

THE DEVELOPMENT OF THE THEORY OF THE RIGHT TO PRIVACY IN FRANCE

WENCESLAS J. WAGNER*

Lacking legislative enactments on the right to privacy, French courts had to tackle the problems of privacy from case to case, in the common law way; but judicial decisions did not establish any general principles. While American and English judgments are elaborate and lay down legal theories, French decisions are extremely short, failing in some instances to give a clear picture of the facts, omitting the discussion of various aspects of the problem and abstaining from developing solid theoretical bases for their holdings. It is well known that French judgments are written in the form of a recitation which has only commas or semi-colons between the ideas expressed and thus constitutes only one sentence, however long it may be. The task of establishing a legal theory of the right to privacy was thus left to the legal writers.

The purpose of the following introductory observations to the French law of privacy is to present the ideas on this subject which have been expressed by scholars and commentators. This body of materials, known as LA DOCTRINE, is an important source of the law in the civil law world.

Similar civilizations give rise to similar legal problems. In the Western world, for many centuries there was no pressing necessity to protect the citizens from the indiscretion of others. In England, one's home was his castle, the access to which—without proper authorization—was forbidden to the government's officials as well as to private individuals. The basic common law concept of trespass, having no parallel in other legal systems, testifies to the esteem which the society developed for the land of its citizens. This tradition passed to the United States, where frequently private residences, "surrounded by a few acres of lawn, are separated from each other only by imaginary borders."¹ No walls are necessary.

The lack of a tangible obstacle making it difficult to penetrate through the property of others may result in false inferences by the superficial and uninitiated observer. Thus, Mr. Robert Lindon, one of the highest judicial officers in France, admittedly drawing his knowledge about the United States from motion pictures, arrived at the conclusion that the

* Professor of Law, Indiana University School of Law.

1. Lindon, *La presse et la vie privée*, [1965] J.C.P. I. 1887.

French are more attached to their "real estate individuality" than many other nations, because if they have land of any importance around their house, they tend to shut it off from the curious by erecting walls.² In fact, this custom renders many of the French villages and small towns quite unsightly, as the walls are usually crude and falling into disrepair. Beside this element of aesthetics, another question occurs immediately to a comparatist of national customs: is there no possibility that in some countries, the only way to keep off intruders is to physically make the premises inaccessible, while in others, a mere respect for the property of others and a sense of abidance by the law make such precautions unnecessary?

Be it as it may—but the French walls were a sacro-sanct institution, respected by the society and protected by the law. Thus, Article 675 of the Civil Code was couched in the following terms: "One of the neighbors may not, without the consent of the other, install any window or make any opening in the dividing wall, in whatever manner possible, even by using opaque glass."

This provision, relating to property rights, is an old text which results in the protection of privacy—but only against the neighbor of the person concerned.³ The real necessity of curbing the indiscretion of those who may be too much interested in private affairs of others arose in very different situations.

In old times, people seemed to be less interested in scandalous stories than they are today—and maybe they had to take care of their physical survival more than at present, which left them less time to worry about their intangible personality rights. Thus, in the legal history of the common law, the problem did not appear with force until the second half of the nineteenth century, if we disregard the famous case of 1348, *I. de S. et ux. v. W. de S.*,⁴ whose *ratio decidendi* was most probably not an invasion of privacy, but liability for assault.⁵

2. *Id.*

3. It has been suggested that the theory of abuse of rights may also be helpful. "The one who takes a glance on a neighboring structure, in objectively licit circumstances, but for the only purpose of catching those who live there in the course of their private life, abuses his property right and commits a fault." Stoufflet, *Le droit de la personne sur son image*, [1957] J.C.P. I. 1374.

4. Y.B. Liber Assisarum f. 99, pl. 60.

5. Defendant, asking for wine in night-time, was striking at the door of the tavern with his hatchet, and continued to manipulate with his weapon when the wife of the tavern keeper appeared at the window and asked him to stop. The judgment, written in old French, used the term "ferist". The court found that a harm had been done and granted recovery, without explaining what harm the judge had in mind.

With the growing literacy of the masses, the establishment of ever more dailies and magazines and their increasing circulation, the invention of photography and then of the motion pictures, the discovery of the radio and television—all coupled with the less discriminating taste of the population—the curiosity of many members of the public in what their fellow citizens were doing in private was becoming more acute and more easily satisfied. A better justified interest—that in public figures and current events—came into collision with the desire of some individuals to escape publicity, either irrespective of circumstances, or if it was related to an unpleasant occurrence, or else if revealing to the general public something the aggrieved person would like to keep for himself or to a restricted circle of persons. Last but not least, another factor appeared—the development of advertising. First conceived as a gentle reminder on where or what products should be purchased to satisfy the consumers, it frequently degenerated into an absurd brainwashing of the public, trying to dictate the taste and preferences desired by treating the citizens who would dare to resist as fools and by repeating slogans, more or less nonsensical, praising some merchandise as the best in the world. Believing that the desired end justifies the means, some business enterprises did not hesitate to use the likeness, name, statement or signature—real or false—of some more or less famous persons or pretty girls, as the case might be, in order to advance their goals.

It seems that the expression *vie privée murée* (private life behind the walls) was used, for the first time, by Royard-Collard during a discussion on the law concerning the press, a century and a half ago—in 1819.⁶ The term “private life” has been accepted by many authors and courts and is, in many instances, equivalent to that of the American idea of privacy. The original connection with walls⁷ gave way to an approach which de-emphasizes such tangible signs of someone’s desire to be hidden from the world. The old expression did not escape criticism, and one of the most recent students of the problem, Professor Badinter’s,⁸ prefers the American approach and definition given by the “American

6. H. FOUGEROL, *LA FIGURE HUMAINE ET LE DROIT* (1913); Badinter, *Le droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 8; Lindon, *La presse et la vie privée*, [1965] J.C.P. I. 1887.

7. Besides legal scholars, some courts took the same approach. For instance, the Court of Appeals of Paris, permitting the famous writer Alexander Dumas, Sr. to withdraw his consent to give publicity to his photograph, stated that “if the private life of individuals must be walled in the interest of the individuals, the same is true as to the interest of public morality and of the respect which is due by everyone to the public opinion.” *Dumas v. Liébert*, [1868] S. II. 241 (Paris).

8. Badinter, *Le droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 8.

Professor" Nizer who said that the right of privacy is the right "to live a life of seclusion and anonymity."⁹

This American concept of privacy was developed little by little by the courts; but, as has been frequently emphasized, it was prompted by a law review article¹⁰—an unusual phenomenon in the common law world. It became quite comprehensive, and is said to include today four different types of situations, involving various interests of the plaintiff; their common denominator is that in all of them, the plaintiff's right "to be let alone" is invaded.¹¹ They may be classified as: (1) intrusion upon the plaintiff's physical solitude or seclusion, (2) public disclosure of private facts, (3) publicity which places the plaintiff in a false light in the public eye, and (4) appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage.¹²

There is no exact French counterpart of the American right of privacy concept. In most cases, the result reached in the United States and France will be the same, but the reasoning may be different, and the characterization of the legal problem presented may vary. There will also be situations where relief will be granted in one of the two legal systems, but denied in the other. Perhaps the most striking example is the far-going protection of the family name in France. In particular, the unauthorized use of a name which is rare or famous or which presents an historical value is prohibited. This protection has been rested on the solid basis of a statute dating back to the Great Revolution (*Loi du 6 Fructidor, an II*). It has been extensively applied and developed by the courts. A special body of legal rules emerged. It may be said that it constitutes a distinct field of law which has no American counterpart. This body of law should be the subject of a separate study.

The only French statutory provision clearly protecting the right of privacy is Article 15 (2 bis) of the law of July 29, 1881, on the press, as amended by the ordinance of May 6, 1944, by virtue of which truth is not a defense to defamation in three situations. The first one relates to a statement which "concerns the private life of a person."¹³ Thus, the

9. Nizer, a member of the New York Bar, wrote an article entitled "The Right of Privacy" which was published in 39 MICH. L. REV. 526 (1941). The above cited definition appears at 528. Badinter gave an erroneous citation.

10. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 832 (3d ed. 1964).

12. *Id.* 833-842.

13. The application of this provision by the courts is sometimes puzzling. Thus, it was held that nonpayment of a debt for which a letter of exchange had been issued is a matter concerning private life, and so is the issuance of bad checks for the payment of gambling debts and the condemnation

concept of "private life" advanced by Royard-Collard, was picked up by the legislature, but declared to be applicable in a very narrowly circumscribed set of situations: in cases of defamation. In addition to this law, a few provisions of the Penal Code are relevant to the protection of privacy, but again only in very precise circumstances: interfering with the mail;¹⁴ and violating a "professional secret" by "physicians, surgeons and other health officers, as well as pharmacists, midwives and all other persons . . . to whom secrets are being confided by reason of their status or profession or temporary or permanent position."¹⁵

Other rules of law in the field which correspond to the American concept of privacy have not been reduced to writing. Thus, while the origin of the American developments was uncommon—a law review article—the situation in France is not typical, either. In the codified French legal system, where many minute details of law, particularly property law, have been laid down with a far-going precision, most of the legal structure in the field of privacy has had to be erected by judicial decisions. Of course, in taking care of the problem, the courts may always pretend to apply some general provisions of the Civil Code—mainly the famous tort rule of Article 1382;¹⁶ but in fact, they proceed from case to case and rely on precedents, showing that contrary to classical theories, the principle of *stare decisis* is well known in the French system.¹⁷

Legislative inaction was criticized by more than one legal scholar. As early as 1909, Professor Perreau expressed dissatisfaction with the fact that the Civil Code is almost completely silent on personality rights.¹⁸ Some sixty years later, the situation remaining unchanged, Professor Badinter stated: "In the matter of protection of private life, it is thus up to the legislator to intervene at the present time."¹⁹

of property made by a mayor for his own profit. Badinter, *Le droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 10.

14. Article 187 of the Penal Code includes two provisions. The first one, enacted in 1832, imposes a fine and imprisonment of three months to five years on postal or governmental employees for interfering with the mail. The second provision, enacted in 1922 and amended in 1956, aims at any other person, acting in bad faith, and subjects him to a fine and/or imprisonment of six days to one year for the same conduct.

15. Article 378 of the Penal Code, in the wording of 1939 and 1944, provides for a fine and imprisonment of one to six months for such a violation, except in cases of criminal abortions.

16. Article 1382 provides: "Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage." [translated by von Mehren, A. VONMEHREN, *THE CIVIL LAW SYSTEM* 339 (1957)].

17. The same developments took place in some other fields of French law.

18. Perreau, *Des droits de la personnalité*, 1909 REV. TRIM. DR. CIV. 501.

19. Badinter, *Le droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 44.

The first among privacy rights to be firmly established by judicial decisions was the right to one's own likeness. Contrary to the hesitation shown in the United States²⁰ and the necessity, in New York and a few other American jurisdictions, to enact statutes protecting the citizens against unwarranted photography, publicity or other similar violations of privacy, the French courts demonstrated, as soon as they were asked to consider the problem, much comprehension of the position of the plaintiffs, and proceeded to grant them recovery. Undoubtedly, this approach was greatly facilitated by the principle which became recognized in French law during the course of the nineteenth century that relief should be granted for mental damages, while the American courts had to endeavor, by any possible means, to find the existence of pecuniary damages before they could rule for the plaintiff. Anyhow, having been asked to take a stand on the problem, the French courts enthusiastically and unanimously endorsed the idea of the right to one's own likeness, so that the real question was not the very existence of the right, but of its coverage: should it extend to the likeness of dead persons and of public men? to group photographs? to street scenes? etc.

In other situations involving the question of protecting privacy, the rules were slower to develop, and the courts showed less determination to grant relief. At the beginning of the century, Perreau deplored the lack of any well-settled principles, which led to a far-going uncertainty and resulted in "a thousand disputes, where the tribunals frequently deliver contradictory judgments."²¹ He attempted to elaborate a theoretical background for "rights of personality" (*les droits de la personnalité*).

Relying on well-established French legal concepts, Perreau started with "patrimonial" rights—or "those which deal with property." All others were branded by him as rights of personality. He classified them into three main categories, in accordance with ideas on which they are based—respect of the individual himself, respect of the individual as a member of family, respect of the individual as a citizen of the state. He further suggested subdividing the rights of the individual himself into three groups. The first one would require the recognition of the human being "as an individual distinct from all others" and would include, in particular, the use of the name which is "a label serving to distinguish

20. Compare *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), with *Pavesich v. New England Life Ins. Co.*, 112 Ga. 190, 50 S.E. 68 (1904)

21. Perreau, *Des droits de la personnalité*, 1909 REV. TRIM. DR. CIV. 501. For a recent discussion of the problem of likeness, see Wagner, *The Right to One's Own Likeness in French Law*, 46 IND. L.J. (1970).

the various individuals from each other.”²² In the second group, the author would put additional rights concerning the “physical individuality” of the citizens such as the right to life, to corporal integrity, to health, and to muscular strength, as well as the right to forbid the reproduction of their picture. Some of these rights are protected by criminal law; some others may be reflected in special legal rules such as those concerning incapacity to work caused by an impairment of physical strength.²³

The third group would include incidents affecting “moral individuality” and would be divided into those concerning an individual’s honor, his freedoms, and his intellectual work. Enumerating the “freedoms”, Perreau mentioned that of having relations with others, and particularly those of entering into contracts, and of “organizing one’s private life.”²⁴ He did not elaborate on this point.

The second main category would include attributes granted to some members of the family, such as paternal or marital rights, and rights common to all members of the family, such as, again, to the name, title, coat of arms, the ordering of a funeral of a close relative, etc.²⁵ Some other prerogatives may be added such as those dealing with family graves and souvenirs. These rights present, first of all, moral aspects, but may also have some pecuniary value which in some cases may be quite considerable when they relate to family portraits, autographs, etc.²⁶

The third main category would consist of rights granted to citizens by rules of constitutional and administrative law.²⁷

Perreau’s classification is not likely to appeal to the common law jurist, to whom most of his groupings would appear as a mixture of legal concepts not having much in common. What counts in the Anglo-American legal systems is the proper result in concrete cases, rather than a theoretical structure of the law, more or less artificial, into which all existing legal concepts must be fitted; but in the French legal mind there is no rule of law which stands alone and develops independently of the others and of the whole set of principles which serves as a tapestry in which the details must be woven. Because of the traditional brevity of judicial opinions, frequently leaving unclear on what theoretical

22. *Id.* 504.

23. *Id.* 505.

24. *Id.*

25. *Id.* 509.

26. *Id.* 510.

27. *Id.* 513 *et seq.*

premises the judgment rests, the construction of the background of legal principles must be done by legal scholars.

The ideas of Perreau have not been accepted in their entirety even in France. Indeed, there is not yet any classification of rights of personality upon which French jurists agree; however, Perreau's analysis could serve as a springboard for future studies, and the ground for theoretical speculation on the problem has been broken.

This speculation, it must be admitted, is made difficult by the treatment of the field of torts in the French Civil Code. Except for a few special instances, the whole law of torts is included in the famous Article 1382.²⁸ The principle it lays down may be excellent, but such a general approach hardly helps an analyst who endeavors to deduce from a judicial decision the more precise theory on which it was based if the only reference the court made is that to Article 1382.

"Pure" privacy cases in which plaintiff decided to bring an action only because his theoretical right was violated are rare. In most situations there are other elements present. Usually the defendant, by publication or advertising, derived profit which plaintiff considers should not inure to the other party, or of which he was deprived himself; defendant put plaintiff into an embarrassing situation; or plaintiff considers that the conduct of his adversary went as far as to amount to defamation.

As a typical example, a 1932 case, *Hallez et al. v. Montpezat et al.*,²⁹ may be given. Defendants wrote and published a novel in which the seven plaintiffs were represented as characters of the book. The true name of one of them was used, while the others could be identified by persons familiar with the locality in question. The treatment administered by the defendants to the plaintiffs was unkind in various degrees; some of them were merely ridiculed, while to others dishonorable conduct was imputed. The action brought by the plaintiffs was not based on defamation, but on Article 1382, and the recovery granted by the Court may be understood to rest on the violation of their right to privacy,³⁰ at least in part, even though the Court did not use this term but elaborated on the idea of "moral damages" (mental suffering) inflicted on the plaintiffs. Damages were set in various amounts, in accordance with the degree of severity with which the defendants treated each of the plaintiffs. Besides, the book was banned by the Court until passages

28. See note 16 *supra*.

29. [1932] Gaz. Pal. II. 739.

30. See, e.g., Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 227, 254.

referring to the plaintiffs were eliminated, under the sanction of *astreinte*.³¹

Decisions along the above lines assimilate the protection of privacy with actions based on libel.³²

Thirty years after Perreau, Nerson came out with a book on "Extra-Patrimonial Rights".³³ Like Perreau, he started from the idea of "patrimony" which he defined as the "totality of property belonging to an individual and of obligations which may be charged against him" and which appears "as an abstraction representing the aggregate of the rights and obligations which can be reduced into pecuniary value."³⁴ Rights which do not have this feature are extrapatrimonial, usually referred to as "rights of personality". This broad term became generally accepted, but its contents and internal classification are a matter of controversy. In his long study, Nerson discussed a variety of "rights" having very different characteristics: the right to one's name; domicile; legal capacity; occupation; physical security; honor; moral rights of the author; right to souvenirs and family graves; right to answer in cases of defamation; etc. He devoted special attention to the right to one's own likeness, and designated another field of personality rights as the "right to secrecy". After stating that never in prior history had people attempted to collect so much information about the private life of others, he asserted that, in the absence of statutes protecting the right to secrecy and granting recovery to the victim for its violation, redress must be based on Article 1382 of the Civil Code.³⁵

Nerson mentioned a number of other personality rights which were said by some theorists to have a separate existence: the right to love, to be happy, to work, the right to the product of one's own work, to silence, the right to strike, to be let alone.³⁶ The latter, admittedly influenced by American theories,³⁷ may indeed be regarded as one of the essential aspects of the law of privacy. However, it is difficult to speak about many other separate rights. Human activities are many and multifarious, and it is useless to try to enumerate them and to attach to each of them the label of a determined legal institution.

31. Each violation of an *astreinte* results in additional damages, fixed by the court, to be paid to the other party.

32. Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 227, 255.

33. R. NERSON, LES DROITS EXTRAPATRIMONIAUX (1939) [hereinafter cited as NERSON].

34. *Id.* 2.

35. *Id.* 161.

36. *Id.* See also Nerson's comments on cases involving persons and family rights in 1966 REV. TRIM. DR. CIV. 65.

37. NERSON 306.

It can be easily observed that in Nerson's theory, many personality rights which have nothing to do with the law of privacy in the American sense are given extensive consideration. This is quite understandable, as the two concepts are not parallel, the French rights of personality being much broader; but it is striking that some rights, recognized as entitled to protection in the United States under the label of privacy, were not mentioned by him. This approach continues to prevail in French legal writings.

It is suprising to note how little attention the right to privacy was given until recently even by comprehensive French textbooks and treatises. As late as 1928, the great legal scholar Henri Capitant thought that the only rights which should be definitely recognized were "patrimonial" ones.³⁸ Two years later, in Professor Josserand's course on civil law, the right to the family name appeared among the "attributes of the personality", along with a mere mention that some other attributes do exist, such as the right to the honor, reputation, and integrity of the moral, intellectual or physical person, and other "moral rights of different kinds".³⁹ One of the best-known texts on civil law, by Planiol and Ripert, offered hardly any discussion on the problem as late as 1952.⁴⁰ The sole brief mention related to this field was on the secrecy of private correspondence, the authors stating that the principle of secrecy is generally attached to personality rights, which are based on the human personality itself.⁴¹ In the loose-leaf supplement to the treatise, which began to appear in the sixties, there is a further reference to the question, couched in telegraphic style: "Modern theories emphasize ever more the 'legal discovery of the person' and the rights of the personality." It is supplemented by a few citations.⁴²

The popular civil law manual by Aubry and Rau offered in 1961⁴³ a most summary mention of the problem under consideration. After giving to extra-patrimonial rights the usual definition, the authors cited, as examples, the rights of the man to his own body and his name and the moral right of the author of a literary or artistic product. They made a statement which cannot be contested that "the infringement of an extra-patrimonial interest may give rise to liability in damages," but followed

38. Nerson, 1966 REV. TRIM. DR. CIV. 65.

39. L. JOSSERAND, COURS DE DROIT CIVIL POSITIF FRANCAIS t. I, part II (1930).

40. M. PLANIOL & G. RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS (2d ed. 1952).

41. *Id.* 62.

42. XIV *id.* 1-1, no. 6.

43. *Id.* t. 2, part 2, No. 3 (7th ed. 1961).

it by a much more doubtful assertion that there is a prohibition to convey extra-patrimonial rights, either for or without consideration.⁴⁴ A few other treatises have mentioned the subject without introducing any new or interesting elements into the discussion.⁴⁵

Among the most recent textbooks, the *Droit Civil* of Carbonnier⁴⁶ gives the problem more attention than do most other treatises. He uses the term "attributes of the physical person", as some of the other scholars did, and divides them, in accordance with the established tradition, into three categories, the contents of which, however, vary from one theorist to another. For Carbonnier, they are: (1) the fundamental rights of the physical person, (2) civil freedoms, and (3) civil equality. Again, some of the rights he enumerates have nothing to do, according to the American approach, with the others; thus, in the first group, the right to likeness, honor, and name is juxtaposed to that to life and physical integrity. In the second group, next to "physical freedoms" such as that to move around, to do or not to do, and to close oneself in, "moral freedoms" are discussed; they include, according to the author, the freedom of choosing the way of life; of conscience; and of the "sphere of intimacy". The author states:

The individual should be granted a secret sphere of his life from which he will be able to eliminate third persons: the modern theory thus recognizes his right to require respect of the private character of his person, a right to be let alone; properly, this is a freedom. Sometimes, one has attached to it actions by which an individual objects that his name and his likeness be subjected to publicity—actions which others base on fundamental personality rights In particular, what derives from it . . . is the right of the individual to prevent that his intimate life be, even with the change of name, used by writers for a novel, in a more or less clear way. The freedom of the sphere of intimacy should also be defended against an indiscreet zeal of charity (a person may prohibit opening a collection for his benefit).⁴⁷

44. *Id.* The moral right of authors and artists is a well recognized French concept which finds no exact parallel in American law. For recent discussions of the problem, see Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968); Trecc, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP. L. 487 (1968).

45. *E.g.*, G. MARTY & P. REYNAUD, *DROIT CIVIL* (2d ed. 1967). Again, the authors divide the personality rights into three groups: those dealing with "constitutive elements" (physical and moral) of a person (and in particular, the right to honor); those which identify the individual and his expression (such as the right to the name, likeness, secrecy and intellectual creativity); and those which warrant a free exercise of human activities.

46. J. CARBONNIER, *DROIT CIVIL* (8th ed. 1969) [hereinafter cited as CARBONNIER].

47. *Id.* 71.

This is, at last, a discussion similar to the American approach. The author is familiar with the general principles of privacy law in the United States.⁴⁸ He uses a sociological approach to the law and illustrates his statements by judicial decisions.

In some more specialized studies, French jurists continue the discussion. Stoufflet, particularly interested in the right to one's own likeness, asserted that the recognition of civil liberties and human rights has two aspects: it results, in public law, in the defense of the individual against the state, and necessitates the assurance of the inviolability of the person in private law relations.⁴⁹ This is an interesting approach. But Stoufflet did not put an end to the confusion and lack of agreement on the content and scope of personality rights in French legal thinking. This is well illustrated by another attempt to lay down a general theory in this field, presented by Decocq in 1960.⁵⁰ In his 460 page volume, the author took a very broad approach to the question. He discussed many problems which are unrelated to each other, such as the rights to the human body, to the corpse, parental rights, freedom of contracts, labor contracts, inequality of some contracts, blood tests, body transplants, experiments on human beings, sale of total property for promoting the career of a child, agreements not to compete, duels, disclaimer of liability in physical injury cases, moral rights of an author, human liberty and the right to prove a case, personal rights in marriage, body execution, relations between the physician and patient . . . an extraordinary hodge-podge of rules of every possible kind (except for property law *stricto sensu*) which in the American legal classification would belong to many different fields, such as contracts, torts, labor law, trade regulation, domestic relations, criminal law, literary property, civil liberties, civil procedure But the most amazing feature of the book—which gives, it should be recognized, much interesting but unconnected (at least by American standards) information—is that the author did not include in his observations any of the numerous aspects of the law of privacy, be it in the American sense or in the French approach!

Much more in point is a study by Martin, written at about the same

48. He cites the article by Wagner, *Le "droit à l'intimité" aux Etats-Unis*, 1965 REV. INT. DR. COMP. 365.

49. Stoufflet, *Le droit de la personne sur son image*, [1957] J.C.P. I. 1374. The above wording is the English translation of Title 3 of his book.

50. A. DECOCQ, *ESSAI D'UNE THÉORIE GÉNÉRALE DES DROITS SUR LA PERSONNE* (1960).

time.⁵¹ The author puts aside the incidences of public life⁵² and points out the conflict existing between the freedom of information, on the one hand, and “the interest that everyone has to maintain his privacy (*intimité*), the secrecy of his private life.”⁵³ To Martin, a simple ability we have cannot be considered as a right. Nobody can prevent us from enjoying the freedom of thinking; but it is impossible to speak about a right to think. And he continues: “Likewise, there is no right to privacy; the right appears only when there is a possibility that it will be revealed to others. In other words, it is the secrecy, not privacy, which can be the subject matter of a right.”⁵⁴

This right to secrecy belongs, according to Martin, to the field of personality rights, which are of a “moral character.”⁵⁵ By this, the author means that they are not easily translated into money, in contrast to property rights. In this, there is nothing new. As has been indicated above, if anything was clear in the French theoretical approach to problems known in American law as those of privacy, it was that they should be included into the field of personality rights which were “extra-patrimonial”; but this well established concept is beginning to tumble. Indeed, some writers began recently to assert that the concept of patrimony should not be limited to financial assets; that it should cover two kinds of rights: one which could be termed as a pecuniary patrimony, and the other one, as moral patrimony. This approach seems to have been prompted by a couple of cases in which the courts made the distinction.⁵⁶ Elaborating on this term, Martin appeared to accept the general concept of moral patrimony which would include, in particular: “The moral right of the author, the one of the writer of a letter, the reparation due for a moral wrong; undoubtedly, the right to likeness and, it is submitted, the right to the secrecy of private life.”⁵⁷

A strong blow to the classical theory was dealt by the brothers Mazeaud. Criticizing the approach opposing patrimonial to extra-

51. Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 227.

52. An interesting observation is that the respect of public life of a person is dominated by the idea of defamation, and that of private life — of secrecy. *Id.* 230.

53. *Id.* 229.

54. *Id.* 239.

55. *Id.* 242.

56. Thus, in *Marlene Dietrich v. France-Dimanche Co.*, [1957] D. 295 (1st ch., Paris), the court stated: “Memoirs of the private life of each individual belong to his moral patrimony [which] nobody has the right to publish, even without any malicious intent, in the absence of an explicit and unambiguous authorization of the person whose life is being related.”

57. Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 227.

patrimonial rights, they pointed out that most rights have both a pecuniary value and a moral aspect, although in varying proportions. They gave the following definition: "*The patrimony comprises all pecuniary and non-pecuniary rights which come to merge into it.*"⁵⁸

If so, personality rights are a part of the general patrimony of a man; but the authors recognize that they have some characteristic features because of their close relation to the person who has them. They constitute an element of the person himself and cannot be disconnected from him.⁵⁹ The public law idea of the citizen's rights has a counterpart, in private law, in that of personality rights which regulate, on the one hand, the position of an individual in his family, and on the other, his life in society.⁶⁰ As Perreau, the brothers Mazeaud set three broad categories of the latter ones — but their contents were defined quite differently: in the first one, they placed the rights to physical integrity, in the second, to moral integrity, and in the third, the right to work.

It may readily be seen that the questions of privacy may be included only in the second category. But again, only some of them are mentioned by the authors, while many problems foreign to the concept of privacy are discussed. Thus, next to the right to our own likeness, the authors put intellectual freedom (thought, conscience, religion, opinion, assembly), freedom of marriage, the right to honor and to affectionate sentiments (in whose context recovery granted in two cases for mental suffering occasioned by a wrongful death of an animal is discussed), the right to secrecy (professional and of mail), and to the name.

It seems to be proper to end this review of French theories on the law of privacy by mentioning two recent comments on the problem written by Lindon and Badinter. Lindon⁶¹ may misinterpret the situation in the United States⁶² or simply be misinformed,⁶³ but his suggestions as to the content of the right to be recognized are generally well taken even if by American standards they are too narrow in some respects and too broad

58. H., L. & J. MAZEAUD, *LEÇONS DE DROIT CIVIL* No. 622 (4th ed. 1967).

59. *Id.* Nos. 623, 624.

60. *Id.* Nos. 626, 628.

61. Lindon, *La presse et la vie privée*, [1965] J.C.P. I. 1887.

62. See text following note 1 *supra*.

63. Thus, he states: "We know that in the United States everyone has not only the desire, but also the right, to know what any of the citizens pays as income taxes." The author does not reveal the source of this false information. In fact, while property taxes are, as a rule, a matter of public record, the most important taxes — federal income taxes — are considered to be a strictly confidential matter, and the citizens cannot learn what their fellow citizens are paying.

in others. Privacy of a private individual should extend, according to Lindon, to:

- a) Family life—births (their place, date, juridical nature), marriages, divorces, deaths.
- b) Professional life.
- c) Leisures; even if they should be enjoyed in public, no newspaper should be permitted to designate the persons in question by their names.
- d) Likeness; the author seems to approve the theory that everyone has property rights in his likeness.⁶⁴
- e) Profits that an individual derives from his work or his property; the amount that he pays to the state.

The author concludes that the private life of a man is “his life at home . . . and out of the home, his life at work, his leisures, his likeness, his paycheck and his tax return.”

American theorists would agree with instances of the right to privacy enumerated by Lindon; but it should be pointed out that he omitted to mention a few other aspects of the problem. Family life (with the possible exception of data which may be a matter of public record) and activities at work are clearly entitled to be protected from the curiosity of others, even though, in neither of the two situations, is the person involved all by himself. Clearly — as recognized, by the way, by French judicial decisions — the solitude and desire to be let alone of a person

64. Elaborating on this aspect of the right to privacy, Lindon gives two examples of situations in which recovery should be granted but which have not been, as yet, considered by French courts. In the first one, “a periodical publishes an inquiry on prostitution, and at the beginning, reproduces on the cover page a press photograph which appears to be commonplace and impersonal. But the contrary is true, and the person . . . involved . . . has the right to complain and, if need there be, to be compensated.”

The other example is seasoned by Lindon by the statement that while “according to our customs, marriage is recognized as highly respectable, adultery is tacitly considered as sacred.” It is not quite clear whether this observation is serious or meant to be a joke; in fact, French decisions are usually unwilling to recognize any rights the source of which is an illicit relationship. They go so far as to reach shocking results, as in the recent case of *Pedron v. Kredens*, [1968] J.C.P. II 15510 (Cass. civ. 2e), where plaintiff, completely blind, and mother of the five children of a victim of a car accident with whom she cohabited was denied any recovery for the wrongful death of the latter; or in the *Zieglaire* case, [1968] Bull. Crim. 413 (No. 171), where a similar claim of the plaintiff was dismissed on the ground her ten year relationship with the victim of the accident (lasting until his death) which was “so well known, continuous and well established that many persons believed them to be married,” was illicit because the plaintiff’s divorce, pronounced by the court, was not properly notified to the parties and therefore, even ten years later, was not definitive.

Anyhow, the author suggests recovery in another hypothetical case: “A photographer preparing a report on an Automobile Show takes a picture of a couple who embrace each other tenderly while admiring a recent model of a known make. He publishes it. The man, whose presence at the Automobile Show has thus been revealed, objects, as the lady at his arm was not his lawful spouse.”

who has neither a family nor work cannot be interfered with by others. Again, as pointed out by the courts, the personal history of an individual belongs to him and is granted protection; but it seems to the author that even on the somehow narrow scale he set for the French law of privacy, it appears "to be much broader in France than in other countries, at least occidental" — another incorrect statement, one of those Lindon is prone to commit whenever he ventures into the comparative law field.

Chronologically, the last study on the theory of privacy was published by Professor Badinter.⁶⁵ He begins by stating what seems to be obvious: that as the law should protect only the private life, the public life is not covered by legal restrictions and is open to the curiosity of everyone. However, the statement is useful, as it properly circumscribes the area of privacy. To the public life, Badinter adds the professional life during which there are necessary contacts with others, the leisures, where recreational activities may be witnessed by the members of the general public, and the exercise of the citizen's rights when made in public as well as the involvement in public events. The way Badinter summarizes the concept of public life is unusual; he states that it relates to the participation of the individual to the life of the town in its three aspects: its work, its amusements, its institutions. Like many other French theorists, Badinter recognizes the right to the respect of private life as one of the personality rights, the others being the right to the likeness, honor, and the moral right of the author to his work; they appear to him to be general, absolute and extra-patrimonial.⁶⁶ Contrary to Lindon, he insists that the right to one's self likeness is separate from the right to private life; while the first right would permit someone having been photographed in a fashionable suit during a gala event to object to the commercial use of the photograph, the latter right would not. Private life stops where public life begins, but only because of the separate right to likeness photographs of public men can be used, according to the author, for no other purpose than to illustrate public events in which they were involved. This use is based on their implied consent.⁶⁷

Special emphasis is placed by Badinter on the necessity of protecting privacy after the death of the person in question.⁶⁸ Citing approvingly the *Rachel* case,⁶⁹ in which her family was held to have the right to object to

65. Badinter, *Le droit au respect de la vie privée*, [1968] J.C.P. I. 2138, § 8.

66. *Id.* § 24.

67. *Id.* § 25.

68. *Id.* §§ 20, 21.

69. *Félix v. O'Connell*, [1858] D.P. III. 62 (trib. civ., Seine).

the circulation and publication of the *post mortem* photographs of the famous actress, he points out that the death of a person usually brings him back to the memory of the public even if he fell into oblivion, and results in a temptation to reveal to the readers his forgotten love affairs or scandals. Besides, the requirements of respect due to dead persons should be taken into account. Therefore, "what could not be tolerated during the victim's lifetime appears still less acceptable after his death." The author sees a close analogy between the right to private life and that to an author's work, and would apply, in this situation as well as in others, legal rules laid down by the Law of March 11, 1957, to literary and artistic property.⁷⁰ Protection due to the dead should give way, however, to the requirements of history.⁷¹

As in the United States, there is agreement among the legal scholars in France that the scope of privacy must be limited as far as public figures are concerned. The sharp distinction drawn by Badinter between private and public life is generally approved. It has been said, *e.g.*, that a writer "takes his goods where he finds them, *i.e.* from life"; and if he should be inspired by events of public life, he may be immune from liability as "strictly speaking, there is no question of a sphere of intimacy any longer."⁷²

70. Badinter, *Le droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 41

71. *Id.* § 22.

72. CARBONNIER 74; but a writer who describes in his books events which did actually happen or which he believes to have happened in the non-public past of the lives of others takes a risk of subjecting himself to liability. In the *Hallez* case (*see* note 29 *supra*) defendant wrote a fictitious and malicious story about the plaintiffs. In some other cases, the courts made it clear that the good faith of the author will not save him, as nobody can take advantage of the personality of another without being authorized to do so. *See, e.g.*, *Roger de la Bastie v. Dutourd et Gallimard*, [1956] J.C.P. II. 9256 (trib. civ. 3d ch., Seine). In this case, the defendant published a book entitled "Au bon beurre" (Having Good Butter) in which, among other characters, he described the plaintiff, a career officer, using his true name, as a prisoner of war in a German camp who adjusted perfectly well to this type of life, reconciled himself with the German rule, discouraged others from trying to escape, etc. The objections of the plaintiff were disregarded, and he brought suit asking for damages in the amount of 2 million old francs and other relief. The tribunal granted him 500,000 francs and ordered the suppression of the plaintiff's name in future editions of the book, the insertion of the judgment in copies which had not been sold and the publication of the judgment in three journals, all under *astreinte*.

Even such a famous writer as Anatole France (Noble Prize in Literature, 1921), committed the imprudence of being too much inspired by facts taken from the lives of others. In his "Révolte des anges" (Revolt of Angels) he described, under a fictitious name, the story of plaintiff who had been interned, became insane, and experienced a great deal of troubles. Affirming the decision of the lower tribunal as to the defendant's liability, the Court of Appeals of Paris reduced the damages from 20,000 Fr. to 5,000 stating that "the only direct wrong sustained by Lemoine is that in this novel a particularly painful event of his life is being recalled; that is the only serious reproach he can make to Anatole France; that, by the way, this reminder has readily been noticed but by a very

In particular, persons who have been elected or are candidates to public offices may expect that the citizens will be interested in their lives. As to them, the incidences of their "professional and family life" may be "submitted to the control of public opinion." Such questions may be discussed, e.g., as their foreign birth; religious beliefs which may be those of a minority group; divorce; how they spend their free time. And, as to them, photography becomes more free.⁷³

Whether the right to privacy, along with other personality rights should be recognized as an absolute right, standing all by itself, or whether it should be submitted to the general rule of Article 1382, has neither been made clear by the courts nor agreed upon by legal writers. The decisions are either vague, or take conflicting approaches to the question. If the first alternative should be recognized, the violation of the right would *ipso facto* result in liability. The most recent commentator, Professor Badinter, approves of this result, stating that "the protection of private life, based at the beginning on general principles of tortious responsibility, later departed from it in order to lead to the recognition of a genuine subjective right."⁷⁴ This brings about strict liability which is necessary to curb indiscretions which, not being damaging, may nevertheless be committed against the wishes of the persons in question. Such, e.g., may be the case of a publication of a story about a good looking young man being in love with a beautiful girl — both single and adults.⁷⁵ Stoufflet expressed similar ideas, rejecting the possibility of insuring sufficient respect to personality rights by general tort rules. He pointed out that the "subjective rights" approach tends "to considerably reinforce the protection of the person."⁷⁶

restricted number of readers, 'well informed about the troubles of Lemoine'.") Psichari and Psichari and Establishment Colmann-Lévy v. Lemoine, [1936] S. II. 214 (Paris).

Curiously enough, this case was nearly contemporaneous to a well known American case, *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931), in which the defendants produced and released a moving picture film based on the true life story of the plaintiff, who had been a prostitute, became defendant in a murder trial, was acquitted and then reformed, became "entirely rehabilitated", married and lived an "exemplary, virtuous, honorable, and righteous life." The defendants used the actual maiden name of the plaintiff. The court stated that the use of the incidents from plaintiff's life was not actionable, as they were a matter of public record, but, reversing the judgment of the court below, overruled the defendants' demurrer on the ground they used the plaintiff's name. By so doing, they violated both the "standard of ethics and morals" and Art. 1, § 1 of the Constitution of California, guaranteeing the "inalienable" right of "pursuing and obtaining safety and happiness" to citizens.

73. Lindon, *La presse et la vie privée*, [1965] J.C.P. I. 1887.

74. Badinter, *La droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 24.

75. *Id.*

76. Stoufflet, *Le droit de la personne sur son image*, [1957] J.C.P. 1374, No. 4. For the view that

In the second alternative, the proof of fault and damages would be necessary. Most judicial pronouncements on this point were made in connection with the right to one's own likeness. Usually, the courts are prone to find that defendant committed a fault and that plaintiff suffered some damages. However, on both points, the findings may be based on fictitious arguments, implications or imputations, as sometimes is clearly stated: "Every infringement on the personality right implies damages,"⁷⁷ or "the simple fact of publishing a photographic portrait of another without his consent amounts to a fault for which reparation is due."⁷⁸ Some of the legal scholars agree with such an approach,⁷⁹ and some others believe it to be out of line with decisions requiring that elements of Article 1382 be met.⁸⁰

There are cases in which the plaintiff was granted actual damages even though he did not show that he was really injured by the defendant, except for the fact that his right was infringed upon.⁸¹ This approach effectively tends to curb the thriving peddling of information about others. Indeed, "to require from a victim of an indiscretion the proof that he has been ridiculed amounts, most frequently, to prohibiting him from defending himself against indiscretions which today have become professional."⁸²

In some cases, if plaintiff did not establish any damages, his recovery was only nominal. Thus, both in older⁸³ as well as recent decisions, such as in some of the *Bardot* cases,⁸⁴ the defendant was ordered to pay the

in the absence of a legal text other than article 1382, this article should be the basis of an action, *see* NERSON 161.

77. De Lartigne v. Soc. Gevaert, [1956] Gaz. Pal. I. 284 (trib. civ., Seine).

78. *Bardot v. Beaverbrook Co.*, [1966] J.C.P. II. 14521 (trib. gr. inst. 3d ch., Seine). Similarly, in *De Lartigne v. Soc. Gevaert*, [1956] Gaz. Pal. I. 284 (trib. civ., Seine), the Tribunal said that the publishing of a photograph of someone else without his consent amounts to a fault, and that every infringement on the personality rights implies damages.

79. *E.g.*, Stoufflet, *Le droit de la personne sur son image*, (1957) J.C.P. I. 1374.

80. *E.g.*, Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 227, 254. There are decisions which indicate that plaintiff may recover if at least one of the two elements, fault or damages, has been established. *Id.*

81. This is true, in particular, in cases of infringement of privacy for commercial purposes, even if made in good faith. *See, e.g.*, *Soraya v. Artego Co.*, [1963] Gaz. Pal. I. 73 (trib. gr. inst., Seine), in which plaintiff was permitted to recover 6,000 Fr. Even in absence of bad faith, the defendant was held to have committed a fault.

82. Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 227, 255.

83. *See, e.g.*, *Jahier v. Juven*, [1918-19] Gaz. Pal. I. 64 (trib. civ., Seine), where the Tribunal granted only one franc and the costs to a professional model whose photograph was published in a magazine featuring fashion dresses without her consent, but not causing her any damages she could complain of.

84. *See Bardot v. Beaverbrook Co.*, [1966] J.C.P. II. 14521 (trib. gr. inst. 3d ch., Seine); *Dessault v. Bardot*, [1967] D. 450 (trib. gr. inst., Seine), *aff'd id.* (Paris).

amount of only one franc to the plaintiff. In some rare instances, all that the winning party was permitted to recover were his costs.⁸⁵ The rule was thus stated in *Hallez et al. v. Montpezat et al.*:

. . . [T]he reparation of a moral wrong being admitted, it must necessarily be proportioned to the extent of the damage; . . . it may be limited to the granting of expenses or to a simple expression of disapproval by principle, if it is only the principle of the plaintiff's right which is at stake⁸⁶

Scholars who understand that the general rule developed by the courts denies the existence of a separate right to privacy and favors the application of Articles 1382, brand statements similar to those in the *Hallez* case as contrary to the present law on the problem and argue that in cases where fault and damage has not been established the action should be simply dismissed.⁸⁷ The willingness of the courts to be flexible in granting relief and to supplement damages, as the case may be, with other forms of redress, has been met with general approval by French legal theorists.⁸⁸ In particular, the court may order the publication of the judgment in the press; the seizure of the incriminated publication, its destruction or delivery to the plaintiff; the prohibition of marketing the publication.

Speed in cases of urgency is assured by resort to a summary procedure (*en référé*), in which the judge determines immediately after the petition is filed measures to be taken without delay to protect the plaintiff's rights; such a decision cannot affect the merits of the dispute.⁸⁹ French scholars stress the advantages of the system, but point out its dangers. Indeed, if the seizure of a newspaper or of a periodical is ordered in these proceedings, could a later decision on the merits, favorable to the defendant, undo the harm inflicted on him by the "referee judge"? Among the cases in which the propriety of such proceedings was reaffirmed, some supported the granting of relief by the "referee judge" only in situations where the defendant's interference with the plaintiff's private life was "intolerable". But where is the borderline between what is tolerable and what is not? "It is up to the patient to estimate the pain

85. See, e.g., *Bonnet v. Olibet*, [1893] Ann. propr. ind. 246 (trib. comm., Seine).

86. [1932] Gaz. Pal. II. 739.

87. Thus, Martin qualifies the possibility of ruling for the plaintiff even if he did not show damages as "an exception which is difficult to explain, or . . . an awkward formula." Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 227, 254.

88. See, e.g., *Badinter, Le droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 31.

89. Articles 806-811, C. PRO. CIV.

that he suffers, not up to the physician The jurist . . . has good grounds to wish a legislative intervention into that matter."⁹⁰

If no other tort, and in particular that of defamation, is established, French law, similarly to the prevailing rules of American law, does not provide for any criminal sanctions for invading privacy. In order to curb abuses perpetrated by the peddlers of sensation and scandal, some authors suggest legislative intervention setting sufficiently severe penalties such as heavy fines. Besides, all profits realized by the publication should be turned over to the victim.⁹¹

Thus, after many discussions, arising from actual cases but based on theoretical speculations, French legal scholars, while praising the work of the courts and generally accepting their solutions given in concrete cases, have not elaborated a theory of personality rights and their content which would meet with universal approval.⁹² They did not establish a clearly delineated branch of the law analogous to that of privacy. This field of the law continues to be imprecise, and all that can be done is to reaffirm the existence of such rights "without being able to make a list or to lay down a definite criterion."⁹³ Observers of developments in this field predicted the recognition of new personality

90. Badinter, *Le droit au respect de la vie privée*, [1968] J.C.P. I. 2136, § 37.

91. *Id.* § 42. It may be added that as an exception to the usual approach, some types of invasion of privacy have been declared to be misdemeanors in a few jurisdictions. Thus, § 50 of the New York Civil Rights Law provides as follows: "*Right of privacy*. A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture, of any living person without having first obtained the written consent of such person, or if a minor of his parent or guardian, is guilty of a misdemeanor." This provision is derived from an enactment of 1903.

In California, § 630 of the Penal Code (based on a law of 1872, amended in 1905 and embodied in the former § 640 of the Penal Code) provides for a penalty of imprisonment not exceeding three years or a fine up to \$2,500, or both (previously, up to five years or \$5,000) for wire tapping (interference with telephone or telegraphic communications). Another criminal sanction for violating privacy, embodied in the former § 258 of the Penal Code, provided for the penalty of a fine up to \$500 or imprisonment up to six months, or both, for publishing "the portrait of any living person, a resident of California" without his consent; exceptions were made in cases where the portrait was that "of a person holding a public office" or that "of a person convicted of a crime." This section, enacted in 1899, was repealed in 1915.

92. A similar uncertainty seems to exist in other legal systems based on that of France; in particular, the terms "personality rights" or "protection of personality" have no established content. As a striking example, a study on the Quebec law may be cited. Analyzing the "protection of personality" in that jurisdiction, the author established a list of legal rules he deemed relevant to that problem, but did not mention a single one in the field of privacy law. Azaud, *La protection de la personnalité dans le droit civil de la Province de Québec*, in XIII TRAV. ASS. H. CAPITANT 108 (1963).

93. Nerson, 1966 REV. TRIM. DR. CIV. 65.

rights in the future,⁹⁴ due to the constructive work of the courts. However, some of them warned against a proliferation of these rights before their content becomes clear and their characteristics precise.⁹⁵

Altogether, the work of French legal scholars, in the field of privacy, has not been too impressive; they have shown neither much originality nor creativity. Also, the legislature kept silent.⁹⁶ In a society in which curiosity about what others are doing is the prevailing feature of the average man, sensation is one of the best methods to amuse people, and deriving profits from revealing secrets becomes a standard way of making business, the burden of responding to the new needs of citizens has been relegated to the work of the judiciary.

In situations where American law approaches under the angle of privacy, in France the protection of the name and of the likeness is best established. Other instances — contrary to the usual French tendency to lay down general broad principles and apply them to concrete cases — are simply elaborated by the courts from case to case, as need may be, and accepted by legal theorists. They include, among others, the right of the family of a famous man to object to the construction of a grave or monument; that of parents to prohibit a third person from endeavoring to win the friendship of their children by all possible means; the right to the secrecy of correspondence; and that to be protected against excessive publicity.⁹⁷ Likewise, relief will be granted if somebody's name is entered, without his consent, on an electoral list; if inexact data are printed in a telephone directory; if the work of a painter, torn into pieces and discarded by him, is reconstituted and exhibited; if memoirs of the private life of a star are published without her consent; if a forensic speech of a lawyer is printed in an anthology without the text being submitted to him in order to make it possible for him to enter

94. "[T]he idea of the right to secrecy tends to expand . . . and the most recent decisions appear to begin to take it into consideration in a much more general way. This should not be too surprising. The law is in constant change. The secrecy of private life is ever more felt as a real need." Martin, *Le secret de la vie privée*, 1959 REV. TRIM. DR. CIV. 256.

95. Nerson, 1966 REV. TRIM. DR. CIV. 65, 66.

96. The basic French legal text, the Civil Code, does not use the terms "personality rights", "privacy" or others conveying similar ideas. Article 1166 speaks about "rights attached to the person", but in another context. It has been said that "the problem of the defense of the human person presents more importance in the area of *public law* . . . it is in order to fight against political absolutism and the arbitrariness of the State that the existence of the rights of the citizen has been proclaimed." Nerson, *De la protection de la personnalité en droit privée français*, in XIII TRAV. ASS. H. CAPITANT 60 (1963).

97. CARBONNIER 71.

corrections he deems proper.⁹⁸ Maybe the best general statement about the essence of the protection of privacy was made by one of the foremost students of the problem who stated that "man needs . . . to have a rest, to experience the joys of family life and sometimes to stay all by himself." Stressing the inviolability of the domicile, the author labeled privacy (*intimité*) as a "central reserved area which any person should keep in order to escape from the impact of others . . . the aggression of the external world."⁹⁹

And what happens with the traditional French walls around private real properties?

The best answer was given by the *Tribunal de grande instance* of Marseille in a 1968 case, *Poro v. Grollier*,¹⁰⁰ soon after Mr. Lindon published his observations on the French ideas on "private life". The parties to the suit were owners of neighboring residences on the outskirts of the town. They were not on particularly good terms with each other. The border between the properties was marked by a low wall sustaining a netted fence. It was destroyed by the defendant who built on its place a solid stone wall more than two meters high, which resulted in the transformation of the plaintiff's lot "into a genuine pit, deprived of aeration, and also of sunshine during a great part of the morning." Plaintiff brought an action claiming, along with other arguments, that defendant violated Article 662 of the Civil Code which prohibits either of the neighbors to execute any work on a dividing wall without the consent of the other, or without having, after refusal of the latter, settled through an expert all that is necessary in order that the new structure be not injurious to the rights of the other. Grollier defended the suit by asserting that he was moved not by the desire to annoy his neighbor, but just to the contrary, by a wish "to prevent the latter from being able to reproach him, in the future, indiscreet glances, and thus to eliminate any ground for disputes." However, in view of the sign he placed on the new wall, reading: "Here is the wall of shame," the Tribunal found "a certain hypocrisy" in his contention.

Ruling for the plaintiff and ordering the defendant to demolish the wall, the Tribunal based its decision on two grounds: first, as the structure was "practically of no use" to Grollier, his conduct amounted to an abuse of rights. This represents a well-established French approach

98. Nerson, *De la protection de la personnalité en droit privé français*, in XIII TRAV. ASS. H. CAPITANT 60, 78 (1963).

99. *Id.*

100. [1968] J.C.P. II. 15600 (trib. gr. inst. 3d ch., Marseille).

by virtue of which the same result is reached as in most American jurisdictions under the idea of nuisance. But the second ground of the decision is more interesting. It rests on the violation of Article 663 of the Civil Code which, providing for the obligation to put up enclosures in cities and suburbs, requires that the height of the fence be fixed in accordance with "particular regulations or constant and acknowledged usages."¹⁰¹ In the absence of any regulations on the question, the defendant resorted to customs. He produced in court a compilation of the local usages and rules for the province of Provence (no date), stating that in Marseille the dividing walls are 2 ½ meters high, and should they be higher, the persons who constructed them have to bear the costs of the excess.

It would appear that the defendant's point was well taken, and his evidence good. But the Tribunal proceeded to dismiss it by a simple statement that "the venerable usages, thus indicated, belong to another age and have become since long obsolete," and continued by giving its own findings on the problem:

[T]he present period of time is characterized by a division of properties, in cities and suburbs, into extremely small lots, and villas or houses with gardens separated by high walls cannot be found any longer; . . . it is easy to find, when walking through Marseille's districts, where construction never stops, that villas and small houses with gardens are, with only rare exceptions, separated from one another by low sustaining walls surmounted by metal nets, railings or small bars of various materials; the scantiness of the lots and the necessity of insuring them a sufficient amount of air and sunshine explain and command the change of old usages.

As evidence of the new approach, the Tribunal cited the urban plan of the city of Marseille providing that along public ways, low sustaining walls, surmounted by metal nets, shall be built, and the fact that the Ministry of Construction, "hostile to dividing walls between neighbors," set forth in its circular of March 15, 1962, that "if the owners wish to be isolated from their neighbors, the fencing shall be made of quickset hedges concealing a barrier, if need be."

Most probably, there will be no appeal from this decision, as the abuse of rights argument stands on solid, well-recognized grounds. But it

101. However, in the absence of such usages and regulations, the Article sets the height of the walls at 32 dm. (ten feet) in towns of 50,000 inhabitants or more, and at 26 dm. (eight feet) in others. The small inaccuracy in converting decimetres into feet (if ten feet equal 32 dm., eight feet equal 25.6 dm.), found in the Code, was of no consequence.

is doubtful if the second part of the Tribunal's reasoning would survive a revision by a higher court.¹⁰² However, from the viewpoint of the law of privacy, this is of no consequence. The important point is that the traditional French wall, considered by some as the cradle in which the new field of the law — that of private life — was born and developed, is gradually disappearing. Privacy, ever more frequently violated, is ever more widely recognized and extended to new situations in France, the United States, and other countries. It needs less physical protection while the set of legal rules determining its borders should become more precise and readily applicable by the courts.

102. It has been observed: "The Tribunal, moved by the very legitimate care not to be bound by obsolete customs, passed in its zeal, without even noticing it, the judicial barrier which prohibits the judge to apply his personal statements. Excellent principle which cannot be disregarded without opening the way to arbitrariness." Pierron, note to the *Poro* case, *id.* It may be added that the conclusion of the Tribunal that defendant violated article 663 of the Civil Code is not supported by the facts of the case.

NOTE: This article was prepared before the statutory recognition of the right of privacy in France. The law 70-643 of July 17, 1970, declares that everyone has the right to the respect of his private life, and gives to the judges the authority of applying various means to insure that adequate protection of privacy be enforced. Essentially, this provision is based on rules developed by the courts. In addition, by amendments to the penal code, some sanctions were provided for specified cases of invasion of the right of privacy.

CONTRIBUTORS TO THIS ISSUE

FRANCIS WILLIAM O'BRIEN—Professor, Rockford College. B.A. Gonzaga University, 1941; M.A. Boston College Graduate School, 1952; Ph.D. Georgetown University, 1956; Certificat d'études françaises, Université de Pontiers, France, 1961. Assistant Professor, Georgetown University, 1956-61; Visiting Professor, Université de Fribourg, Switzerland, 1961-62; Visiting Professor, Institute for American Universities, Aix-en-Provence, France, 1965-66; Visiting Professor, Université de Lausanne, Switzerland, 1965-66; Visiting Professor, Emory University, 1967-68; Professor and Chairman of Political Science Department, Rockford College since 1968. Reim Foundation grant for research in Europe in comparative constitutional law, 1965-67; Earhart Foundation grant for study in Ireland of Ulster Problem, 1970. Author: *Justice Reed and the First Amendment*, 1958. Contributor to various legal periodicals in Canada, France, Ireland, Switzerland and the United States.

WENCESLAS J. WAGNER—Professor, Indiana University Law School. L.L.M. University of Warsaw, Poland, 1939; Dr. en Droit de l'Université de Paris, France, 1947; J.D., L.L.M., S.J.D., Northwestern University, 1950-57. Member of the Bar: Indiana. Visiting Professor of Literature, Fordham University, 1948-49; Teaching Fellow, Northwestern Law School, 1950-53; Instructor, Assistant Professor, Associate Professor, Professor, Notre Dame, 1953-62; Visiting Professor, Cornell, 1st sem. 1961-62; Professor, Indiana University Law School since 1962. Associate member, International Academy of Comparative Law; member of many American, foreign and international organizations. Lecturer in Europe, Asia, African and Latin American. Author: *The Federal States and their Judiciary*, 1959; *International Air Transportation as Affected by State Sovereignty*, 1970. Editor: *Polish Law throughout the Ages*, 1970; *Legal Thought in the United States of America under Contemporary Pressures* (with John N. Hazard), 1970. Contributor to various legal publications.

