hardened against all such claims by neighbour against neighbour. Said Baron Bramwell in the 1865 case of *Jones* v *Tapling,* 'it is to be remembered that privacy is not a right. Intrusion on it is no wrong or cause of action.'[87] With this judicial remedy thus foreclosed, householders enlisted the courts in effectuating private solutions: *Potts* v *Smith* in 1868 allowed one neighbour to build a twenty-three foot wall cutting off his neighbour's vantage,[88] and *Manners* v *Johnson* in 1875 enforced a covenant 'that [an] act shall not be done the doing of which causes the invasion of

79 *Burdett* v *Abbott* (1811) 14 East 1, 154–55, 104 Eng Rep 501, 560.

80 See e.g. 'The English, the Scots, and the Irish' *Eur Rev* (Oct 1824) 63; R. Emerson, 'Wealth' in *English Traits* (London 1856) 92–93; R. Collier, *English Home Life* (1885) 13.

81 (1709) 2 Vern 646, 33 Eng Rep 1022.

82 2 Vern at 646, 33 Eng Rep at 1022.

83 *Knowles* v *Richardson* (1670) 1 Mod Rep 55, 86 Eng Rep 727 (opinion of Twisden J).

84 (1811) 3 Camp 80, 82, 170 Eng Rep 1312, 1313.

85 *Cotterell* v *Griffiths* (1801) 4 Esp 69, 170 Eng Rep 644 was one such action.

86 3 Camp at 82, 170 Eng Rep at 1313.

87 (1862) 31 LJCP (NS) 342, 347, aff'd *sub nom Tapling* v *Jones* (1865) 11 HLC 290, 305, 11 Eng Rep 1344, 1350, 12 LT Rep 555 (opinion of Lord Westbury LC) invasion of privacy by opening windows 'is not treated by the law as a wrong for which any remedy is given'. See also *Turner* v *Spooner* (1861) 30 LJ Ch (NS) 801, 803 (opinion of Kindersley V-C) '[N]o doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard but neither this Court nor a Court of law will interfere on the mere ground of invasion of privacy ...'.

88 (1868) LR 6 Eq 311.

privacy'.[89] Yet, in the absence of such independently initiated protections, the English householder at the close of the nineteenth century was at the mercy of curious and resourceful neighbours. A leading casebook on tort mentions a Balham dentist's unsuccessful complaint in 1904 against neighbours who arranged large mirrors in their garden in order to observe all that went on in his study and operating room.[90] To twentieth century commentators, such an absurd situation pointed out the existence of a gap in the legal protection of private property.[91]

Property owners had greater success in preventing observation of their houses and grounds by curious strangers and the public generally. In 1867, for example, a plaintiff invoked the law of nuisance to enjoin his neighbour from holding fêtes attracting large crowds of people, some of whom sat on the walls of the plaintiff's grounds, 'destroy[ing his] privacy'.[92] The lessor of a house on the Thames was granted compensation in 1872 for loss of privacy by reason of the construction of a public road along the river bank.[93] The law of trespass was extended in the last decade of the century to cover 'unreasonable' user of the highway adjoining the plaintiff's land,[94] an activity that encompassed observation of the plaintiff's activities on his own land.[95] The criminal law supplemented these remedies with longstanding sanctions against peeping Toms and eavesdroppers[96] as well as new offences of 'watching and besetting' aimed primarily at trade union picketers.[97]

B. *Confidential communications*

A second set of legal doctrines gave more sketchy protection to the privacy of letters, telegrams, and certain privileged conversations. One of these doctrines was grounded in the right of an author to forbid publication of manuscript works on grounds of 'literary property'.[98] When this legal protection was extended to the writers of personal letters seeking to enjoin their publication by the recipients or

89 (1875) 1 Ch D 673, 681.

90 Editor's Note in C. Kenny, *A Selection of Cases Illustrative of the English Law of Tort* 4th ed (1926) 367.

91 See *Victoria Park Racing & Recreation Grounds Co Ltd* v *Taylor* (1937) 58 CLR 479, 520–21 (Evatt J dissenting); Winfield, *supra* n 18, 27.

92 *Walker* v *Brewster* (1867) LR 5 Eq 25, 26.

93 *Buccleuch (Duke)* v *Metropolitan Board of Works* (1872) LR 4 E & I App 418, 439 (recovery under the Land Clauses Act 1845, s 63 and the Thames Embankment Act 1862, s 27). Cf *Re Penny* (1857) 7 El & Bl 660, 669, 119 Eng Rep 1390, 1394 (no recovery under the Land Clauses Act, *supra,* and the Railway Clauses Consolidation Act 1845, s 6 for loss in value of property overlooked by railway platform).

94 *Harrison* v *Rutland (Duke)* [1893] 1 QB 142, 145–46, 152.

95 *Hickman* v *Maisey* [1900] 1 QB 752, 755–56, 758.

96 See W. Blackstone, *supra* n 66, vol 4, 168.

97 *J. Lyons & Sons* v *Wilkins* [1899] 1 Ch 255, 267.

98 See e.g. *Jefferys* v *Boosey* (1854) 4 HLC 815, 978–79, 10 Eng Rep 681, 745 (distinguishing common law property in a manuscript and statutory copyright); *Southey* v *Sherwood* (1817) 2 Mer 435, 438, 35 Eng Rep 1006, 1007; *Queensberry (Duke)* v *Shebbeare* (1758) 2 Eden 329, 330, 28 Eng Rep 924, 925 (injunction to restrain printing of unpublished manuscript).

by third parties,[99] the grounds of property protection soon became a convenient fiction. In 1813, the decision of the Vice-Chancellor in *Perceval* v *Phipps*[100] recognized that 'correspondence between friends, or relations, upon their private concerns ..., could be made public in a way, that must frequently be very injurious to the feelings of individuals', but expressed doubts that every private letter merited protection as a literary work. Lord Eldon, in his judgment in the 1818 case of *Gee* v *Pritchard,*[101] laid such doubts to rest by stating frankly that he did not forbid publication '*because* the letters are written in confidence, or *because* the publication of them may wound the feelings of the plaintiff', but that he could do so on the ground of property in order to prevent such 'mischievous effects'.

The principle stated in a dissenting judgment in 1769 had become the rule, that 'every man has a right to keep his own sentiments' and 'a right to judge whether he will make them public, or commit them only to the sight of his friends'.[102] In the ultimate formulation of the doctrine, a writer of a letter retained a property right in the words, while giving only a property right in the paper and ink to the recipient.[103] By the beginning of the twentieth century the letter writer's property right was so easily identified with a privacy interest that one High Court judge, in upholding a 1905 judgment of £400 against the publisher of a personal letter, admitted that 'in cases of this kind the property in a thing like a letter may be mainly valuable because it gives the plaintiff the right to keep it private'.[104] Disclosure of private letters would only be allowed if it was necessary to vindicate an important interest of the recipient.[105]

'One instance', an eighteenth century tract pointed out, 'of the legislature's regard to the privacy of papers and correspondence' was the enactment in 1710 of a criminal penalty for unauthorized opening of letters in the Post Office.[106] The nineteenth century courts stiffened the penalty by treating interception of letters in the mails as larceny.[107] Rumours of systematic letter opening by government

99 See *Pope* v *Curl* (1741) 2 Atk 341, 342, 26 Eng Rep 608, 608 (opinion of Lord Hardwicke LC) Letters give 'only a special property in the receiver,' not 'a license to any person whatsoever to publish them to the world'; R. Wooddeson, *A Systematical View of the Laws of England* (1792) vol 3, 415.

100 (1813) 2 Ves & Beam 19, 28, 35 Eng Rep 225, 229.

101 (1818) 2 Swan 402, 426, 36 Eng Rep 670, 678. See also *Lytton (Earl)* v *Devey* (1884) 54 LJ Ch (NS) 293, 295–96.

102 *Millar* v *Taylor* (1769) 4 Burr 2303, 2379, 98 Eng Rep 201, 242 (Yates J dissenting).

103 See *Oliver* v *Oliver* (1861) 11 CB (NS) 139, 141, 142 Eng Rep 748, 748.

104 *Thurston* v *Charles* (1905) 21 TLR 659.

105 See *Lytton (Earl)* v *Devey* (1884) 54 LJ Ch (NS) 293, 295–96; *Labouchere* v *Hess* (1897) 77 LT (NS) 559, 562–63.

106 Father of Candor, *An Enquiry into the Doctrine, Lately Propagated, Concerning Libels, Warrants and the Seizure of Papers* (London 1764) 59. See Post Office Act 1710, s 40, later re-enacted in Post Office Act 1837, s 25, and currently codified in Post Office Act 1969, s 64.

107 See *R* v *Jones* (1846) 2 C & K 236, 245, 175 Eng Rep 98, 102 (interception of letter held larceny); *R* v *James* (1890) 24 QBD 436, 440 (inducing postman to intercept letter held theft).

agents alarmed the English public in the mid-nineteenth century,[108] though the subject did not come to the attention of the courts. An official inquiry revealed that the practice existed, but the issue of six or seven warrants annually was thought by the Select Committee of the Lords not to interfere with 'the sanctity of private correspondence'.[109] As a result of the public outcry, one of the secret offices conducting such work was disbanded and in the other one, specific warrants from the Secretary of State were henceforth required.[110]

Messages sent along telegraph wires, unlike letters in the mail, were necessarily read by the sending and receiving operators.[111] Post Office regulations imposed confidentiality requirements on telegraphers,[112] as did statutes forbidding disclosure of the contents of any telegram.[113] Subpoenas in civil suits ordering wholesale production of telegrams were refused in the 1870s on the basis that 'the necessary confidence of a sender of a telegram in the Post Office should not be violated'.[114] Later in the century, this legal protection of telegraph messages from unofficial interception was carried over to the newly invented telephone.[115] Official interception remained possible, however, on analogy to warrants from the Secretary of State to open letters.

Evidentiary privileges safeguarded the confidentiality of all communications, by

108 See 75 *Hansard* (3rd ser) 892–906, 1264–1305 (1844); 77 *Hansard* 668–97, 738–45 (1845); 'Opening Letters at the Post Office' 33 *Law Magazine* 248, 256 (1845); 'Post-Office Espionage' 2 *N Brit Rev* 257, 260 (1844) ('[T]he English feeling that this was a disgraceful business spread all over the country'). For an earlier outcry, see 9 *Parl Hist Eng* 839, 842 (1735) 'Complaints were made by several Members . . . that the liberty given to break open letters at the post-office could now serve no purpose, but to enable the little clerks about that office to pry into the private affairs of every merchant, and of every gentleman in the kingdom'. For later objections, see 267 *Hansard* (3rd ser) 289–93; 258 *Hansard* 1080–81 (1881).

109 See Report from the Secret Committee of the House of Lords Relative to the Post Office, (HL Rep No 601), in 14 *Parl Papers 1844* 501, at [2]; 'Post-Office Espionage' *supra* n 108, 284: '[W]herever a free Government exists, the sanctity of private correspondence going through the Post-office is the subject of special enactments'. Predictably, Jeremy Bentham opposed the notion of sanctity of correspondence. See J. Bentham, 'Anarchical Fallacies' in 2 *Works, supra* n 57, 489, 532.

110 See E. Kenneth, *The Post Office in the Eighteenth Century* (1958) 141.

111 The introduction of the post card posed a similar problem. See 'Post-Cards *v.* Envelopes' 47 *Chambers's J* 565, 566–67 (1870). One solution for securing both new forms of communication was widespread resort to codes and ciphers, such as had been used in times of rampant letter spying. See J. Wilkins, *Mercury, or the Secret and Swift Messenger* (London 1641) (early code book); 'Post-Cards *v.* Envelopes' *supra*.

112 See R. Bond, *Handbook of the Telegraph* 3rd ed (1870) 7–8.

113 See Post Office Protection Act 1884, s 11; Telegraph Act 1868, s 20.

114 *Borough of Stroud* (1874) 2 O'M & H 107, 112 (opinion of Bramwell B on election petition) '[P]ersons who correspond by telegram are obliged to repose confidence in the Crown, and I believe it will be for the public good if it is found that that is a confidence that the Crown cannot be compelled to violate'. This holding expanded the decision in *Borough of Taunton* (1874) 2 O'M & H 66, 73 (no compulsion to produce telegrams without strong specific grounds) and contradicted *Ince's Case* (1869) 20 LT (NS) 421 (subpoenaed telegram not privileged).

115 See *Attorney-General* v *Edison Telephone Co* (1880) 6 QB 244.

whatever means conducted, when they took place within certain specific relationships.[116] For example, it had long been 'undoubted law, that attornies ought to keep inviolably the secrets of their clients'.[117] This privilege, extending to any matter 'in its nature private' communicated to an attorney by his client,[118] was explained by Knight Bruce V-C as follows:[119]

> [S]urely the meanness and mischief of prying into a man's confidential consultations with his legal advisor, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion, and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.

While the same legal protection did not extend to communications with doctors[120] or clergymen,[121] courts did recognize the public's expectations of confidentiality from these professionals,[122] and judges expressed unwillingness to extract secrets from them on the witness stand.[123]

One other relationship attained a protected status in nineteenth century common law. For the first half of the century, husbands and wives were not considered competent witnesses to testify for or against each other, even in civil cases.[124] When statutes removed the absolute barrier to spousal testimony,[125] there remained a privilege for communications made confidentially between

116 Letters, to be protected from compulsory disclosure in court, had to come under one of these privileges. *O'Shea* v *Wood* [1891] P 286, 290.

117 *Annesley* v *Anglesea (Earl)* (1743) 17 Howell St Tr 1139, 1241. See also *Berd* v *Lovelace* (1577) Cary 62, 21 Eng Rep 33.

118 *Greenough* v *Gaskell* (1833) 1 M & K 98, 104, 39 Eng Rep 618, 621.

119 *Pearse* v *Pearse* (1847) 11 Jur 52, 55.

120 See e.g. *Friend* v *London, Chatham, & Dover Ry Co* (1877) LR 2 Ex D 437 (medical report made solely for informing solicitor held privileged); *Cossey* v *London, Brighton, & S Coast Ry Co* (1870) LR 5 CP 146 (same).

121 See e.g. *Ruthven* v *De Bor* (1901) 45 Sol J 272; *Normanshaw* v *Normanshaw* (1893) 69 LT (NS) 469, 470; *R* v *Hay* (1860) 2 F & F 4, 9–10, 175 Eng Rep 933, 936; *Gilham's Case* (1828) 1 Moody's CC 186, 198.

122 See *Wheeler* v *Le Marchant* (1881) 17 Ch D 675, 681; *Greenlaw* v *King* (1838) 1 Beav 137, 145, 48 Eng Rep 891, 894; *R* v *Kingston (Duchess)* (1776) 20 Howell St Tr 355, 573. Bentham advocated capitalizing on the public perception of confidentiality in communications to clergymen. See Letter from Jeremy Bentham to Charles Abbott, Nov 1800, in 10 *Works, supra* n 57, 351, 354 (curates should be required to collect census data).

123 See *Kitson* v *Playfair, The Times* 28 March 1896, at 5, col 1; *R* v *Griffin* (1853) 6 Cox CC 219; *Broad* v *Pitt* (1828) 3 Car & P 518, 519, 172 Eng Rep 528, 529, M & M 233, 234, 173 Eng Rep 1142, 1143.

124 See e.g. *Stapleton* v *Crofts* (1852) 18 QB 367, 368, 118 Eng Rep 137, 138; *O'Connor* v *Marjoribanks* (1842) 4 Man & G 435, 445–46, 134 Eng Rep 179, 183; *Monroe* v *Twistleton* (1802) Peake Add Cas 219, 221, 170 Eng Rep 250, 251 (privilege survived divorce).

125 See Evidence Amendment Act 1853 (husbands and wives competent to testify in civil cases); Criminal Evidence Act 1898 (husbands and wives competent to testify for defence in criminal cases).

husband and wife.[126] This 'social policy' to hold marital confidences 'sacred'[127] was explained in an 1824 decision: 'the happiness of the marriage state requires that the confidence between man and wife should be kept for ever inviolable'.[128] Jeremy Bentham, who fulminated against all evidentiary barriers to truthfinding, reserved especial scorn for this protection,[129] but it was entrenched in the law. In other contexts as well, nineteenth century courts sought to minimize their interference with 'the private affairs of the people' and their 'domestic life'.[130] The doctrines of literary property in personal letters, sanctity of the mails, and evidentiary privilege, though variously grounded, combined to accord a limited protection for the communications deemed most deserving of confidentiality in the nineteenth century.

C. *Personal information*

Nineteenth century English courts afforded only a precarious protection to intangible personal information but showed some of their greatest legal inventiveness when they did act to protect this privacy interest. As James Fitzjames Stephen wrote in 1873: 'Privacy may be violated not only by the intrusion of a stranger, but by compelling or persuading a person to direct too much attention to his own feelings' and to 'strip his soul stark naked for the inspection of any other.'[131] Personal secrets of past wrongdoing had long been protected from forced disclosure in court by the maxim *nemo tenetur prodere seipsum.*[132] This privilege against self-incrimination, assured by statute since the seventeenth century,[133] also extended to revelations that would lead to civil

126 See e.g. Criminal Evidence Act 1898, s 1(*d*). See also *Cowley* v *Cowley, The Times* 20 January 1897, at 13, col 3 (in divorce proceedings, husband could refuse to produce letter written to him by wife). Judicial attitudes preceded the legislative change. See *Stapleton* v *Crofts* (1852) 18 QB 367, 368, 118 Eng Rep 137, 138.

127 *Wennhak* v *Morgan* (1888) 20 QBD 635, 639 (opinion of Manisty J) (disclosure of libel to wife held not evidence of publication).

128 *Doker* v *Hasler* (1824) Ry & M 198, 198, 171 Eng Rep 992, 992 (opinion of Best CJ).

129 See J. Bentham, *Works, supra* n 57, vol 7, 486 (while the law 'make[s] every man's house his castle', the privilege 'convert[s] that castle into a den of thieves').

130 *In re Agar-Ellis* (1883) 24 Ch D 317, 335 (opinion of Bowen LJ) (custody proceeding).

131 J. Stephen, *supra* n 58, 160, 162.

132 See *R* v *Friend* (1696) 13 Howell St Tr 1, 17; W. Blackstone, *supra* n 66, vol 4, 296. See generally L. Levy, *Origins of the Fifth Amendment* (1968); Wigmore, *'Nemo Tenetur Seipsum Prodere'* 5 *Harv L Rev* 71 (1891). Official seizure of private papers was also condemned by English judicial authority, partly on this ground and partly as trespass to goods, since 'where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass and demand more considerable damages in that respect' *Entick* v *Carrington* (1765) 19 Howell St Tr 1029, 1066, 1073, 2 Wils KB 275, 291, 95 Eng Rep 807, 817–18 (opinion of Lord Camden CJ). See 'Opening Letters at the Post Office' 33 *Law Magazine* 248, 255 (1845).

133 See Abolition of the Court of High Commission 1641, 16 Car I, c 11, s 4, reconfirmed in Ecclesiastical Commission Act 1661, s 4, Law of Evidence Amendment Act 1851, s 3. But see Langbein, 'The Criminal Trial before the Lawyers' 45 *U Chi L Rev* 263, 283 (1978) (finding little respect for this principle in eighteenth century practice).

forfeiture.[134] Judicial interpretations varied on the degree of likelihood of prosecution[135] and the subjective or objective determination of its gravity,[136] but the privilege remained secure. A related doctrine threw cases out of court when they needlessly introduced 'indecent' evidence tending to injure a person's feelings.[137]

With the onrushing complexity of nineteenth century industrial and commercial life, however, individuals gave up more and more sensitive personal information about themselves to governmental and private institutions.[138] The census, for example, widened its inquiry (and thus had to overcome fresh public opposition) with each passing decade.[139] Since customary local remedies against 'gossiping' had long since vanished,[140] the legal ramifications of this loss of individual control had to be worked out anew by the courts. An Englishman's banker, it was held, might be forced to disclose his exact financial status in court upon a proper and

134 See e.g. *Mexborough (Earl)* v *Whitford Urban Dist Council* [1897] 2 QB 111; *Pye* v *Butterfield* (1864) 5 B & S 829, 122 Eng Rep 1038.

135 Compare *Adams* v *Lloyd* (1858) 3 H & N 351, 363, 157 Eng Rep 506, 510 (opinion of Pollock CB) '[T]he answer of the witness must have a direct tendency to place him in danger' with *Harrison* v *Southcote* (1751) 1 Atk 528, 539, 26 Eng Rep 333, 340 (opinion of Lord Hardwicke LC) '[A] man shall not be obliged to discover what *may* subject him to a penalty, not what *must* only' (emphasis in original).

136 Compare *Adams* v *Lloyd* (1858) 3 H & N 351, 362, 157 Eng Rep 506, 510 (judge may determine that a witness is trifling with the court and compel an answer) and *Ex parte Reynolds* (1882) 20 Ch D 294, 297 (same) with *Lamb* v *Munster* (1882) 10 QBD 110, 113 (witness may swear that the answer would endanger him) and *Cates* v *Hardacre* (1811) 3 Taunt 424, 425, 128 Eng Rep 168, 168 (enough that witness 'thought' an answer would incriminate him, links in chain need not be apparent to the judge).

137 See *Da Costa* v *Jones* (1778) 2 Cowp 729, 736, 98 Eng Rep 1331, 1335 (refusing to hear an action brought on a wager as to the sex of a third party); *Ditchburn* v *Goldsmith* (1815) 4 Camp 152, 153, 171 Eng Rep 49, 49 (refusing to hear an action brought on a wager as to the sex of a child about to be born to an unmarried woman).

138 For a proposal to record names, ages, addresses and occupations, under oath, in the Census of 1801, despite 'those suspicions which ignorance is so apt to harbour', see Letter from Jeremy Bentham to Charles Abbott, Nov 1800, in 10 *Works*, *supra* n 57, 351, 351–52, 355–56. For proposals to compile registers of identifying characteristics, see A. Bertillon, *Signaletic Instructions* (1896) vii–ix (anthropometrical identification); Galton, 'Identification by Fingertips' 30 *Nineteenth Century* 303, 305 (1891) (fingerprints used by British magistrate in Bengal to identify natives).

139 See e.g. 'The Census' 23 *Cornhill Magazine* 415, 424 (1871), 'Census Curiosities' 5 *All the Year Round* 15, 15–16 (1861), 'Curiosities of the Census' 22 *N Brit Rev* 401, 402–03 (1855). Earlier opposition is recorded in 'Census of England and Wales and of the United Kingdom, 1881' 44 *J Statistical Soc'y* 398, 399–400 (1881).

140 See Confession of Elizabeth Bowltell, 26 May 1595, quoted in Hall, 'Some Elizabethan Penances in the Diocese of Ely' 1 *Trans Royal Hist Soc'y* (3rd ser) 263, 272 (1907) (ecclesiastical offence of gossiping).

necessary inquiry,[141] but the bank[142] and its employees[143] had a duty not to disclose such information to third parties.[144]

Englishmen seeking damages for an offensive disclosure of personal details in print[145] would look first to their remedies in defamation. The difficulty with civil actions for libel and slander, however, was that the truth of the matter published had become a complete defence.[146] When the gravamen of the injury was an invasion of privacy, the truth of the matter disclosed was precisely its sting.[147] The little-used criminal libel prosecution, by contrast, had as its watchword, 'the greater the truth, the greater the libel'.[148] Courts and juries sympathetic to privacy interests in civil libel actions could nevertheless look for inaccuracies of detail in an otherwise truthful account of the private character of a private individual[149] and could interpret disclosures of personal information as 'comment' that was not 'privileged'.[150]

When an invasion of privacy could be prevented or contained, the equitable injunction offered a means of judicial protection much more satisfying than that of libel damages after the fact. Plaintiffs seeking such relief for the disclosure of personal information had to surmount Chancery's unwillingness to issue injunctions except in protection of property.[151] The first assault on this

141 See *Loyd* v *Freshfield* (1826) 2 Car & P 325, 329, 172 Eng Rep 147, 148.

142 See *Foster* v *Bank of London* (1862) 3 F & F 214, 217, 176 Eng Rep 96, 98 (jury finding).

143 See *Tipping* v *Clarke* (1843) 2 Hare 383, 393, 67 Eng Rep 157, 161 (clerk's implied contract not to reveal what he learns in the course of duty).

144 But see *Hardy* v *Vesey* (1868) LR 3 Ex 107, 111–13 (violation of duty justified when motive is to assist customer).

145 The appetite of the newspaper-buying public for scandalous personal information can be taken as constant over the period. See Perkins, 'The Origins of the Popular Press' 7 *Hist Today* 425, 434 (1957).

146 See e.g. *McPherson* v *Daniels* (1829) 10 B & C 263, 272, 109 Eng Rep 448, 451 (opinion of Littledale J) '[T]he law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess'.

147 See J. Bentham, 'Rationale of Judicial Evidence' in 6 *Works, supra* n 57, 189, 269–70.

148 See e.g. J. Fisher and J. Strahan, *The Law of the Press* (1891) 175–76; '"The Greater the Truth, the Greater the Libel"' 26 *Can L Times* 394, 394–95 (1906). The common law rule was modified by Lord Campbell's Act 1843, s 6 (publication of a defamatory truth not criminal if jury determines publication was for public benefit).

149 See *Wilson* v *Reed* (1860) 2 F & F 149, 152, 175 Eng Rep 1000, 1002, *Bembridge* v *Latimer* (1864) 10 LT (NS) 816; J. Fisher and J. Strahan, *supra* n 148, 133 (strictness of proof). An example is *Leyman* v *Latimer* (1878) 47 LJ Ex (NS) 470, 472 (opinion of Brett LJ), holding the appellation 'felon' to be untrue of one whose sentence has been served and finding it 'wicked and malignant' to thus 'rake up the past misdoings of others'.

150 See e.g. *Pankhurst* v *Hamilton* (1887) 3 TLR 500, 505 (Grove J instructing the jury) 'Matters discussed between gentlemen at clubs, dinner parties, or in the lobby of the House of Commons ought not to be seriously repeated'.

151 See e.g. *Clark* v *Freeman* (1848) 11 Beav 112, 117–18, 50 Eng Rep 759, 761 (no injunction to prevent publication of a libel unless property injured); *Gee* v *Prichard* (1818) 2 Swanst 402, 426, 36 Eng Rep 670, 678 (property basis of injunction to restrain publication of letters). But see *Morison* v *Moat* (1852) 9 Hare 241, 68 Eng Rep 492 (injunction granted for breach of faith and of contract), aff'd (1852) 21 LJ Ch (NS) 248.

jurisdictional barrier to effective privacy relief expanded the concept of property to include privacy interests. Judicial solicitude for the sensibilities of the Queen and her Prince Consort provided the occasion when a Mr Strange offered the public a catalogue describing the amateur artistic efforts of the royal couple. In *Albert* v *Strange,*[152] the Solicitor-General asked the court to find that the defendant had abstracted 'one attribute of property, which was often its most valuable quality, namely, privacy',[153] and Knight Bruce V-C issued the injunction against what he called 'sordid spying into the privacy of domestic life'.[154] On appeal, Lord Cottenham LC also said that privacy was the right invaded, though property was the basis of relief.[155] Chancery's rule limiting injunctions to protection of property led a later Vice-Chancellor to find property in land, goods, business, skill, and 'even in a man's good name'.[156]

Towards the end of the century, Chancery's rule was circumvented in other ways to affirm privacy interests. In *Pollard* v *Photographic Co,* an 1888 case, a woman whose photographic portrait was exhibited for sale by the photographer obtained an injunction on two grounds: breach of an implied term in the photographer's contract and abuse of the confidence placed in him by his customer.[157] In the 1894 case of *Monson* v *Tussauds Ltd,* a man acquitted of murder succeeded in having an effigy of himself removed from a London waxwork exhibition on the basis of defamation.[158] Two of the judges in the latter case delivered denunciations of the practices of exhibitors and newspaper journalists in portraying truthful incidents of private life.[159] Unless some prior relationship of

152 (1848) 2 De G & Sm 652, 64 Eng Rep 293, aff'd (1849) 1 Mac & G 25, 41 Eng Rep 1171. For another expression of deference to royal sensibilities see *Wyatt* v *Wilson* (1820) 1 Mac & G 46, 41 Eng Rep 1179 (opinion of Lord Eldon LC) 'If one of the late King's physicians had kept a diary of what he heard and saw, this Court would not, in the King's lifetime, have permitted him to print and publish it'.

153 2 De G & Sm at 670, 64 Eng Rep at 301.

154 2 De G & Sm at 698, 64 Eng Rep at 313.

155 1 Mac & G at 47, 41 Eng Rep at 1179.

156 *Dixon* v *Holden* (1869) LR 7 Eq 488, 492 (opinion of Sir Richard Malins V-C).

157 See *Pollard* v *Photographic Co* (1888) 40 Ch D 345, 349, 352 (married woman's photograph sold as Christmas card). See also *Stedall* v *Houghton* (1901) 18 TLR 126 (on the same double grounds, husband restrained the exhibition of photographs of his estranged wife and children). It was much doubted whether the courts could have reached this result under the Copyright (Works of Art) Act 1862, s 1. See Williams, 'The Sale of Photographic Portraits' 24 *Sol J* 4, 4–5 (1879).

158 See *Monson* v *Tussauds Ltd* [1894] 1 QB 671. The opportunity for a ruling on the law of privacy in this case drew widespread attention. See Speed, 'The Right of Privacy' 163 *N Am Rev* 64, 70–71 (1896); Note 7 *Harv L Rev* 492 (1894).

159 See [1894] 1 QB 678 (opinion of Matthew J). For a newspaper 'to shadow a man who had been acquitted of a crime, to take portraits of him and to publish them ... would be a sharp instrument of torture, and an outrage on the man's comfort and peace'; ibid. 687 (opinion of Lord Halsbury) 'Is it possible to say that everything which has once been known may be reproduced with impunity in print or picture; ... every incident which has ever happened in private life, furnish material for the adventurous exhibitor ...?'.

the parties or defamatory innuendo could be shown, however, publication of a person's likeness or description would not give rise to an injunction at the end of the nineteenth century.[160] The legal regime in place by 1900—interstitial and incomplete protection of acknowledged privacy interests through a variety of other legal doctrines—was to remain largely unchanged in England until the second half of the twentieth century.[161]

IV. OTHER ROUTES TO RECOGNITION

A. *Statutory proposals*

In 1961, thirty years after Percy Winfield had urged the courts to recognize a right to privacy,[162] Gerald Dworkin remarked in the pages of the *Modern Law Review* that in default of judicial creativity, legislation was the only avenue open.[163] Thus began nearly two decades of Parliamentary temporizing and judicial buck-

160 See e.g. *Dockrell* v *Dougall* (1899) 80 LT 556, 15 TLR 333 (use of name); *Corelli* v *Wall* (1906) 22 TLR 532 (postcards depicting novelist).

161 See generally *infra* 353–362. For example, courts continued to reject claims based on publication of photographs in *Sports & General Press Agency Ltd* v *'Our Dogs' Publishing Co Ltd* [1916] 2 KB 880, 889 (dictum of Horridge J) (no right to prevent publication of a photograph or description 'not libelous or otherwise wrongful'), aff'd [1917] 2 KB 125; *Wood* v *Sandow, The Times* 30 June 1914, at 4, col 1 (plaintiff's photograph appeared in corset advertisement, no libel or copyright infringement). But juries could take a different view. See *Plumb* v *Jeyes' Sanitary Compounds Co Ltd, The Times* 15 April 1937, at 4, col 4 (plaintiff's photograph appeared in footbath advertisement, jury awarded £100 libel damages); *Funston* v *Pearson, The Times* 12 March 1915, at 3, col 3 (plaintiff's photographs with and without false teeth appeared in dentist's advertisement, jury awarded £30 libel damages).

162 See Winfield, *supra* n 18.

163 See Dworkin, *supra* n 21, 188–89. The House of Commons may have considered taking measures against press activities following the press's hounding of Colonel Lindbergh and his wife during their stay in England. See Adam, 'Freemen of the Press?' 144 *Fortnightly* (NS) 34 (1938); Ervine, 'Privacy and the Lindberghs' 139 *Fortnightly* (NS) 180 (1936). See also Political and Economic Planning, *Report on the British Press* (1938) (call for legislation). Privacy concerns also played a part in Lord Reading's Preservation of the Rights of the Subject Bill 1947 introduced at 147 *Hansard HL* (5th ser) 762, 767 (clause 6 on powers of search), and Lord Samuel's Liberties of the Subject Bill 1950 introduced at 167 *Hansard HL* (5th ser) 1041, 1051–52 (1950) (clause 6 on same). Several committees had considered and rejected the possibility of privacy legislation. See *Report of the Departmental Committee on Powers of Subpoena of Disciplinary Tribunals* (HMSO 1960) Cmnd 1033, para 30 (Viscount Simonds, Chairman) allowing evidence from telephone wire-tapping; *Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communications* (HMSO 1957) Cmnd 283 (Lord Birkett, Chairman) approving government wire-tapping procedures despite lack of express statutory authorization (hereinafter cited as 'Birkett Committee'); Royal Commission on the Press, 1947–1949, *Report* (HMSO 1949) Cmd 7700, paras 489–91, 642–43 (Sir William Ross, Chairman) ('extremely difficult to devise legislation' on intrusion by reporters); *Report of the Committee on the Law of Defamation* (HMSO 1948) Cmd 7536, paras 24–26 (Lord Porter, Chairman) (invasion of privacy merely an 'offence against good taste'); Lloyd, 'Reform of the Law of Libel' 5 *Current Legal Problems* 168, 176–77 (1952).

passing.[164] The first comprehensive legislative proposal on the subject, Lord Mancroft's Right of Privacy Bill, was introduced in the House of Lords in March of that year.[165] It provided a remedy against publication without consent of a plaintiff's personal affairs or conduct unless the defendant established one of a number of defences, including 'reasonable public interest' in the publication.[166] Though the newspapers bitterly fought the measure, focusing their attack on its 'reasonable public interest' standard,[167] Lord Goddard (a former Chief Justice) and Lord Denning supported the Bill,[168] and a strong majority of the Lords sent it on to a Second Reading.[169] The Lord Chancellor, however, thought the subject unsuitable for legislation,[170] and without the Government's support it died in Committee.[171] It is worth remarking that in the debate on Lord Mancroft's Bill, both Lord Denning and Lord Kilmuir LC expressed their confidence that judicial recognition of an action for infringement of privacy was not far off.[172]

The next flurry of legislative interest arose in 1967, sparked by Alexander Lyon's Right of Privacy Bill establishing an action against unreasonable and serious interference with the seclusion of an individual, his family, or his property, subject again to several defences.[173] This proposal also drew heavy opposition from the press[174] and foundered for want of Government support.[175] Later that

164 See e.g. *Director of Public Prosecutions* v *Withers* [1975] AC 842, 863, 872 (opinion of Lord Simon) (to find a 'conspiracy to invade privacy' illegal would interfere with Parliament's consideration of the issue); *Malone* v *Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344, 380–81 (opinion of Megarry V-C) (even on a subject [government wire-tapping] which 'cries out for legislation', the court should avoid a result that would induce Parliament to legislate).

165 See 228 *Hansard HL* (5th ser) 716 (1961); *The Times* 16 February 1961, at 17, col 4.

166 See Right of Privacy Bill 1961 reprinted in Younger Committee, *supra* n 1, Appendix I at 273–74.

167 See e.g. Editorial, 'What is Reasonable?' *The Times* 13 March 1961, at 15, col 4. See also 229 *Hansard HL* (5th ser) 618–19 (1961).

168 See 229 *Hansard HL* (5th ser) 621–24 (1961) (remarks of Lord Goddard) 'It has always seemed to me a blot on our jurisprudence that there is no remedy for a person whose privacy is invaded. . . .'; ibid., 637–40 (1961) (remarks of Lord Denning) '[I]f the law does not give the right of privacy, the sooner this Bill gives it the better'.

169 The vote was 74 to 21. Ibid., 660 (1961).

170 See ibid., 625–30; 232 *Hansard HL* (5th ser) 293–96 (1961).

171 See 232 *Hansard HL* (5th ser) 289–90 (1961).

172 See 229 *Hansard HL* (5th ser) 639–40 (1961) (remarks of Lord Denning) 'But would not our own courts give a remedy in infringement of privacy? . . . [T]hey ought to'; 232 *Hansard HL* (5th ser) 295 (1961) (remarks of Lord Kilmuir LC) '[W]hether there is already a right of privacy in Common Law' is a matter which '[j]udges . . . might have at any time to decide'.

173 See 740 *Hansard HC* (5th ser) 1565 (1967); Right of Privacy Bill 1967 reprinted in Younger Committee, *supra* n 1, Appendix I at 275.

174 See Editorial, 'The Private Citizen', *The Times* 16 June 1967, at 11, col 1. See generally Baxter, *supra* n 39, 7; Vetch, 'Interests in Personality' 23 *N Ir LQ* 423, 448 (1972).

175 See 794 *Hansard HC* (5th ser) 881 (1970). See generally D. Madgwick, *Privacy Under Attack* (1968) 7; Dworkin, 'The Younger Committee Report on Privacy' 36 *Mod L Rev* 399, 402 (1973).

year, the Law Commission held a high-level seminar on privacy legislation, but withdrew from the field in expectation of a parliamentary committee.[176] Also in 1967, following a conference of the International Commission of Jurists,[177] 'Justice', the British section of that body, embarked on a long-term study of the privacy issue.[178] Succeeding years saw a number of bills introduced to deal with one or another aspect of privacy invasion,[179] all of them unsuccessful. Justice emerged with a draft bill in 1969,[180] and with slight changes this was put forward by Brian Walden as a Right of Privacy Bill in 1969.[181]

The Walden Bill defined an inclusive 'right to privacy' and a 'right of action for infringement of privacy' subject as always to certain definite defences.[182] It attracted such wide support that, despite predictable press hostility,[183] the Home Secretary only averted a Second Reading by promising to set up a Government Committee to consider legislation.[184] This Committee, chaired by Sir Kenneth Younger and charged to consider only non-governmental incursions on privacy,[185] laboured for two years and made its Report in 1972. The Committee members, with two dissents, came out against a general right to privacy.[186] The scheme of parliamentary enactment of comprehensive privacy legislation proposed by Dworkin in 1961 was discredited.[187] Even the Younger Committee's minor recommendations for new criminal offences have not been enacted. The Committee's suggestions for voluntary self-regulation, including an increased lay

176 See Law Commission, Third Annual Report: 1967–68, para 70 (Law Comm No 15, 1968). See also Law Commission, Fourth Annual Report: 1968–69, para 76 (Law Comm No 27, 1969) ('[E]arly comprehensive examination of this subject by a widely based commission or committee is essential').

177 See International Commission of Jurists, Conclusions of the Nordic Conference on Privacy (1967).

178 See Justice, *Privacy and the Law* (1970) 2.

179 See e.g. Bill of Rights (No 2) Bill 1969 introduced at 787 *Hansard HC* (5th ser) 1519, 1520 (1969) (Clause 10 provided: 'Every person is entitled to protection from arbitrary interference in his personal, family or other private affairs'). See also Unauthorised Telephone Monitoring Bill 1967, Industrial Information (Protection) Bill 1968, Private Investigations Bill 1969, Data Surveillance Bill 1969, Personal Records (Computers) Bill 1969, Control of Personal Information Bill 1971, Security Industry Licensing Bill 1973, Private Detectives Control Bill 1974.

180 See Justice, *supra* n 178, 59–62.

181 See 792 *Hansard HC* (5th ser) 430 (1969).

182 See Right of Privacy Bill 1969, reprinted in Younger Committee, *supra* n 1, Appendix I at 276–78.

183 See e.g. Baistow, 'Privacy versus Freedom' 79 *New Statesman* 108 (1970).

184 See 794 *Hansard HC* (5th ser) 941 (1970).

185 See Younger Committee, *supra* n 1, paras 1, 3–5.

186 See ibid., paras 661–67 (majority recommendation); ibid., 208–15 (minority reports).

187 See e.g. 343 *Hansard HL* (5th ser) 104–78 (1973) (inconclusive debate on the Younger Committee Report).

presence on the Press Council[188] and complaint procedures in the broadcasting authorities,[189] have had more effect, but comprehensive privacy legislation has not appeared likely since the 1972 report.[190]

Issues of governmental intrusion on personal privacy, a matter beyond the scope of the Younger Committee's report, have since been drawn to Parliament's attention. When the question of official wire-tapping was raised in 1979,[191] a White Paper was prepared on the subject[192] but the Government remained opposed to any legislation altering current practices.[193] Interest in proposed 'freedom of information' legislation has sparked consideration of what privacy exceptions such enactments would require,[194] again with no tangible result as yet. Parliament has shown more willingness to consider codes of protection for personal information in public and private data banks, no doubt in response to pressure from other European nations.[195] Two reports in 1975[196] and one in

188 See 'Press Council Is Doubling Its Lay Membership' *The Times* 29 November 1972, at 6, col 4. The Press Council, established voluntarily in 1953 to avert statutory imposition, remains firmly opposed to privacy legislation. See Press Council, Policy Statement on Privacy, quoted in *The Times* 12 April 1976, at 4, col 1: '[A]ny attempt to legislate on privacy would be contrary to the public interest'. See generally H. Levy, *The Press Council* (1967) 240–69; G. Murray, *The Press and the Public* (1972) 91–92.

189 In 1971 the Independent Television Authority set up its Complaints Review Board, see *The Times* 4 October 1971, at 1, col 4; and in 1972 the British Broadcasting Corporation established a Programmes Complaints Commission, see 'Adjudications' 88 *Listener* 83, 83–84 (1972).

190 The Younger Committee Report expressed hope that the developing law of breach of confidence could encompass an adequate substitute for a privacy remedy, but a Law Commission study has found this approach inadequate in several respects. See Law Commission, Breach of Confidence (Working Paper No 58, 1974). See also *Royal Commission on the Press, Final Report* (HMSO 1977) Cmnd 6810, paras 19.9–19.18 (Prof McGregor, Chairman) reluctantly recommending against a statutory right to privacy; *Report of the Committee on Contempt of Court* (HMSO 1974) Cmnd 5794, para 216 (Phillimore LJ Chairman) recommending minimum interference with the press; *Report of the Committee on Defamation* (HMSO 1975) Cmnd 5909, paras 137–40 (Faulks J, Chairman) rejecting a public benefit component in the defence of justification. Recently, the Law Commission has recommended a statutory remedy, this one denominated breach of confidence, applicable to strangers acquiring personal information and marital confidences by such means as electronic bugging and surreptitious surveillance. See Law Commission, Breach of Confidence (Law Comm No 110, 1981); Jones, 'The Law Commission's Report on Breach of Confidence' [1982] *Camb LJ* 40.

191 See 963 *Hansard HC* (5th ser) 750–51 (1979).

192 See *The Interception of Communications in Great Britain* (HMSO 1980) Cmnd 7873 (disclosing the issuance of nearly 1,000 warrants for interception annually).

193 See 982 *Hansard HC* (5th ser) 205–20 (1980).

194 See T. Barnes, *Open Up!* 8–9 (Fabian Tract 467, 1980); Justice, *Freedom of Information* (1978) 8, 10, 17–18.

195 See *infra* 350–353.

196 See *Computers and Privacy* (HMSO 1975) Cmnd 6353 (promising future legislation); *Computers: Safeguards for Privacy* (HMSO 1975) Cmnd 6354 (reviewing Britain's computer systems and legislation abroad).

1978[197] have addressed the problem, recommending establishment of a permanent Data Protection Authority. At the end of 1982, the Thatcher Government introduced a Data Protection Bill of limited scope; it would require registration of most computerized record systems compiling personal information on individuals (but not manual record systems) and would establish procedures for subjects to obtain access to their records.[198]

Although the drive for explicit and comprehensive privacy legislation has failed, Parliament did enact, in a piecemeal and incidental fashion, a number of privacy protections of limited scope. Unofficial mail-opening and disclosure of the contents of telegrams have long been offences,[199] and it is possible to piece together statutory prohibitions against most methods of wire-tapping and bugging.[200] Many statutes, including the Official Secrets Act, make disclosure by civil servants of information obtained in confidence in the course of duty an offence.[201] Beginning in the 1920s, statutes have begun to close off court proceedings in divorce, wardship and other highly sensitive matters from press reporting.[202] Also by statute, fingerprints of arrested minors under the age of fourteen are not recorded, and fingerprint records of acquitted adult defendants are destroyed.[203] The Copyright Act has added a remedy for false attribution of authorship,[204] and television broadcasting authorities have been required to delete programmes offensively representing any living person.[205] More recently, Parliament has prohibited intrusive 'harassment' of tenants by landlords,[206] of debtors by creditors,[207] and of any person by means of obscene and menacing telephone calls[208] and unsolicited obscene publications.[209] In the mid-1970s major

197 See *Report of the Committee on Data Protection* (HMSO 1978) Cmnd 7341 (Sir Norman Lindop, Chairman) recommending a Data Protection Act establishing a Data Protection Authority (hereinafter cited as 'Lindop Committee').

198 See Shaw, 'Data Bank Reforms Aim to Extend Individual Rights' *The Times* 23 December 1982, at 11, col 1.

199 See Post Office Act 1969, s 64; Post Office Act 1953, ss 52, 56, 58(1); Telegraph Act 1868, s 20; Post Office Protection Act 1884, s 11.

200 See Wireless Telegraphy Act 1949, ss 1(1), 5(8); Theft Act 1968 (stealing electricity).

201 See e.g. Finance Act 1978, s 77; Population (Statistics) Act 1938, s 4; Census Act 1920, s 8(2); Official Secrets Act 1911, s 2.

202 See Judicial Proceedings (Regulation of Reports) Act 1926; Criminal Justice Act 1967, s 6(1). On the latter provision see *R* v *Stafford* [1972] 1 WLR 1649, 1651 (opinion of Lord Widgery CJ) 'the right of an accused person to, as it is said, opt for privacy in committal proceedings'; *Attorney-General* v *English* [1982] 2 WLR 959, 970 (judgment of Watkins LJ).

203 See Magistrates' Courts Act 1952, s 40.

204 Copyright Act 1956, s 43; *infra* n 328.

205 See Television Act 1954, s 3(1).

206 See Rent Act 1965, s 30. See *Jennison* v *Baker* [1972] 2 QB 52, 60 (landlord jailed for contempt). 'The tenants' rooms were entered with a pass-key and furniture left disturbed and windows opened so that tenants should know that their privacy had been invaded'.

207 See Administration of Justice Act 1970, s 40.

208 See Post Office Act 1953, s 66.

209 See Unsolicited Goods and Services Act 1971, s 4.

statutory protections have been the Consumer Credit Act of 1974 providing individuals with access and opportunities to correct credit information compiled on them,[210] the Rehabilitation of Offenders Act, imposing criminal and civil penalties on disclosure of spent convictions,[211] and the Sexual Offences (Amendment) Act of 1976, securing the anonymity of rape victims and defendants.[212] The parliamentary contribution remains small, however, and the legislative momentum appears to have been lost to the courts.[213]

B. *International protection of human rights*

British jurists, notably Sir Hersch Lauterpacht,[214] played an important role in the drafting and adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948.[215] Among the broad and ambiguous statements of principle in the Declaration, Article 12 provides: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. . . . Everyone has the right to the protection of the law against such interference . . .'.[216] Despite the Declaration's unanimous adoption, and despite subsequent resolutions calling upon States to 'fully and faithfully observe' its provisions,[217] its status as a norm of international law has long been doubted.[218] Some enforcement apparatus was created by the International Covenant on Civil and Political Rights, opened for signature in 1966 and brought into force ten years later.[219] Article 17 of the Covenant repeats the Universal Declaration provision on privacy, adding the qualification that interference is only a violation if 'unlawful' as well as arbitrary.[220] Parties to the International Covenant, of which the United Kingdom is one, oblige themselves 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction' all of the rights enumerated and 'to adopt such legislative or other measures as may be necessary to give effect' to them.[221] The British Government has denied, however, that any such legislation on its part is necessary, pointing to 'safeguards of different kinds, operating in the various legal systems, independently of the Covenant but in full conformity to it'.[222] Human rights agreements of world-wide

210 Consumer Credit Act 1974, ss 158–60.
211 Rehabilitation of Offenders Act 1974.
212 Sexual Offences (Amendment) Act 1976, s 6.
213 See *infra* 353–362.
214 See H. Lauterpacht, *An International Bill of the Rights of Man* (1945).
215 Universal Declaration, *supra* n 6.
216 Ibid.
217 See e.g. GA Res 1904, 18 GAOR, Supp 15, UN Doc A/5515 at 35 (1963).
218 See e.g. Henkin, 'Introduction' in L. Henkin ed, *The International Bill of Rights* (1981) 1, 9.
219 International Covenant, *supra* n 7.
220 Ibid.
221 Ibid., Art 2(1) and (2). But see UN Doc E/CN.4/SR.427 at 10 (1954) (UK representative denying that treaties could impose requirement of domestic legislation).
222 UN Doc CCPR/C/1 Add 17 at 1 (1977). See also Central Office of Information, Human Rights in the United Kingdom (R 3980, 1958).

scope have not provided any impetus for the recognition of a right to privacy in English law.[223]

By contrast, the European Convention on Human Rights of 1950 has shown much greater promise.[224] Article 8(1) of the Convention states a general and unqualified right to privacy: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.[225] The Article goes on to provide that '[t]here shall be no interference by a public authority with the exercise of this right' and adds several qualifications:[226]

> 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 United Kingdom, as a signatory, is obliged to 'secure to everyone within [its] jurisdiction' all the rights defined by the Convention,[227] but makes no more specific undertaking to enact such rights or to give the Convention the force of law.[228] In a report to the Secretary General of the Council of Europe, the British Government dealt with Article 8 by stating: 'Any power a public authority may have to interfere with a person's right to respect for private and family life, his home and his correspondence must be provided by law'.[229] Current interpretation of Article 8 to provide a right against non-governmental as well as governmental interferences[230] renders such an answer inadequate and promises at least continued consideration of legal protection of privacy by the English domestic courts.

It is standard constitutional doctrine in England that international treaties do not have the effect of domestic law,[231] and the European Convention is no

223 See e.g. 229 *Hansard HL* (5th ser) 628–29 (1961) (remarks of Lord Kilmuir LC) (The 1948 Universal Declaration 'aim[s] mainly at physical interference, such as the activities of secret police'); International Commission of Jurists, 'The Legal Protection of Privacy: A Comparative Survey of Ten Countries' 24 *Int'l Soc Sci J* 417, 458 (1972) (The Universal Declaration 'has no legal effect in English law').

224 European Convention, *supra* n 8.

225 Ibid., Art 8(1).

226 Ibid., Art 8(2).

227 See ibid., Art 1.

228 See e.g. Jaconelli, 'The European Convention on Human Rights—The Text of a British Bill of Rights?' 1976 *Pub L* 226, 233–34.

229 Doc H (67) 2, published 10 January 1967. This appears to be untrue of telephone tapping. Compare *Malone* v *Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344 (sustaining government wire-tapping practices) with the *'Klass' Case* (1978) 2 EHRR (finding government wire-tapping a violation of Article 8).

230 See Council of Europe, Consultative Assembly, Res 428 (23 January 1970).

231 See e.g. *Attorney-General for Canada* v *Attorney-General for Ontario* [1937] AC 326, 347. In Western Europe only Ireland and Iceland join the United Kingdom in failing to give even limited effect to international agreements. See Golsong, 'The European Convention on Human Rights Before Domestic Courts' 38 *Brit YB Int'l L* 445, 445 (1962).

exception to this doctrine.[232] Thus, the Convention provides no basis for bringing an action at law in England.[233] At one time, the courts began to admonish government officials to 'bear in mind' the Convention's principles[234] including Article 8's right to respect for family life.[235] Soon, however, the courts cut back on this application of the Convention, on the grounds that Article 8 was 'so wide as to be incapable of practical application' to administrative practices.[236] Though the English courts have at times interpreted other broadly drafted international conventions more flexibly and freely,[237] the Convention's sweeping pronouncements are themselves considered incapable of judicial interpretation[238] and only grudgingly adverted to as guides to the interpretation of domestic statutes.[239] Like the official pronouncements of the Government to the Council of Europe, judicial decisions tend to assume that existing law adequately protects all the rights mentioned in the European Convention.[240]

The European Convention does operate of its own force in actions brought directly in the European Court of Justice in Luxembourg.[241] Thus, in 1980 an English company brought before the European Court, albeit unsuccessfully, an action against European Commission inspectors for their surprise search of its office premises and records.[242] The jurisdictional ambit within which such suits can be brought is very limited.[243] The United Kingdom has, in addition, signed the Optional Clause to the 1950 Convention giving its subjects the right to petition directly to the European Court of Human Rights in Strasbourg.[244] Although this too provides a route for privacy protection,[245] the administrative obstacles facing a petitioner are truly formidable.[246] Even so, opportunities for

232 See e.g. 596 *Hansard HC* (5th ser) 333–34 (1958).

233 See Golsong, *supra* n 231, 446.

234 See *R* v *Secretary of State for the Home Dep't, ex parte Bhajan Singh* [1976] QB 198, 207.

235 See *R* v *Secretary of State for the Home Dep't, ex parte Phansopkar* [1976] QB 606, 626, 628.

236 See *R* v *Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* [1976] 1 WLR 979, 984–85.

237 See *James Buchanan & Co Ltd* v *Babco Forwarding & Shipping (UK) Ltd* [1977] QB 208, 213, aff'd on other grounds, [1978] AC 141.

238 See Crawford, 'Decisions of British Courts during 1976–1977' 48 *Brit YB Int'l L* 333, 351 (1978).

239 See e.g. *Pan-American World Airways Inc* v *Department of Trade* [1976] 1 Lloyd's Rep 257, 261–62.

240 But see *R* v *Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* [1976] 1 WLR 979, 984–85.

241 See *Firma J. Nold KG* v *Commission of the European Communities* [1974] CJ Comm E Rec 491, 508 [1974] 1 CMLR 338, 354 (European Convention on Human Rights incorporated into Community law); Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities' 18 *Am J Comp L* 343 (1970).

242 *National Panasonic (UK) Ltd* v *Commission of the European Communities* [1981] ICR 51.

243 See Jaconelli, *supra* n 228, 230.

244 See European Convention, *supra* n 8, Optional Protocol.

245 See *infra* 365.

246 See O'Hanlon, 'The Guarantees Afforded by the Institutional Machinery of the Convention' in A. Robertson ed, *Privacy and Human Rights* (1973) 307, 308; A. Robertson, *Human Rights in Europe* 2nd ed (1977) 203–12.

adjudication of privacy claims under Article 8 of the Convention in these international tribunals may have the indirect effect of spurring the creation of domestic remedies to forestall unfavourable world publicity.[247]

International pressure of a different sort has recently been put on Britain to catch up with other European Community members in explicit protection of individual privacy. Western European nations with high levels of privacy protection for personal information contained in public and private computer data banks within their borders have threatened to refuse to allow transmission of such information to countries without such safeguards.[248] In response, the Committee of Ministers of the Council of Europe has adopted a Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.[249] The Data Convention imposes restrictions on the gathering of personal information for automated processing and a right of individual access to automated files.[250] Signatories to the Data Convention could refuse to transmit information about an individual's race, politics, religion, sexual life, or criminal convictions to a country whose domestic law lacked 'appropriate safeguards'.[251] Britain signed the new convention in 1981, but the Thatcher Government introduced no legislation to implement it domestically until the end of 1982,[252] and in the absence of legislation this highly technical area provides little incentive for judicial innovation.

V. RECENT JUDICIAL INITIATIVES

A. *Private property*

In the twentieth century, the Englishman's castle is not the potent symbol of individualism and self-reliance it once was.[253] The use of violence to ward off public and private invasions of the domestic castle has been closely circumscribed by codification of the criminal law of self-defence.[254] At the same time, legislation

247 See e.g. Jaconelli, *supra* n 228, 227 and n 7. Cf *Raymon* v *Honey* [1982] 2 WLR 465 (access to court broadened after decision of European Court of Human Rights).

248 See Evans, 'Computers and Privacy: The New Council of Europe Convention' 130 *New LJ* 1067 (1980), 'Privacy—We Don't Worry, We're British' *Economist* 25 October 1980, 81.

249 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, adopted 17 September 1980.

250 Ibid., Arts 5, 8.

251 Ibid., Art 6.

252 See Jefferson and Thornberry, 'European Convention on Data Processing' 126 *Sol J* 5 (1982); *supra*, 349.

253 See e.g. D. Watkinson and M. Reed, *Squatting, Trespass and Civil Liberties* (1976) 41; Hewitt, 'The Englishman's Front Door' 36 *New Statesman* 435, 435–36 (1948).

254 See Criminal Law Act 1967, s 3(1): 'A person may use such force as is reasonable in the circumstances in the prevention of crime'; *R* v *Barrett*, unreported decision of the Court of Appeal, 23 June 1980 (defendant's honest belief that his home was his castle to defend by all necessary force was of no avail). For the earlier view of defence of the home, see *Townley* v *Rushworth* (1963) 62 LGR 95, 98; *R* v *Hussey* (1924) 18 Crim App R 160, 161. The castle privilege against the sheriff remains. See *Southam* v *Smout* [1964] 1 QB 308, 320; *Swales* v *Cox* [1981] QB 849, 855.

has authorized many new penetrations of the family home by national and local authorities for various purposes: to check water and electricity usage, to monitor television licences and so forth.[255] New restrictions on the individual owner's use of property have also multiplied with more crowded conditions and the increased role of the State.[256] Nevertheless, the twentieth century has seen a great willingness on the part of the courts to recognize and protect an interest in privacy—more recently denominated a fundamental *right* to privacy—in a number of contexts.[257]

While landowners have continued to complain about overlooking by neighbours,[258] the unwillingness of the nineteenth century courts to find implied covenants of privacy remained in force until the 1950s.[259] Since then, the question has arisen in the Lands Tribunal under statutory authority to discharge or modify restrictive covenants.[260] In that forum, objectors have frequently been able to keep covenants in force on the grounds that loss of privacy would result from the modification.[261] Moreover, public works have been successfully challenged in the courts when their purposes included providing a public promenade overlooking hitherto private estates.[262] The actions of the Lands Tribunal have in effect reversed the earlier judicial attitude of ignoring privacy interests, while at the

255 See J. Garner, *An Englishman's Home Is His Castle?* (1966) 3; P. Devlin, *supra* n 55, 18–19; Haldane Club, *The Law of Public Meeting and the Right of Search and Seizure* (New Fabian Research Bureau No 13, 1941) 23–24; Hewitt, *supra* n 253, 435–36. Early challenges to these new powers of entry were occasionally successful in court, see *Stroud* v *Bradbury* [1952] 2 All ER 76, 77, or if not, see *Grove* v *Eastern Gas Board* [1952] 1 KB 77, at least accomplished some parliamentary retrenchment, see Rights of Entry (Gas and Electricity Boards) Act 1954.

256 See J. Garner, *supra* n 255, 20 (1966) (planning permission, compulsory purchase, inspection).

257 See cases cited at n 11 *supra.*

258 An explicit covenant to prevent overlooking would, of course, still be enforced. See *Re Henderson's Conveyance* [1940] 1 Ch 835, 849.

259 See e.g. *Owen* v *Gadd* [1956] 2 QB 99, 107 (erection of scaffolding outside leased premises did not breach covenant of peaceable and quiet enjoyment); *Kelly* v *Battershell* [1949] 2 All ER 830, 836 (mere interference with privacy no derogation from landlord's grant to tenant); *Browne* v *Flower* [1911] 1 Ch 226, 228 (dictum).

260 Law of Property Act 1925, s 84(1).

261 See e.g. *Re M. Howard (Mitcham) Ltd's Application* (1956) 7 P & CR 219, 222 (application to modify 1899 restrictive covenant dismissed; avoidance of invasion of privacy was of 'considerable importance'); *Re Munday's Application* (1954) 7 P & CR 130, 131–32 (application refused on grounds of loss of seclusion and privacy); *Re Berridge's Application* (1954) 7 P & CR 125, 127 (application granted on condition to provide screen of trees for garden privacy); *Re Sloggetts (Properties) Ltd's Application* (1952) 7 P & CR 78, 83 (application refused on grounds of injury to privacy and amenities of surrounding property). The volume of Lands Tribunal cases decided since the mid-1950s on this ground is too large to catalogue, see LEXIS, ENGLG library, but more recently assertions of 'rights of privacy' in this context can be found. See e.g. *Re Davies's Application* (1971) 25 P & CR 115, 119.

262 See e.g. *Webb* v *Minister of Housing & Local Gov't* [1965] 1 WLR 755, 773 (compulsory purchase order for construction of sea wall quashed; public promenade an improper purpose).

same time the privacy of neighbouring landowners has become an explicit consideration guiding local authorities in their grants of planning permission.[263]

Intrusions by strangers falling short of physical trespass have twice failed to elicit injunctive relief from the English courts in the past decade. The claim of invasion of privacy was central to the plaintiff's argument in *Bernstein* v *Skyviews & General Ltd* in 1977.[264] Lord Bernstein of Leigh brought an action for damages for trespass and injunctive relief when photographs of his country estate were taken by the defendants' aeroplane flying over his property.[265] Griffiths J found the single overflight to be neither a trespass nor a nuisance, though he recognized that 'constant surveillance' of a plaintiff's house from above would be a 'monstrous invasion of privacy' for which a court might well grant relief.[266] The privacy claim was more incidental in the 'cricket case', *Miller* v *Jackson,* decided by the Court of Appeal in the same year.[267] Landowners adjoining a playing field sought an injunction against the local cricket club when, season after season, a few long drives would invariably send cricket balls flying into their garden, threatening damage and necessitating retrieval by the players. Though damages would have been awarded on grounds of negligence and nuisance, the injunction was not issued because, as Lord Denning put it, the plaintiff's private interest 'in securing the privacy of his home and garden' was outweighed by the public interest in preserving the institution of village cricket.[268] Privacy has not found a place among actionable nuisances, at least when injunctive relief is sought.

Since 1921, the English courts have narrowly construed police powers of entry, search, and seizure in the interest of 'the privacy of the Englishman's dwelling house'.[269] As Lord Denning announced in *Ghani* v *Jones* in 1970, the requirement of reasonable grounds for searches and seizures was based on the principle that the individual's 'privacy and his possessions are not to be invaded except for the most compelling reasons'.[270] Alongside the line of decisions following *Ghani* v

263 See e.g. *Wakelin* v *Secretary of State for the Environment* (1978) 77 LGR 101 (upholding refusal to grant planning permission based on privacy considerations). But see *Chelmsford Corp* v *Secretary of State for the Environment* (1971) 70 LGR 89, 95 (planning permission imposing conditions relating to walls and fences for privacy and decoration held ultra vires).

264 [1978] QB 479.

265 Ibid., 484.

266 Ibid., 489. On a smaller scale, habitual 'peeping Toms' are still dealt with by the law. See *R* v *Dyson, The Times* 10 April 1979, at 3, col 5.

267 [1977] QB 966.

268 Ibid., 981.

269 *Great Central Ry Co* v *Bates* [1921] 3 KB 578, 581 (opinion of Atkin LJ) (constable entered warehouse as a trespasser, no liability for his injury in a fall).

270 [1970] 1 QB 693, 708. See also *Chic Fashions (West Wales) Ltd* v *Jones* [1968] 2 QB 299, 307–08 (opinion of Lord Denning MR, applying the maxim 'every man's house is his castle').

Jones,[271] another series of cases has invoked the privacy interest to forbid any official search whatever under statutes not explicitly allowing entry into homes.[272] As most recently stated, 'Parliament should not be presumed to have authorized any greater invasion of privacy than was expressly sanctioned'.[273]

Recent decisions in the House of Lords have developed each of these lines of authority with explicit reference to the right of privacy. In *Inland Revenue Commissioners* v *Rossminster Ltd,*[274] although the judgment reversed a Court of Appeal decision holding a broad search of documents unlawful,[275] Lords Wilberforce and Scarman in the majority and Lord Salmon in dissent all appealed to the citizen's 'right to privacy', an important 'human right' limiting the State's power to search homes, offices, and papers.[276] *Morris* v *Beardmore*[277] construed sections 8 and 9 of the Road Traffic Act 1972 to forbid intrusion into the home but to allow the trial judge discretion in excluding evidence so obtained. Lord Edmund-Davies, Lord Keith of Kinkel, Lord Scarman, and Lord Roskill all made mention of the right, Lord Scarman describing it as 'fundamental' both in the common law and under the European Convention.[278] In the *Rossminster* decision, moreover, the Law Lords explicitly charged the courts with enforcing this right to privacy against police searches.[279]

A new threat to the privacy of private property, the 'Anton Piller' order,[280] has made the surprise tactics of police search and seizure available to plaintiffs in civil suits, on a showing that evidence in a defendant's possession is likely to be destroyed if subpoenaed by regular means. The procedure traces its origin to Chancery's circumvention of the householder's protection in *Semayne's Case.*[281] Invasion of the defendant's privacy was a concern expressed in one of the first

271 See e.g. *R* v *Thornley* (1980) 72 Crim App R 302, 304 (license to enter premises granted by wife and not revoked by husband); *Frank Truman Export Ltd* v *Metropolitan Police Comm'r* [1977] QB 952, 964 (documents held under search warrant for suspicion of fraud held privileged and returned).

272 See e.g. *R* v *Adams* [1980] 1 QB 575, 579–80, 583 (interpreting Obscene Publications Act 1959, s 2); *Clowser* v *Chaplin* (1981) 72 Crim App R 342, 353 (interpreting Road Traffic Act 1972, s 8); *Congreve* v *Home Office* [1976] QB 629, 649 (television licences); *R* v *Surrey Quarter Sessions Comm, ex parte Tweedie* (1963) 61 LGR 464, 467 (interpreting Education Act 1944, ss 36, 37). See also *Hutton* v *Esher Urban Dist Council* [1972] Ch 515, 523–24, rev'd, [1974] Ch 167. Cf *Stott* v *Hefferon* [1974] 1 WLR 1270, 1273–74 (limiting the presumption; Parliament intends that premises only be protected if actually inhabited).

273 *Clowser* v *Chaplin* (1981) 72 Crim App R 342, 353 (opinion of Donaldson LJ).

274 [1980] AC 952.

275 *R* v *Inland Revenue Comm'rs, ex parte Rossminster* [1980] AC 952.

276 Ibid., 997, 1019, 1022.

277 [1981] AC 446.

278 Ibid., 462, 464–65, 465.

279 *Inland Revenue Comm'rs* v *Rossminster Ltd* [1980] AC 952, 997.

280 So named from the leading case. See *Anton Piller KG* v *Manufacturing Processes Ltd* [1976] Ch 55.

281 See *East India Co* v *Kynaston* (1821) 3 Bli 153, 163–64, 4 Eng Rep 561, 564.

Anton Piller cases.[282] This concern has surfaced again in two 1980 decisions,[283] one of them grounded explicitly on the 'rights of privacy' and on the maxim that 'an Englishman's home is his castle'.[284]

B. *Confidential communication*

The security of communications by letter, telegram and telephone from official and unofficial interception remains a subject of concern in England.[285] Although criminal prosecutions[286] and damage actions[287] have succeeded against detectives for unofficial acts of wire-tapping, courts have held admissible evidence obtained by tapping and by other forms of electronic eavesdropping.[288] In the 1979 *Malone* decision, Megarry V-C rejected a challenge to police wire-tapping based on an asserted right to privacy,[289] but he held out the possibility of judicial recognition of such a right against unofficial interception.[290] Megarry V-C's opinion also suggested that future scrutiny of England's official wire-tapping practices may well proceed under the European Convention.[291]

282 *EMI Ltd* v *Pandit* [1975] 1 WLR 302, 305.

283 *Thermax* v *Schott Industrial Glass Ltd* (1980) 7 Fleet Street R 289, 298; *Yousif* v *Salama* [1980] 1 WLR 1540, 1544 (Donaldson LJ dissenting).

284 *Thermax* v *Schott Industrial Glass Ltd, supra* n 283, 298 (opinion of Browne-Wilkinson J). See also *ITC Film Distributions Ltd* v *Video Exch Ltd, The Times* 18 November 1981, at 18, col 5 (quoting this passage).

285 See e.g. *The Interception of Communications in Great Britain, supra* n 192; Birkett Committee, *supra* n 163; Duffy and Muchlinski, 'The Interception of Communications in Great Britain' 130 *New LJ* 999 (1980); Nathan, 'Eavesdropping' (Parts 1–3) 225 *Law Times* 119, 135, 149 (1958); Wade, 'Post-Office—Interception of Messages' [1958] *Camb LJ* 6.

286 *R* v *Blackburn, The Times* 6 June 1974, at 4, col 3 (telephone tapping) (judgment of Nield J). '[W]hatever the legal technicalities, this offence constituted a very serious invasion of privacy'; cited in *Director of Public Prosecutions* v *Withers* [1975] AC 842, 866, *R* v *Withers, The Times* 17 June 1971, at 1, col 2 (bugging of bedroom for divorce evidence was conspiracy to commit trespass) (judgment of Roskill J) ('serious breaches of a citizen's right to privacy in his own home'); *R* v *Sergeant, The Times* 11 August 1967, at 3, col 1 (bugging to obtain industrial secrets). The medieval criminal offence of eavesdropping was judicially disapproved, see *R* v *London Quarter Sessions* [1948] 1 KB 670, 675 and was abolished in 1967, see Criminal Law Act 1967, s 13(1)(*a*).

287 *Sheen* v *Clegg, Daily Telegraph* 22 June 1961.

288 *R* v *Robson* [1972] 1 WLR 651; *R* v *Senat* (1968) 52 Crim App R 282, 286–87; *Gabbitas* v *Gabbitas, The Times* 5 December 1967, at 3, col 1 (evidence obtained by bugging wife's bedroom); *Trehearne* v *Trehearne, The Times* 18 October 1966, at 9, col 1 (evidence obtained by bugging husband's bedroom, though 'a disgraceful invasion of privacy', was admitted); *R* v *Maqsud Ali* [1966] 1 QB 688, 702 (opinion of Marshall J) 'The method of the informer and of the eavesdropper is commonly used in the detection of crime'; *R* v *Mills* [1962] 1 WLR 1152, 1157. Intercepted letters appear to have been offered in evidence at criminal trials very rarely. See e.g. *R* v *O'Brien, The Times* 5 July 1923, at 11, col 4 (Irish seditious conspiracy trial); *R* v *Atterbury (Bishop)* (1723) 16 Howell St Tr 323, 332–35 (treasonable conspiracy).

289 [1979] Ch 344. The 'inalienable human right' to privacy was early invoked against wire-tapping in Nathan, *supra* n 285, 120.

290 [1979] Ch 372 ('[T]here has to be a first time for everything').

291 See [1979] Ch 380; Wacks, *supra* n 23, 74 n 8. The plaintiff has indeed sought this relief. See *The Times* 27 July 1981, at 3, col 3; *The Times* 5 November 1980, at 6, col 1.

Evidentiary privileges[292] have been supplemented by new legal protections for communications made in judicial proceedings. Court-ordered discovery creates obligations of confidentiality on the basis of a 'public interest in preserving privacy', announced by Lord Denning in *Riddick* v *Thames Board Mills*, a 1977 decision.[293] This principle has prevented the use of discovered information in other suits against the party making discovery[294] and has provided limitations on the scope of discovery.[295] Most recently, in *Harman* v *Secretary of State for the Home Department*,[296] the House of Lords upheld a Court of Appeal decision in which Lord Denning elevated the 'public interest' of the *Riddick* case to 'one of our fundamental human rights' and Templeman LJ joined him in an appeal to this 'right to privacy'.[297] Discovery, said Lord Roskill, 'involves invasion of an otherwise absolute right to privacy', but neither this supposed right nor a 'right to freedom of information' could be rigidly applied in this area.[298] Just as communications between client and attorney earned legal protection because of their central importance to the conduct of litigation, documents made available to the opposing party in litigation now bear strict safeguards formulated explicitly in privacy terms.

Two attempts in the mid-1970s to restrain the publication of matters disclosed in the privacy of wardship proceedings failed to win over the Court of Appeal,[299] although one of them did provoke Lord Denning to express the need for a 'general remedy for infringement of privacy'.[300] Suits for breach of confidence, relying on *Albert* v *Strange*[301] and the trade secret cases,[302] have met with more success in preventing public disclosure of communications made confidentially. A pair of cases on public relations employees disclosing information about their principals

292 The privacy basis of the husband-wife privilege was eroded in *Rumping* v *Director of Public Prosecutions* [1964] AC 814, 832 (no privilege against 'disclosure by a witness who was an eavesdropper or who had intercepted or stolen a letter from one spouse to the other').

293 [1977] QB 881, 895, 896.

294 Ibid.; *Medway* v *Doublelock Ltd* [1978] 1 WLR 710, 713 (quoting this passage).

295 See *Church of Scientology of California* v *Department of Health and Social Security* [1979] 1 WLR 723, 728; *Halcon Int'l Inc* v *Shell Transp & Trading Co* [1979] Pat Cas 97, 107.

296 [1982] 2 WLR 338.

297 *Home Office* v *Harman* [1981] QB 534, 557, 558.

298 [1982] 2 WLR 361 (opinion of Lord Roskill). See also [1982] 2 WLR 351, 358 (Lord Scarman, dissenting).

299 *Re F (a minor)* [1977] Fam 58, 98; *Re X (a minor)* [1975] Fam 47, 58. See also *Barritt* v *Attorney-General* [1971] 1 WLR 1713, 1714 (in exercising discretion to proceed in camera, courts weigh effect of publicity and disclosure of family secrets). The origin of the protection afforded private and domestic affairs in wardship proceedings is *Scott* v *Scott* [1913] AC 417, 482–83.

300 *Re X (a minor)* [1975] Fam 47, 58 (opinion of Lord Denning MR).

301 (1848) 2 De G & Sm 652, 64 Eng Rep 293, aff'd (1849) 1 Mac & G 25, 41 Eng Rep 1171.

302 *Morrison* v *Moat* (1851) 9 Hare 241, 68 Eng Rep 492, aff'd (1852) 21 LJ Ch (NS) 248 (injunction to restrain former partner from making medicine by secret method); *Yovatt* v *Winyard* (1820) 1 J & W 394, 37 Eng Rep 425 (injunction to restrain journeyman from disclosing recipes of medicines on grounds of breach of trust and confidence).

in breach of confidence show the close relation of this new action[303] to privacy interests. In one case, the injunction was refused on the ground that the publicity-seeking plaintiffs 'were in no position to complain of an invasion of their privacy' by the defendants' disclosures.[304] In the other decision, that 'fundamental human right', the 'right of privacy', outweighed the right of the press to keep the public informed, and the injunction issued.[305]

The action for breach of confidence extends to intimate details of domestic affairs as well as commercial secrets.[306] It prevents disclosure not only by those in whom the confidence has been reposed but also by third parties who acquire the sensitive information.[307] In the twentieth century counterpart to *Albert* v *Strange,* the Duke of Argyll was restrained from publishing details of his divorce proceedings, including his estranged wife's private diary.[308] Ungoed-Thomas J, in issuing the injunction, quoted Lord Cottenham's 1849 pronouncement that 'privacy is the right invaded'.[309] *Argyll* v *Argyll* sums up the legal protection of confidential communications in England: the property interest of the writer in sentiments confided to paper, the implied bond of confidentiality in the marital relationship, the limitations on testimony and documents discovered in judicial proceedings, and the privacy interest at the heart of the action of breach of confidence.

C. *Personal information*

Collection, storage, and use of sensitive personal information in public and private organizations has accelerated in twentieth century England,[310] and with it has increased the level of privacy concerns reaching the courts. As government's

303 See G. Dworkin, *Confidence in the Law* (1971); Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' 86 *LQ Rev* 463 (1970); North, 'Breach of Confidence: Is There a New Tort?' 12 *JSPTL* 149 (1972). See also Hammond, 'The Origins of the Equitable Duty of Confidence' 8 *Anglo-Am L Rev* 71 (1979).

304 *Woodward* v *Hutchins* [1977] 1 WLR 760, 764 (opinion of Bridge LJ).

305 *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1, 21 (opinion of Lord Denning MR, dissenting in part).

306 See e.g. *Coco* v *A. N. Clark (Engineers) Ltd* [1969] Pat Cas 41, 50; *Fraser* v *Evans* [1969] 1 QB 349, 361.

307 *Saltman Engineering Co Ltd* v *Campbell Engineering Co Ltd* (1948) 65 Pat Cas 203, 213, [1963] 3 All ER 413, 414 (opinion of Lord Greene MR) ('[T]he obligation to respect confidence is not limited to cases where the parties are in contractual relationship. . . . If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, with the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights').

308 *Argyll* v *Argyll* [1967] Ch 302, discussed in Cline, 'The Argyll Decision' 213 *Spectator* 837 (1964) ('a decisive step towards a new law of privacy').

309 [1967] Ch 320.

310 See e.g. *Computers: Safeguards for Privacy* (HMSO 1975) Cmnd 6354; Lindop Committee, *supra* n 197; B. Rowe ed, *Privacy, Computers and You* (1972); J. Rule, *Private Lives and Public Surveillance* (1973); P. Sieghart, *Privacy and Computers* (1976); 'Computers and Privacy' 128 *New LJ* 423 (1978).

information demands have multiplied, fears of gossip by local enumerators[311] have given way to court challenges directed against the entire regime of data collection.[312] The potential for unauthorized access to recorded information about individuals was highlighted in *Director of Public Prosecutions* v *Withers*, an unsuccessful prosecution of a detective agency for 'conspiracy ... to invade privacy' by impersonating bank officers to obtain confidential financial reports.[313] More recently, again in the name of privacy, courts have protected bank records from government 'fishing expeditions' of various kinds.[314] But the impact of the courts on public and private recordkeeping practices has on the whole been negligible.[315]

English courts have made more of an effort to minimize the intrusions on privacy caused by their own proceedings, thus adding to the small arsenal of legal protections for personal information. For example, a strong showing of necessity must be made to justify invasions of a party's privacy by medical examinations,[316] body searches,[317] and blood tests.[318] Litigants are also given some protection through requirements of confidentiality in wardship[319] and divorce cases,[320] as well as for documents disclosed in discovery. The truth-seeking function of the courts must give way, as Lord Fraser remarked in a 1983 decision of the House of Lords, when a litigant decides to 'withhold information that would help his case ... for reasons of delicacy or personal privacy'.[321] Moreover, in a number of recent cases, courts have acted to prevent disclosure of the private affairs of non-parties. On grounds of privacy protection, courts have refused to compel the parents of divorcing spouses to disclose the testamentary provisions they have made,[322] and have refused to order disclosure of confidential employee records in employment discrimination suits.[323] Likewise, they have sought to prevent 'jury vetting', the collection of official record information about members of jury panels by prosecution and defence lawyers, again in the name of the juryman's 'right of privacy'.[324] Most recently, the Court of Appeal has applied the 'individual's right

311 *Dyson* v *Attorney-General* [1911] 1 KB 410, 421. See also a related case of the same name, [1912] 1 Ch 158. The same fear had been expressed in 'The Census', *supra* n 139, 424.

312 *Turner* v *Midgely* [1967] 1 WLR 1247, 1252, *Willcock* v *Muckle* [1951] 2 KB 844.

313 *Director of Public Prosecutions* v *Withers* [1975] AC 842, 863 (opinion of Lord Simon).

314 *Clinch* v *Inland Revenue Comm'rs* [1974] QB 76, 87 (opinion of Ackner J).

315 More is expected of Parliament and the European Community. See *supra* 349–353.

316 *Starr* v *National Coal Board* [1977] 1 WLR 63, 75.

317 *Lindley* v *Rutter* [1981] QB 128, 134.

318 *S* v *S* [1972] AC 24, 57 (quoting *Bednarik* v *Bednarik*, 18 NJ Misc 633, 652, 16 A 2d 80, 90 (1940)).

319 See *supra* n 358.

320 *M* v *M (No 1)* [1967] P 313, 315; *Edwards* v *Edwards* [1968] 1 WLR 149, 149.

321 *Air Canada* v *Secretary of State for Trade* [1983] 1 All ER 910, 916. See *supra* 357–358.

322 See *W* v *W*, *The Times* 21 March 1981, at 6, col 6, *Morgan* v *Morgan* [1977] Fam 122, 123, 125.

323 *Science Research Council* v *Nassé* [1980] AC 1028, 1085.

324 *R* v *Crown Court at Sheffield, ex parte Brownlow* [1980] 1 QB 530, 542 (opinion of Lord Denning MR). But see *R* v *Mason* [1981] QB 881 (condoning practice).

to privacy' in limiting statutory powers to inspect individual bank accounts of nonparties for litigation purposes.[325]

Having put its own house in order, the English judiciary remains reluctant to safeguard personal information further by enforcing broad privacy protections against the press. The House of Lords rejected an explicit privacy remedy against the press in *Tolley* v *Fry*,[326] and actions for damages on the explicit ground of privacy invasion have not been successful,[327] although the courts have on occasion upheld awards of damages for the publication of truthful information about private persons and of photographs.[328] There remains hope, however, for judicial creativity in this area as well. In the 1980 case of *British Steel Corp* v *Granada Television Ltd,* Lord Denning assumed the availability of a privacy tort against the excesses of irresponsible 'investigative journalism':[329]

> [T]he plaintiff has his remedy in damages against the newspaper—or sometimes an injunction; and that should suffice. It may be for libel. It may be for breach of copyright. It may be for infringement of privacy. The courts will always be ready to grant an injunction to restrain a publication which is an infringement of privacy.

In a series of rapid-fire proceedings in December 1982 concerning a hotel's attempt to enjoin the broadcasting of a surreptitiously recorded television film of

325 *R* v *Grossman* (1981) 73 Crim App R 302, 308, 309.

326 [1931] AC 333. The case was interpreted variously by American commentators. See e.g. Green, 'The Right of Privacy' 27 *Ill L Rev* 237, 294 n 23 (1932) (the theory of the case would give recovery in libel for the invasion of privacy claim in *Roberson* v *Rochester Folding Box Co* 171 NY 538, 64 NE 442 (1902)); Recent Decisions 32 *Mich L Rev* 1172, 1172 n 5 (1934) (the decision 'seemingly recogniz[es] the right of privacy in England'); Recent Cases 16 *Minn L Rev* 220, 221 (1932) (the case 'somewhat extend[s] the action for libel to accomplish the result . . . of the right of privacy').

327 See e.g. *Briant* v *Prudential Assurance Co Ltd* [1976] 1 Lloyd's LR 533, 534; *Byrne* v *Kinematograph Renters Soc'y Ltd* [1958] 1 WLR 762, 777.

328 See e.g. *Williams* v *Settle* [1960] 1 WLR 1072, 1082 (opinion of Sellers J) (publication of wedding picture after bride's father had been murdered was a violation of copyright and 'intrusion into his life, deeper and graver than an intrusion into a man's property'), discussed in Cline, 'Invasion of Privacy' 204 *Spectator* 880 (1960): '[T]he court was in effect punishing the defendant for an unscrupulous invasion of the plaintiff's privacy'; *Webb* v *Times Publishing Co* [1960] 2 QB 535, 569 (opinion of Pearson J) (defamatory article not fair comment or privileged if it appeals to 'an interest which is due to idle curiosity or a desire for gossip'); *Plumb* v *Jeyes' Sanitary Compounds Co Ltd, The Times* 15 April 1937, at 4, col 4 (jury award for unauthorized publication of photograph). See also *Moore* v *News of the World* [1972] 1 QB 441 (false attribution of authorship in fictitious 'interview' about private life). See generally R. O'Sullivan and R. Brown, *The Law of Defamation* (1958) 11–12 (once defamation is established, jury may take into consideration invasion of privacy). For a remarkable case, holding that a legal periodical's opinion about the criminality of a particular reporter's invasive tactic was not libelous, see *Lea* v *Justice of the Peace Ltd, The Times,* 15 March 1947, at 2, col 7 (opinion of Hilbery J) ('It could not be too strongly emphasized that in this country the Press has no right to go on private property and intrude into people's lives'.); H. Hyde, *Privacy and the Press* (1947).

329 [1981] AC 1096, 1129–30; [1981] AC 1189 (opinion of Lord Salmon quoting this passage in part).

its interior, Comyn J speculated that the pleadings might be amended to include a claim based on the 'emergent tort' of invasion of privacy, though he was 'not disposed to be the first to break new ground on that front' at the interlocutory stage, and on appeal Watkins LJ also anticipated that the future action for damages would raise 'such interesting matters as the law of privacy . . . and the question of the attitude of the courts to the claim of the press to report at will.'[330] The English courts from highest to lowest have expressed in recent years a willingness to speak of the right to privacy, and in the appropriate case to give it force, even when this nascent right comes into conflict with existing rights to free expression and the vested interest of a powerful press.

VI. ANALYTICAL AND COMPARATIVE OVERVIEW

A. *The scope of the right*

How far have the English courts taken the fledgling right to privacy? In a dozen or so reported decisions, all within the last four years, English judges have explicitly invoked such a right, though without taking the final step of creating a new legal right of action in tort.[331] The House of Lords has made three such pronouncements. First, through the power of the courts to hold searches and seizures unlawful, the right to privacy prevents abuses of statutory powers of search by government officers.[332] Secondly, as a tool of statutory construction, the right forbids government officers to force their way into private homes without explicit authorization of an Act of Parliament and, further, gives judicial discretion (at least in some circumstances) to exclude evidence obtained in an unauthorized entry.[333] Thirdly, in the context of civil litigation, the right limits a party's use of documents obtained through discovery, making wider disclosure of such documents a contempt of court.[334] In the Court of Appeal the right to privacy has grounded even more restrictive constructions of statutory powers of search,[335] as well as injunctions against the publication of information obtained in confidence,[336] and refusals by the Court itself to assist litigants in obtaining criminal records by jury members[337] and bank records of other nonparties.[338] In the Chancery Division the right has occasioned refusal to order surprise searches of defendants' premises in civil cases,[339] and in the Queen's Bench Division it has

330 *Savoy Hotel* v *BCC, The Times* 18 December 1982 (granting the injunction); reversed in an unreported decision of the Court of Appeal, 20 December 1982.

331 See cases cited in n 11 *supra*.

332 *Inland Revenue Commissioners* v *Rossminster Ltd* [1980] AC 952.

333 *Morris* v *Beardmore* [1981] AC 446.

334 *Harman* v *Secretary of State for the Home Dep't* [1982] 2 WLR 338.

335 *R* v *Thornley* (1980) 72 Crim App R 302, *R* v *Adams* [1980] 1 QB 575.

336 *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1.

337 *R* v *Crown Court at Sheffield, ex parte Brownlow* [1980] QB 530.

338 *R* v *Grossman* (1981) 73 Crim App R 302.

339 *Thermax Ltd* v *Schott Industrial Glass Ltd* (1980) 7 Fleet Street R 289.

struck down police regulations on body searches of arrested persons.[340] Finally, in dicta of the Court of Appeal quoted with approval in the House of Lords, some English judges have assumed the existence of a remedy for infringement of privacy by publication of confidential information.[341] This judicial recognition of a right to privacy in a broad range of contexts, the culmination of a decade or more of decisions focusing explicitly on privacy interests,[342] delineates the present scope of a healthy, exuberant new branch of English common law. Privacy law, no longer the interstitial and incidental by-product of other doctrines, is about to come into its own.

Needless to say, the Englishman's right to privacy is not absolute.[343] It remains in conflict with other rights, values, and interests. The cases recognizing the right show this inherent tension. One countervailing consideration is 'the interest which the public has in preventing evasions of the law',[344] phrased more particularly in these cases as 'the public interest in the detection and punishment of tax frauds'[345] and 'its desire to stamp out drunken driving'.[346] Another interest limiting privacy in civil litigation is 'the public interest in discovering the truth so that justice may be done between the parties'.[347] Finally, there is of course the 'freedom of expression' embodied in 'the right of the press to inform the public, and the corresponding right of the public to be properly informed'.[348] It is in conflict with this lattermost right, the robust freedom of the English press, that the right to privacy shows its true vigor and promise. Its victories over interests in effective law enforcement and in the courtroom search for truth would not be nearly so impressive if the right to privacy did not also prevail occasionally over the well-guarded liberty of the press.[349]

On first sight, the litigants who have won for the Englishman his right to privacy appear to be an unlikely assortment of characters. Just as the principal beneficiaries of an explicit right to privacy in the nineteenth century were the Royal family,[350] it would seem fair to say that the rights most often vindicated by

340 *Lindley* v *Rutter* [1981] QB 128.

341 *British Steel Corp* v *Granada Television Ltd* [1981] AC 1096.

342 See *supra* 353–362.

343 See e.g. *Harman* v *Secretary of State for the Home Dep't* [1982] 2 WLR 338, 361, *Lindley* v *Rutter* [1981] QB 128, 134.

344 *Inland Revenue Commissioners* v *Rossminster Ltd* [1980] AC 952, 997 (opinion of Lord Wilberforce).

345 [1980] AC 1021 (opinion of Lord Scarman).

346 *Morris* v *Beardmore* [1981] AC 446, 465 (opinion of Lord Scarman).

347 *Riddick* v *Thames Board Mills* [1977] QB 881, 895, 896 (opinion of Lord Denning MR), paraphrased in *Harman* v *Secretary of State for the Home Dep't* [1982] 2 WLR 338, 349 (opinion of Lord Keith of Kinkel).

348 *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1, 21 (Lord Denning MR, dissenting in part).

349 The same can be said of the American development. *See* Note, *supra* n 13.

350 *Albert (Prince)* v *Strange* (1848) 2 De G & Sm 652, 64 Eng Rep 293, aff'd, (1849) 1 Mac & G 25, 41 Eng Rep 1171.

the recent cases have been those of limited companies and governmental entities. An international drug company,[351] a nationalized industry[352] and the Home Office[353] have joined the householder,[354] the individual shopkeeper,[355] and the disorderly conduct defendant[356] as successful contenders for a right to privacy. Perhaps these vast institutions could better absorb the legal costs for what must have appeared at the outset of their cases an almost hopeless line of argument. Perhaps the courts have simply seized upon the first cases to come before them in which the right could be recognized. The language of all the decisions, at any rate, consistently treats privacy as a 'human' right, one belonging to the 'individual'. Thus, in a case involving the search of a company's offices, Lords Wilberforce, Scarman, and Salmon were all careful to invoke the individual citizen's right to privacy in his own home, an important and basic human right.[357] Despite the character of the litigants so far successful in asserting this right in the courts, it is evident that the English judiciary are keeping the central focus of the nascent right to privacy on the individual Englishman, his home, and his private life.

B. *Sources of the right*

What influence has the American right to privacy had on its English counterpart? American privacy cases are discussed only rarely in the opinions, when counsel are willing to cite them and judges to consider them. Megarry V-C, for instance, gave extensive consideration to leading American cases on wire-tapping in his rejection of a privacy argument in the *Malone* decision.[358] Lord Denning, in his Court of Appeal decision in *British Steel Corp* v *Granada Television Ltd,*[359] brought many American decisions on privacy and the press to the attention of the House of Lords. The Law Lords had earlier adopted the privacy language of a New Jersey case on the legality of compulsory blood testing,[360] and most recently, in the 1982 *Harman* decision, Lord Scarman referred to American cases balancing the confidentiality of discovered documents and the freedom of the press.[361] By and large, however, the American law of privacy informs the English debate only indirectly, as a background presence not fully understood in detail but felt nevertheless to lend some credibility to claims of legal protection for privacy in England.

351 *Schering Chemicals Ltd* v *Falkman Ltd* [1982] QB 1.
352 *British Steel Corp* v *Granada Television Ltd* [1981] AC 1096.
353 *Harman* v *Secretary of State for the Home Dep't* [1982] 2 WLR 338.
354 *Morris* v *Beardmore* [1981] AC 446.
355 *R* v *Adams* [1980] 1 QB 575.
356 *Lindley* v *Rutter* [1981] QB 128.
357 *Inland Revenue Commissioners* v *Rossminster Ltd* [1980] AC 952, 997, 1019, 1022.
358 [1979] Ch 344, 358–59 (citing *Katz* v *United States,* 389 US 347 (1967), *Rhodes* v *Graham,* 238 Ky 225, 37 SW 2d 46 (1931)).
359 [1981] AC 1096.
360 *S* v *S* [1972] AC 24, 57 (opinion of Lord Hodson quoting *Bednarik* v *Bednarik,* 18 NJ Misc 633, 652, 16 A 2d 80, 90 (1940)).
361 [1982] 2 WLR 338, 358.

Article 8 of the European Convention on Human Rights[362] has likewise played only an indirect role in the formulation of an English right to privacy. In the *Malone* decision, Megarry V-C weighed and rejected an argument from the European Convention.[363] Lord Denning, on the other hand, referred to Article 8 of the Convention in *Schering Chemicals Ltd* v *Falkman Ltd,* in support of the contention that the right to privacy is a 'fundamental human right',[364] as did Lord Scarman in *Morris* v *Beardmore.*[365] Terming a right 'fundamental', Scarman admitted, 'has an unfamiliar ring in the ears of common lawyers',[366] but the language of fundamental human rights is frequently encountered in recent English decisions on privacy. The European Convention is a background force, an international legal norm of uncertain weight and uncertain scope. Its promise of an external forum for privacy claims rejected by the English courts[367] does, however, provide an extra spur to recognition of the new right that the American example can never supply.

Ultimately, as Lord Scarman noted in the 1982 *Harman* decision, 'neither American law nor the European Convention can be decisive . . ., but both are powerfully persuasive—the Convention because its observance is an obligation of the United Kingdom, and American law because of its common law character'—yet each of these sources, he added, 'reinforces conclusions which we draw independently from our own legal principles'.[368] The common law of England has itself given birth to the right to privacy. Authority for limiting the intrusions of the State has been found in the strongly-worded judgments of the Court of Common Pleas in the eighteenth century cases striking down general search warrants, principally *Entick* v *Carrington.*[369] Authority for limiting the inroads of the press and other unofficial intruders has been found in *Albert* v *Strange.*[370] When neither of these precedents seems appropriate, the courts are thrown back on the still vigorous maxim 'an Englishman's house is his castle'.[371] All this is not to say that the right must have some *constitutional* force of its own. In all the recent cases applying a right to privacy, English judges have not been

362 See 351–353 and n 8 *supra.*

363 [1979] Ch 344, 354.

364 [1982] QB 1, 21.

365 [1981] AC 446, 464–65.

366 Ibid.

367 See *supra* 353.

368 [1982] 2 WLR 338, 358.

369 See *Ghani* v *Jones* [1970] 1 QB 693, 708 (citing *Entick* v *Carrington* (1765) 19 Howell St Tr 1029, 2 Wils KB 275, 95 Eng Rep 807); *Morris* v *Beardmore* [1981] AC 446, 464–65 (citing same). But see *Inland Revenue Commissioners* v *Rossminster Ltd* [1980] AC 952, 997 (opinion of Lord Wilberforce, distinguishing the eighteenth century cases).

370 See *Argyll* v *Argyll* [1967] Ch 302, 320 (quoting *Albert* v *Strange* (1849) 1 Mac & G 25, 47, 41 Eng Rep 1171, 1179); *British Steel Corp* v *Granada Television Ltd* [1981] AC 1096, 1129–30 (citing same).

371 See e.g. *Thermax Ltd* v *Schott Industrial Glass Ltd* (1980) 7 Fleet Street R 289, 298 (citing the maxim).

embarrassed by the constitutional difficulties encountered by proponents of a Bill of Rights. Their privacy protections extend to civil actions, limitations on their own court procedures, and construction of statutes, but not to abrogation of statutes altogether. Even so, members of the House of Lords have had considerable experience with constitutional rights to privacy. In their role as judges of the Judicial Committee of the Privy Council, the Law Lords have on many occasions had to interpret written constitutions of Commonwealth members guaranteeing a right to privacy.[372] The English courts, as comparative latecomers to privacy law, have an abundance of sources upon which to draw.

C. *Privacy in other English-language jurisdictions*

A quick review of the extent of privacy protection in other English-speaking countries will show that England's recognition of a right to privacy has, by comparison, come very late indeed. Scottish decisions since the nineteenth century have gone beyond the English cases towards recognizing an explicit right of action for invasions of privacy.[373] In addition to warrantless searches[374] and the activities of peeping Toms,[375] police surveillance of a dwelling-house without probable cause has been considered to give rise to a cause of action.[376] Scottish courts based their refusal to allow publication of private letters on the grounds of injury to reputation and to feelings, rather than on the property grounds maintained by English courts,[377] and awarded damages for breach of an 'obligation to secrecy' against a doctor who divulged intimate medical information.[378] Scottish law carried privacy protection furthest in opposition to press intrusions, settling by the mid-nineteenth century that damages could be awarded for publications of truthful information about 'some old and generally forgotten immoral act or act of impropriety'[379] or 'some physical deformity or secret defect'.[380] Personal ridicule was only allowed, according to one Scottish judge, 'so long as the privacy of domestic life is not invaded'.[381] In a 1916 decision of the House of Lords

372 See e.g. *Minister of Home Affairs* v *Fisher* [1980] AC 319 (Bermuda); *Hinds* v *The Queen* [1976] 2 WLR 366 (Jamaica); *Francis* v *Chief of Police* [1973] AC 761 (St Christopher, Nevis & Anguilla); *Akar* v *Attorney-General of Sierra Leone* [1970] AC 853.

373 See e.g. D. Walker, *The Law of Delict in Scotland,* 2nd ed, 703 *et seq*; Kilbrandon, 'The Law of Privacy in Scotland' 2 *Cambrian L Rev* 35 (1971); Middleton, 'A Right to Privacy?' 8 *Jurid Rev* (NS) 178 (1963).

374 See cases cited in D. Walker, *supra* n 373, 707.

375 See *Raffaelli* v *Heatly* 1949 SLT 284, 285–86.

376 See *Robertson* v *Keith* 1936 SC 29, 48.

377 See *Cadell* v *Davies* (1864) Mor. Literary Property, Appendix pt 1, no 4; G. Bell, *Commentaries on the Laws of Scotland,* vol 1, 111–12 (1st ed Edinburgh 1804) (7th ed 1870). Cf *Caird* v *Sime* (1887) 12 App Cas 326, 343 (lecturer retains right of property in spoken lecture).

378 *AB* v *CD* (1851) 14 D 177, 180 (opinion of Lord Fullerton).

379 *Friend* v *Skelton* (1855) 17 D 548, 555 n* (opinion of Lord Deas). See also *Sheriff* v *Wilson* (1855) 17 D 528, 530 (effect of press ridicule on plaintiff's feelings).

380 *Cunningham* v *Phillips* (1868) 6 M 926, 928 (Lord Deas dissenting).

381 Ibid., 929.

interpreting Scottish law, Lord Haldane LC invoked 'the right of a private individual to have his character respected' and reminded the press that 'people should not as private persons be exposed to unjustifiable and arbitrary comment'.[382] These cases proceed on the broad principle of the *actio injuriarum*, which affords remedies for affronts to reputation, honour, and feelings.[383] Privacy has fitted well within this scheme of values in Scottish law.

In Canada, experimentation with privacy remedies at the provincial level has led to growing acceptance of a right to privacy nationwide.[384] Quebec has extended its version of the civil law *actio injuriarum* to invasions of privacy[385] and Ontario[386] and Alberta[387] have allowed damage actions and injunctive relief based on a right to privacy. Three provinces, British Columbia,[388] Manitoba[389] and Saskatchewan[390] have enacted statutes making wilful violation of privacy a tort. Under these statutes, the Canadian courts have begun to work out the scope of the new statutory right.[391] The federal legislature has made wire-tapping and electronic eavesdropping criminal offences under a 1973 Protection of Privacy Act.[392] The federal statute applies to official interceptions, rendering them unlawful and inadmissible in evidence unless specifically authorized by a judge applying very narrow criteria of overriding public interest.[393] The Act further provides that punitive damages may be awarded to the victim of an unlawful interception.[394] As one recent commentator has concluded, '[a]lthough many provinces lack general privacy legislation, the combined effect of the extant

382 *John Leng & Co Ltd* v *Langlands* (1916) 114 LT (NS) 665, 668.

383 See e.g. D. Walker, *supra* n 373, 703–704.

384 See e.g. *Aspects of Privacy Law, supra* n 5; Burns, *supra* n 5. For an early complaint against government intrusion into the home, seizure of papers, and interception of letters, see S. Wilcocke, *A Letter to the Solicitor General on the Seizure of Papers* (Montreal 1821) 12–14 ('[T]here are secrets which, though I would rather have died than have discovered, . . . secrets of thought and of conduct such as not any man has a right to look upon, and . . . no color of law has a right to expose') (emphasis omitted).

385 See *Robbins* v *CBC* (1957) 12 DLR (2d) 35, 42.

386 See *Krouse* v *Chrysler Canada Ltd* (1970) 12 DLR (3d) 463, 464 (refusing motion to dismiss), decided on alternate grounds (1972) 25 DLR (3d) 49, 56, rev'd (1974) 1 OR (2d) 258; *Burnett* v *The Queen in Right of Canada* (1979) 23 OR (2d) 109, 115.

387 See *Motherwell* v *Motherwell* (1976) 73 DLR (3d) 62, 78 (privacy in context of private nuisance).

388 See British Columbia Privacy Act 1968. A 'common law right to privacy' was also incorporated into the British Columbia Landlord and Tenant Act 1960, s 46 by *Re MacIsaac* (1972) 25 DLR 3d 610.

389 See Manitoba Privacy Act 1970.

390 See Saskatchewan Privacy Act 1974.

391 See e.g. *Davis* v *McArthur* (1971) 17 DLR (3d) 760.

392 1973–1974 Can Stat, Chap 50. See generally D. Watt, *Law of Electronic Surveillance in Canada* (1979).

393 Protection of Privacy Act, ss 178.13, 178.16.

394 Ibid., s 178.21.

common law, and provincial and federal legislation, grants Canadians a fair measure' of privacy protection, 'perhaps as great as the United States' where the common law right to privacy originated.[395]

The Australian High Court rejected a right to privacy in 1937. The decision in *Victoria Park Racing & Recreation Grounds Co Ltd* v *Taylor* refused relief to a racetrack owner whose races were being watched, reported and broadcast to the public from a platform on the neighbouring defendant's land.[396] Prior to this decision, Australian courts had indirectly come closer to privacy protection than their English counterparts, by providing that truthful publications could be found defamatory if they were not for the 'public benefit'.[397] Since 1937, Australian courts have given recognition to privacy interests against peeping Toms,[398] eavesdroppers,[399] and wire-tappers,[400] but most of the recent developments have been on the legislative front. In the past three years, the Australian Law Reform Commission has pressed forward with proposals for statutory rights of action for invasions of privacy by publication of 'sensitive private facts' concerning the plaintiff,[401] by intrusion into or secret surveillance of a plaintiff's home,[402] and by breach of privacy safeguards in personal information systems.[403] Some States have already enacted privacy protections along these lines,[404] but much will depend upon the vigour with which the Australian Law Reform Commission pursues its mission.[405]

Among other Commonwealth and common law jurisdictions, South Africa was early to recognize a right to privacy.[406] Like Scotland, it had long interpreted its *actio injuriarum* to remedy, for example, shadowing of the plaintiff by a private detective.[407] Several cases in the 1950s, all involving photographs of the plaintiffs published to accompany newspaper gossip-column material, held that invasions of

395 Burns, *supra* n 5, 64.

396 *Victoria Park Racing & Recreation Grounds Co Ltd* v *Taylor* (1937) 58 CLR 479, 495–96 (opinion of Latham CJ) '[N]o authority was cited which shows that any general right of privacy exists'.

397 See e.g. *McIsaacs* v *Robertson* (1864) 3 NSW S Ct R 51, 54.

398 See *Haisman* v *Smelcher* [1953] VLR 625, 628.

399 *Grieg* v *Grieg* [1966] VR 379, 381.

400 *R* v *Padman* (1979) 36 FLR 347, 352. But see *Miller* v *Miller* (1978) 22 ALR 119.

401 Australian Law Reform Commission, Unfair Publication: Defamation and Privacy 130 (No 11, 1979).

402 Australian Law Reform Commission, Privacy and Intrusions 96 (Discussion Paper No 13, 1980).

403 Australian Law Reform Commission, Privacy and Personal Information 122 (Discussion Paper No 14, 1980).

404 See e.g. Queensland Invasion of Privacy Act 1971, New South Wales Listening Devices Act 1969, Victoria Listening Devices Act 1969.

405 See Kirby, 'The Computer, the Individual, and the Law' 55 *Australian LJ* 443 (1981).

406 See e.g. D. McQuoid-Mason, *The Law of Privacy in South Africa* (1978) 86–90.

407 See e.g. *Epstein* v *Epstein* 1906 TH 87, 88.

'the right of the plaintiff to personal privacy' constituted an *injuria*.[408] English judges in British India gained familiarity with a 'customary right of privacy' necessitated by religious rules about the seclusion of women.[409] More recently, the Supreme Court of India, with a nod to the American case of *Griswold* v *Connecticut*,[410] has held that 'the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as an emanation from them', though this right found in their 'penumbral zones' is subject to restrictions in the public interest'.[411] Finally, judges in the Sudan, another inheritor of the English common law, have recently held that 'since privacy is as important to protect as peoples [sic] other property in the light of the zeitgeist there is nothing as a matter of principle to hinder us from receiving the American concept as to the invasion of privacy'.[412] So forthright a judicial recognition could hardly be expected from the English courts, but the comparison once again is instructive.

VII. CONCLUSION

In the latter half of the nineteenth century, tort law came into its own as a doctrinal category of the common law. It was the synthesis of a number of disparate actions, with a general principle of negligence informing most of its applications. This development of tort law has since been explained as the necessary response of the legal system to threats to life, limb, and property brought on by the mechanical inventions of the industrial revolution. Of course, developments in the realm of legal thought also played a part in the emergence of a general theory of tort law. Once the subject had come into being through a conjunction of material forces, human motives, and legal ideas, it took on a life of its own, working a powerful transformation on the ways the law is conceived, taught, and practised.

Privacy law is a new doctrinal category in the making. In England and elsewhere it is coming to be perceived as a unified body of rules determining the

408 See *Mhlongo* v *Bailey* 1958 (1) SA 370, 373 (opinion of Kuper J) '[A]n invasion of the plaintiff's privacy' by the publication of a photograph 'constituted an aggression upon his *dignitas*'; *Kidson* v *South Afr Assoc Newspapers Ltd* 1957 (3) SA 461, 467–68 (opinion of Kuper J) publication of photograph with misleading article infringed 'the right of the plaintiff to personal privacy'; *O'Keeffe* v *Argus Printing & Publishing Co Ltd* 1954 (3) SA 244, 249 (invasion of privacy by newspaper photograph constitutes an *injuria*).

409 See e.g. *Maneklal Motilal* v *Mohanlal Narotumdas* (1919) 44 Indian LR Bombay 496, 498–99 (customary right of privacy); *Gokal Prasad* v *Radho* (1888) 10 Indian LR Allahbad 358, 385–87 (announcing recognition of a customary right to privacy after exhaustive review of previous cases).

410 381 US 479, 484 (1965).

411 *Govind* v *State of Madhya Pradesh* 1975 AIR (SC) 1378, 1385, 1386, [1975] 2 SCR 148, 157, 158 (opinion of Mathew J).

412 *Mohamed Ahmed El Naeem* v *Adeel Osman* (1970) Sudan LJ & R 8, 9 (opinion of Dafalla El Radi Siddig J citing an English treatise on need for common law right to privacy).

boundaries we may rely upon to keep out an intrusive world. Privacy law recognizes that ours is not a world of hermits. Much privacy is freely waived, and much is traded for benefits of other kinds. Nevertheless, some privacy is retained by those who do not thrust themselves into the public eye, and courts are more and more willing to recognize that that retained minimum of personal privacy gives rise to legal obligations on the part of those who would intrude upon it.

Like the law of torts, privacy law has arisen, in part, as a response to new inventions and modes of organization. If tort law was the product of the industrial revolution, privacy is the result of a communications and information revolution. Photography, microphones, telephones and computers have all increased our vulnerability to unwanted intrusion without erasing our expectations of privacy, confidentiality and security. Legislative proposals in England and legislation elsewhere have tended to focus on the new machines themselves, while the courts, viewing problems on a case-by-case basis, have reminded us of the human motives giving rise to privacy invasion and privacy protection. These motives do not seem to have changed very much as new ways of creating, transmitting and storing information have replaced the handwritten letter and the manila file folder.

New legal ideas also contribute to the growing importance of privacy in the courts. The language of human rights permeates legal discourse from the international level to the confines of the family. Everybody has rights, and privacy is one of the fundamental human rights gaining widespread acceptance. Critics of the right to privacy point out its 'newness', but as this article has shown, the common law roots of the right run deep in the realms of private property and confidential communications. By recognizing a unified law of privacy, the courts can gradually develop and define the boundaries around the private life in these realms and the newly-important realm of personal information. The requirement of a search warrant can be rendered more effective if the police are not permitted to join peeping Toms at the window-sill. The exclusion of marital confidences in testimony can be extended to a privilege against their disclosure through eavesdroppers and intercepted letters. The action for breach of confidence can be strengthened by establishing that the press, in publishing such confidences, is not completely immune from restraint. The right to privacy, now a fixture of English law, will prove fruitful for decades to come.