A REPORT BY JUSTICE

Privacy and the Law

JOINT CHAIRMEN OF COMMITTEE
MARK LITTMAN, Q.C.
PETER CARTER-RUCK

A STEVENS Publication

16s net
80p net

JUSTICE

British Section of the International Commission of Jurists

SECRETARY

Tom Sargant, O.B.E., J.P.
12 Crane Court,
Fleet Street,
London, E.C.4.
Telephone: 01–353 9428

A REPORT BY JUSTICE

Privacy and the Law

JOINT CHAIRMEN OF COMMITTEE

MARK LITTMAN, Q.C.

PETER CARTER-RUCK

LONDON

STEVENS & SONS LIMITED

1970

Published in 1970 by
Stevens & Sons Limited of
11 New Fetter Lane, London,
and printed in Great Britain
by The Eastern Press Ltd.
of London and Reading

This Report has been prepared and published under the auspices of the JUSTICE Educational and Research Trust

SBN 420 42990 5

JUSTICE

British Section of the International Commission of Jurists

COMMITTEE ON PRIVACY [1]

Joint Chairmen	Mark Littman, Q.C.
	Peter Carter-Ruck
Committee	Patrick Burgin [2]
	Raoul Colinvaux
	Prof. Gerald Dworkin
	G. Laurence Harbottle
	George C. Heseltine
	Neville Hunnings
	J. Clement Jones
	Herbert Lloyd
	Alexander W. Lyon, M.P.
	Jasper More, M.P.
	John F. Mummery
	Paul Sieghart
	Prof. Harry Street
	Philip Wien, Q.C.[3]
Secretaries	Robin F. Clark
	Mrs. Adrienne Ibbett

[1] For some brief particulars of the Members of the Committee, see Appendix L.
[2] Resigned in October 1969 owing to pressure of other commitments.
[3] Resigned in December 1968 owing to pressure of other commitments.

AUSTRALIA
The Law Book Company Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Toronto

INDIA
N. M. Tripathi Private Ltd.
Bombay

ISRAEL
Steimatzky's Agency Ltd.
Jerusalem : Tel Aviv : Haifa

MALAYSIA : SINGAPORE : BRUNEI
Malayan Law Journal
Singapore

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

CONTENTS

CHAPTER 1

INTRODUCTION

1. By subscribing to international agreements of the first importance, the United Kingdom has recognised the right to privacy as one of the fundamental human rights. Thus, Article 12 of the Universal Declaration of Human Rights and Article 17 of the United Nations Covenant on Civil and Political Rights of December 1966 (to which the Government of the United Kingdom is a party) provide that:

> "No-one shall be subjected to arbitrary interference with his privacy. . . ."

and that

> "Everyone has the right to the protection of the law against such interference. . . ."

Similarly, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which the Government of the United Kingdom is also a party, provides that:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

2. On May 22 and 23, 1967, there was held in Stockholm an international conference of distinguished jurists from many regions of the world, organised by the Swedish section of the International Commission of Jurists in collaboration with the Secretariat of the Commission. Amongst the organisations who sent observers were the Council of Europe, the International Press Institute, the English Law Commission and the Press Council of Great Britain. The conference was convened specifically to discuss the right to privacy, and amongst its conclusions were:

> "(1) The right to privacy, being of paramount importance to human happiness, should be recognised as a fundamental right of mankind. It protects the individual against public authorities, the public in general and other individuals.
>
> . . . .
>
> (14) . . . (a recommendation) that all countries take appropriate measures to protect by legislation or other means the right to privacy in all its different aspects and to prescribe the civil remedies and criminal sanctions required for its protection."

The full conclusions of this conference are reprinted as Appendix B to this Report.

3. In the United States, as long ago as 1890, a great American lawyer, Louis D. Brandeis, in collaboration with Samuel D. Warren, published an article entitled "The Right to Privacy" stressing the need for the law to protect personal privacy and suggesting that the common law was itself capable of being interpreted as recognising a general right of this kind. Under the influence of this article American judicial decisions and statutes have gone a considerable way towards acknowledging such a right.

4. The legal systems of a good many other civilised countries specifically recognise a right to privacy and provide sanctions against its infringement.

5. Against this background it is noteworthy that English law does not at present recognise any general right to privacy. The law protects a man's person, it protects his property, it protects his reputation, but it does not specifically protect his privacy. Such protection as privacy enjoys under our law is the fortuitous by-product of laws designed or evolved for other purposes. It would not, therefore, be surprising if such protection turned out, upon examination, to be fragmentary and incomplete. Nor would it be surprising if it showed itself inadequate to meet the increasing pressures created by developments in the technology of the collection and recording of information and the growth of a profitable market for such information.

6. It is for reasons such as these that in the last decade or so the right to privacy has become the subject of widespread debate not only in this country but throughout the civilised world. As a result, an abundant literature now exists of which we give a selection in Appendix A to this Report.

7. In this country there has been an increasing body of opinion which has questioned the adequacy of the present law. Two attempts have been made to introduce legislation in Parliament, so far without success. In the summer of 1967 the English Law Commission embarked upon a study of the subject, produced a most valuable working paper (a copy of which they kindly made available to this Committee) and held a seminar on the subject at All Souls College, Oxford. They then deferred further work in anticipation of the expected appointment of a Select Committee.

8. It was in these circumstances that this Committee was set up by JUSTICE in September 1967 to examine the whole subject of privacy and in particular whether the right to privacy could and should be safeguarded in English law. We were given the widest terms of reference, but we have thought it right to exclude those matters which can fairly be said to fall within the "public law sector," such as censorship, police rights of search, and the rights and duties of public authorities, which need to be considered in a much wider context. Although we ourselves have not considered this area, we feel that an examination of it is needed.

9. We have met on over thirty occasions and have considered numerous papers and reports. We have also received oral evidence, written memoranda or other assistance from the following:

(a) Mr. J. H. B. Dodd, Assistant Director of the National Institute of Industrial Psychology.
(b) Mr. Peter Wyatt, Chairman of the Computer Privacy Specialist Group of the British Computer Society.
(c) An expert in the field of security with special knowledge of electronic equipment.
(d) Mr. E. F. Berrett, Managing Director of Dun & Bradstreet Ltd.
(e) Mr. Hugh MacPherson of *The Guardian.*
(f) Mr. Joseph Jacob, Lecturer in Law at the College of Law.

10. Our conclusions and recommendations are set out in Chapter 8 of this Report. In short, they amount to a finding that English law is seriously defective as it now stands, and that there is an urgent need for legislation. Such legislation could take a variety of possible forms, but on balance we

think that the best method would be to create a new statutory tort of "infringement of privacy." We have drafted a Bill which we consider adequate to meet the case and which we include as Appendix J to this Report. No doubt there are other ways of drafting the necessary provisions, but this is the one which we think would best fill the existing gap in the law without imposing any undesirable fetters on the freedom of the Press and the other legitimate interests of society.

11. As this Report goes to print, the following important events have taken place:

(1) In the debate in the House of Lords on the second reading of the Personal Records (Computers) Bill, the Lord Chancellor, Lord Gardiner, referring to the right of privacy, said:

> ". . . it is one in which I have for long been interested: the extent to which a man or woman not in private life is entitled to say, 'This is my private life which is of no legitimate concern to the general public'; the extent to which there should be protection for business organisations against industrial espionage; the extent to which there should be protection against the invasion of our homes by the telescopic lens, or the bug under the bed, or the private detective, or even the too pressing methods of the doorstep salesman. . . . My right honourable friend the Home Secretary and I fully recognise the importance of these issues and are very conscious of the widespread feeling about activities of this kind and the growing desire to find means of protecting the citizen from unreasonable infringements of his privacy. It may be that there is a need for an inquiry into this whole field. . . ."

(2) In paragraph 76 of its Fourth Annual Report (Law Com. No. 27) under the heading "Privacy" the English Law Commission says:

> "We are more than ever convinced that early comprehensive examination of the subject by a widely based commission or committee is essential."

(3) In December 1969 Mr. Brian Walden, M.P., was successful in the ballot for Private Members' Bills in obtaining leave to introduce in the current Session a Bill relating to the law of privacy.

12. The present Report has been very much the joint work of members of the Committee. The Committee would, however, like to acknowledge the particular help that it has received from those members who have been engaged on research and have produced working papers, especially Gerald Dworkin and Neville Hunnings. It would also like to acknowledge the special contribution that has been made by Peter Carter-Ruck and Paul Sieghart in preparing the draft of this Report and the major role which Mr. Sieghart has played in preparing the draft Bill which appears in Appendix J to this Report.

We should also like to thank our joint secretaries, Robin Clark and Mrs. Adrienne Ibbett, for their devoted and efficient services, and Mrs. Margaret Kitchingman for her secretarial assistance in the final preparation of the Report.

Chapter 2

WHAT IS PRIVACY?

13. Man is a social animal. No human being can exist for long in total isolation from all others. Yet we also have a need to withdraw from others, to a greater or less extent, at different times of our lives. It is because of the conflict between these opposing needs that the concept of privacy gives rise to problems.

14. To preserve his sense of identity and the integrity of his personality, to work out his personal relationships and find his way to his own salvation, each human being needs to be able to limit the area of his intercourse with others. The chosen area will fluctuate from person to person and from moment to moment: there are times when we need solitude and others when we need the comfort of our friends; there are times when we need the intimacy of communication with one or more people who are close to us, and others when we need to maintain our reserve. Above all we need to be able to keep to ourselves, if we want to, those thoughts and feelings, beliefs and doubts, hopes, plans, fears and fantasies, which we call " private " precisely because we wish to be able to choose freely with whom, and to what extent, we are willing to share them.

15. The opposing force in the conflict is given by the needs of the community of which we form part. By living in close proximity with others and sharing the burden of the common human experience, we are able to live in far greater material comfort, and to develop our potential far more than we could achieve unaided. The price we pay for these advantages is the abandonment of part of our freedom of choice. The benefits which social organisation can make available for any one of its members must, in the nature of things, flow from those which the others have been willing to surrender. In the special area with which we are concerned, there are innumerable examples where the individual's desire to preserve his privacy has had to yield to the greater needs of the community to regulate its affairs for the benefit of all its members.

16. The problem, therefore, is one of balancing the individual's need for privacy against the legitimate needs of the community constituted by his fellows. It is to achieve such a balance between conflicting needs that we have laws. Our task, therefore, is to discover, if we can, what we mean by privacy, what limitations on that privacy the community can legitimately claim to impose, and what are the kinds of legal rules and machinery most apt to strike the balance between the two.

17. There have been many attempts to define the concept of " privacy " in this sense. Perhaps the most succinct was the one adopted by Judge Cooley, when he called it " the right to be let alone." [1] The *Shorter Oxford English Dictionary* gives " the state or condition of being withdrawn from the society of others, or from public interest; seclusion." Academic writers in more recent times have attempted to analyse it in greater detail. Dean Prosser, for example, classified the American law on the subject as dealing with privacy under essentially four heads:

[1] *Torts*, 2nd ed., 1888.

(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
(2) public disclosure of embarrassing private facts about the plaintiff;
(3) publicity which places the plaintiff in a false light in the public eye;
(4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[2]

Professor Westin, on the other hand, sub-divides the concept under the heads of solitude, intimacy, anonymity and reserve.[3]

18. In the course of our work, we have become increasingly aware of the difficulties which seem to beset any attempt to find a precise or logical formula which could either circumscribe the meaning of the word " privacy " or define it exhaustively. We think that there are two underlying reasons for this. First and foremost, the notion of privacy has a substantial emotive content in that many of the things which we feel the need to preserve from the curiosity of our fellows are feelings, beliefs or matters of conduct which are themselves irrational. Secondly, the scope of privacy is governed to a considerable extent by the standards, fashions and *mores* of the society of which we form part, and these are subject to constant change, especially at the present time. We have therefore concluded that no purpose would be served by our making yet another attempt at developing an intellectually rigorous analysis. We prefer instead to leave the concept much as we have found it, that is as a notion about whose precise boundaries there will always be a variety of opinions, but about whose central area there will always be a large measure of agreement. At any given time, there will be certain things which almost everyone will agree ought to be part of the " private " area which people should be allowed to preserve from the intrusion of others, subject only to the overriding interest of the community as a whole where this plainly outweighs the private right. Surrounding this central area there will always be a " grey area " on which opinions will differ, and the extent of this grey area, as also that of the central one, is bound to vary from time to time.

19. Accordingly, we shall use the word " privacy " in this Report in the sense of that area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade.

20. In considering what ought to be the law, we think that a broad concept of this kind is ultimately more useful than one which more precisely defines the conceptual boundaries. If the law is to keep pace with changing social needs, it must remain flexible and have the ability to adapt itself. This is best achieved by leaving it so far as possible to the courts to decide from case to case, and from time to time, what should or should not enjoy the law's protection. Such an approach has served the community reasonably well in a number of fields of common law, and seems to us particularly well-suited to the present subject.

[2] (1960) 48 Cal.L.Rev. 383.
[3] *Privacy and Freedom*, Atheneum, 1967.

CHAPTER 3

TO WHAT EXTENT SHOULD THE LAW PROTECT PRIVACY?

21. A man's privacy requires protection from the law to the extent—and only to the extent—to which it would be infringed by others, without just cause, in the absence of such protection. In considering both the extent of the protection required, and the scope of what would be a "just cause" for infringement, we have adopted an essentially libertarian approach, probably best expressed in the classical passage from John Stuart Mill's *Essay on Liberty*:

> "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right.
> . . . Over himself, over his own body and mind, the individual is sovereign."

22. Starting from these premises, we observe first of all that there are a number of human attributes which, unchecked, will tempt people to infringe the privacy of others. Chief among these are probably mere curiosity or the desire for power or financial gain. We think that most reasonable people would agree that, by themselves, none of these motives are sufficient warrant for one man to infringe the privacy of another, and that the restraint of infringements so grounded is a proper task for the law.

23. The extent to which, subject to the limitations which we must consider later, the laws of any civilised country should protect the basic right of privacy must be largely co-extensive with the concept of privacy itself which, as we have already found, will vary in content from time to time. So long as our society is based on family units and the ownership or occupation of private property, these are the principal areas which need protection. As we see it, one of the effects of the changes through which our society is currently passing at increasing speed is to increase the pressures on these areas of privacy. The higher the density of population and the degree of organisation of the social structure, and the greater our technological skills, the greater will be the threat to the private areas hitherto preserved from the prying eyes of others. It may not be wholly irrelevant that the studies of the ethologists have shown a similar phenomenon with other species: the more they become crowded together, the greater the drive to keep each other apart, and the greater the stress for the individual if he fails to preserve the minimum territory (both physical and symbolical) which he needs for his separate existence.

24. Nonetheless, we must accept certain limitations on the area of privacy which, left to ourselves, we might choose without the necessary regard for others. For example, we place a high value on knowledge, discussion and the arts, and it would be a poor system of law which

inhibited the free flow of any of these. Then again, if we are to continue to enjoy the advantages which the highly organised and structured society of today brings with it, we must be willing to afford those whose task it is to design and administer that structure enough information to enable them to perform their tasks efficiently, so long as we always bear in mind that they are employed to perform them in our interest and not in their own.

25. There are, therefore, a variety of valid reasons why the privacy of one person may properly be infringed by another. All these, to justify the intrusion, must in our view be acceptable to the community at large as legitimate private or public interests if they are to be allowed to have their way. Prominent among these are the interests of the Press, as one of the guardians of the public interest, in ascertaining and publishing the truth. We regard this as a vital interest of any democratic community, with which it would be most undesirable to interfere, and we therefore single it out for special mention at this early stage.

26. Some sections of the Press have expressed anxiety at the suggestion that any general right of privacy should have the protection of the law of England. They urge that public opinion, good taste and professional ethics can, in general, be relied upon to protect the individual from unreasonable and unnecessary invasion of privacy and that the introduction of a general legal right of privacy is both unnecessary and liable to create an undesirable fetter upon the freedom of the Press. They can refer to the fact that in the fourteen years since the creation of the Press Council only 38 of over 450 complaints coming before it related to infringement of privacy and only 16 of these have been upheld. This view is worthy of the most serious consideration, but in the opinion of the Committee it is wrong:—

(1) The fact that in the recent past the Press has in general shown praiseworthy restraint does not alter the fact that there have been a number of cases from time to time where there have been lapses. In such cases it is unjust that the victim should be without remedy.
(2) There is no guarantee that the Press will show similar restraint in the future. The ownership of newspapers can and does change and so do their policies, especially at a time of increasing international mergers.
(3) The Press in the United States has worked for many years with a general right of privacy in one form or another, and has expressed no concern that its freedom of expression might be in any way fettered as a result. Indeed, the majority of the Press in the United States has fully supported the mounting concern about the many new threats to privacy in that country.[1]
(4) We think that proper provision can be made for securing the legitimate freedom of the Press by a defence of "public interest." We might also draw attention here to the recommendations made in 1965 by the Joint Working Party of JUSTICE and the British Committee of the International Press Institute, which we reprint, for convenient reference, in Appendix K to this Report.

27. The rightful concern of Press, radio and television is to ascertain and publish the truth. But we are satisfied that the more responsible editors of newspapers and periodicals, and the producers of radio and television programmes, are well aware of the fundamental difference

[1] Westin, *Privacy and Freedom*, p. 314 *et seq.*

between those truths which, in its own interest, "the public has a right to know," and those which merely gratify voyeuristic curiosity at the expense of another's suffering or embarrassment.

28. For these reasons, *we do not consider that the protection of a right to privacy need have an adverse effect upon the freedom of the Press, provided the relevant provisions are appropriately framed.*

29. These, then, in very broad outline, are the considerations which must be borne in mind when examining an existing system of laws to see whether, in current conditions, it adequately protects the respect for the right to privacy without which there cannot be the respect for the dignity and integrity of the individual human being which we regard as fundamental to any humane society. We must therefore now examine the system which we already have to see whether it meets those criteria.

CHAPTER 4

THE PRESENT LAW IN ENGLAND

No general right of privacy at common law

30. There is no reported English decision which determines authoritatively whether or not an independent cause of action in tort for invasion of privacy exists. There are a few dicta to indicate that there is no such right (*e.g.*, Swinfen Eady J. in *Correlli* v. *Wall* (1906) 22 T.L.R. 532; Greer L.J. in *Tolley* v. *Fry & Sons Ltd.* [1930] 1 K.B. 467 at 478; the High Court of Australia (by a majority) have rejected the existence of such a right: *Victoria Park Racing and Recreation Co. Ltd.* v. *Taylor* (1937) 58 C.L.R. 479). But although these dicta do not in theory prevent the courts from developing such a cause of action at some time in the future, it is generally recognised that at the present time there is no existing common law remedy for invasion of privacy as such.

Indirect protection through other civil remedies at common law

31. Infringements of privacy may, however, be actionable at common law, if the plaintiff can bring his complaint within any of the existing heads of liability in tort. For example, if someone enters private property without authority and plants a bugging device, this is an invasion of privacy for which there may be no remedy as such, but it also constitutes the tort of trespass, and the court will, in assessing damages, take into account the whole of the injury to the plaintiff.

32. There would be no great practical problem if all genuine privacy grievances were capable of remedy through the media of other established heads of liability. It is necessary, therefore, to examine the existing heads of liability into which infringements of privacy could possibly be fitted so as to ascertain whether or not they are adequate.

Trespass

33. There are three forms of trespass:

(a) *Trespass to land*—available where there is any unauthorised entry upon land or premises in the possession of the plaintiff.

(b) *Trespass to chattels*—available where there is unauthorised interference with chattels in the possession of the plaintiff.
(c) *Trespass to the person*—available where there is an unauthorised physical interference with the plaintiff's person.

34. Trespass was one of the earliest of English remedies and its scope today is limited because of the historical development of the old forms of action. An important limitation is that the interference with the plaintiff's interest must be direct: there must usually be some *physical* contact with the plaintiff or his property. A further limitation is that, with the first two forms of trespass, the plaintiff can only bring an action if he is entitled to possession of the land or chattels.

35. Because of these limitations, trespass does not provide a remedy for many infringements of privacy. Thus, the owner-occupier or tenant of a house can sue intruders for trespass to land, but the hotel guest, lodger or patient in hospital cannot. In addition, trespass does not cover the many other forms of intrusion which are less easy to detect but which are often more damaging. There is no civil remedy in trespass against someone who uses binoculars or a telescopic camera to spy from anywhere outside the plaintiff's property. (There may be some protection where the spy is on the highway adjoining the plaintiff's property, since the latter may also be the owner of the sub-soil beneath the highway; thus an action in trespass might be brought on the ground that the highway was not being used for lawful purposes (*Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142), but this remedy is of little practical use.)

36. If someone places a microphone or other surveillance device in someone else's house, there will usually be an unauthorised entry into that house, which will constitute a trespass. But where the listening device is placed in an hotel room so as to listen to the private conversations of a guest, the only person able to sue in trespass would be the hotel owner, who has " possession " of the room in law. If he was a party to the plot, no action for trespass will lie against anyone. Moreover, an increasing number of surveillance devices can be used without any physical entry.

37. Trespass to chattels will lie, irrespective of an unauthorised entry on land, where there is an unauthorised search or inspection of correspondence or other confidential documents to the possession of which the plaintiff is entitled. Once again, there must be some physical interference with the chattels, and the plaintiff will have no cause of action if the documents happen to be in the lawful possession of a third party at the time.

38. Trespass to the person is available to plaintiffs in straightforward assault and battery situations. Thus, the unauthorised search of a person will give rise to a cause of action. Often, however, a person may consent reluctantly to being searched, even though there is no duress in law, to avoid greater embarrassment and inconvenience. Thus, where the manager of a store who has no right to search a customer offers him the alternative of being searched or reported to the police for theft, an action in trespass is unlikely to succeed. Likewise, an employee will usually have no remedy if he is searched at the request of his employer unless the search was carried out in circumstances carrying a defamatory implication. Because of the necessity of physical contact, shadowing and following a person will not give rise to an action in trespass.

39. The law of trespass is, therefore, inadequate in many ways to protect the various forms of intrusion which now occur and which have multiplied as a result of the development of modern technological devices.

Nuisance

40. The tort of nuisance is committed where there is an unreasonable interference with the use or enjoyment of land resulting in damage. Some infringements of privacy are actionable under the nuisance rubric. Thus, if a debtor is unreasonably hounded with telephone calls at his home, or if a neighbour persistently dials the plaintiff's telephone number in the middle of the night, an action in nuisance may lie. But there are many more cases where the nature of the tort makes this remedy unavailable. As in trespass, the plaintiff must usually have an interest in land as a pre-requisite to his action, and if the plaintiff has no interest in the land, he cannot sue (*Malone* v. *Laskey* [1907] 2 K.B. 141). The "peeping Tom" is unlikely to be liable in nuisance (although this is arguable since watching and besetting premises from a highway has been held to be a private nuisance in an old trade dispute decision (*Lyons* v. *Wilkins* [1899] 1 Ch. 255)).

Defamation

41. An action in defamation lies wherever a person can show that a statement has lowered his reputation in the eyes of right-thinking members of the community or has exposed him to hatred, ridicule or contempt or caused him to be shunned or avoided.

42. Many infringements of privacy fit within the framework of defamation, provided they involve a "publication." Although exemplary damages are now only awarded in rare cases (*Rookes* v. *Barnard* [1964] A.C. 1129) aggravated damages of considerable size may still be given. A typical privacy action within the framework of defamation proceedings was *Fry* v. *Daily Sketch, The Times,* June 28, 1966, where the plaintiff received on settlement of libel proceedings substantial damages in respect of two articles about her marriage which gave the impression that she was "so lacking in sensitivity, dignity and reserve," that she was prepared to authorise the publication of "intimate, private and confidential information affecting her marriage and her family." In that case the plaintiff had also been subjected to persistent telephone calls and banging on her front door.

43. Defamation may also be an appropriate remedy where a person has suffered damage as a result of inaccurate statements about his creditworthiness. The position is complicated with regard to agencies or trade protection societies carrying on the business of collecting information about the credit and financial standing of people and selling it to others. Here "the law has to steer some middle course between allowing third persons to help a tradesman to protect himself against dealing with insolvent persons and 'safeguarding commercial credit against the most dangerous and insidious of all enemies—the dissemination of prejudicial rumour, the author of which cannot be easily identified, nor its medium readily disclosed.'" (*London Association for Protection of Trade* v. *Greenlands* [1916] 2 A.C. 15 at 26, *per* Lord Buckmaster, cited in *Winfield on Tort,* 8th ed., p. 312.) The law is not settled, but it appears to allow the defence of privilege to a mutual protection association which has been formed to protect the members of that association where inquiries are made of persons with whom they are about to deal; but it does not

allow such a defence to credit agencies which are prepared to inquire about, or sell their information to, any person (*London Association for Protection of Trade* v. *Greenlands, supra; cf. Macintosh* v. *Dun* [1908] A.C. 390).

44. There are, however, several major areas where defamation is unlikely to protect invasions of privacy:

(a) *The unnecessary and unreasonable disclosure of embarrassing private facts about the complainant.* There is nothing in the civil law of defamation to prevent the past being resurrected to the detriment of a man and his family, however personal this information may be. Justification is a complete defence to a civil action in defamation. Thus, if a person out of malice ruins another's career by disclosing an unsavoury incident—however private—in which he was involved thirty years earlier, the truth of the disclosure will be a complete answer to an action in defamation.

Moreover (since the Civil Evidence Act 1968, s. 13), the fact of a *criminal* conviction is conclusive evidence in subsequent civil proceedings for libel or slander that a person committed such offence. In theory a prosecution for criminal libel will lie, notwithstanding the truth of the defamatory statement, unless the defendant can prove that the publication was for the public benefit. The essence of such a crime is however that the words complained of are calculated to provoke a breach of the peace. "There ought to be something of a public nature about a libel" to justify criminal proceedings,[1] and prosecutions are in fact very rare.

(b) *The unauthorised use of a person's name, identity or likeness.* Such practices are frequently to the financial advantage of the offender and to the financial detriment of the plaintiff. In some situations an action in defamation may lie. The leading case is *Tolley* v. *Fry* [1931] A.C. 333: Messrs. Fry, the well-known chocolate manufacturers, published as an advertisement a caricature of Mr. Cyril Tolley, a well-known amateur golfer, without his consent, depicting him as playing golf with a packet of their chocolates protruding from his pocket. A caddie was represented with him who also had a packet of chocolates, the excellence of which he likened, in a limerick, to the excellence of the golfer's shot. An action for libel was upheld by the House of Lords on the basis that there was an innuendo that Tolley, an *amateur* golfer, had prostituted his amateur status by allowing his likeness to be advertised for financial gain, thus being guilty of conduct unworthy of an amateur golfer. No such innuendo would have been possible had Tolley been a *professional* golfer, and no remedy in defamation would then have been available, yet the infringement of Tolley's privacy would have been virtually the same. In another advertisement case, *Blennerhassett* v. *Novelty Sales Services Ltd.* (1933) 175 L.T.J. 393, the plaintiff was unsuccessful.

(c) *The defamation of the dead.* There is, in general, no civil remedy when information is published about a deceased person, whether that information be true or false. Living relatives cannot complain that they have suffered embarrassment or loss, unless they can show that by innuendo they themselves have also been defamed. In a recent adjudication the Press Council criticised *The Sunday Times* for falsely stating that Mr. Le Roux Smith Le Roux committed suicide. Although this caused considerable distress to his widow, she had no legal redress. Similarly, there

[1] *Per* Lord Coleridge C.J. in 86 L.T.J., p. 300.

have been many criticisms concerning statements about recently deceased public figures. In such cases considerable distress may have been caused to surviving relatives, but no action could be brought either on behalf of the estates of these men, or by the relatives themselves.

Copyright

45. Copyright law can sometimes protect individuals against unwanted intrusion into their affairs. In *Williams* v. *Settle* [1960] 1 W.L.R. 1072 the defendant was a professional photographer who had been engaged to take photographs at the plaintiff's wedding. Some time later, the plaintiff's father-in-law was murdered and two newspapers, seeking a story, persuaded the photographer to sell them a picture of the wedding group. This picture was published, causing considerable distress to the plaintiff and his wife. In an action which, in America, would have been a privacy action, the plaintiff succeeded in England on the basis of breach of copyright. Further, exemplary damages were awarded, since these are expressly authorised by the Copyright Act 1956.

46. Such a remedy depends, however, on the copyright being vested in the plaintiff. Thus, the wife and other members of the wedding group would not have been able to sue; nor, too, would the plaintiff had he signed the now prevalent contract form which vests the copyright in the photographer.

Passing off

47. A remedy in passing off may be available in certain cases where there is unfair business competition. A person is liable for this tort " if in the course of selling or offering for sale his goods or services in an area where he and the plaintiff are business competitors he represents them as being those of the plaintiff in a manner calculated to deceive members of the public into thinking that the goods or services are those of the plaintiff or of a group to which the plaintiff belongs" (Street, *Torts*, 4th ed., p. 367).

48. The remedy is relevant in those situations (frequently regarded as privacy situations) where a person appropriates, for his own advantage, the plaintiff's name or likeness. The scope of the remedy is, however, very limited: it is available only to persons engaged in business and the businesses have to be in some common field of activity. In *Sim* v. *Heinz* [1959] 1 W.L.R. 313 the court was not prepared to grant an injunction to a well-known actor to restrain another from imitating his voice, without permission, in a television commercial. In certain circumstances there may be a remedy under section 43 of the Copyright Act 1956 for false attribution of authorship, but this is unlikely to be of much avail in privacy situations.

Contract

49. Where a complainant can show that there is a contractual relationship between himself and the person whom he claims to have interfered with his privacy, it may be possible to bring an action for breach of an express or implied term of the contract. Thus (quite apart from copyright) there are several reported decisions where photographers have been restrained from using the portrait of a client for advertising purposes on the grounds that this would constitute a breach of an implied term

in the contract. Contracts of employment (especially those involving confidential posts) frequently prohibit the disclosure or use by the employee of trade secrets, names of customers and other confidential information, but such contracts do not as a rule give any protection to the employee in regard to the disclosure by the employer of polygraphic (lie detector) or personality test records.

Wilful infliction of physical harm

50. In *Wilkinson* v. *Downton* [1897] 2 Q.B. 57 the defendant, as a practical joke, told the plaintiff that her husband had been badly injured in an accident. Believing this to be true, she suffered nervous shock resulting in serious physical illness, and was held to have a cause of action against the practical joker. There has been no further development of this doctrine towards a general right of privacy.

51. The same principle was upheld by the Court of Appeal in a privacy-type situation in *Janvier* v. *Sweeney* [1919] 2 K.B. 316: the defendants, who were private detectives, told the plaintiff that unless she procured certain letters of her mistress for them, they would disclose to the authorities that her fiancé, an internee during the First World War, was a traitor; they knew that they had no such evidence. She recovered damages for the physical illness brought on by the nervous shock occasioned by the defendants' conduct.

52. The principle of these cases is that a wilful act (or statement) which causes physical harm is an actionable wrong. The necessity of proving actual damage often defeats the plaintiff. This difficulty also exists in nuisance and negligence.

53. Although the principle established by these cases is relevant to offensive and unwanted importuning and intrusions into a person's private life, it has been applied only to cases of nervous shock resulting in physical illness, and so would not apply to the many outrageous intrusions upon a person in his private life, home, family and correspondence, which, though offensive and humiliating, may not produce any physical harm.

Breach of confidence

54. (a) *Abuse of private confidence.* In *Gee* v. *Pritchard* (1818) 2 Swan. 402 the plaintiff obtained an injunction to prevent the defendant from disclosing confidential and private material contained in letters (which had already been returned to the plaintiff but of which the defendant had kept copies) written by the plaintiff to the defendant on the ground that the plaintiff had a right of property in the letters. This case has been used extensively in American courts in privacy cases.

55. (b) *Abuse of commercial confidence.* Cases where photographers have been restrained from making improper use of customers' photographs have been decided not only on the grounds of copyright or breach of contract, but also on the ground that there was a breach of confidence (*Pollard* v. *Photographic Co.* (1888) 40 Ch.D. 345; *Stedall* v. *Houghton* (1901) 18 T.L.R. 126; *Prince Albert* v. *Strange* (1849) 1 Mac. & G. 25). It is said that an injunction is only available where there is a violation of an enforceable right (*e.g. Day* v. *Brownrigg* (1878) 10 Ch.D. 294; *Cowley* v. *Cowley* [1901] A.C. 450). In the field of industrial property it has been stated that " the 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, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights." (*Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co.* [1963] 3 All E.R. 413n. at 414, *per* Lord Greene M.R.) Damages have also been awarded in a recent case where the defendants, although acting honestly and without any conscious plagiarism, made use of information which had been given to them by an inventor in confidence and which was not available to the public (*Seager* v. *Copydex* [1967] 1 W.L.R. 923).

56. (c) *Abuse of marital confidence.* The availability of the injunction may be seen from the recent decision in *Argyll* v. *Argyll* [1967] Ch. 302. There the Duchess of Argyll applied for an injunction to restrain her former husband from publishing confidential matters relating to their private life during their marriage. This claim, of course, dealt with an entirely different kind of confidential relationship from those already mentioned. The court held that confidential communications between spouses made during marriage are within the scope of the court's protection against breach of confidence. It was held, first, that a contract or obligation of confidence need not be expressed but can be implied; secondly (following *Prince Albert* v. *Strange*), that a breach of confidence or trust or faith can arise independently of any right of property or contract; and, thirdly, that the court in the exercise of its equitable jurisdiction can restrain a breach of confidence independently of any right at law. The injunction in that case was granted both against the husband and against the third party publishers.

Negligence

57. The action in negligence is now the most important general remedy in the law of torts. It is the successor to the action on the case in that most remedies for unintentional conduct which have developed in the twentieth century have developed through the medium of the tort of negligence.

58. It is true that many, if not most, complaints about intrusions into privacy concern intentional conduct. However, where legitimate complaints exist as a result of unintentional but negligent activity it may be possible on occasions to sue for damages in negligence. Thus, in a New Zealand case (*Furness* v. *Fitchett* [1958] N.Z.L.R. 238), a doctor was held liable to a wife who suffered nervous shock as a result of his giving an *accurate* certificate of the wife's condition to her estranged husband, which was used in court proceedings.

59. The courts in recent years have begun to develop a general remedy for careless statements giving rise to damage, even of a purely financial nature (*Hedley Byrne* v. *Heller* [1964] A.C. 465). Before a person can sue he must show that he and the maker of the statement were in some special relationship which justified him in relying on the accuracy of the statement. This legal development, however, does not yet provide a remedy for a person about whom erroneous information is given. Thus, if A makes an unsolicited non-defamatory remark to B about C's private life, resulting in B's refusal to give C a job, C in general will have no remedy.

60. Negligence has developed rapidly in recent years, particularly in the area of economic damage, and the courts might conceivably use this tort as an additional weapon against unintentional but negligent intrusions into privacy. However, once again actual physical or economic damage is a necessary element of any claim.

Indirect protection through legislation—Specific provisions

61. There are examples of statutory provisions both ancient and modern which make certain kinds of intrusion into privacy criminal offences. They are few and sporadic, as may be seen from the following examples.

62. The Justices of the Peace Act 1361 enables eavesdroppers and "peeping Toms" to be bound over to be of good behaviour, and this procedure is still in use. Whilst this Act might cover the use of a telescopic lens, it is unlikely to cover the use of electronic devices.

63. The Conspiracy and Protection of Property Act 1875 prohibits a person from watching or besetting a house or other place where a person resides or works. The Act is so worded, however, that it cannot be invoked unless the object of the watching or besetting is to force somebody to do or abstain from doing something. It has little connection, therefore, with infringement of privacy.

64. We have already seen that persistently ringing a person on a telephone may in some circumstances be actionable as a nuisance if it interferes with the enjoyment of the plaintiff's land. It is also a criminal offence under section 66 of the Post Office Act 1953, punishable on summary conviction with a fine of up to £10 and/or imprisonment of up to one month.

65. There are other criminal provisions relating to postal, telegraphic and telephonic communications. Under section 1 (1) of the Wireless Telegraphy Act 1949 it is an offence to instal any apparatus for wireless telegraphy except under the authority of a licence from the Postmaster General. Section 19 (1) interprets "wireless telegraphy" as "the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electro-magnetic energy." Accordingly, devices using wires fall outside the provision. Moreover, there is nothing to prohibit the possession or sale of such devices, nor is there any provision for a civil remedy.

66. Under section 58 (1) of the Post Office Act 1953 an officer of the Post Office is guilty of an offence if he opens, wilfully detains or delays any postal packet (including a telegram).

67. In addition, under section 20 of the Telegraph Act 1868, "any person having official duties connected with the Post Office or acting on behalf of the Postmaster General who shall, contrary to his duty, disclose or in any way make known or intercept the contents of any telegraphic message or any message entrusted to the Postmaster General for the purpose of transmission" is guilty of an offence. It appears that this also covers a telephonic conversation. These offences, however, are limited to employees of the Post Office and, as is pointed out in the Law Commission Working Paper for the Oxford Seminar, are less directed to the privacy of the communications concerned than to other circumstances. As that Paper pointed out, the most important gap in legal protection under

this heading concerns the tapping (as distinguished from malicious damage to or obstruction) of telephonic communications. It drew attention to the Report of the Committee of Privy Councillors appointed To Enquire Into The Interception of Communications which conceded (1957 Cmnd. 283) that tapping of telephones can be carried out without the commission of trespass upon private or Crown property and suggested that Parliament might wish to consider whether legislation should make the unauthorised tapping of a telephone an offence.

68. Under section 5 (*b*) of the Wireless Telegraphy Act 1949 " any person who uses any wireless telegraphy apparatus with intent to obtain information as to the contents, sender or addresses of any message (whether sent by means of wireless telegraphy or not) which neither the person using the apparatus nor any person on whose behalf he is acting is authorised by the Postmaster General to receive " is guilty of an offence. The Working Paper took the view that this provision, although primarily directed to the interception of confidential wireless messages, has a wider application. To the extent that it is technically possible to pick up telephone conversations by wireless telegraphy apparatus (as defined in section 19 of the 1949 Act) it might fill some part of the gap detected by the Privy Councillors.

69. The Post Office (Data Processing Service) Act 1967 deals with the processing of data by computer and imposes an obligation of secrecy on post office personnel in connection with the provision of such services and facilities.

70. Comparable provisions may be found in tax legislation. Under the Income Tax Management Act 1964 revenue officials are required to make a declaration not to disclose information received in the execution of duties except for purposes of those duties or the prosecution of an offence relating to inland revenue or in such other cases as may be required by law. These obligations of confidence may be undermined by legislative provisions which are not brought to the attention of the general public. Thus, in the Finance Act 1969, ss. 58 and 59, the Board of Inland Revenue is authorised to disclose certain information in its possession to the Board of Trade, for statistical survey purposes, and to the Horserace Betting Levy Board for the purposes of assessment under the Betting, Gaming and Lotteries Act 1963. If this trend were to lead eventually to widespread exchange of confidential information between unconnected government departments, it would in our view be a matter for the most serious concern.

71. The Official Secrets Act 1911, as amended, deals with the unauthorised obtaining or disclosure of official information. Parallel with some of the developing civil remedies for unjustifiable interference with confidential information, it is arguable that the Theft Act 1968 makes it a crime to steal trade secrets or other confidential information. Section 4 (1) defines " property " to include " money and all other property, real or personal, including things in action and other intangible property." If the courts are prepared to classify private and confidential information as being " things in action " or " other intangible property " (a question upon which commentators are at present divided), then an effective criminal (though not a civil) remedy may exist.

72. The Rent Act 1965, s. 30, gives protection to all residential occupiers of property against unlawful eviction or harassment by any

person (not limited to the owner of the property) in order to induce them to give up occupation or to refrain from exercising any right or pursue any remedy. This provision, which was a consequence of the outcry against Rachmanism, is a very useful protection aaginst certain kinds of intrusion into privacy, but it is limited to activities connected with property rights, and does not extend the civil remedies in trespass (*cf. Perera* v. *Vandyar* [1953] 1 W.L.R. 672).

73. The Race Relations Acts 1965 and 1968 have introduced a host of new provisions against discrimination on the ground of colour, race or ethnic or national origins. Some privacy situations in the area of race relations could be within the scope of the Acts as, for example, where a person has suffered injury as a result of being harassed on racial grounds. Incitement to racial hatred is a criminal offence but, in the main, the onus has been placed upon the Race Relations Board to secure compliance with the statutory provisions and the resolution of any differences arising out of them. Where the conciliation procedure is unsuccessful the Race Relations Board may take civil proceedings; the claims may include an injunction and damages on behalf of an individual who has suffered loss.

74. The Theatres Act 1968 also introduces provisions about the public performance of plays and provides that the use of threatening, abusive or insulting words with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins shall be punishable by a fine not exceeding £200 or imprisonment not exceeding six months.[2]

75. The Dramatic and Musical Performers' Protection Act 1958 (as amended by the Performers' Protection Act 1963) makes it a summary offence knowingly to make otherwise than for private and domestic use any record or cinematograph film directly or indirectly from or by means of the performance of any actors, singers, musicians, dancers or other persons who play in or otherwise perform literary, dramatic, musical or artistic works without the consent in writing of the performers or to sell or let for hire or distribute for the purposes of trade any record or cinematograph film made in contravention of the 1958 Act as amended. Section 2 of the 1963 Act contains provisions dealing with the case of a record made outside the United Kingdom. This protection is confined broadly to those engaged in the theatrical and musical professions.

Indirect protection through legislation—Civil actions for breach of statutory duty

76. The disadvantage of criminal provisions from the point of view of the victim of the criminal offence is that he does not necessarily have a civil remedy for the damage he has suffered at the hands of the wrong-doer. The common law development of the remedy for breach of statutory duty has been slow and restrictive. In general, as most legislation is silent on this question, the action for breach of statutory duty has been held to be excluded, with the notable exception of the area of industrial safety legislation and, to some degree, the provisions in the Race Relations Act 1968, s. 19.

77. The only remedy a person will usually have against those who persistently disregard the criminal law is to seek an injunction (*Att.-Gen.* v. *Harris* [1961] 1 Q.B. 74).

[2] Theatres Act 1968, s. 5.

Proposals for legislation

78. Apart from the isolated criminal offences which we have mentioned, there is no legislation creating a general right of privacy. The Porter Committee on the Law of Defamation in 1948 touched upon this problem but, as it was outside its terms of reference, it made no proposals, although it expressed disapproval of any extension of *the law of defamation* to cover invasions of privacy.

79. Several attempts have been made to introduce legislation of a general nature. In 1961 Lord Mancroft introduced a Right of Privacy Bill in the House of Lords. The Second Reading was carried 74–21. Two judges, Lords Goddard and Denning, spoke in favour of the Bill, but Viscount Kilmuir L.C., speaking for the Government, opposed it. The Bill was withdrawn. In 1967, Mr. Alexander Lyon, M.P., a member of this Committee, introduced a Right of Privacy Bill in the House of Commons, which again did not become law.

80. In addition to these two Right of Privacy Bills, various other Bills have been sponsored from time to time in connection with various aspects of privacy. Thus, in 1950, a Liberties of the Subject Bill was introduced. In more recent years the rate of introduction of such Bills has accelerated (presumably as a result of the increasing urgency of these problems): the Unauthorised Telephone Monitoring Bill 1967; the Industrial Information Bill 1968; the Private Investigators Bill 1969; the Data Surveillance Bill 1969; Personal Records (Computers) Bill 1969. All this activity lends weight to the demand for legislation and the desirability of one comprehensive general measure.

Conclusions

81. Where an individual seeks redress for, or protection from, unwanted intrusions into his privacy, he cannot at the present time bring an action based squarely on the infringement of this interest. Instead he must find another cause of action, if he can, based upon the invasion of some other interest, such as interference with his person, his property or his reputation. Such remedies as do exist, therefore, are parasitic remedies. The possible claims are varied and scattered mainly through the range of tort law, but at present, even in this indirect way, there is no comprehensive protection.

82. The remedies needed by an individual may vary. He may require damages to compensate him for the physical or mental damage he has suffered; he may require damages for serious inconvenience or embarrassment; he may require an injunction or a declaration to put an end to certain types of intolerable activity; or he may require an account of the profits which someone else has unfairly made at his expense. There is no coherent judicial policy relating to these different remedies in the area of privacy.

83. The application of the criminal law is also haphazard. Criminal penalties relating to intrusions into privacy are to be found in several unrelated statutes. This may be unavoidable. However, the criminal legislation is not comprehensive. Further, little or no consideration has been given to the question whether statutes which impose criminal penalties ought also to give corresponding civil remedies.

84. The common law is developing and will continue to develop. There are indications that the development of a general principle is not beyond the power of the judiciary. Following the famous article by Warren and Brandeis ("The Right of Privacy" (1890) 4 Harv. L.R. 193), the American courts did develop a tort of privacy by relying extensively on early English authorities; also, both Lord Denning and Viscount Kilmuir, speaking during the debate on Lord Mancroft's Right of Privacy Bill, felt that the common law was capable of creating, and might eventually create, a right of privacy. (But even in the United States, it has been found necessary to supplement the common law principles by legislation in a number of states.) In paragraphs 119 to 121 of this Report we explain why we do not consider the possible further development of the common law as adequate to meet the existing problem. Moreover, since the creation of the Law Commission in 1965, there are signs that in areas where major decisions of principle are involved the courts are less willing to create new rights, on the grounds that Parliament is the better instrument for evaluating competing pressures.

85. *English law does therefore provide a remedy for some kinds of intrusion into privacy, but it is certainly not adequate to meet the activities of a society which is perfecting more and more sophisticated techniques for intrusion. The present law in the field of privacy is unco-ordinated and unsatisfactory, and a strong case in our view exists for the creation by means of statutory provision of comprehensive protection for the right of privacy.*

Chapter 5

THE PRESENT LAW IN OTHER COUNTRIES

86. The outline in this chapter of the law relating to privacy and its infringement in other countries embraces a brief examination only in three selected countries, namely, France, Germany and the United States. Protection of privacy is accorded to the private citizen in many other countries. The résumé set out below is therefore representative only.

France

87. As in the U.S.A. and Germany, the protection of privacy in France is the creation of case law. The general context in which it has developed is the set of judge-made principles called *droit de la personnalité,* which also includes the *droits moraux* of Continental copyright law; and the rubric under which it is usually discussed is *la vie privée* (*e.g., le droit au respect de la vie privée, la défense du secret de la vie privée*), which is also the term used in the French text of the Universal Declaration of Human Rights (Art. 12). There is, however, another term which is even more private: *la vie intime.*

88. There are two main legal foundations upon which the French protection of privacy is based:

(*a*) Article 1382 of the Civil Code, which reads:

> "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

This is the general basic provision upon which a large part of French tort law is based, covering in particular those areas which in English law are included in negligence and nuisance.

(*b*) Article 35 of the Press Law of July 19, 1881 (as amended on May 6, 1944), which provides, in part:

"La verité des faits diffamatoires peut toujours être prouvée, sauf:

(*a*) lorsque l'imputation concerne la vie privée de la personne;
(*b*) lorsque l'imputation se réfère à des faits qui remontent à plus de dix années;
(*c*) lorsque l'imputation se réfère à un fait constituant une infraction amnistiée ou prescrite, ou qui a donné lieu à une condamnation effacée par la réhabilitation ou la révision. . . ."

There are a number of other texts, also of importance, *e.g.*:

(*c*) Article 378 of the Criminal Code, which provides a strict enforcement of professional secrecy;
(*d*) Article 157 of the Criminal Code, which prohibits violation of the secrecy of correspondence;
(*e*) Article 184 of the Criminal Code, which protects the privacy of the "domicile."

89. The actual content of the *vie privée* which is to be protected has not been clearly stated in either legislation or case law, and the writers differ as to what should be included. There is a strong distinction made between private persons (*anonymes*) and persons in the public eye (*protagonistes de l'actualité*) and also between private life and public life, even though, as might be expected, the borderlines are not entirely clear.

90. The major part of the recent discussion in France has related to the sensational Press (*la fructueuse industrie de la scandale*), both in its writings and in its photographs, but especially the latter. There is now a well-established case law to the effect that a person has a right to control publication of a representation of his features, which has its origins in a decision of the Tribunal de la Seine in 1858 [1] prohibiting publication of a photograph of the actress, Rachel, on her death-bed. A public figure who has frequently in the past permitted indelicate photographs of her to be published in the Press is entitled to protection when photographed in her garden (the *Brigitte Bardot* case).[2] And even in public, such a personality, if snapped attending, *e.g.*, a wedding or first night, may forbid publication of the photograph; although, in the absence of express prohibition, consent will normally be presumed, in which case the only restriction is against photographing the subject in a moment of inattention so as to show him in a ridiculous or incongruous light.

91. Gossip and anecdotes about the private life of a person may not be published in the Press without the express consent of the subject, whatever may be the latter's general attitude to personal publicity (the *Marlene Dietrich* case).[3] Similarly, a novelist who builds a character on an actual, identifiable person may be liable to that person. On the other hand, a historian may portray the life of a contemporary person so long

[1] App., Paris, 16 juin 1858, [1858] 3 Dalloz Pér. 62.
[2] Seine, 24 novembre 1965, [1966] II J.C.P. 14521; *aff.*, App. Paris, 27 février 1967, [1967] Dalloz 450.
[3] [1955] I *Gazette du Palais* 396.

as his facts are properly documented and he displays objectivity. A film made on the life of an actual criminal will be free of liability so long as its facts are historically true, known to the public and have already been widely disseminated (Cass. civ. March 15, 1957).

92. The most recent book on *La Vie Privée et le Droit Moderne* (by Jean Malherbe) contains chapters on:

(a) Défense du secret de la vie privée, sub-divided into
  (i) Press,
  (ii) communications (letters, telephone and recordings), and
  (iii) medicine;
(b) Défense de l'honneur;
(c) Défense du nom et la choix du prénom;
(d) Défense du domicile; and
(e) La vie privée et la perte de l'emploi.

Of these, (e) would fall under labour law in England, and (c) partly is an unknown problem in England (lacking as we do any serious restriction on freedom of choice of Christian names) and partly would be included in defamation. The proposed draft articles for the new Civil Code (drafted in 1953) on Personality Rights (Arts. 148–165) are mainly concerned with disposal of part or whole of a person's body before or after death. Only three of the draft articles are relevant to a right of privacy: Article 162, which gives a property right in the use of a photograph to the person whose image it is; Article 163, which gives the writer of a letter an absolute right to prevent divulgence of its contents; and Article 165, which gives a remedy against any unlawful infringement of the personality.

93. On the whole, the French law protects privacy to a far greater extent than the recommendations which we make in this Report.

Germany

Civil Law

94. The protection of privacy in German law is based on a bundle of rights called "right of the personality" (*Persönlichkeitsrecht*). This right has been developed by case law from theoretical origins in the 19th century; but unlike the similar right in Swiss law, a right of personality was not included in the Civil Code of 1896.

95. The Federal Constitution (*Grundgesetz*) of 1949 included two relevant articles, however: Article 1 (1): "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority"; Article 2 (1): "Everyone shall have the right to the free development of his personality, in so far as he does not infringe the rights of others or offend against the constitutional order or the moral code."

96. A particularly important personality right sector is that covered by copyright, and indeed the Franco-German concept of *droits moraux* in copyright was developed by German writers (and French courts) within the context of the right of personality.

97. The gradual pragmatic development of personality right protection on the basis of Article 826 of the Civil Code ("one who intentionally damages another in a manner violating good morals (*gute Sitten*) is

obliged to compensate him for such damage") and of Articles 1 and 2 of the Federal Constitution led to the preparation by the Ministry of Justice in 1958 of a draft Bill. Although the Bill was not passed, it "represents as comprehensive a theoretical statement of the status of the right of personality in Germany as can be drawn from the cases."[4] We therefore think it useful to reproduce it here. Under the title "Draft Law for the Reform of the Protection of Personality and Honour in Private Law," it takes the form of amendments to the Civil Code, as follows:

Article 12

One who wrongfully injures another in his personality is obliged to abate the injury: this applies particularly in the cases of Articles 13 to 19. If further injuries are to be anticipated, the injured person also may sue for an injunction. Frictions which may reasonably be expected to be borne in everyday life are not included in this provision. [Paras. 2 and 3 give a right of action to surviving spouse and children, or certain other relatives, for thirty years after the death of the injured person.]

Article 13

[Injury to life, body, health or freedom of a person.]

Article 14

[Insult and defamation "the truth of which he is unable to prove."]

Paragraph 4 Subject to Article 15, a negative criticism concerning an accomplishment or the conduct of another and a demonstrably true factual defamatory assertion concerning another which someone makes before and disseminates to a third person is a wrongful injury within the meaning of Article 12 only if through form or circumstances the statement constitutes an insulting publication of contempt or if it injures the other in his personality in a manner which violates good morals.

Article 15

It is a wrongful injury within the meaning of Article 12 if, without authority, someone publicly makes or disseminates assertions of a factual nature concerning the private or family life of another. The communication is permissible if it serves the reasonable observation of a legitimate public or private interest.

It is a wrongful injury within the meaning of Article 12 if someone, without authority, publishes the confidential contents of letters or notes of a personal nature. The publication is permissible if the author, and in the case of letters also the recipient, have consented thereto or where it serves the reasonable observation of a legitimate public or private interest.

Press, radio and film observe a legitimate interest if, within the framework of their public duty, they inform the public or exercise criticism.

Article 16

[Taking another's name.]

[4] Krause, "The Right to Privacy in Germany—Pointers for American Legislation?" in (1965) Duke L.J. 481, 499.

Article 17

It is a wrongful injury within the meaning of Article 12 if someone publishes a picture of another without authority.

The publication is permissible if it involves

(1) pictures relating to current events;
(2) pictures of events or localities in which the person pictured is only a secondary object;
(3) pictures of assemblies, processions or similar public functions;
(4) pictures which were not made on the order of the person injured, if a serious interest of art or science justifies publication.

Even if the conditions of paragraph 2 are met, publication is not permissible if it violates a legitimate interest of the person pictured.

Aside from the cases listed under (1) to (3) in paragraph 2, it is a wrongful injury within the meaning of Article 12 if someone makes a picture of another against the other's discernible will or, by making a picture, injures a legitimate interest of the person pictured.

Article 18

It is a wrongful injury within the meaning of Article 12 if someone, without authority, records the spoken word of another by technical means or makes it publicly perceptible, whether directly or by technical means. The spoken word of another may be recorded or made publicly perceptible if the reporting of assemblies, processions or similar public events is involved. This is not applicable if a legitimate interest of the other is injured thereby.

Article 19

It is a wrongful injury within the meaning of Article 12 if someone, without authority, by use of a listening device or in similar manner procures for himself knowledge of statements of another that are not intended for him or of facts or events from the private or family life of another.

Article 20

[Right of reply.]

98. The Bill includes a number of other sections of a more technical nature, but which include:

Article 823 (1)

One who, intentionally or negligently, wrongfully injures another in his personality or who, intentionally or negligently, wrongfully injures the property or any other right of another is obliged to compensate him for the damage resulting therefrom.

Article 847

One who is injured in his personality may demand reasonable compensation in money for non-pecuniary damage, including satisfaction for humiliation suffered. This is not applicable to the extent to which a return to the situation that existed prior to the injury is possible and adequate, or to the extent to which the injured person

is given satisfaction by means other than money; furthermore, a minor injury is not contemplated here. The amount of compensation is determined in accordance with the circumstances of the case, particularly with regard to the gravity of injury and fault.

This right is not transferable and does not enure to the heirs, unless it has been recognised by contract or is pending in court.

99. Of the protection of particular interests, the following may be mentioned:

(a) *Publication* of a person's picture, unauthorised by the subject, may be prevented under the copyright law; unauthorised *taking* of such a picture may be actionable ((1957) 24 BGHZ 200—a surreptitiously taken photograph which, when published in a magazine, harmed the plaintiff's business by encouraging a public boycott).

(b) *Recording* of a private conversation is permissible only with the consent of *all* participants, except for cases of detection of blackmail and ordinary business messages ((1958) 27 BGHZ 284—where the defendant secretly recorded a private conversation with the plaintiff and subsequently used it in other litigation between them).

(c) *Confidential information* relating to private activities and private life is protected, including letters, diaries and other sources of such information.

(d) *Unauthorised use of a person's name or image* in advertisements or other trade publicity or for economic purposes is actionable.

Criminal Law

Defamation

100. Insults are penalised under Article 185 of the Criminal Code; and false allegations against the plaintiff's honour which the defendant knows to be false constitute a special offence under Article 187.

101. Ordinary defamation (Art. 186) may be met by the defence that the defamatory words are true, in all cases in which facts are involved. Case law qualifies this by a rule that the defendant must prove the truth of the defamatory words only, and may not offer proof of extraneous facts which go to show the plaintiff's unworthiness of legal protection of his honour. Even where truth cannot be proved a special defence of "legitimate interest" (Art. 193) is available, which includes the duty to supply information to the public by the Press, including cinema and broadcasting; this special defence is not available for incidents of strictly private life which do not affect the public interest in any manner.

Protection of private secrets

102. The following are punishable offences:

(a) Unauthorised opening of a letter or other sealed document addressed to or intended for another (Art. 299).

(b) Revelation by certain professional people (*e.g.*, doctors, lawyers, financial advisers) of information confided to them by their clients (Art. 300).

(c) Revelation of postal secrets by post office workers (Art. 354).

(d) Revelation of contents of telegrams and telephone conversations by post office workers (Art. 355).

Electronic surveillance

103. The use of wireless eavesdropping instruments without a permit is punishable under the Telecommunications Installations Act 1928 and the Ministry of Justice has stated that it does not intend to grant permits under that Act for the use of micro-eavesdropping equipment. In 1967 a statute was passed making it an offence to make any unauthorised recording of another's voice or to use such a recording; and in 1968 a further statute was passed prohibiting unauthorised wiretapping by private persons.

Summary

104. We do not think that we can do better in summarising the effect of German law than by quoting from Professor Krause's "The Right to Privacy in Germany":

> "There is in Germany today a court-made right to privacy that has been defined quite generously in terms of coverage. It provides an action for negligent as well as intentional invasions and allows damages for all harm, including mental distress. This right probably will eventually be codified and take a legitimate place in German law."

U.S.A.

105. The "right of privacy" in American law originated, as did the analogous French and German "right of personality," from theoretical writings (an article on "The Right to Privacy" in (1890) 4 Harv. L.R. 193 by Warren and Brandeis) and developed through case law, with some statutory assistance. By 1960, the cases were so numerous that Dean Prosser could classify the right of privacy into four separate torts, and these were taken up in the 1967 draft *Second Restatement of the Law of Torts.* We have already given this classification in Chapter 2, and we repeat it here, together with a very small selection of cases which fall roughly within each category:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs (*Restatement*: (a) unreasonable intrusion upon the seclusion of another). For example:

> *Olmstead* v. *U.S.*, 277 U.S. 438 (1928). During Prohibition, a federal agent tapped the telephone of a bootlegger. The latter sued for violation of the 4th Amendment (search and seizure), but the U.S. Supreme Court dismissed the claim since there had been no actual physical invasion of private property as the wires had been tapped from outside the premises of the plaintiff. (This decision has been widely criticised.)
>
> But where there is physical trespass, *e.g.*, with a "spike mike" (*Silverman* v. *U.S.*, 365 U.S. 505 (1961)), or the listening device is stuck into a wall merely to the depth of a drawing pin (*Clinton* v. *Virginia*, 377 U.S. 158 (1964)), there is an invasion of privacy.
>
> *Roach* v. *Harper*, 143 W. Va. 869, 105 S.E. 2d 564 (1958). A landlord installed a listening device in his tenant's apartment and listened in on the tenant's confidential conversations, but did not publish them and the tenant suffered no special damage. Held: There was an invasion of privacy, since the injury lay not in publication but in the intrusion itself. The same conclusion on similar facts was reached by the New Hampshire courts in *Hamberger* v. *Eastman*, 206 A. 2d 239 (1964).

2. Public disclosure of embarrassing private facts about the plaintiff (*Restatement*: (c) unreasonable publicity given to the other's private life).

3. Publicity which places the plaintiff in a false light in the public eye (*Restatement*: (d) publicity which unreasonably places the other in a false light before the public). For example:

Melvin v. *Reid,* 112 Cal. App. 285 (1931) (the "*Red Kimono*" case). The plaintiff, a former prostitute, had been acquitted of a murder, and subsequently had reformed and lived an exemplary life. Seven years after the trial, the defendants made a film which was advertised as being based on the plaintiff's life. Held: There had been an invasion of privacy and the defence of news reporting and use of a public personage was dismissed.

Cason v. *Baskin,* 155 Fla. 198 (1944), 159 Fla. 31 (1947). The author of a best-selling novel was sued on the ground that the plaintiff's right of privacy had been invaded by the similarities between her and one of the (favourable) characters in the novel. The Florida Supreme Court held that there had been an invasion of privacy, but no damages would be awarded because the plaintiff had suffered no mental anguish that injured her health.

Koussevitsky v. *Allen,* 188 Misc. (N.Y.) 479 (1947), affirmed 272 App. Div. (N.Y.) 759 (1947). A biography of the conductor K. was published against his objections. Held: K's achievements as a musician made him a public figure, and anyone could freely write a biography about him and his career; but a novelised portrayal of him would have been an invasion of privacy.

Time Inc. v. *Hill,* 385 U.S. 374 (1967). The Hill family had been held captive in their home for nineteen hours by three escaped convicts. The following spring, a novel based upon this incident was published, and it was followed by a film and a play (both presented as fiction). *Life* magazine, two-and-a-half years after the event, published an article in connection with a production of the play in which it wrongly suggested that the play was based on the Hills' experience. The latter sued for invasion of privacy and the New York Court of Appeals held that there was invasion because (1) the article was outside the scope of the "newsworthy" privilege, because the Hill incident was no longer a matter of public interest, (2) the article was commercially motivated [this was relevant because of the narrowness of the New York privacy statute], and (3) the article inaccurately identified the Hill incident with the plot of the play. The U.S. Supreme Court reversed the judgment on the ground that the defendant, to be liable, must have knowingly published a false report or acted in reckless disregard of the truth (neither of which had been proved in the instant case); mere negligence was not enough.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness (*Restatement*: (b) appropriation of the other's name or likeness). For example:

Roberts v. *Condé Nast Publications Inc.,* 286 App. Div. 729, 146 N.Y.S. 2d 493 (1955). The plaintiff, in the course of a public speech, praised an article in a magazine; the publisher of the magazine thereupon mailed out postcards quoting (accurately) the

praise and attributing it (correctly) to the plaintiff, who sued for invasion of privacy under the New York privacy statute which provides that no person's name can be used "for advertising purposes or for the purposes of trade" without written consent. The court held that the publicity amounted to an invasion of the plaintiff's privacy under the statute.

106. Of these four categories, (2) and (3) are primarily concerned with the Press (the sole ground of complaint in the minds of Warren and Brandeis in 1890) and have a quasi-defamation character; (4) is quasi-copyright in character; and (1) is quasi-trespass in character. In spite of the uneven growth and development of the law of privacy in the U.S., the bounds of the rights have been relatively easy to determine.

107. On the whole, the development of the "right of privacy" in this way has been piecemeal and fragmented, and has proved difficult to adapt to new situations. This is exemplified by the failure (in the *Olmstead* case in 1928) to apply the law of privacy to wiretapping. Professor Westin (in his major survey of the problem in *Privacy and Freedom*) pinpoints the following areas in which the American "right of privacy" provides insufficient protection, either in law or in practice (apart from the problem of control of invasions of privacy by public officials):

(1) polygraphing (lie detectors) and personality tests, mostly by prospective employers;
(2) data surveillance through the increased computerisation of government and private records (banks, credit companies, employers, insurance companies, etc.);
(3) electronic surveillance and telephone tapping where there is no physical trespass, by public officials, especially police, and by private bodies or persons.

CHAPTER 6

IS LEGISLATION NECESSARY?

108. It is clear from the relevant branches of the law of England which we have briefly summarised in Chapter 4 that the law is inadequate to deal with many cases of infringement of privacy, a number of which, for a variety of reasons, are of recent origin. In Appendix C to this Report we have given a few examples. Although they are hypothetical, they are realistic in the sense that any of them could happen today. As the law now stands, the persons injured in the examples would have no remedy, nor would those who have infringed their privacy have committed any criminal offence or civil wrong.

109. However, the fact alone that there is an area of mischief for which at the present time the law provides no remedy is not enough by itself to make out a case for present legislation: it must be shown in addition that the mischief is substantial, that it will persist, and that legislation is the only practicable answer to the problem. *We have come to the conclusion that all these conditions apply and that a strong case has therefore been made out for legislation.* In the rest of this chapter, we set out the reasons for this conclusion.

110. First, we are satisfied that the mischief is substantial and is growing. This is due in the main to the advance of technology. Privacy has been infringed as long as man has lived in society; in every community, there have always been eavesdroppers, gossips and peeping Toms. But, until very recent times, the physical means of infringement available to these have been our natural senses, apparatus with which we are all familiar and against which we know instinctively how to protect ourselves. The arrival of advanced electronics, microcircuits, high-definition optics, infra-red film, and the laser beam, have changed all this.[1] The ordinary man today can no longer ascertain by ordinary means whether or not he is being watched or overheard: only expensive experts wielding expensive and complicated equipment can tell him with any useful degree of certainty. A crucial feature of such developments is that many of these devices give the opportunity of intrusion without any infringement of the existing law.

111. We have ourselves inspected a number of the more sophisticated spying devices which are in use today, and had them demonstrated to us by experts. We are satisfied that they do everything which even the most lurid accounts in the popular Press about "bugs" claim for them. A sufficiently skilful and determined spy has the means today of listening to almost every conversation which his victim has in his own house or elsewhere, over the telephone or face to face. In addition—though at the present time still subject to some slight technical limitations—he can arrange visual surveillance by day or night, in light or in darkness, and make a still or moving film of what he sees. Short of tearing his house and office to pieces and having sophisticated detection equipment, and the skill necessary for its use, at his disposal, the victim has no means of knowing whether such surveillance is taking place.

112. In this area alone, therefore, there has been a fundamental change in the nature of the mischief. Moreover, the pace of development in technology has been brisk and continues to accelerate. The transducers, amplifiers, transmitters, receivers and recorders available to the spy become constantly smaller, cheaper and more efficient. Both the auditory and visual devices benefit continuously from the rapid advances being made in research and development in the fields of electronics and optics, and there is no reason to think that this trend will not continue.

113. In the next area, that of the collation as opposed to the collection of private information, a radical change in the mischief is imminent. Until quite recently, the task of building up a coherent picture of someone else's private life without his consent has been one requiring so much time and effort as to deter all but the most determined. Regular physical surveillance; interviews with reluctant acquaintances, tradesmen, employers, landlords, painstaking research in public records and elsewhere; months, if not years, of single-minded effort were required to piece together the manner of a man's life from the traces which he leaves behind as he moves through his world.

114. With the advent of the electronic computer, all this information—and much more—can be made available in seconds to anyone who has access (lawfully or otherwise) to the right buttons and knows in what

[1] We include a description of some types of surveillance devices already perfected and under current development in Appendix D to this Report.

order to push them. A man's complete bank statements over many years will occupy a few feet of magnetic tape on one reel, his income tax returns a few inches on another, his hire-purchase acquisitions will be available on a third and his credit card transactions on a fourth.[2] Within a few seconds, all these can be printed out for easy inspection, and between them they will not only give the clearest picture of every aspect of the subject's financial affairs, but will even show how many people he entertained at what restaurant on what day. Other segments of magnetic tape may hold all the details of his insurance policies and membership of associations, and as more and more organisations begin to use computers it will not be long before full records of his education, his driving convictions, his telephone calls, and eventually his political affiliations and his medical history, will be held on computer files. Once there, the right push on the right button will produce them in clear and legible form.[3]

115. The third area of infringement of privacy is the publication of private material. Here also, the dimensions of the mischief have changed in parallel with the change in the nature and scale of the media of publicity. The piece of gossip which, at one time, might at worst have given rise to the odd paragraph in a journal with a modest readership can now span the world in seconds by teleprinter, radio and television. The audiences of press and broadcasting are today numbered in millions, to all of whom some distressing piece of private information can be purveyed in a flash.

116. *We conclude, therefore, that the mischief is substantial and growing.* It is substantial because we have already achieved technical possibilities which were never contemplated by the common law and against which the private individual cannot effectively defend himself. It is growing because technology always advances, and the fields with which we are concerned happen to be the ones in which it is advancing faster than elsewhere at the present time.

117. The remaining question, therefore, is whether legislation is the only practicable answer. Other than legal remedies, we know of no weapon which could give the ordinary man an effective protection. There is, therefore, no alternative to legislation unless it is argued either that no protection is necessary, or that the law as it stands already provides it.

118. To argue that no protection is necessary is tantamount to arguing that we must accept stoically all the changes for better or for worse which follow from advances in technology or changes in the structure of society; as we have to live with exhaust fumes and the jet aeroplane, so we must learn to live with the hidden microphone, the telephoto lens and the data bank. For ourselves, we disagree fundamentally with this attitude. If technology is to remain the servant of man rather than his master, we must limit its application to those areas where we choose to use it to enhance the quality of our lives, and exclude it from those areas where we regard it as harmful. Indeed, the more deleteriously the quality of our lives is affected by those side effects of technological developments which we have chosen to accept, the more important appears to us the continued effort necessary to preserve the humane quality of our lives from avoidable

[2] The methods of collection, collation and supply of credit data information and their dangers are described briefly in Appendix H.

[3] For an outline of the dangers to privacy from computers, see Appendix E.

encroachments. *Accordingly, we are satisfied that protection for the ordinary man is necessary.*

119. It is argued by some that the common law is capable of further development if only plaintiffs and lawyers were ready to invoke it. There is some theoretical force in this argument. It is a fact little-known in England that the whole of the extensive law of privacy which has been developed in the U.S.A. has its roots, indirectly, in the common law of England. As we have already had occasion to mention in Chapter 5, the history of the "right of privacy" in the U.S.A. began with the publication, in the *Harvard Law Review* of 1890, of the classical paper by Warren and Brandeis, in which they argued that a right of privacy existed in the common law of England, citing in support of their thesis the leading English case of *Prince Albert* v. *Strange*,[4] and the earlier cases which this followed. The thesis gained acceptance in the courts of Massachussets, and in due course in many other American jurisdictions. Together with supplementary legislation in some states, it has led to the law of privacy which exists in the U.S.A. today.

120. If such a development has taken place in the U.S.A., why can it not take place here? In theory, we believe that it could, and our view has judicial support in the words of Ungoed-Thomas J., who is reported as saying:

> "If this were a well-developed jurisdiction doubtless there would be guides and tests to aid the court in exercising it. If, however, there are communications which should be protected and which the policy of the law recognises should be protected, . . . then the court is not to be deterred merely because it is not already provided with fully-developed principles, guides, tests, definitions and the full armament for judicial decision. It is sufficient that the court recognises that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction; and I have no hesitation in this case in concluding that publication of some of the passages complained of would be in breach of marital confidence." [5]

121. But the practical difficulties seem to us to be insurmountable. It is true that the essence of every invasion of privacy of this particular class is the obtaining or use by one person of confidential information (in the widest sense) relating to another, and there is a fairly highly developed law of "confidential information" to be found in our law reports. But, almost without exception, this has been developed in cases where the subject-matter has been a trade secret; it would take many cases dealing with "private" confidential information before this aspect of the matter could achieve an equally high degree of development. And, until there is a developed law, only the boldest of lawyers will advise and the boldest or richest of plaintiffs will launch, a civil action which may cost many thousands and take many years before the House of Lords finally decides that the plaintiff's case lay (for him) just the wrong side of the line. We believe that it is for this reason that, in the 117 years between *Prince Albert* v. *Strange* and *Argyll* v. *Argyll*, the law of privacy in England was given no opportunity to develop a detailed structure and clear lines of demarcation. The circumstances are different in the field of

[4] (1849) 1 Mac. & G. 25.
[5] *Argyll* v. *Argyll* [1967] Ch. 302.

trade secrets, where there is often more than enough money involved to balance the risk of losing the lawsuit. But, in the absence of a large class of rich private plaintiffs who feel strongly enough about their privacy—or a large class of very poor such plaintiffs, combined with abundant legal aid and enough bold lawyers—it seems likely that very many years would be required to bring the law of privacy in England to the point which it has reached in the U.S.A. today. And that, in our view, would be far too late.

122. Another advantage of legislation is that the law of privacy has tended to develop piecemeal, and not always very logically, in other jurisdictions. The U.S.A. is a good example, and its present system has come in for much criticism on this count. We should be able to learn from their experience and use it to introduce here a system which is both consistent and flexible, establishing principles which are both rational and reasonable, and yet leaving room for the courts to adapt them to changing circumstances, and also to the changing *mores* in our society.

123. A further argument in favour of present legislation comes from the field of what is commonly called "industrial espionage." This subject has given rise to increasing concern in recent years, and we have evidence to support the view, already held by many others, that these activities are increasing in this country at a rate which we regard as alarming.[6] Certainly, if the experience of the United States may be taken as a guide to the shape of things to come, legislation to cover this field merits urgent attention. As in the case of other infringements of privacy, we are satisfied that our law is at present defective in this field also. We think that general legislation to protect the right of privacy, in the form which we recommend, should be framed so as to include corporate as well as individual plaintiffs, and to include business affairs within the field of privacy. If this is done, a valuable legal remedy will be added to the defences against the industrial spy.

124. Finally, for reasons which we discuss in the next chapter, we consider that there are certain aspects of the protection of privacy which cannot be adequately dealt with except by the creation of criminal sanctions or other methods of control, and this, of course, cannot be done at all without legislation.

Chapter 7

WHAT PROTECTION SHOULD THIS LEGISLATION PROVIDE?

125. As we have shown, there is a strong case for the proposition that the individual is inadequately protected by our present law against many infringements of privacy. English law has not hitherto flinched from providing a remedy where an obvious wrong existed. Privacy has not so far been protected as such because, in a less sophisticated age, the protection of property and of reputation gave adequate redress. Unfortunately, at the same time as technological invention and modern commercial and social pressures created the means and the demand to intrude in greater measure, the English courts have tended to become more cautious about

[6] For a discussion of the scope of the problem, see Appendix G.

creating new law for changing social conditions on the grounds that Parliament is the better instrument to evaluate the competing pressures in a new situation.

126. If Parliament is now to tackle this growing social problem of intrusion into privacy, it must do so in a way which is effective but maintains a proper balance between the freedom of the individual to be left alone and the freedom of others to find out about him whatever they legitimately need to know. Neither freedom is absolute and both must continue to exist in a tolerant and sophisticated society. But the balance at present is provided only by the good taste of the intruder and his capacity to overcome any defences which the individual has been able to erect. *Our conclusion is that the balance is now unfairly weighted against the individual, and that a new legal structure is required so that a proper balance may be restored.*

127. One comes, therefore, to the question of choosing the best method of approach to legislation. This question has occupied a good deal of our time and we have considered various methods of approach.

(1) One approach would be to make the *minimum adjustments to the existing common law causes of action* necessary to extend their effect to the main types of privacy situation which are at present not covered. For example, the law of trespass could be extended so as:

(a) to apply to intrusive devices which do not involve physical entry; and

(b) to apply to persons in occupation but not in strict legal possession of premises, *e.g.* in hotel rooms.

Similarly, the law of nuisance could be extended to protect certain forms of interference with the enjoyment of privacy. Again, the law of defamation could be modified so as to apply to publications which are embarrassing even though not defamatory; to remove the defence of justification, save where publication was in the public interest; and to extend to defamation of the dead.

We have, however, rejected this approach as being somewhat artificial. It would mean that well-established and well-defined common law causes of action well adapted to their traditional roles would have to be extended, modified and even distorted to deal with situations of quite a different type. It was an objection of this kind which no doubt moved the Porter Committee on the law of defamation to regard the reform of the law of privacy as outside its terms of reference.

(2) Another approach would be to accept the task of creating a new cause of action for infringement of privacy, but to treat the matter *piecemeal* by reference to particular classes of case rather than as a whole. If one were to adopt this approach, the classification put forward by Dean Prosser could form a useful guide (see para. 17). Approached in this way the main part of the subject falls into three categories:

(a) The invasion of privacy, which consists in the use of offensive methods of obtaining information, *e.g.*, long-distance photography, bugging devices, or wire-tapping or besetting. Here the wrong consists essentially of wrongful intrusion into private situations.

(b) The wrongful use of private information by whatever means obtained. This aspect concerns the publication, for example, of

embarrassing facts of a private nature but of no real or legitimate public concern.

(c) The wrongful appropriation of a person's name or likeness for some commercial or similar purpose, without his consent.

This approach has certain attractions, but it is open to the objection that it endeavours to confine a wide subject within limited categories, which may not, in the course of time, prove sufficient. It also fails to recognise adequately that one principle should underlie all these different types of case.

(3) The third main approach is to create *a general right of privacy*, treating the matters in (2) above merely as examples of a general principle. This is the approach which on the whole we prefer, although it may give rise to some difficulties of definition and drafting. We have set forth in Appendix J of this Report a possible draft of a Bill designed to achieve this result.

128. It would seem that the principles which ought to determine the balance of the competing interests of the intruder and the individual are the same in any privacy situation, and that if Parliament can define them for one purpose it can define them for all. *We have, therefore, come to the conclusion that legislation ought to create a general right of privacy applicable to all situations, and that to allow flexibility in a changing society the language of such a statute must be general.*

Method of protection

129. Intrusion on privacy can be treated as an attack on property, as a tort or as a crime. Historically, the existing remedies in English and American law were closely related to the *protection of property*. Many of the American cases relate to the appropriation of another's name or likeness for financial gain. In England protection of confidential information has been dealt with as a question of property by the Chancery Division (*e.g.* in *Argyll* v. *Argyll* [1967] 1 Ch. 302). However, invasion of privacy is pre-eminently an affront to the feelings of the individual. Many of the " appropriation " cases are not obviously privacy cases, and most true privacy cases are not easily related to property. What offence to property is caused by snooping on a man's conversation with his mistress, asking embarrassing questions for a personality test, or disclosure of the name of a heart donor? *We feel that it would be artificial to create a right of property in such circumstances.*

130. Some attempt has been made in recent Private Members' Bills to prohibit certain forms of intrusion into privacy by *the criminal law, e.g.* wire-tapping or industrial espionage. Conduct of this kind is treated as a criminal offence in many other civilised countries, and it comes as a shock to many people that we do not already do the same. We think that there is a strong case for provisions of this kind but we do not think that criminal sanctions can be extended to cover more than certain specified, and peculiarly distasteful, *methods* of infringement. The individual is, however, concerned not only with the methods used to intrude upon his privacy, but also with the use which is made of the material obtained as a result. If a criminal prohibition is to be extended not only to the method of obtaining information but also to the use of the information obtained, it would be difficult to find acceptable criteria. Some people like to have their names in the newspapers; other object violently. Some

regard doorstep salesmen as a convenience; others as a nuisance. Reactions to invasions of privacy vary with the individual, and it would in our view be difficult to establish a sufficient consensus to justify criminal prohibition of all infringements of privacy.

131. We do, however, take the view that certain modern methods of infringement are so offensive, and so difficult to detect, that it is in the public interest to visit them with criminal sanctions. We have in mind particularly the many types of optical and electronic surveillance devices which are now freely available on the market, are in daily use, and against which the individual has virtually no protection.[1] We are impressed by the evidence which we have received to the effect that nothing less than the imposition of criminal sanctions is likely to deter their continued use.

Accordingly, we recommend that the use of any optical, electronic or other artificial device as a means of surreptitious surveillance should be made a criminal offence, with appropriate penalties, unless the user acts under the authority of a Secretary of State or a Chief Officer of Police.

132. The *use* of a wireless transmitter without the licence of the Postmaster General is already a criminal offence, but its possession or sale is not. Accordingly, all kinds of transmitter can be freely bought across the counter, although the buyer commits an offence the moment he uses it. Since the range of those most useful for electronic surveillance can be kept down to a few hundred feet, their use is unlikely to be detected. *We therefore recommend that the possession and transfer (whether by way of sale or otherwise) of wireless transmitters without a licence from the Postmaster General should be made a criminal offence.*

133. Since legislation on these limited subjects will need to be integrated with the existing Wireless Telegraphy Acts and allied statutes, we have not thought it right to include model provisions in the draft Bill [2] which we recommend to deal with the protection of privacy in general.

134. We also consider that certain aspects of industrial espionage [3] (quite apart from surveillance devices) may well require the imposition of criminal sanctions.

135. We have also come to the conclusion that quite apart from any general remedy for infringement of privacy it may be necessary to control by special legislation those modern computerised data banks which purvey personal information.[4] What appears to be required is a method of ensuring that the information they hold is accurate, that it is accessible only to those who are lawfully authorised to extract it, and that the individual to whom it relates can check it, correct it where necessary, and discover to whom it has been given. We have come to the conclusion that this subject requires early detailed examination. *Subject to this, our present view is that the necessary control can only be achieved by legislation of the kind exemplified by the Data Surveillance Bill* [5] *which was presented to the House of Commons in its last Session.*

136. The wrong of invasion of privacy in general, however, we think can be most easily assimilated into *the law of tort.* This is the area of

[1] See Appendix D.
[2] See Appendix J.
[3] See Appendix G.
[4] See Appendix E.
[5] May 6, 1969, No. 150.

the law designed to compensate the individual for harm done to him by other members of the community. Defamation, negligence, nuisance and trespass already overlap the area to be covered. The law of tort is already used to evaluate injury to feelings and to give appropriate remedies. The law of negligence, in particular, has been developed as a flexible series of principles easily adapted to different facts and different social conditions. We envisage the development of a law of privacy in a similar way. *We have therefore reached the conclusion and recommend that the right method of providing for the protection of privacy in general is the creation of a new statutory tort of "infringement of privacy".*

What should be protected?

137. Any such statute must begin by defining the area to be protected. As we have already said, privacy is more easily recognised than described. In the classic phrase of Judge Cooley, which we have already quoted, it is the right "to be let alone." The American *Restatement* (Chap. 42, para. 867) contains the following provision: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." The Right of Privacy Bill of 1967 defined it as "the right of any person to preserve the seclusion of himself, his family or his property from any other person." The Nordic Conference of 1967 defined it simply as "the right to be let alone to live one's own life with the minimum degree of interference."

In the form of legislation which we recommend, we have purposely used words which will enable the courts to decide whether there has been an infringement in each case having regard to all the circumstances. We consider it essential to preserve the same flexibility of interpretation of what is and what is not an infringement of privacy as the law provides for the court in the fields of defamation, nuisance and negligence. Thus we advocate legislation which will stand the test of time and meet its changing attitudes and conditions.

138. Clearly, however, there must be limits to the field of the individual's protection and the individual cannot be the sole judge of what he wants to keep private. The community has an interest in knowing something of his affairs for all kinds of valid reasons. *But in an increasingly sophisticated society like ours we think that the individual requires protection of his privacy, limited only by the legitimate demands of the rest of the community.* The burden of justifying incursions into the private life of another should therefore rest on the intruder. While defining a wide field, we have therefore sought to make actionable all infringements which are "substantial and unreasonable," and have provided specific defences for those intrusions which we regard as legitimate. The limitation provided by the words "substantial and unreasonable" is, in our view, of great importance and will operate not only to deter trivial claims, but also to enable the courts to sanction all infringements which, in the circumstances of the case, they regard as reasonable. The courts have shown in the past that this is a concept with which they are peculiarly well qualified to deal.

139. The Press must retain the freedom to educate, inform and even entertain society. But, like every other freedom, it is not inviolate; it must be balanced against competing freedoms. The test should be what is reasonably necessary in the public interest and these considerations

have been borne in mind in our recommendation for defences to an action for infringement of privacy.

140. We consider that any such limitation on the freedom of some is justified by the extension of freedom of others. The need was never stated better than by Warren and Brandeis in their seminal article in (1890) 4 Harv.L.R. 193:—

> "The intensity and complexity of life attendant upon advancing civilisation have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."

Defences

141. The paramount problem in providing a right to privacy is to know how far it should extend, and where the line should be drawn between permissible and impermissible infringements. As we have thought it best to state the right to privacy in general terms, it is necessary to provide specifically for defences to meet those situations where infringement of the right is justifiable, much on the lines of the existing defences in the field of defamation, so as to encourage the free exchange and publication of information in the public interest, however unpleasant the statements may be. *These defences must, in our view, provide for a degree of flexibility to avoid the growth of a technical area of law and, at the same time, make clear to everyone the boundaries of infringement of privacy within which he can safely collect and purvey information about others.*

142. In our opinion, provision should be made for the following defences:

(i) *Innocent infringement.* Although liability should exist if the intrusion is intentional (and most serious intrusions are of this kind), there ought to be protection for cases where infringement has been unwitting and without any lack of care on the part of the defendant. *We consider that a defendant should be allowed a defence to the effect that, although he used all reasonable care, he neither knew nor intended that his conduct would infringe any right of privacy.*

(ii) *Consent.* Where a person expressly agrees to any course of conduct which would prima facie involve an infringement of his right of privacy, then clearly the defence of express consent must be available. More important, perhaps, is the defence of implied consent. A person may not expressly authorise an infringement into his private life, but his behaviour may indicate his implied consent. Thus, a person who voluntarily answers the questions of a person he knows to be a Press reporter cannot, in the absence of special factors, be later allowed to complain if these answers are accurately recorded and commented upon in the Press. But implied consent may go much further. Whenever a person appears in public—in the street, at a sporting event, walking in the park—he exposes himself to the risk of unwanted publicity—he may appear in a television newsreel film accidentally as a pedestrian, or as a spectator at a televised sporting event; in all these cases it is arguable that by appearing in public he has impliedly consented to the everyday

consequences of being a member of the public. The implied consent may not extend, however, to all infringements merely because he is in a public place: an unauthorised close-up of a photographic study of a courting couple in a public park may be beyond the scope of the implied consent. Once again, these are matters of degree, and clearly for the courts to decide. It would be neither workable nor desirable to suggest precise criteria. *In our opinion, therefore, there should be a defence similar to the defence of* volenti non fit injuria, *namely, that the plaintiff either expressly or by implication consented to the infringement.*

(iii) *Public interest.* This covers one of the most important aspects of an action for infringement of privacy. As in defamation, it is necessary in the public interest for people to know and comment about others. The Press, above most, has the duty to seek out information, to inform and to comment. The risks which the Press and other purveyors of news and comment run in defamation are reduced by the defences of justification, fair comment, absolute and qualified privilege, and we consider that a defendant, whether the Press or not, should be entitled to plead to a claim for infringement of privacy that the publication, whether of fact or comment, was in the public interest. Similar provision will be found in the legal codes of the most advanced European countries and has the merit of enabling, in particular, newspapers to publish facts, however unsavoury, where it is in the public interest to do so, but not to publish material which infringes the privacy of private individuals where it is unnecessary in the public interest. No doubt difficult questions will arise, as they do now in the field of defamation. If it is in the public interest to record the criminal conviction of a public figure at the time of the trial, is it in the public interest to mention it again three months later, three years later, thirty years later? Is it in the public interest to disclose that a politician was expelled from school years ago for cheating? Is it in the public interest to disclose the indiscretions of the dead and humiliate and damage their living relatives? It is possible to provide for these situations as some other countries have done. Thus, it may be possible to make actionable the disclosure of events of a person's private life which occurred more than five, or ten, years earlier. It would be possible to make specific provisions for many such situations. However, to attempt this raises many problems, and we prefer the solution of phrasing the defence in general terms, leaving it to the courts to apply it in the circumstances of the case.

In defamation there is a defence of fair comment on a matter of public interest. Whilst the phrase "fair comment" may not be appropriate to a tort of invasion of privacy, we consider that where the plaintiff has shown a prima facie case by proving that there has been a substantial and unreasonable invasion of his privacy it should be a defence for the defendant to prove that the subject-matter of publication was *of* public interest and that the publication was *in* the public interest. *We therefore recommend that where the infringement consists of the publication of words or visual images and the publication was in the public interest, this should be a complete defence.*

(iv) *Absolute and qualified privilege.* In defamation there are also the important defences of absolute and qualified privilege. These are available to a defendant in the many situations where some obligation owed to another, or to society, make it important that he should be able to act freely, without fear of the legal consequences if at the time what he said honestly should afterwards prove to be wrong. The employer giving a reference, the citizen making a report to the police, the witness in court,

are all obvious examples. These privileges appear to us to be equally important in the field of privacy, and we consider—with one exception—that any circumstances which provide such a defence in the field of defamation should provide one in the field of privacy also. The exception stems from the fact that there exist common law defences of privilege which, if abused, might enable long-buried skeletons to be "raked up" with impunity in situations where there was no conceivable public benefit to be served from so doing. *We recommend, therefore, that absolute or qualified privilege should be a defence to an action for infringement of privacy to the private citizen, but that publishers of the mass media should be required to show, in addition, that the matters were of public concern and their publication for the public benefit.*

This limitation would, of course, be co-extensive with that already imposed on the mass-circulation media by Parliament in the Law of Libel Amendment Act 1888 and the Defamation Act 1952, where the defences of privilege conferred by those Acts are made subject to the same additional test.

(v) *Legal authority.* There are many cases where public officials and sometimes private citizens have the right, and occasionally the duty, to do acts, such as entering other persons' property without their consent, which are prima facie an infringement of privacy. The justification for such infringements is occasionally derived from the common law, though usually from statute. Accordingly, to safeguard the existing position, *we recommend that there should be a defence that the defendant was acting in accordance with authority conferred upon him by statute or by any other rule of law.*

(vi) *Protection of property and legitimate business interests.* We can envisage situations where conduct might technically be held to be an infringement of privacy which is obviously necessary for the protection of one's person, one's property or one's legitimate business or other interests. An example is the installation of closed-circuit television circuits in a department store, together with warning notices, to deter and detect shoplifters. Another may be the employment of a reputable inquiry agent in certain circumstances. *We accordingly recommend that there should be a defence apt to protect such activities, provided that what is done is both reasonable and necessary for the protection of the interest concerned.*

Remedies

143. The extent to which some invasions of privacy should be dealt with by the criminal law alone, some by a civil remedy alone and some by providing for both a criminal sanction and a civil remedy, has been discussed earlier. We deal here with redress in so far as the civil remedy is appropriate.

144. *Damages.* The award of damages is the basic remedy in most actions for tort and the measure of damages is such as to compensate the plaintiff, as far as it is possible in monetary terms, for the wrong which he has suffered. Two problems have to be considered:

(a) Must the plaintiff prove that he has suffered damage before he can sue, or should the statutory tort be actionable *per se, i.e.* without the necessity of proving actual damage?
(b) Should there be power to award exemplary damages?

We have come to the conclusion that it would be difficult in many cases of unjustifiable infringement of privacy for the plaintiff to show actual loss comparable, for example, with physical injury or damage to property. *Therefore, we consider that, as in defamation or trespass, actual damage should be assumed and the tort should be actionable* per se.

The second question, that of exemplary damages, raises the manner in which damages are to be assessed. Whether the wrongful conduct is intentional or negligent, damages are usually assessed so as to give compensation for the loss which the plaintiff has in fact suffered. Exemplary damages are designed to punish the wrongdoer for his conduct and provide the plaintiff with a sum of money above the purely compensatory figure, but the scope for their award is today very restricted: *Rookes* v. *Barnard* [1964] A.C. 1129. The exceptional cases where exemplary damages may nowadays be awarded to a plaintiff cover many privacy situations, but by no means all. It should be realised, however, that although *exemplary* damages may not always be available, *aggravated* damage is always a permissible head of damage. Aggravated damages may be awarded when the motives and conduct of the defendant aggravate the injury to the plaintiff. *In our opinion, damages should be on the same footing as other similar actions in tort and the rules relating to the award of compensatory, exemplary and aggravated damages should apply.*

145. *Injunction.* In modern times, the injunction has proved of great importance in protecting a plaintiff against present and future interference. The use of the injunction, either alone or linked with a claim for damages, is a valuable weapon and, *in our view, the injunction should be available particularly in those cases where there has been an infringement of privacy in obtaining information and there is a threat to publish.* It should also be available where an unlawful infringement of privacy by publication is threatened, although the information has quite properly come into the possession of the defendant.

146. *Account of profits and delivery up.* Those invasions of privacy which are concerned with, for example, the improper use of confidential information, trade secrets, industrial information or private photographs raise the question of the profits which a defendant has made as a result of his wrongful conduct. *We consider that the plaintiff should be entitled to an account of profits, and, where appropriate, delivery up of material obtained by the infringement.* An account of profits represents the extra profit which the wrongdoer has obtained by his wrongful activity (*e.g. Peter Pan Manufacturing Corporation* v. *Corsets Silhouette Ltd.* [1964] 1 W.L.R. 96). Delivery up will be necessary where the defendant still retains articles or documents which he possesses solely as a consequence of his wrongful act but in respect of which (because of the absence or non-availability of copyright in the material) the remedies under section 17 and 18 of the Copyright Act 1956 are inapplicable. In some cases it may not be possible for the wrongdoer to provide an account of profits and delivery up and his actions may be such that the plaintiff will have lost the benefit of his confidential information. In such cases the court will take the defendant's behaviour into account in assessing damages.

Procedure

147. Several procedural problems arise:

(i) Should the proceedings be available in the High Court or in the county court or both?

(ii) What should be the mode of trial?
(iii) Should legal aid be available?

(i) *County court or High Court?* The legislation we recommend is specifically designed not to lead to a technical field of law, and we can envisage claims for which the county court would provide a fully adequate forum. If the matter is sufficiently serious or complex to merit trial in the High Court, it can be begun there, or transferred under the existing Rules. *We therefore recommend that actions for infringement of privacy should be capable of being brought either in the High Court or in the county court.*

(ii) *Mode of trial.* The general attitude towards trial by jury is reflected in the Rules of Court (Administration of Justice (Miscellaneous Provisions) Act 1933, s. 6 (1)). A party has the *right* to trial by jury if he can satisfy the court that he is (*inter alia*) making a claim in respect of libel or slander, or that there is a charge of fraud being made against him by the other party. In other cases an application for trial by jury is in the *discretion* of the court. Under the legislation which we propose, there may well, in a serious or difficult case, be questions which can best be determined by a jury—such as whether the infringement was "substantial and unreasonable," whether a publication was for the public benefit, and what is the proper award of damages. Cases of this kind will presumably be brought in the High Court, or be transferred there, *and we therefore recommend that, where a case comes to trial in the High Court, either party should, under the appropriate Rules of Court, have the right to ask for trial by jury.* An infringement of privacy may be complete before there is any publication, and publicity is the very harm which the plaintiff may most be concerned to avoid. The certainty of a public trial could therefore easily make an action for infringement of privacy an empty remedy in many cases. The situation appears to us to be closely analogous so that of trade secrets, where a public trial could destroy the very substance of the action, and the courts therefore have power, frequently exercised, to sit in private. Again, it is because a public trial would be an infringement of privacy that the jurisdiction of the courts over infants is almost invariably exercised in private. *We therefore recommend that, under Rules of Court, the court should be given power, in its discretion, to hear actions for infringement of privacy otherwise than in open court.*

(iii) *Legal aid?* Legal aid is available for practically all tort actions, but not where the action is (*inter alia*) one of defamation. It may be claimed that many kinds of infringement of privacy are analogous to defamation and that, therefore, no legal aid should be available in these cases. We believe, however, that there is no valid reason for withholding legal aid in such cases and *we recommend, therefore, that legal aid should be available in actions for infringement of privacy.* "If an action is socially approved, there can be no justification for denying any citizen the right to bring it, whereas, if it is socially unacceptable, it ought not to be available to any by purchase." This is of special importance if any cases are to be tried by jury. The Legal Aid Committees already provide the necessary sifting process to safeguard the public against frivolous actions.

Limitation of actions

148. In considering what limitation period would be appropriate for the statutory tort which we propose, we have come to three conclusions:

(a) Since many invasions of privacy are carried out in secret and may remain undetected for long periods, it would be wrong for a plaintiff to lose his remedy by reason of the mere passage of time, unless he was himself at fault in failing to make the discovery;
(b) on the other hand, once the facts are known, we can see no reason why a plaintiff should not proceed promptly if the infringement was serious enough to merit a lawsuit;
(c) lastly, since there must be finality in all litigation, we consider that there should be an absolute period after the expiry of which no action should be brought. We think that the period of six years which already applies to most other torts is adequate for this purpose.

Accordingly, we recommend that there should be a limitation period of three years, starting with the time when the plaintiff first became aware, or by the exercise of reasonable diligence could have become aware, of the infringement but that in any case no action should be brought more than six years after the cause of action accrued to the plaintiff.

Admissibility of evidence obtained through infringement of privacy

149. We are aware that this is a debatable issue, which we have ourselves discussed at some length. The principal considerations are, on the one hand, the court's concern to establish the truth and, on the other, the incentive which the admissibility of such evidence provides for professional and amateur spies. In the field of criminal law, we have hesitantly come to the conclusion that the needs of the community for its own safety outweigh the opposing considerations. However, in the field of civil litigation we consider that the upholding of the standards of civilised life is a great deal more important than the few occasions on which one party or another may be deprived of evidence which could be obtained in no way other than by an offensive method of spying. *Accordingly, we recommend that evidence so obtained should no longer be admissible in civil litigation.*

Chapter 8

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

150. To summarise the result of our work, we *conclude* that

(1) the right of privacy reflects a fundamental human need which must be respected in any civilised society, and requires the protection of the law;
(2) the tendency in sophisticated and technological society is for infringements of the right of privacy to increase, and accordingly the need for legal protection also increases;
(3) in modern conditions, English law as it stands today falls well short of an adequate degree of protection.

151. We therefore *recommend* that legislation should be passed now to amend the law in the following respects:

(1) to provide a civil remedy for any substantial and unreasonable infringement of any person's privacy, while fully safeguarding the

interests of the community, and especially the needs of the Press as a guardian of the public interest;

(2) to make the use of electronic, optical or other artificial devices as a means of surreptitious surveillance a criminal offence except in certain clearly defined circumstances;

(3) to extend the present licensing provisions relating to the use of wireless transmitters also to their sale and possession;

(4) to make evidence obtained through certain actionable infringements of privacy inadmissible in civil proceedings;

and that the following two subjects require further investigation:

(1) criminal sanctions for industrial espionage;

(2) the regulation of the acquisition, storage and communication of personal information by data banks so that any person to whom the information relates can ensure that it is accurate, and discover to whom it is given.

Appendix A

SELECTED BIBLIOGRAPHY

United Kingdom

Dworkin: "The Common Law Protection of Privacy" (1967) 2 Univ. of Tas.L.Rev. 418.

Hamilton, Peter: *Espionage and Subversion in an Industrial Society*, Hutchinson, 1967.

Hickson, Philip: *Industrial Counter-Espionage*, Spectator Publications Ltd., 1967.

Levy: *The Press Council*, London, Macmillans, 1967.

Madgwick, Donald: National Council for Civil Liberties: *Privacy under Attack* (1968).

Neill: "Protection of Privacy" (1962) 25 M.L.R. 393.

Payne, Ronald: *Private Spies*, Barker, 1967.

Report of Committee on Law of Defamation (Porter), 1948 Cmd. 7536.

Winfield: "Privacy" (1931) 47 L.Q.R. 23.

Computers and Freedom—Conservative Research Department, 1968.

Computers and Personal Records. Debate in House of Lords, December 3, 1969 (306 H.L.Deb. 103–177).

"Privacy," *New Society*, May 25, 1967.

"Computer Threat to Freedom," *The Times*, December 2, 1968.

"Computers: Privacy Must Be Preserved," *The Times*, August 14, 1969.

"Campaign to Safeguard the Right to Privacy," *The Times*, February 19, 1969.

Comparative

Gutteridge and Walton: "The Comparative Law of the Right of Privacy" (1931) 47 L.Q.R. 203.

Kalven: "Privacy in Tort Law" (1966) *Law and Contemporary Problems* 326.

Molina, Ivan M. Diaz: "El derecho a la vida þrivadad" (1967) 126 *La Ley*. 981.

Strömholm, Stig: *Right of Privacy and Rights of the Personality: A Comparative Survey*, Stockholm, P. A. Norstedt, 1967.

Yang: "Privacy: A Comparative Study" (1966) 15 I.C.L.Q. 175.

Bulletin of the International Commission of Jurists (No. 31) (1967).

The Rule of Law and Human Rights: Principles and Definitions, 1966 I.C.J.

Canada

Ryan, E. F.: *The Protection of Privacy in Ontario*, Toronto, Ontario Law Reform Commission, 1968.

France

Badinter, Robert: "Le droit au respect de la vie privée" [1968] 1 J.C.P. 2136.

Lindon, Raymond: "La presse et la vie privée" [1965] 1 J.C.P. 1887.

Malherbe, Jean: *La vie privée et le droit moderne*, Paris, Librairie du Journal des Notaires et des Avocats, 1968.

Germany

Jeschek, Hans-Heinrich: "La protection pénale des droits de la personnalité en Allemagne" (1966) 21 *Revue des Sciences Criminelles et du Droit Pénal Comparé* 545.

Schüle, Adolf and Hans Huber: *Persönlichkeitsschutz und Pressefreiheit*, Tübingen, J. C. B. Mohr, 1961.

Japan

Ito, Masami: "Issues in the 'After the Banquet' decision" (1967) 1 *Law in Japan* 141.

Sweden

Elsin, P. E.: *Allmänna handlingars offentlighet och sekretess*, Stockholm, Ministry of Justice and City of Stockholm, 1965.

Fahlbeck, Erik: *Tryckfrihetsrätt*, Stockholm, P. A. Norstedt, 1954.

Switzerland

Schüle, Adolf and Hans Huber: *Persönlichkeitsschutz und Pressefreiheit*, Tübingen, J. C. B. Mohr, 1961.

U.S.A.

Bloustein, E. J.: "Privacy as an Aspect of Human Dignity" (1964) 39 New York University L.R. 962.

Brennan, William J.: "Privacy in the U.S.," *The Lawyer* (1962) Vol. 5, No. 2.

Ernst, Morris L. and Alan U. Schwartz: *Privacy: the Right to be Let Alone*, New York, Macmillan, 1962 (London: MacGibbon & Kee, 1968).

Long, Senator Edward V.: *The Intruders: the Invasion of Privacy by Government and Industry*, New York, Praeger, 1967.

Miller, Arthur R.: "Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society" (1969) 67 Michigan L.R. 1089.

Packard, Vance: *The Open Society*, New York, 1964.

Prosser, William L.: "Privacy" (1960) 48 California L.R. 383.

Warren, Samuel D. and Louis D. Brandeis: "The Right to Privacy" (1890) 4 Harv.L.R. 193.

Westin, Alan F.: *Privacy and Freedom*, New York, Atheneum, 1967.

Hearings on the Computer and Invasion of Privacy before a Sub-Committee of the House Committee on Government Operations, 89th Congress, 2nd Session, 7, 1966.

Hearings on Computer Privacy before the Sub-Committee on Administrative Practice and Procedure of the Senate Committee of the Judiciary, 90th Congress, 1st Session, 248, 1967.

Hearings before the Sub-Committee on Financial Institutions of the Committee on Banking and Currency, 91st Congress, 1st Session ("Fair Credit Reporting"), 1969.

Appendix B

CONCLUSIONS OF THE NORDIC CONFERENCE ON THE RIGHT OF PRIVACY

Part I: Nature of the Right to Privacy

1. The right to privacy, being of paramount importance to human happiness, should be recognised as a fundamental right of mankind. It protects the individual against public authorities, the public in general and other individuals.

2. The right to privacy is the right to be let alone to live one's own life with the minimum degree of interference. In expanded form, this means:

> The right of the individual to lead his own life protected against: (a) interference with his private, family and home life; (b) interference with his physical or mental integrity or his moral and intellectual freedom; (c) attacks on his honour and reputation; (d) being placed in a false light; (e) the disclosure of irrelevant embarrassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, prying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence. (The limitations of this right are set forth in Part II.)

3. For practical purposes, the above definition is intended to cover (among other matters) the following:

(i) search of the person;
(ii) entry on and search of premises and other property;
(iii) medical examinations, psychological and physical tests;
(iv) untrue or irrelevant embarrassing statements about a person;
(v) interception of correspondence;
(vi) wire or telephone tapping;
(vii) use of electronic surveillance or other "bugging" devices;
(viii) recording, photographing or filming;
(ix) importuning by the Press or by agents of other mass media;
(x) public disclosures of private facts;
(xi) disclosure of information given to, or received from, professional advisers or to public authorities bound to observe secrecy;
(xii) harassing a person (*e.g.* watching and besetting him or subjecting him to nuisance calls on the telephone).

Part II: Limitations

4. In modern society, the right to privacy, as any other human right, can never be without limitation except in the sense that nothing can justify measures which are inconsistent with the physical, mental, intellectual or moral dignity of the human person. The limitations which are necessary to balance the interests of the individual with those of other individuals, groups and the State will vary according to the context in which it is sought to give effect to the right of privacy.

5. The public interest frequently requires the granting to public authorities of greater powers to interfere in the individual's private sphere

than would be acceptable in the case of interference by private individuals or groups. Such powers should never be used except for the purpose for which they were granted.

6. The circumstances in which a public authority may be granted such powers have been laid down in the European Convention for the protection of Human Rights and Fundamental Freedoms as those in which interference in the private sphere 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."

7. It is essential that the cases in which interference is permitted be defined with precision. Legislation should ensure that powers which may involve invasion of privacy should only be exercised by a specifically appointed person or agency upon the order of a judicial authority or some other public authority ultimately responsible to the legislature. Such order should determine the period and place of the exercise of the powers concerned.

8. In relation to interference in the above-mentioned circumstances, the following considerations apply:

(a) *National security, public safety and emergency situations.* State powers to interfere with the right to privacy must vary according to the situation facing a country and may not be exercised except in accordance with its international obligations.

(i) *In peace-time* national security may require invasions of privacy for very special and limited purposes. In order to ensure that such invasions are made only in cases of genuine threats to national security, and that powers granted by law in the interests of national security are not misused for political purposes, it is desirable that some form of independent supervision or control be instituted.

(ii) *In time of war or other public emergency* threatening the life of the nation, any additional powers to interfere with the right to privacy of the individual in the interests of public safety should be restricted to those strictly required by the exigencies of the situation and should be limited in time to the period of war or public emergency. For this purpose, they should be subject to periodic review and renewal by Parliament.

(iii) *In cases of natural disaster* public safety may necessitate invasions of privacy to enable measures to be taken to deal with such disasters or other calamities endangering the life of the people. The measures taken should be strictly proportionate to the threat involved.

(b) *The economic well-being of a country* is not a concept which is capable of being precisely and narrowly defined. Therefore it should not be relied upon except when absolutely necessary.

(c) *The prevention of disorder or crime* may justify measures taken in the sphere of criminal law:

(i) for the investigation of criminal offences and the detection of offenders;

(ii) for the prosecution and punishment of offenders;

(iii) to prevent the commission of a criminal offence or the outbreak of disorder which there are compelling grounds to believe is imminent.

This presupposes that the crime in question is not one which forbids the exercise of any of the fundamental rights and freedoms. It further presupposes that legal provisions define in detail the powers of the police and criminal investigation authorities, set out the offences in relation to which they can be used and lay down precise limits to their use. These limits should, in particular, ensure that measures involving an invasion of privacy are in all cases reasonably necessary having regard to the gravity of the offence involved and that there should be a reasonable proportion between the measures taken and the magnitude of the offence. In addition, there must be reasonable grounds for suspecting that the person concerned is guilty of or is about to commit a criminal offence.

(d) *The protection of health* may justify reasonable measures taken in order to combat or to prevent the outbreak of an epidemic, or the spread of communicable diseases. Measures taken for *the protection of morals* (otherwise than within the ordinary framework of criminal law) should be limited to those necessary for the protection of children and young persons.

The administration of civil justice

9. The extent to which the right to privacy requires to be limited for the purposes of the administration of civil justice must clearly be defined in the laws relating to procedure and evidence in civil cases.

Freedom of expression, information and debate

10. The exercise of these freedoms is obviously in the public interest and it is inevitable that in some cases there should be a conflict between the interest of society in their exercise and the interest of the individual to live his private live unmolested. The line of demarcation between these interests is very difficult to draw. Certainly it cannot be drawn in the simple terms of the axiom that where public life begins, private life must end. The private life of public figures is entitled to immunity save where it can be shown to impinge upon a course of public events. Even less acceptable is the axiom that " being in the news " of itself justifies intrusion on private life. It would be undesirable and indeed impossible to provide for all cases by legislation; but it may be insufficient to rely exclusively upon the self-discipline of the Press and other mass media or upon rules of conduct laid down by the professional organisations concerned.

The subject-matter is so full of problems and the checks and balances must be so many and so delicate that a combination of all these methods, the formulation of rules of conduct, the establishment of professional disciplinary tribunals and appropriate legislation may be required for dealing satisfactorily with this aspect of the right to privacy.

It should be emphasised however that, because freedom of expression is one of the great freedoms on which so many others depend, it ought not to be curbed by the Press or other mass media, unless the self-discipline of the Press and other mass media and the rules of conduct laid down by professional organisations have been shown to fail. That does not imply that the Press or other mass media are exempt from general legislation protecting the right to privacy including legal provisions which apply to improper methods of obtaining information.

Part III: Protection

Protection under existing rules

11. There are in most countries legal rules in other fields which provide civil remedies or criminal sanctions against certain forms of invasion of privacy. Some of these remedies or sanctions have not the protection of privacy as their primary object and it may therefore be necessary to strengthen or modify the provisions in question in order to secure the more effective protection of privacy aspects involved. An institution which can give valuable assistance in the protection of privacy against invasion by public authorities is the Ombudsman.

12. The following invasions would seem to fall within the category referred to in the preceding paragraph. Where provisions of the nature described do not already exist, their introduction is considered necessary as part of the adequate protection of the right to privacy.

(a) *Entry on and search of premises and other property.* Criminal provisions in this field may not provide an adequate protection of individual interests. Similarly, civil remedies designed primarily to protect ownership or possession may not extend protection to individuals who have the mere use of premises or other property without possession.

(b) *Search of the person.* Where existing laws provide for the search of the person, they should ensure that the search is limited to the object for which it is authorised and conducted with due respect for the individual searched.

(c) *Compulsory medical examinations and other tests.* The circumstances and cases in which medical examinations or other tests can be ordered and carried out should be clearly defined.

(d) *Interception of correspondence and other communications.* Most countries have legislative provisions prohibiting the opening of correspondence and protecting the secrecy of telegrams. In some cases these provisions apply only to employees of the postal and telecommunications services and there would seem to be a need for more general provisions—criminal and civil—protecting correspondence and other communications from interference by third parties.

(e) *Disclosure of information given to public authorities or professional advisers.* Such disclosures are normally covered by legal or disciplinary provisions against the disclosures of confidential information given to public authorities. In the case of communications to professional advisers, their unauthorised disclosures should be made the subject of sanctions, which may be criminal, civil or disciplinary, or a combination of these, according to the circumstances of the case.

(f) *Defamation.* The law of defamation in most legal systems protects the individual against attacks on his honour and reputation. In some systems truth is an absolute defence; in others it is not. In the former types of system there is need for legal protection in relation to the publication of true but irrelevant embarrassing facts relating to the individual's private sphere.

Protection under special rules relating to privacy

13. There are forms of invasion of privacy, other than those mentioned in the preceding paragraph, infringing rights which cannot be adequately

protected by straining the existing legal rules devised mainly to meet other problems in other fields. These naturally fall within a law of privacy and should be protected by such a law. The following invasions are within this category:

(a) *Intrusion upon a person's solitude, seclusion or privacy.* An unreasonable intrusion upon a person's solitude, seclusion or privacy which the intruder can foresee will cause serious annoyance, whether by the intruder's watching and besetting him, following him, prying on him or continually telephoning him or writing to him or by any other means, should be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.

(*b*) *Recording, photographing and filming.* The surreptitious recording, photographing or filming of a person in private surroundings or in embarrassing or intimate circumstances should be actionable at law. In aggravated cases, criminal sanctions may also be necessary.

(c) *Telephone-tapping and concealed microphones.*

(i) The intentional listening-in to private telephone conversations between other persons without consent should be actionable at law.

(ii) The use of electronic equipment or other devices—such as concealed microphones—to overhear telephone or other conversations should be actionable both in civil and criminal law.

(d) *The use of material obtained by unlawful intrusion.* The use, by publication or otherwise, of information, photographs or recordings obtained by unlawful intrusion (paras (a), (b), and (c) above) should be actionable in itself. The victim should be entitled to an order restraining the use of such information, photograph or recording, for the seizure thereof and for damages.

(e) *The use of material not obtained by unlawful intrusion.*

(i) The exploitation of the name, identity or likeness of a person without his consent is an interference with his right to privacy and should be actionable.

(ii) The publication of words or views falsely ascribed to a person, or the publication of his words, views, name or likeness in a context which places him in a "false light" should be actionable and entitle the person concerned to the publication of a correction.

(iii) The unauthorised disclosure of intimate or embarrassing facts concerning the private life of a person, published where the public interest does not require it, should in principle be actionable.

Need for specific legal rules

14. Finally, this Conference recommends that all countries take appropriate measures to protect by legislation or other means the right to privacy in all its different aspects and to prescribe the civil remedies and criminal sanctions required for its protection.

Appendix C

EXAMPLES OF INFRINGEMENTS OF PRIVACY

1. You have a secluded garden, overlooked only by a hill two miles away. One day you are kissing your wife in the garden when a stranger,

standing on a highway on the hill, takes a photograph of you through a powerful telephoto lens.

2. You and your co-director are in your office, discussing your company's future marketing strategy. The window is open. From premises across the street your trade rival, with the permission of the occupier, records your conversation with a parabolic microphone.

3. A national credit information bureau makes every reasonable effort to get its information only from the most reliable sources. The agent whom they employ in your locality has a grudge against you and knows about some past skeletons in your cupboard, an accurate version of which he includes in a report on you which goes on their file. Your credit is ruined.

4. Your employer, unknown to you, has your wife followed and her friends and neighbours interviewed. The results, with adverse (but true) comments, go down on your personnel record.

5. You are at home, discussing your business affairs with your bank manager over the telephone. Where the wires cross a road, an inquiry agent listens to the whole conversation with an induction coil. Later, he sells the information to your trade rival.

6. You are a respected member of your local community, but not in any sense a public figure. One day, your local newspaper publishes an article about you in which they allude to the facts that:

(a) twenty-five years ago you were convicted of stealing;
(b) ten years ago, you had an affair with a married woman; and
(c) your mother died in a lunatic asylum.

All these statements are true.

7. You have the misfortune to be knocked down by a car driven by a well-known politician and you are badly hurt. With the consent of a member of the hospital staff (but not with that of yourself or your family), a photographer from a news agency takes a picture of you, disfigured and unconscious, in your hospital bed. A magazine to whom he sells it publishes the picture.

8. Your only child, a successful actress, is killed in a car crash. Reporters telephone you night and day, and your house is besieged by photographers from the Press and the television companies, who take pictures of you and your wife whenever you show yourselves at the door. These are published in the national Press and on the television news bulletins.

9. You are the manufacturer of a well-known product and your home telephone number is "ex-directory." A popular television personality makes fun of you on his programme, but without being libellous. He screens your private telephone number and suggests that viewers should ring you up. Your telephone does not stop ringing for days: you have to have it disconnected, and lose an important contract as a result.

10. Your brother, who died not long ago, was a homosexual. He was deeply troubled by this, and fought it with almost complete success. Very few people knew about it, but one of them happens to be a friend of your employer (a man of strong prejudices), whom he tells in strict confidence. You are dismissed without being given any reason, and your employer spreads the story far and wide.

In none of these cases would you have any redress as the law now stands, nor would anyone have committed any criminal offence.

Appendix D

MODERN SURVEILLANCE DEVICES

1. Of our five senses, the two through which we acquire most information are our eyes and our ears. The sophisticated information-gathering devices developed by modern technology can therefore be conveniently divided into the two groups which, respectively, are extensions of these senses.

Visual devices

2. There is almost no practical limit to the magnification which can be achieved with modern lens systems, and the speed and fineness of grain of modern films is sufficient for almost any light conditions. The only practical limitation lies in the extent to which the intervening atmosphere reduces visibility through mist or heat shimmer. In conditions of good visibility, normal-size print on a document can be legibly photographed at distances of hundreds of yards.

3. Nor is it necessary nowadays for the object being photographed to be properly lit. Film emulsions have been developed which are highly sensitive to infra-red light, which is invisible to the human eye. Light of these wavelengths is emitted by most objects, and is reflected by virtually anything if it is "illuminated" by an infra-red "light". By these means, still or moving photographs of excellent definition can be taken in the dark.

4. Recent developments in the design of television cameras have reduced them to a size which can easily be hidden in most rooms. These also can operate with infra-red light, *i.e.* in the dark. They may be connected to a viewing screen either by cable, or through a small wireless transmitter, signals of which can be picked up at a considerable distance.

Listening devices

5. To eavesdrop on a conversation, all one needs is a chain consisting of the following three links:

(a) a microphone which converts the sound into an electrical signal;
(b) a communications channel which transmits the electrical signals, at sufficient amplitude, to the listening point;
(c) a device at the listening point which converts the electrical signals back into sound or, if so desired, records them.

6. At the present time, the smallest useful microphone sufficiently sensitive to pick up a whisper at 20 feet or so is about the size of a

match-head. In the foreseeable future, it will be possible to make them even smaller.

7. There are two kinds of communication channel sufficiently developed for everyday use: those with wires and those without. The former kind makes use either of existing telephone or electric mains wiring, or of a special pair of wires led from the room being "bugged." The latter kind necessitates the use of a wireless transmitter which, with the recent developments of micro-circuits, can be reduced to the size of a lump of sugar, including the necessary battery.

8. The size of the listening device is usually not crucial, but there is no reason why it should be any larger than the wireless transmitter, leading to the earphone of "deaf aid" size often supplied with transistor radios. There are tape-recorders now no larger than a packet of cigarettes, and with modern circuitry they can switch themselves on automatically as soon as a signal appears on the circuit, and so can be left unattended.

9. A miniature microphone and radio transmitter, little larger than a lump of sugar, can easily be secreted almost anywhere and is very difficult to find. The range of such a transmitter can be up to a quarter of a mile, and the batteries powering it will, at best, run for a few days.

10. There are four particularly ingenious devices which deserve special mention:

(a) Many rooms today already have a built-in microphone in the shape of the one fitted to the telephone handset. A device easily obtainable in the United States, and with only slightly greater difficulty here, operates as follows: Under the guise of a visit from a telephone engineer, the spy places the device (which is about the size of a small matchbox) inside the victim's telephone. At any time thereafter, he dials the victim's number (perhaps even from abroad if there is a direct-dialling system). Before the telephone rings, the spy blows a note down his telephone on a special whistle which activates the device. The effect will be that the victim's telephone does not ring but is—unbeknown to him—switched on, so that every word spoken in the room until the spy puts down his own receiver will be clearly audible—and recordable—at his end.

(b) The parabolic microphone works like a car headlamp in reverse: instead of sending out a beam of light from a concentrated light source, it concentrates a beam of sound on to a sensitive microphone. By pointing such a device at someone speaking, even in a whisper, at any distance up to about a quarter of a mile (*e.g.* through an open window or in a public place such as a street or a park) the wielder of the microphone can hear every word that is spoken at the other end, untroubled by any intervening sound such as traffic noise.

(c) Another device currently under development, and likely to be perfected in the foreseeable future, makes use of a laser beam as the communications channel. If such a beam is pointed at a windowpane of a room in which people are talking, the imperceptible vibrations imparted to the window by the conversation will modulate the beam so that the conversation can be extracted from a reflection of the beam, amplified and recorded. At the present time, it is still necessary to put a very thin (and invisible)

metallic film on to the outside of the window-pane, but the industry hope that this problem can be overcome. The beam itself can be at infra-red frequency and therefore invisible to the human eye. It is anticipated that ultimately the useful range for this device could be of the order of several miles.

(d) As an aid to diagnosis, medical technology has developed a "pill" radio transmitter, no bigger than the familiar antibiotic capsule, which, when swallowed by the patient, will transmit over distances of some hundreds of yards information for which it has been programmed in advance, such as temperature, pulse rate, acidity or the like. It takes a day or two before the "pill" is eliminated by the natural route and, during this time, anyone with the appropriate receiving equipment can keep a permanent check on the whereabouts and condition of the "patient" who has swallowed it.

11. We have summarised here descriptions of those devices only which we know to be in current use or, in the last two cases mentioned, under active development. There are virtually no technological limits which would seriously inhibit further development work of this type, and we have every reason to think that both visual and auditory surveillance devices will continue to diminish in size and increase in useful range, ease of operation and difficulty of detection at a steadily accelerating pace.

Appendix E

COMPUTERS AND PRIVACY

1. The threat which computers pose to privacy is little understood outside the computer industry at the present time. The following is therefore an attempt at a brief and non-technical explanation.

2. The modern electronic computer has been aptly described as "a very fast and accurate idiot." It can do nothing which an ordinary human being cannot do but it can do it some millions of times faster and, provided it has been adequately programmed, with unerring accuracy. To take just one example, a large machine of the current generation can perform up to half a million error-free multiplications in one second.

3. Again, the amount of information which a computer can keep in permanent storage is astronomically greater than anything with which we are familiar in our everyday lives. By way of illustration, the latest storage devices could store the entire contents of the Bible in a record the size of a postage stamp, and a matchboxful of computer records can hold information which, were it to be printed or typed on paper, would fill a cathedral from floor to roof.

4. It therefore becomes economic to record a multitude of transactions which it was never before worth anyone's while to record at all, and possible for the first time to collate and edit this information. To take only two examples:

(a) It is likely to become economic in the foreseeable future for all hotels in a country to participate in a central computer-based reservation system. Once such a system is in operation, the touch of a button will throw up the information that, whenever Mr. X

has spent a night at any hotel in the United Kingdom in the last two years, Miss Y has occupied the adjoining room. Without the computer this information might have been obtained—if at all—only at enormous cost in time and trouble.

(b) As we progress towards a cashless and chequeless society, more and more of our daily expenditure will be liquidated by the insertion of a personal plastic credit card into a wide variety of slots. It may not be long before this system becomes available for, say, supermarkets, public libraries, telephones and parking meters. In this way, the central system will acquire information, available at the touch of a button, about the tastes, interests and probable opinions and day-to-day whereabouts and contacts of any selected subject.

5. We have evidence that the computer industry is becoming seriously disturbed about these possibilities. They have the ability, and the willingness, to build into their systems virtually any safeguards which the community may require. But they do not regard themselves as qualified to decide what the safeguards should be, and they anxiously await a lead.

6. A separate threat to privacy posed by the advent of the computer lies in the so-called "data banks." These should be thought of not so much as computers, but as immense storage systems in which an astronomic amount of information can be permanently held and extracted in any sequence, and in any selected permutations, at any time. The usefulness of such systems to the community is obvious, particularly in the fields of medical statistics, planning, simulation of economic models, prediction of demographic and other trends, and so forth. For this reason, the U.S. Federal Government has been anxious for some years to establish a central data bank which would hold "pertinent information" on all citizens of the United States, thus greatly easing the task of the various federal departments and agencies responsible for the government of the nation. So long as the use of the data stored in the facility is confined to statistical purposes of this kind, the benefit is obvious. The danger arises only because, by the very nature of the facility, it provides an open invitation for the extraction of the full record of named individuals, legitimately by those who have official access to the facility, and possibly illegitimately by those who can obtain access by fraud, stealth or corruption.

7. Data banks of one kind or another already exist, though—at all events in this country—not of the size and scope envisaged in the Federal Government's plans. The banks, credit card companies, credit information companies and various departments of government such as the National Health Service and the Social Security Departments, already hold stored in computers a great deal of information on most of us. As Mr. Paul Baran, the Rand Corporation expert on computers, lucidly explained when he gave evidence to a Congress Committee investigating the Federal Government's proposal,[1] the danger lies in the very centralisation of information of this kind. Where, only ten years ago, personal information on individuals was scattered throughout the country in small units held on pieces of paper in manilla folders (and therefore for all practical purposes impossible to bring together in one place), much of this information has by now found its way into the storage systems of different

[1] Hearings of the House Sub-Committee on the Computer and Invasion of Privacy, p. 121.

computers. At the present time, these have not yet begun to talk to each other. But just as the railways and the telegraphs began with a number of independent lines and, by the inexorable pressures of economics, were ultimately welded together into nation-wide systems, so it is only a matter of time before the computers, with their attendant storage systems, become interconnected into a single network. Once this happens, all information on any individual stored anywhere within the network can be made available in one print-out at the press of the appropriate button.

8. Much time and trouble has been spent in the United States in planning in advance for this situation, and in devising satisfactory safeguards. The general view, which we share, is that it is useless to try to stem the tide, and far better to seek means now to give the individual the kind of protection which can be built into the system while it is being designed. At the very least, we consider that this must fulfil the following criteria:

(a) safeguards which preclude any individual, agency or organisation from extracting from the system any information which they have not themselves put into it, at all events without specific authorisation from someone in a responsible position who is in turn accountable to an independent public body for the authorisations which he gives;
(b) the right of every individual about whom information is held in the system to call for a print-out of all information which relates to him at any time of his choice, possibly on payment of an appropriate but small fee;
(c) the right of any individual to challenge any information in that print-out which he considers to be wrong, unfair or misleading, with the opportunity of an appeal to an independent tribunal in case of dispute;
(d) the right of any individual to discover what information has been communicated by the system to any third party, at what time, and on what authority.

Appendix F

INDUSTRIAL PSYCHOLOGY

1. At the present time, the threat to individual privacy in this field is a live issue in the United States but not—so far as we have been able to discover—in this country. This does not, however, mean that it will not become one in the foreseeable future.

2. The current bogey in the United States is the polygraph, more popularly known as the "lie detector." Despite the apparent lack of any scientific basis for the usefulness or reliability of this instrument, it appears to have enjoyed some vogue in screening applicants for employment, especially in security-sensitive jobs. The use of the instrument is clearly a gross invasion of personal privacy, but there would seem to be indications that it is currently going out of fashion. We express the hope that this now heavily-discredited gadget will not find a belated vogue in this country.

3. However, the matter does not rest there. Applied psychology has undoubted value in a number of fields, among which are selection interviews with prospective employees, attitude survey interviews with existing employees, and market research.

4. We can safely ignore the last of these for the purposes of this Report, since anyone threatened with such an interview is free to refuse to give it. Although in theory the same considerations apply to the other two categories, the position in practice may well be different in the first, and most certainly will be different in the second. The tacit pressure, backed by the unspoken threat of loss of employment or at the least of delayed promotion, against an employee who contemplates refusing to submit himself to an interview with his employer's chosen industrial psychologist may well be considerable, and gives us cause for concern. We have evidence that this concern is shared by the profession.

5. By way of example of the type of intrusive questions which, unless discouraged by legislation, the future may hold in store here for prospective employees, we cite the following sample questions taken from a "personality test" used by some United States Federal agencies[1]:

State whether *true* or *false*

I feel there is only one true religion.
My sex life is satisfactory.
During one period when I was a youngster, I engaged in petty thievery.
I believe in the second coming of Christ.
I believe women ought to have as much sexual freedom as men.
Christ performed miracles.
There is very little love and companionship in my family as compared to other homes.
I dream frequently about things that are best kept to myself.
Once in a while I laugh at a dirty joke.
There is something wrong with my sex organs.

Appendix G

INDUSTRIAL ESPIONAGE

1. Industrial espionage covers a variety of dishonest activities for the purposes of obtaining information illicitly on behalf of any person, firm, company or country, about the activities, trade secrets and future plans of competing industries or competing countries.

2. The purposes for which the information is sought and obtained may vary: sometimes it is with a view to obtaining money by the individual carrying out the particular operation; in most cases it is for the purpose of obtaining information about a competitor operating in a similar field; in many other cases it is concerned with competition on an international scale and yet again, on occasions, for subversive political purposes.

3. The area of operations is national and international and the extent of espionage in this field may be judged from the fact that, according to the latest report of the American Management Association, these

[1] See *Privacy under Attack*, N.C.C.L., 1968.

operations are estimated to cost American business 65 million dollars a year.[1] There is, somewhat belatedly, increasing concern in this country and, in 1968, a book was published, sponsored by the Institute of Directors, on counter-espionage in industry, outlining the various methods used and explaining the various defensive and preventative measures which could be taken.[2] It has also been reported that French Intelligence has evidence of widespread industrial espionage in France and recently published a booklet, *L'espionnage une realité*, distributed to 10,000 French heads of industry.[3] The danger, according to available evidence, both to individual industries in this country and of harm to our national "know-how" is increasing rapidly and, according to a director of a counter-espionage company specialising in "de-bugging" offices, there are many companies in the Midlands whose board rooms are bugged, many of the devices being planted by highly-paid private detectives. He claims that this is evidence only of much wider activity throughout the country and that he was personally offered £3,000 to set up an electronic surveillance device in one board room.

4. The personnel and methods used vary, of which the following are examples:

Personnel

(1) The employee who realises the importance to a competitor of the work on which he is engaged and, for his own gain, communicates with the competing firm with a view to selling know-how.
(2) The employee whose aid is enlisted by a competitor.
(3) The employee, previously enlisted by a competitor, and who has taken employment in a competing firm specifically for the purposes of stealing information.
(4) The professional inquiry agent working, for profit, for anyone prepared to engage him.
(5) The international professional spy working either for a competitor in another country or for a foreign government.

Methods

5. Every known means of electronic device is in use in this field, including briefcases with built-in tape recorders and concealed microphones, cigarette packets, matchboxes, lumps of sugar, and one firm of security agents markets a bowler hat with a built-in electronic device, selling at about £70. Lastly, of course, there is the method of telephone-tapping, which is increasing.

6. The losses from industrial espionage, particularly by companies who have to expend vast sums of money on research before their commodities reach the market, are considerable. In the Cyanamid case in 1961, in which valuable research data was sold to an Italian company for £20,000, Cyanamid estimated their losses as a result of espionage at 100 million dollars. In another case, in the motor industry, a competitor extracted information illicitly about a new model. This was deliberately leaked by premature announcement, which caused a run of cancelled orders estimated to have cost the victim nearly half a million pounds.

[1] Ronald Payne, *Private Spies*, Arthur Barker, 1967.
[2] Philip Hickson, *Industrial Counter-espionage*, Spectator Publications Ltd., 1968.
[3] Peter Hamilton, *Espionage and Subversion in an Industrial Society*, Hutchinson, 1967.

7. As the law stands at present, the only possible remedies (and therefore the only discouragement to industrial espionage) are:

(1) (possibly) proceedings under the Theft Act 1968 [4];
(2) a claim for damages for breach of contract against any employee concerned in the extraction or disclosure of confidential information;
(3) an injunction on the grounds of breach of confidence, against the spy and his employers (if the plaintiff knows who they are).

8. If there were criminal sanctions whereby both those obtaining and those receiving confidential information would be subject to heavy financial penalty or imprisonment, this, it would seem, would provide an acceptable deterrent which at present does not exist, or exists in a somewhat specious form (in one case, an employee, having stolen trade secrets, was charged with stealing " paper to the value of £3 ").

9. In many cases, however, where the financial loss may be considerable to the company whose trade secrets or other confidential information have been stolen and given to a competitor, criminal sanctions would go no way to compensate them for their loss and, again, it would seem that a civil remedy would serve two just and reasonable purposes, namely, to compensate the plaintiff and to prevent the defendant from making any profit from the information obtained by illicit means.

Appendix H

CREDIT DATA

1. In the United States, according to Professor Alan Westin,[1] one corporation in the credit data field had by 1967 adopted computers to provide subscribing companies with information on individuals within ninety seconds of a request for data. By telephoning the credit data corporation a subscriber can obtain information on any customer's account, about any defaults, and about his general reliability as an individual.

2. There are two types of such organisation in this country at the present time. In the first category, there are companies and firms giving information about commercial enterprises, based upon data quite properly and openly obtained by, for instance, inquiring of the commercial enterprise direct, obtaining company reports and statements from the Companies Register and the Press, and collecting information from shareholders. In this category are a number of long-established, reputable organisations, giving readily collated and lawfully obtained particulars of considerable value in the field of international trade and with a number of overseas subscribers.

3. In the other category are companies and firms concerned almost entirely with obtaining and purveying information about the creditworthiness of individuals. Such credit associations already operate on a vast scale in the United States and one such organisation in that country is, according to a United States Congress Reports,[2] compiling computer records on more than 100 million Americans, so that anyone can go to his local branch of the credit bureau and ascertain a person's income, debts,

[4] See para. 71 of this Report.
[1] *Privacy and Freedom*, Atheneum Press, 1967.
[2] *Hearings* before the Sub-Committee on Financial Institutions of the Committee on Banking and Currency, 91st Congress, 1st Session (" Fair Credit Reporting "), 1969.

payment record, details of their bank account and apparently even their drinking habits, something of the relationship with his wife, and other personal data. Another credit bureau in New York has files on more than 8 million people (on which, according to one account, 750,000 are shown as "defaulters").

4. According to Mr. Hugh MacPherson,[3] the Tracing Services Group in the United Kingdom—a credit protection firm—estimate that they will have a file on 80 per cent. to 90 per cent. of the nation's households within the next ten years. They claim already to have 4 million names on their files, and to be adding 40,000 every week.

5. For 2s. a retailer can ascertain if a customer's name is on the "black list," and for 10s. 6d. he can have a "full status inquiry" involving county court judgments, file search, confirmation of length and type of employment, confirmation of length and type of residence, local reputation, status of local accounts, and the firm's opinion of credit-worthiness.

6. There is a considerable risk at present of erroneous entries being made or left uncorrected and of an individual's being blacklisted as a bad payer (when, for instance, he may, quite legitimately, have refused to pay for goods on the grounds that they were defective). Furthermore, to clear a false entry or, as Mr. MacPherson points out, a correct entry of an unpaid account which may have been unpaid owing to illness or a prolonged absence from home, the victim might have to make inquiries of every credit data agency in the country.

7. Without a right of action for infringement of privacy, the only remedy now available to an aggrieved individual (and that only in limited circumstances) is to sue for libel. The rapid growth of credit data agencies indicates that the threat of such proceedings is no effective deterrent. There is, furthermore, no remedy at present for the individual citizen, whatever the methods used, short of actual physical trespass, to prevent a credit data agency from collating a complete personal file on all the most private aspects of his life, and then selling this information for their own profit.

8. Two directors of one such service were fined £5,000 at the Central Criminal Court after posing as doctors, police officers, officials from the Inland Revenue and from the Ministry of Pensions. By using these fraudulent and dishonest devices, they obtained considerable information about missing debtors. In that case, the police were able to take action for conspiracy to effect a public mischief by obtaining information by fraudulent means about missing debtors. The private citizens, however, were left with no remedy for these inexcusable intrusions.

Appendix J

DRAFT RIGHT OF PRIVACY BILL

Right of action for infringement of privacy

1. Any substantial and unreasonable infringement of a right of privacy taking place after the coming into force of this Act shall be actionable at the suit of any person whose right of privacy has been so infringed.

[3] *The Guardian*, September 16, 1969.

Joinder of parties

2. In any such action the plaintiff may join as a defendant any person who

(a) has committed the infringement; or
(b) has knowingly been party to the infringement; or
(c) knowing of the infringement, has made any use thereof for his own benefit or to the detriment of the plaintiff.

Defences

3. In any such action it shall be a defence for any defendant to show that

(a) the defendant, having exercised all reasonable care, neither knew nor intended that his conduct would constitute an infringement of the right of privacy of any person; or
(b) the plaintiff, expressly or by implication, consented to the infringement; or
(c) where the infringement was constituted by the publication of any words or visual images, the publication was in the public interest; or
(d) the defendant's acts were reasonable and necessary for the protection of the person, property or lawful business or other interests of himself or of any other person for whose benefit or on whose instructions he committed the infringement; or
(e) the infringement took place in circumstances such that, had the action been one for defamation, there would have been available to the defendant a defence of absolute or qualified privilege, provided that if the infringement was constituted by a publication in a newspaper, periodical or book, or in a sound or television broadcast, any defence under this paragraph shall be available only if the defendant also shows that the matters published were of public concern and their publication was for the public benefit; or
(f) the defendant acted under authority conferred upon him by statute or by any other rule of law.

Remedies

4. (1) In any such action the Court may

(a) award damages;
(b) grant an injunction if it shall appear just and convenient;
(c) order the defendant to account to the plaintiff for any profits which he has made by reason or in consequence of the infringement;
(d) order the defendant to deliver up to the plaintiff all articles or documents which have come into his possession by reason or in consequence of the infringement.

(2) In awarding damages the Court shall have regard to all the circumstances of the case, including

(a) the effect on the health, welfare, social, business or financial position of the plaintiff or his family;
(b) any distress, annoyance or embarrassment suffered by the plaintiff or his family; and

(c) the conduct of the plaintiff and the defendant both before and after the infringement, including any apology or offer of amends made by the defendant, or anything done by the defendant to mitigate the consequences of the infringement for the plaintiff.

Limitation

5. No such action shall be brought more than three years from the time when the plaintiff first became aware, or by the use of reasonable diligence could have become aware, of the infringement, nor in any case more than six years after the cause of action accrued to the plaintiff.

Miscellaneous provisions

6. The right of action conferred by this Act shall be in addition to and not in derogation of any right of action or other remedy available otherwise than by virtue of this Act, provided that this section shall not be construed as requiring any damages awarded in an action brought by virtue of this Act to be disregarded in assessing damages in any proceedings instituted otherwise than by virtue of this Act and arising out of the same transaction.

Rules of Court

7. The Lord Chancellor may make Rules regulating the procedure of the Court for the trial of actions for the infringement of the right of privacy and may by those rules make provision

(a) where the action has been begun in or transferred to the High Court, for trial by judge and jury upon the application of any party to the action;

(b) for the trial of the action or of any interlocutory proceedings therein or any appeal therefrom otherwise than in open Court.

Amendment of law of evidence

8. From and after the coming into force of this Act no evidence obtained by virtue or in consequence of the actionable infringement of any right of privacy by any of the means described in paragraphs (a), (b), (c) or (d) of section 9 (1) of this Act shall be admissible in any civil proceedings.

Definitions

9. (1) "Right of privacy" means the right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs, including intrusion by

(a) spying, prying, watching or besetting;

(b) the unauthorised overhearing or recording of spoken words;

(c) the unauthorised making of visual images;

(d) the unauthorised reading or copying of documents;

(e) the unauthorised use or disclosure of confidential information, or of facts (including his name, identity or likeness) calculated to cause him distress, annoyance or embarrassment, or to place him in a false light;

(f) the unauthorised appropriation of his name, identity or likeness for another's gain.

(2) "Family" means husband, wife, child, step-child, parent, step-parent, brother, sister, half-brother, half-sister, step-brother, step-sister (in each case whether legitimate or illegitimate and whether living or dead).

(3) "The court" means the High Court or any county court.

Amendment of Administration of Justice Act 1960

10. In section 12 (1) of the Administration of Justice Act 1960 (which provides for the publication of information relating to proceedings in private) there shall be inserted immediately after paragraph (d) the following new paragraph—

"(dd) where the court sits in private pursuant to Rules of Court made under the power conferred by section 7 of the Right of Privacy Act 1970."

Application to Crown, citation and commencement

11. (1) This Act shall bind the Crown.

(2) This Act may be cited as the Right of Privacy Act 1970.

(3) This Act shall come into force on January 1, 1971.

Appendix K

SUMMARY OF RECOMMENDATIONS MADE BY THE JOINT WORKING PARTY OF JUSTICE AND THE BRITISH COMMITTEE OF THE INTERNATIONAL PRESS INSTITUTE IN THEIR REPORT "THE LAW AND THE PRESS" 1965

Contempt of Court

1. Proceedings in relation to publications in newspapers and journals should be brought only on the instructions or with leave of the Attorney-General.

2. The question of whether it is contempt for a newspaper to publish a further libel after a writ has been issued or to comment on a libellous publication in another newspaper should be clarified in any future legislation.

3. In the light of the proposed prohibition of the publication of contemporaneous reports of committal proceedings, the rights of newspapers to publish responsible appeals for witnesses to come forward should be clearly established.

4. It should not be regarded as contempt to publish the name and photograph of a notorious and dangerous convict on the run, and the crimes he is suspected of having committed.

5. Newspapers should regard themselves as free to comment responsibly on sentences between a trial and the hearing of an appeal and should do so in appropriate cases.

6. Newspapers should accept their responsibility as guardians of the proceedings in the courts and if criticism of judges needs to be made they should be prepared to risk the consequences of making it.

7. In the public interest newspapers should devote more continual and serious attention to matters concerning the administration of justice and should employ more experienced reporters and editorial staff for this purpose.

Official Secrets

It should be a valid defence in any prosecution under the Official Secrets Act to show that the national interest or legitimate private interests confided to the state were not likely to be harmed and that the information was passed and received in good faith and in the public interest.

Libel

Practice and procedure

1. The Court of Appeal should be given the power to vary damages awarded by a jury in the same way as it is entitled to vary an award of damages made by a judge.

2. The issue whether the words are or are not capable of having a defamatory meaning should not be decided by the judge in the presence of the jury. The judge should only sum up to the jury the evidence upon which they are to decide whether the words were defamatory and the jury should then decide the issue without being given any ruling that the words were capable of a defamatory meaning. It should still, however, be open to defence counsel to submit in the absence of the jury that the words were not capable of having a defamatory meaning. If such a submission were rejected the case should continue before the jury without their being informed of the judge's ruling upon the submission and the judge should sum up in the same way as in cases where no submission was made.

3. Whenever the defence of fair comment or qualified privilege is met with an allegation of malice, it should be the function of the judge to decide whether or not the publication was malicious.

4. The Rules of the Supreme Court should be amended so that if a defendant can show that a plaintiff has taken no steps to prosecute an action for at least six months he shall be entitled to have the action dismissed unless the plaintiff can show good cause for his delay.

Substantive law

5. Section 5 (of the Defamation Act 1952) should be amended to provide that where an action is brought in respect of a defamatory publication, the defendant shall be entitled to rely on the defence of justification in respect of the whole publication so that if the truth of every allegation of fact is not proved the defence shall not fail if the words not proved to be true do not materially affect the plaintiff's reputation taking the publication as a whole.

6. There should be a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true, provided that the defendant has published upon request a reasonable letter or statement by way of explanation or contradiction and withdrawn any inaccurate statements with an apology if appropriate to the circumstances.

7. There should be a statutory defence of qualified privilege for newspapers in respect of re-publication of criticism made of a person or institution if the subject-matter of the criticism was one of public interest, and the newspaper made the publication in good faith, provided that the newspaper, if requested to do so by the person or institution criticised, has published a reasonable letter or statement by way of explanation or contradiction.

8. Where a defendant relies on the defence that an offer of amends was made in accordance with section 4 of the Defamation Act 1952, the court should have power to rule that an apology made before the rejection of the offer of amends constituted satisfaction of that part of the offer which requires publication of an apology.

9. Evidence of specific known past conduct of the plaintiff, which is connected in time or substance to the statements of which the plaintiff complains, should be admissible in evidence in mitigation of damages.

10. Fair and accurate contemporaneous reports of foreign judicial and parliamentary proceedings published in a newspaper should be the subject of qualified privilege.

Appendix L

MEMBERS OF THE COMMITTEE

Mark Littman, Q.C.: Practised at Bar 1947–1967; Deputy Chairman and Chief Legal Advisor, British Steel Corporation; Director, Rio Tinto-Zinc Corporation; Member, General Council of the Bar; Member, Law Commission Advisory Panel on Law of Contract.

Peter Carter-Ruck: Solicitor; Joint Author of *The Law of Libel and Slander*, and of *Copyright: Modern Law and Practice* (with E. P. Skone-James); Author of Chapters on Defamation, *Essential Law for Journalists*; Member of the Joint Working Party of JUSTICE and the British Committee of the International Press Institute on "The Law and the Press."

Raoul Colinvaux: Barrister at Law; Law Editor and Legal Adviser of *The Times* 1951–1967; Member of JUSTICE Committee on Contempt of Court (1959).

Gerald Dworkin: Solicitor; Professor of Law at the University of Southampton.

G. Laurence Harbottle: Solicitor.

G. C. Heseltine: Barrister at Law; Author and Journalist.

Neville Hunnings: Barrister at Law; Senior Research Officer at the British Institute of International & Comparative Law; Editor of *Common Market Law Reports* and of *Bulletin of Legal Developments*; Author of *Film Censors and the Law*.

J. Clement Jones: Editor of *Wolverhampton Express and Star*; Member of the Press Council and Chairman of its Parliamentary Bills Committee; Former President of the Council of the Guild of British Newspapers and

Chairman of its Standing Parliamentary Committee; Member of the Working Party of the International Press Institute on the Law of Defamation.

Herbert Lloyd: Solicitor; Public Relations Officer of the Port of London Authority; Formerly Secretary (Public Relations) of the Law Society; Past President of the Institute of Public Relations; Author of *The Legal Limits of Journalism.*

Alexander Lyon: Barrister at Law; Member of General Council of the Bar; Member of Parliament for York; Sponsor of Right of Privacy Bill, 1967.

Jasper More: Barrister at Law; Member of Parliament for Ludlow; Sponsor of Freedom of Publication Protection Bill, 1967.

John Mummery: Barrister at Law.

Paul Sieghart: Barrister-at-Law; practised at Bar 1953–1966; Director, Systems Programming Limited; Editor, *Chalmers' Sale of Goods,* 13th edition (1957) and 14th edition (1963); Member of JUSTICE Committee on Contempt of Court (1959).

Harry Street: Professor of Law at Manchester University; Author of first and second editions, *Freedom, the Individual and the Law* (Pelican).

Printed in Great Britain by Lewis Reprints Ltd.
member of Brown Knight & Truscott Group London and Tonbridge

JUSTICE

British Section of the International Commission of Jurists

JUSTICE is an all-party association of lawyers concerned, in the words of its constitution, "to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible: in particular, to assist in the administration of justice and in the preservation of the fundamental liberties of the individual." It is also concerned to assist the International Commission of Jurists in its efforts to promote observance of the Rule of Law throughout the world.

JUSTICE was founded in the Spring of 1957 following a joint effort of leading lawyers of the three political parties to secure fair trials for those accused of treason in Hungary and South Africa. From this co-operation arose the will to found a permanent organisation. A preamble to the constitution lays down that there must be a fair representation of the three political parties on the governing Council, which is composed of barristers, solicitors and teachers of law.

In the twelve years of its existence, JUSTICE has become the focal point of public concern for the fair administration of justice and the reform of out-of-date and unjust laws and procedures. It has published authoritative reports on a number of subjects (see below) and the majority of these have been followed by government action. Other important matters covered in recommendations to official committees include trade unions and trade associations, jury service, planning inquiries and appeals, bail and remands in custody, and the laws of evidence. In Commonwealth countries, JUSTICE has played an active part in the effort to safeguard human rights in multi-racial communities, both before and after independence.

Membership of JUSTICE is open to both lawyers and non-lawyers and inquiries should be addressed to the Secretary at 12 Crane Court, Fleet Street, London, E.C.4. Tel. 01–353 9428.

JUSTICE *reports previously published* by Stevens & Sons, Ltd.:

Contempt of Court (5s.).
Legal Penalties: the Need for Revaluation (3s. 6d.).
Preliminary Investigations of Criminal Offences (5s.).
The Citizen and the Administration (11s. 6d.).
Compensation for Victims of Crimes of Violence (7s. 6d.).
Matrimonial Cases and Magistrates' Courts (5s.).
Criminal Appeals (17s. 6d.).
The Law and the Press (17s. 6d.)
(the report of a joint working party with the International Press Institute).
Trial of Motor Accident Cases (9s. 6d.).
Home Office Reviews of Criminal Convictions (7s. 6d.).
Compensation for Compulsory Acquisition and Remedies for Planning Restrictions (10s.).
The Citizen and his Council: Ombudsman for Local Government? (10s.).