Can the Reasonable Person Still be "Highly Offended"? An Invitation to Consider the Civil Law Tradition's Personality Rights–Based Approach to Tort Privacy

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THE PRIVACY TORT'S COHERENT DEVELOPMENT AWAY FROM THE NARROW "right to be left alone," inhibited by connotations of physical space and proprietorship, may be well informed by comparative inquiry. Accordingly, this article undertakes to shine the light of comparative analysis on the dilemmas of American tort law, as they pertain specifically to privacy. If privacy continues to be defined by reference to seclusion, technological imperatives necessarily dictate that the sphere in which one can reasonably claim solitude will contract. That, in turn, augurs poorly for the prevailing expectation-driven tort standard. In sharp contrast to what might be characterized as the common law's oftentimes rigid vision of privacy torts, the civil legal method—captivated by the French and Quebec experience surveyed here—favours a more flexible construction of actionable privacy infringements. Most importantly perhaps, privacy is deemed a "personality right"—an idea central to the civilian tradition but alien to the Anglo-American system. Removed from the "reasonable expectations" doctrine and free of express references to seclusion, civilian jurisdictions' principled approach to civil liability ("tort") seems better able to protect individual privacy in intangible fora (such as "cyberspace") because it regards certain dignity-based personality rights as inalienable. Under this conceptual framework, human beings enjoy personality rights in private law by reason of their very personhood, regardless of express statutory or jurisprudential intervention, or spatial or proprietary constraints. Conceiving the right to privacy as a personality right in civil liability ("tort"), allows the civilian legal method to grasp privacy as a zone of intimacy delineated not by space or ownership but by the basic needs of personhood—as a right to preserve a state of mind of tranquility. Commensurate with privacy management in the technology age, the civilian view of privacy as a personality right merits further examination with an eye towards informing the development of privacy torts in Anglo-American law.

LE DÉVELOPPEMENT COHÉRENT DE LA RESPONSABILITÉ DÉLICTUELLE pour atteinte à la vie privée qui s'écarte du strict « droit d'être laissé tranquille » et entravé par des connotations d'espace physique et d'entreprise individuelle, pourrait bénéficier d'une étude comparative. Cet article entreprend par conséquent de jeter la lumière de l'analyse comparative sur les dilemmes posés par le droit de la responsabilité délictuelle américain en ce qu'ils relèvent précisément de la protection de la vie privée. Si l'on continue de définir la vie privée en référence à l'isolement, les impératifs technologiques dictent que la sphère au sein de laquelle on peut raisonnablement revendiquer la solitude finira par se rétrécir inévitablement. Ceci augure mal pour la norme en responsabilité délictuelle axée sur les attentes de la personne raisonnable. Par comparaison avec la vision que la common law a des délits en matière de vie privée et que l'on pourrait qualifier de souvent rigide, la méthode prévalant en droit civil — représentée par l'expérience française et québécoise analysée ici — favorise une construction plus souple des atteintes à la vie privée donnant ouverture à des poursuites. Plus important encore peut-être, le droit à la vie privée est censé être un « droit de la personnalité » — une notion qui réside au cœur même de la tradition civiliste mais qui demeure étrangère au système anglo-américain. Loin de la théorie de « l'expectative raisonnable » et libérée des renvois explicites à l'isolement, l'approche envers la responsabilité civile (« tort »), fondée sur des principes, propre aux ressorts de droit civil semble plus à même de protéger le droit individuel à la vie privée dans le cadre de forums intangibles (tels que le « cyberespace ») du fait qu'elle considère les droits de la personnalité fondés sur la dignité comme inaliénables. En vertu de ce cadre conceptuel, les êtres humains bénéficient de droits de la personnalité en droit privé en raison de leur identité individuelle, peu importe l'intervention légale ou judiciaire expresse ou les contraintes spatiales ou liées à propriété. Le fait de concevoir le droit à la vie privée comme un droit de la personnalité en matière de responsabilité civile (« tort »), permet à la méthode juridique civile de considérer la vie privée comme une zone d'intimité définie non pas par l'espace ou la propriété, mais par les besoins fondamentaux inhérents à l'identité individuelle —comme un droit de conserver un état d'esprit paisible. Comparée à la gestion de la vie privée à l'ère de la technologie, la conception civiliste de la vie privée en tant que droit de la personnalité mérite que l'on s'y penche sérieusement dans l'optique d'éclairer l'avènement d'un régime de délits pour atteinte à la vie privée dans le droit anglo-américain.

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> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been necessary from time to time to define anew the exact nature and extent of such protection.
>
> – Samuel D Warren and Louis D Brandeis, 1890[1]

1. INTRODUCTION

THE SUPREME COURT OF CANADA ONCE OBSERVED THAT GEORGE ORWELL in his classic novel *1984*, describes a society "whose citizens *had every reason to expect* that their every movement was subject to electronic video surveillance. The contrast with the *expectations of privacy* in a free society such as our own could not be more striking."[2] But have the often times overwhelming encroachments on privacy that are increasingly—albeit incrementally—visited on persons in the age of technology served to desensitize us to their unreasonableness? Have they accordingly come to gain tacit acceptance in some contexts? If tort law's view of privacy in the common law world is, by and large, predicated on society's construction of "reasonable privacy," then the changing nature of these expectations invites us to perhaps rethink the applicable standard.

To date, such examinations have, for the most part, been uni-systemic, focusing either on common law or civil law systems. Given the great promise instantiated by the migration of ideas—in private law no less than in its public counterpart[3]—the following proposes a comparative analysis of the rationales underlying "tort" recovery for privacy violations in the common law and civil law traditions.[4] It will focus specifically on the theoretical underpinnings on which the (continental) civil legal method rests, as it pertains to privacy and civil liability specifically. Particular emphasis will attach to the Quebec experience, from which

1. Samuel D Warren and Louis D Brandeis, "The Right to Privacy," (1890) 4:5 *Harvard Law Review* 193–220, available at *Louis D Brandeis School of Law Library*, <http://library.louisville.edu/law/brandeis/privacy.html> at p. 193.
2. *R v Wong*, 1990 SCC 36, <http://scc.lexum.umontreal.ca/en/1990/1990rcs3-36/1990rcs3-36.html>, 1990:3 *Supreme Court Reports* 47 (emphasis added).
3. Although the latter has certainly been the object of greater comparative analysis, whereas the former regrettably has not.
4. Or civil liability as it is known in civil law jurisdiction.

useful conclusions can plausibly be drawn.[5] Conceivably, these conclusions can, in turn, inform the evolution of privacy torts in the United States and other common law jurisdictions.[6]

While not all jurisdictions that adhere to the common law tradition recognize the actionability of privacy torts,[7] those that do—the US specifically—have generally done so only if the impugned privacy infringement would be deemed "highly offensive to a reasonable person."[8] Thus, an individual's right to privacy is assessed by reference to society's conception of the measure of privacy that one is entitled to reasonably expect. That standard, this article submits, is particularly awkward when such expectations are rapidly eroding precisely by reason of eventual social habituation to recurring intrusions. Paradoxically, the more we are watched, the less privacy we expect. The less we are bothered, the more we expect others to share in our complacency. Therefore, if privacy continues to be defined *negatively*[9] as "the right to be left alone,"[10] technological imperatives will necessarily dictate that the sphere in which one can reasonably

5. Due to its hybrid character, featuring a continental system that is highly influenced by the surrounding common law systems, the Quebec experience provides useful insight. As Lara Khoury observes in a different context: "The […] province of Quebec […] is of particular interest by reason of the influence of the common law on its civil law system." Lara Khoury, "The Liability of Auditors Beyond Their Clients: A Comparative Study," (2001) 46:2 *McGill Law Journal* 413–471, <lawjournal.mcgill.ca/abs/vol46/2khour.pdf> at p. 416.
6. While a broader discussion is outside the scope of this article, suffice it to note that in common law Canada the statutory tort of the invasion of privacy varies by province. British Columbia, Manitoba, Newfoundland, and Saskatchewan have created a statutory tort of invasion of privacy: *Privacy Act*, (1996) *Revised Statutes of British Columbia* ch. 373, <http://www.qp.gov.bc.ca/statreg/stat/P/96373_01.htm > [*Privacy Act* BC]; *Privacy Act*, (1987) *Revised Statutes of Manitoba* ch. P125, <http://web2.gov.mb.ca/laws/statutes/ccsm/p125e.php> [*Privacy Act* MB]; *Privacy Act*, (1990) *Revised Statutes of Newfoundland* ch. P-22, <http://www.assembly.nl.ca/legislation/sr/statutes/p22.htm> [*Privacy Act* NF]; *Privacy Act*, (1978) *Revised Statutes of Saskatchewan* ch. P-24, <http://www.publications.gov.sk.ca/details.cfm?p=767> [*Privacy Act* SK]>. The Canadian courts have left the door open for a general American-style privacy tort and have not rejected it as in England. For a broader discussion see John Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens," (1997) 42:2 *McGill Law Journal* 355–402, <http://lawjournal.mcgill.ca/abs/vol42/2craig.pdf>.
7. Australia, arguably until recently (see *Grosse v Purvis* (AUS QL Dist Ct, 2003), <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/qld/QDC/2003/151.html?query=Grosse%20v%20Purvis>, upholding a common law tort of invasion of privacy), the UK, and part of common law Canada most notably have not expressly recognized such a free-standing tort. "In common law Canada, on the other hand, the right to secrecy receives even less protection than in the United States, since it is not yet clear whether a common law right to privacy has been acknowledged by the courts." Patrik S Florencio and Erik D Ramanathan, "Secret Code: the Need for Enhanced Privacy Protections in the United States and Canada to Prevent Employment Discrimination Based on Genetic and Health Information," (2001) 39:1 *Osgoode Hall Law Journal* 77–116, <http://www.ohlj.ca/archive/articles/39_1_florencio_ramanathan.pdf> at pp. 94–95. For a more thorough discussion of the state of the law in these countries see Craig, "Invasion of Privacy," *supra* note 6. Regarding Australia see M Norton, K Clark, and K Sainty, "A Common Law Right to Privacy for Australia?" <http://www.findlaw.com.au/articles/default.asp?task=read&id=12832&site=LE>, discussing the leading Australian case on common law privacy rights, *Australian Broadcasting Corporation v Lenah Game Meats*, 2001 HCA 63, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2001/63.html?query=Australian%20Broadcasting%20Corporation%20v%20Lenah%20Game%20Meats>, (2001) 185 *Australian Law Reports* 1, where they summarized that "the High Court refrained from recognizing a separate right to privacy, but left open the possibility of a new tort of invasion of privacy." The article also discusses New Zealand where a new tort of privacy was recently recognized in *Hosking v Runting*, 2004 NZCA 34, <http://www.austlii.edu.au/cgi-bin/sinodisp/nz/cases/NZCA/2004/34.html?query=hosking%20w/5%20runting>. The New Zealand tort of privacy, as in the US, has two requirements: (i) a "reasonable expectation of privacy" must have existed; and (ii) the publication must be considered highly offensive to an objective reasonable person. With respect to the UK, the case of *Campbell v Mirror Group Newspapers*, 2004 UKHL 22, <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/campbe-1.htm>, is of particular interest. The House of Lords held that privacy infringements in public places were actionable as a breach of confidence, thus reflecting the acrobatics at times performed under the Anglo-American system for purposes of defending privacy in the private realm, as discussed below in part 2.
8. *Restatement of the Law, Second, Torts* (The American Law Institute, 1977), s. 652B, available at <http://cyber.law.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm> [*Restatement (Second) of Torts*].
9. In Berlinian terms, referring to Isaiah Berlin's *Two Conceptions of Liberty*, in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1990) 118–172.
10. Warren and Brandeis, "The Right to Privacy," *supra* note 1 at p. 193.

claim solitude will contract. That, in turn, augurs poorly for the expectation-driven prevailing tort standard prevalent at common law.[11]

Strikingly symptomatic of the emergent tendency to anticipate, expect, and even acquiesce to privacy intrusions once considered untenable are recent polls indicating that most Americans deem warrantless wiretapping of their private phone conversations and email "reasonable."[12] Taken to its logical conclusion, it stands to reason that the expectation-focused standard, centering on the perceived reasonableness of the invasion of privacy, renders even the most manifest intrusions presumably inactionable in tort. What is more, it would appear that expectation-based torts standards not only shape normative evolutions but *social* perceptions of privacy, as one eminent Canadian sociologist's study reinforces,[13] thus leading to an untenable tautology in the privacy context. This might—and should, as this paper argues—impel us to revisit the standard by which the individual's right of action in tort is assessed and the traditional thinking animating its use.

In contradistinction to its civilian counterpart, the common law tradition seems to place great emphasis on the *territorial* aspect of privacy, that is to say seclusion. Accordingly, it is said that "Americans carve out space where law may intrude and no further" (privacy zone).[14]

Historical analysis plays an important role in comparative study.[15] For our purposes, this territorial vision can be traced back to the common law tradition's historical understanding of privacy as deriving from *property*.[16] In the context of the information age, as the preceding example of warrantless wiretapping illustrates, the "reasonable expectation of privacy" criterion is falling into rapid desuetude, for not only does it fail to adequately respond to contemporary circumstance,[17] but it tends to reinforce social tolerance of intrusions once

11. And enshrined in the *Restatement (Second) of Torts*, *supra* note 8 at s. 652B. See also Shaun B Spencer, "Reasonable Expectations and the Erosion of Privacy," (2002) 39:3 *San Diego Law Review* 843–915.
12. According to a recent Angus Reid poll: "Many adults in the United States see nothing wrong with the domestic electronic surveillance program initiated by their federal government, according to a poll by TNS released by the Washington Post and ABC News. Fifty-four percent of respondents think wiretapping telephone calls and emails without court approval is an acceptable way to investigate terrorism." Angus Reid, "Many Americans Accept NSA Surveillance," (19 March 2006), <http://www.angus-reid.com/polls/index.cfm/fuseaction/viewItem/itemID/11182>; See also David Lyon, "Globalizing Surveillance: Comparative and Sociological Perspectives," (2004) 19:2 *International Sociology* 135–149. Discussing Canadians' penchant for acquiescing to surveillance from a sociology perspective, Lyon's study interestingly reveals that while Canadians do not seem to attach a very high value to their privacy, Quebeckers (governed by the civil law tradition) do. While that in itself by no means definitively points to the legal tradition's determinative influence on public perception of privacy, it does raise questions as to the law's impact on culture and vice versa.
13. Lyon, "Globalizing Surveillance," *supra* note 12.
14. "In [common law] Canada, 'privacy' includes 'a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.' […] That is the American conception as per *Griswold v. Connecticut* (1965), in a system where personality rights are unknown," Adrian Popovici, "Le Rôle de la Cour Suprême en Droit Civil," (2000) 34:3 *Revue Juridique Thémis* 607–624, <http://www.themis.umontreal.ca/pdf/rjtvol34num3/popovici.pdf> at p. 618, quoting *Godbout v Longueuil (City)*, <http://scc.lexum.umontreal.ca/en/1997/1997rcs3-844/1997rcs3-844.html>, 1997:3 *Supreme Court Reports* at para. 66 (author's translation). Popovici cites W Page Keeton, Dan B Dobbs, Robert E Keeton, and David G Owen, *Prosser & Keeton on the Law of Torts*, 5th ed. (West, 1984) at pp. 866–867; and Laurence H Tribe, *American Constitutional Law*, 2d ed. (Foundation Press, 1978) at p. 775. See also Daniel Pollack, *Contrasts in American and Jewish Law*, <http://www.jlaw.com/Commentary/contrasts.html>, from "Preface" to Daniel Pollack, ed., *Contrasts in American and Jewish Law* (Yeshiva University Press, 2001).
15. For a more in-depth discussion of the relationship between comparative law and historical analysis, see Mathias Reiman and Alain Levasseur, "Comparative Law and Legal History in the United States," (1998) 46 *American Journal of Comparative Law Supplement* 1–15.
16. As discussed in Part 2 below.
17. Spencer, "Reasonable Expectations," *supra* note 11.

deemed unreasonable.[18]

In this vein, the comparative approach offers a particularly edifying perspective. Shining the light of the comparative experience on the theory underlying the precarious privacy tort, while being mindful of the history and political culture animating the privacy tort, can serve to inform its coherent evolution.[19] As sociologist David Lyon observes, "it is important to note that privacy is a highly mutable concept, both historically and culturally relative. If privacy is dead then it is a form of privacy—legal, relating to *personal property* […] —that is a relatively recent historical invention in the western world."[20]

For our purposes, in sharp contrast to what might be characterized as the common law's libertarian and oftentimes rigid vision of privacy torts,[21] the civil legal method, exemplified by the French and Quebec experience, favours a more flexible construction of actionable privacy infringements, as exposed below. Most importantly perhaps, privacy is considered to be a "personality right"—an idea central to the civilian tradition but alien to the common law.[22] Succinctly put, "personality rights focus on the *être*—the being—in contrast with the *avoir*—the having"[23] and are therefore divorced from property or territory. These are *subjective* rights *deriving from personhood* and attaching to personality, which time or evolving notions of the private sphere cannot dilute. Central among these personality rights is privacy.[24] As shall be discussed in greater detail, personality rights have been recognized within the "delictual"[25] or civil liability context[26] for privacy protection purposes and are predicated on dignity.[27]

The practical result of this distinction is as follows: as personality rights,

18. Lyon, "Globalizing Surveillance," *supra* note 12 at para. 25.
19. According to Ernest Weinrib, a leading tort scholar in Canada, "private law strives to avoid contradiction, to smooth out inconsistencies, and to realize a self-adjusting harmony of principles, rules, and standards." Ernest Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) at p. 12.
20. David Lyon, "Surveillance, Power, and Everyday Life," in Robin Mansell, Chrisanthi Avgerou, Danny Quah and Roger Silverstone, eds., *Oxford Handbook of Information and Communication Technologies* (Oxford University Press 2007), 449-467 at p. 459.
21. The common law divides privacy torts into categories of recognized torts. See Keeton *et al*., *Prosser & Keeton on the Law of Torts, supra* note 14 at pp. 866–867.
22. Personality rights are also known as "primordial rights" by reason of their importance. See France Allard, "Les droits de la personnalité," in *Collection de droit: Personnes, famille et successions* (Éditions Yvon-Blais, 2005–2006) 59–77. According to Samuel, "for better or for worse, the concept of *le droit subjectif* [subjective rights such as personality rights] has little relevance in English law." Geoffrey Samuel, "'Le Droit Subjectif' and English Law," (1987) 46:2 *Cambridge Law Journal* 264–286 at p. 286. Personality rights have become increasingly important in Quebec law as Laverne A Jacobs remarks: "Quebec Civil law […] over the past three decades, has increasingly placed central emphasis on the person and personality rights." Laverne A Jacobs, "Integrity, Dignity and the Act Respecting Industrial Accidents and Occupational Diseases: Can the Act Provide More Appropriate Compensation for Sexual Harassment Victims?" (2002) 30 *Revue de Droit Université de Sherbrooke* 281–316 at p. 316 (online version, <http://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_30/30-2-jacobs.pdf>).
23. Adrian Popovici, "Personality Rights—A Civil Law Concept," (2004) 50:2 *Loyola Law Review* 349–358. See also Alain Seriaux, "La notion juridique de patrimoine: Brèves notations civilistes sur le verbe avoir," (1994) 93:4 *Revue Trimestrielle de Droit Civil* 801–806; Allard, "Les droits de la personalité," *supra* note 22, observing that these rights generally do not have any inherent monetary/pecuniary value, as they derive from and inhere to personhood.
24. See Allard, "Les droits de la personnalité," *supra* note 22; Louis LeBel, "La Protection des Droits Fondamentaux et la Responsabilité Civile," (2004) 49 *McGill Law Journal* 231–254, <http://lawjournal.mcgill.ca/abs/vol49/2lebel.pdf>.
25. "Delictual" is roughly civilian terminology for "tort," now referred to as "civil liability."
26. As it is referred to in that tradition.
27. According to Adrian Popovici, one of the leading authorities of civil liability and civilian theory in Quebec, « Le droit civil québécois demeure fidèle à la tradition civiliste, qui elle privilégie la notion de droits subjectifs inaliénables. Ces droits de personnalité intangibles ne sauraient être assimilés aux droits propriétaires, car ils découlent de la personnalité juridique du détenteur […] l'idée d'une protection de la personnalité humaine s'enracine et prend corps sous la forme de droits subjectifs." Gregoire Loiseau («Des droits patrimoniaux de la personnalité en droit français» (1997) 42 *McGill Law Journal* 319 at 328.

privacy rights in private law are inalienable and, as subjective rights, cannot be "reasonably" violated in the private law context.[28] Such intrusions are therefore deemed "faults" (roughly equivalent to a tort) and the damage that they cause is actionable regardless of whether it occurs in seclusion (within the privacy "zone") or is "consented" to individually or by tacit social acquiescence (as the surveillance example of acquiescence to warrantless wiretapping illustrates.[29] Moreover, the *rationale* underlying these privacy protections in the civilian idea of tort is inherently personality- or dignity-based, rather than animated by the libertarian idea of "being left alone" in areas delimitated by space, as Whitman demonstrates.[30]

The former conception, it is submitted, seems to better comport with Charles Fried's relational understanding of privacy as "inherent to the notions of respect, love, friendship and trust, and that close human relationships are only possible if persons enjoy and accord to each other a certain measure of privacy"[31] than does an understanding clinging to the notion of isolation or seclusion.

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28. See France Allard, "Les droits de la personalité," in *Collection de droit: Personnes, famille et successions* (Editions Yvon-Blais, 2005-2006) 59-77, noting that these personality rights cannot be alienated or renounced as they inhere to personhood. Regarding "reasonable violations," it has been argued that personality rights cannot be "reasonably" violated in the same way that government might justify certain infringements under constitutional law standards. Popovici has written quite extensively on the important distinction between the notion of rights and their limitations in private and public law. To summarize the argument: whereas Section 1 of the Canadian *Charter of Rights and Freedoms*, for instance, allows government to infringe on constitutionally protected rights and freedoms if it can show that such infringements are "demonstrably justified in a free and democratic society," a violation of a private law right, once demonstrated by plaintiff cannot be justified by the defendant invoking the violation's purported "reasonableness." As Popovici explains in a different context:

> neither the concept nor the content of an individual right is identical in constitutional law and [private] civil law […] [T]he construction of "the right to privacy" in private law [under the civilian tradition] is not necessarily the same as in public law. Therefore, what is deemed to be a legitimate or reasonable infringement by the State is not necessarily such at the hands of an individual [in the private law realm]. Nor is the opposite true. These are two separate legal standards—very different processes indeed. Thus, while authorized electronic eavesdropping [under a warrant] may violate the right to one's privacy, it can be justified under article 1 of the Charter. Accordingly, there can be a licit [reasonable] violation of a protected right in constitutional law (the same can be said for mandatory vaccination). In private law however, infringements on rights are necessarily illicit at the hands of a private party.

Popovici, "Le Rôle de la Cour Suprême en Droit Civil," *supra* note 14 at pp. 615–616 (author's translation).

29. *Aubry v Éditions Vice-Versa*, <http://scc.lexum.umontreal.ca/en/1998/1998rcs1-591/1998rcs1-591.html>, 1998:1 *Supreme Court Reports* 591 at para. 17: "A reasonable person respects the rights and freedoms of everyone and carries out his or her obligations while bearing his or her own rights in mind." Aubry brought an action in civil liability against the appellants for taking and publishing a photograph without her consent, albeit in a public place in Montreal.

30. To paraphrase Warren and Brandeis, "Right to Privacy," *supra* note 1 at p. 195, quoting Thomas M Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*, 2d ed. (Callaghan & Co., 1888) at p. 29; Louis Henkin, "Privacy and Autonomy," (1974) 74:8 *Columbia Law Review* 1410–1433 at pp. 1419, 1425, discussing the "right to be let alone" as "the moral freedom of the individual to engage in his or her own thoughts, actions and decisions." See also Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?" (1983) 58:3 *Notre Dame Law Review* 445–492; Daniel R Ortiz, "Privacy, Autonomy, and Consent" (1989) 12:1 *Harvard Journal of Law and Public Policy* 91–97; and Michael J Perry, "Substantive Due Process Revisited: Reflections On (and Beyond) Recent Cases," (1976) 71:4 *Northwestern University of Law Review* 417–469 at p. 440. As Whitman explains: "It is the contrast between two conceptions of privacy most recently distinguished by Robert Post: between privacy as an aspect of dignity and privacy as an aspect of liberty. Continental privacy protections are, at their core, a form of protection of a right to respect and *personal dignity*. The core continental privacy rights are *rights to one's image, name, and reputation*." James Q Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty," (2004) 113:6 *Yale Law Journal* 1151–1221, <http://yalelawjournal.org/113/6/1151_james_q_whitman.html> at pp. 1160–1161.

31. Charles Fried, "Privacy," (1968) 77:3 *Yale Law Journal* 475–493 at pp. 477–478, cited in Craig, "Invasion of Privacy and Charter Values," *supra* note 6 at p. 361. According to Fried, privacy is linked to respect, love, friendship and trust and is the "oxygen" by which individuals are capable of building "relations of the most fundamental sort."

In the same vein, the civilian approach, basing recovery on objective loss[32]—albeit intangible loss such as dignity—that derives from the inherently unreasonable violation of a personality right is edifying. Inalienable rights, whose violation by private parties[33] is judged unreasonable by the civil legal method, can arguably weather technological evolution in a way that fluctuating social perceptions of the privacy "zone" might not. If tort law's very objective is to regulate human relationships through corrective justice[34] this approach merits further attention, with an eye towards developing coherent privacy tort reasoning.[35]

In view of that, this article's objective is twofold: First, it questions the continued use of the "reasonable expectation of privacy" model, prevalent in American law with its references to seclusion. The narrow focus on territorial and/or proprietary notions of "seclusion," it will be shown, derives from historically entrenched property-based reasoning, which fails to capture the complexity of the privacy value in modern times. Tort law standards, which are shaped by and can in turn fashion narrowing societal perceptions of privacy, ill-comport with the imperatives of technology. This is particularly true when heightened surveillance curiously tends to foster complacency rather than aversion.[36]

Second, and most importantly, the article sets forth an alternative conception of "privacy tort" reasoning, gleaned from the preceding comparative exercise, specifically the civilian tradition's flexible personality rights-based approach to civil liability. Under the civilian tradition, the right to privacy is considered a fundamental attribute of personhood and therefore actionable outside any spatial or proprietary "privacy zone."

Those attributes of the person called "personality rights" are characteristic of the continental legal optic. They are internal and divorced from space or time and thus able to better withstand technological advances. This comparative perspective to the privacy tort is offered in the hope that it may serve to illuminate the debate in the United States and common law Canada.

For present purposes, I focus my discussion on the theoretical underpinnings of these respective traditions' conception of the privacy tort/civil liability and therefore make no attempt to provide a thorough examination of the normative framework on point.[37] To this end, the article will adopt the following structure. Following this introduction, Part 2 proposes an overview of the

32. *Québec (Curateur Public) v Syndicat national des employés de l'hôpital St-Ferdinand*, <http://scc.lexum.umontreal.ca/en/1996/1996rcs3-211/1996rcs3-211.html>, 1996:3 *Supreme Court Reports* 211.
33. Unlike government. See Popovici, *supra* note 23. See also Adrian Popovici, "De l'impact de la Charte des droits et libertés de la personne sur le droit de la responsabilité civile: un mariage raté?" in *Conférence Meredith Memorial Lectures 1998–1999: La pertinence renouvelée du droit des obligations : retour aux sources / Back To Basics : The Continued Relevance of the Law of Obligations* (Éditions Yvon Blais, 2000) 49–94 at pp. 49–56.
34. Weinrib, *The Idea of Private Law*, *supra* note 19.
35. In so doing, it thus ensures coherence that has been so markedly absent to date. As Ernest Weinrib remarks, "private law strives to avoid contradiction, to smooth out inconsistencies, and to realize a self-adjusting harmony of principles, rules, and standards." Weinrib, *The Idea of Private Law*, *supra* note 19 at p. 12.
36. As the above example pertaining to post September 11th warrantless wiretapping, *supra* note 12, illustrates. See Angus Reid, "Many Americans Accept NSA Surveillance," *supra* note 12, and Lyon, "Global Surveillance," *supra* note 12.
37. For a thorough examination of the Canadian privacy framework beyond tort law, see Benôit Pelletier, "La Protection De La Vie Privée au Canada," (2001) 35:1–2 *Revue Juridique Thémis* 485–522, <http://www.themis.umontreal.ca/pdf/rjtvol35num1_2/pelletier.pdf>.

underlying rationales and historical justifications[38] animating privacy protections at common law, from whence recognized privacy torts in the US (and common law Canada) in their various incarnations derive. In so doing, it will highlight the "growing disconnect between people's perception of privacy and the rapid growth of various forms of surveillance."[39]

Having conducted an examination of the salient history and theoretical perspective defining the normative framework, the second stage of analysis (Part 3) will engage in a comparative exercise aimed at exposing the civil law tradition's distinct approach to civil liability for privacy infringements.

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2. THE MEAGER PRIVACY TORT: THE PROPERTY ORIGINS OF REASONABLE EXPECTATIONS AND SECLUSION AT COMMON LAW

WHEREAS THE CIVIL LAW TRADITION ADHERED TO BY the nations of continental Europe and the province of Quebec, among other jurisdictions,[40] favours a broad and flexible construction of fault,[41] which is particularly amenable to compensating modern privacy intrusions, states abiding by the common law tradition[42] have, for various reasons elaborated below, refused to stray from rigid categorizations of tort. Instead they by and large chose to rely on "the expectation-driven privacy test focusing on the context of the alleged intrusion and the social norms and customs that determine whether an expectation of privacy is reasonable."[43] Much has already been written respecting the normative framework and caselaw in the US pertaining to torts,[44] particularly in the

38. "It is a banality that comparative law and legal history are kindred disciplines in the sense that the former looks at law across space while the latter looks at law across time. One might therefore expect a close working relationship between comparatists and legal historians, perhaps even a trend toward a harmonization or a rapprochement of the comparative and historical approaches." Reiman and Levasseur, "Comparative Law," *supra* note 15 at p. 1.
39. To paraphrase from Lyon, "Globalizing Surveillance," *supra* note 12.
40. These include those which boast a Civil Code such as France, Germany and Belgium amongst many others.
41. Fault is the first element of civil liability. See Part 3 below for a detailed discussion of the elements of civil liability in the civil law tradition.
42. The common law tradition is chiefly Commonwealth countries, with the exception of Cyprus and Ireland that may be deemed pluralistic systems with Codal elements. See Craig, "Invasion of Privacy," *supra* note 6.
43. Spencer, "Reasonable Expectations," *supra* note 11 at p. 854.
44. For a detailed discussion of privacy torts in the American context, see Michael S Raum, "Torts—Invasion of Privacy: North Dakota Declines to Recognize a Cause of Action for Invasion of Privacy," (1999) 75:1 *North Dakota Law Review* 155–177 at pp. 162–165.

information technology context.[45] Suffice it then simply to observe the following: the pertinent American common law tort of invasion of privacy[46] that may be invoked in this context is premised on four theories of liability,[47] all based on the "right to be let alone."[48] Most relevant amongst these for our purposes is "the unreasonable intrusion into the seclusion of another, if shown to be highly offensive to the reasonable person" category (the elements being "intrusion" that is "highly offensive" to a "reasonable person"). Telling in this vein is the following example: American Courts are inclined to frame email eavesdropping issues in the workplace as matters of property rights[49] and tend to use property-

45. See Jarrod J White, "E-Mail @Work.com: Employer Monitoring of Employee E-Mail," (1997) 48:3 *Alabama Law Review* 1079–1104; Erin M Davis, "The Doctrine of Respondeat Superior: An Application to Employers' Liability for the Computer or Internet Crimes Committed by Their Employees," (2002) 12:2 *Albany Law Journal of Science and Technology* 683–713; C Forbes Sargent III, "Electronic Media and the Workplace: Confidentiality, Privacy and Other Issues," (1997) 41 *Boston Bar Journal* 6–21; Deborah M McTigue, "Marginalizing Individual Privacy on the Internet," (1999) 5 *Boston University Journal of Science and Technology Law* 95–117, <http://www.bu.edu/law/central/jd/organizations/journals/scitech/volume5/5bujstl5.pdf>; Joshua S Bauchner, "State Sovereignty and the Globalizing Effects of the Internet: A Case Study of the Privacy Debate," (2000) 26:2 *Brooklyn Journal of International Law* 689–722; Alan F Westin, "Privacy in the Workplace: How Well Does American Law Reflect American Values?" (1996) 72:1 *Chicago-Kent Law Review* 271–283; Anne L Lehman, "E-Mail in the Workplace: Question of Privacy, Property or Principle?" (1997) 5 *CommLaw Conspectus: Journal of Communications Law and Policy* 99–112; Matthew Finkin, " Privacy & Employment Law," review of John DR Craig, *Privacy & Employment Law* (Hart, 1999) and Dieter Simon and Manfred Weiss, eds., *Zur Autonomie Des Individuums: Liber Amicorum Spiros Simitis* (Nomos Verlag, 2000), (2000) 21:4 *Comparative Labor Law and Policy Journal* 813–817; Samuel A Thumma and Darrel S Jackson, "The History of Electronic Mail in Litigation," (2000) 16:1 *Santa Clara Computer and High-Technology Law Journal* 1–33; Sarah DiLuzio, "Workplace E-Mail: It's Not as Private as You Might Think," comment, (2000) 25:3 *Delaware Journal of Corporate Law* 741–760; Alexander I Rodriguez, "All Bark, No Byte: Employee E-Mail Privacy Rights in the Private Sector Workplace," (1998) 47:4 *Emory Law Journal* 1439–1473; Jay P Kesan, "Cyber-Working or Cyber-Shirking? A First Principles Examination of Electronic Privacy in the Workplace," (2002) 54:2 *Florida Law Review* 289–332, <http://www.flr.law.ufl.edu/pdf/april2002/kesan.pdf>; Rafael Gely, "Distilling the Essence of Contract Terms: An Anti-Antiformalist Approach to Contract and Employment Law," (2001) 53:4 *Florida Law Review* 669–725, <http://ssrn.com/abstract=264021>; S Elizabeth Wilborn, "Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace," (1998) 32:3 *Georgia Law Review* 825–887; Dan McIntosh, "E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace," (2000) 23:2 *Hamline Law Review* 539–584; Todd M Wesche, "Reading Your Every Keystroke: Protecting Employee E-Mail Privacy," (2002) 1 *Journal of High-Technology Law* 101–118, <http://www.jhtl.org/docs/pdf/TWESCHEV1N1N.pdf>; Rebecca Ebert, "Mailer Daemon: Unable to Deliver Message Judicial Confusion in the Domain of E-Mail Monitoring in the Private Workplace," (2002) 1 *Journal of High-Technology Law* 63–83, <http://www.jhtl.org/docs/pdf/REBERTV1N1N.pdf >; Gregory I Rasin and Joseph P Moan, "Fitting a Square Peg into a Round Hole: The Application of Traditional Rules of Law to Modern Technological Advancements in the Workplace," (2001) 66:4 *Missouri Law Review* 793–825; Benjamin F Sidbury, "You've Got Mail… and Your Boss Knows It: Rethinking the Scope of the Employer E-Mail Monitoring Exceptions to the Electronic Communications Privacy Act," (2001) 5 *UCLA Journal of Law and Technology* <http://www.lawtechjournal.com/articles/2001/05_010912_sidbury.php>.
46. Needless to say this is broadly speaking, with differences among the various states.
47. The four theories of liability arguably derive from the writings of Thomas M Cooley and are animated by the right "to be let alone." Cooley, *Treatise on the Law of Torts*, *supra* note 30 at pp. 1–7, 20, 29. See also Keeton *et al*., *Prosser & Keeton on the Law of Torts*, *supra* note 14 at p. 849, para. 117, citing the "right to be let alone" as the chief impetus for privacy protection in tort, and William L Prosser, "Privacy," (1960) 48:3 *California Law Review* 383–423 at p. 389 discussing four distinct kinds of invasion or four different interests of the plaintiff and referring to Cooley. For a critique of the four categories, see Edward J Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," (1964) 39:6 *New York University Law Review* 962–1007 especially at pp. 964–966.
48. For further discussion, see Joan TA Gabel and Nancy R Mansfield, "The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace," (2003) 40:2 *American Business Law Journal* 301–353 at p. 313. The authors define the relevant tort in the following manner: "The tort of intrusion on seclusion consists of intrusion into a matter in which the employee has privacy (i.e., the employer has no legitimate interest) and by means that would be objectionable to a reasonable person" (notes omitted).
49. Property rights are balanced between privacy and ownership. See Lawrence E Rothstein, "Privacy or Dignity?: Electronic Monitoring in the Workplace," (2000) 19:3 *New York Law School Journal of International and Comparative Law* 379–412 at p. 382.

based reasoning in their decisions.[50]

Thus, for instance, the leading case of *Smyth v. Pillsbury Co.*[51] pertaining specifically to email eavesdropping in the workplace can be said to stand for the proposition that employees do not have a reasonable expectation of privacy at work because no "reasonable person would consider the defendant's interception of [his] communications to be a substantial and highly offensive invasion of his privacy."[52] Although this present article, as noted, intends to refrain from detailing the normative framework—a task proficiently tackled by many scholarly writings[53]—suffice it to tersely and succinctly make note of the following relevant points.

Generally speaking, American courts recognize four separate privacy torts: intrusion upon seclusion, public disclosure of private facts, "false light" invasion of privacy, and appropriation of personality.[54] *The Restatement (Second) of Torts*, for its part, enshrines protection against intrusion and eavesdropping on one's "seclusion," and disclosure of one's private information.[55] As previously alluded, these references to "seclusion" are particularly noteworthy in light of the above highlighted historical references to property and privacy being delineated spatially. Comporting with the property rationale, the intrusion must be into a private place or "a private seclusion that the plaintiff has thrown about his person or affairs" to be actionable.[56]

As Van der Haag remarks in the electronic surveillance context, in the US, and indeed in the common law world generally speaking, "[p]rivacy is best treated as a property right. Property grants an owner the exclusive right to dispose of what he owns. Privacy is the exclusive right to dispose of access to one's proper (private) domain."[57]

Although the rationales justifying this optic may have found legitimacy in the past, they are today the object of increasing scrutiny and critique.[58] This property-based or spatially based construction, which unconsciously, if not otherwise, continues to animate modern American privacy tort law, is awkward in the information technology context, for this antiquated rationale would dictate that the individual has few or no privacy rights in the public realm where it would be unreasonable to expect to be left alone.[59]

Not surprisingly therefore, "[i]n the United States, judicial protection

50. Property reasoning is qualified only by narrowly tailored exceptions. See Karen Eltis, "The Emerging American Approach to E-mail Privacy in the Workplace: Its Influence on Developing Caselaw in Canada and Israel: Should Others Follow Suit?" (2003) 24:3 *Comparative Labor Law and Policy Journal* 487–523, <http://www.law.uiuc.edu/publications/CLL&PJ/archive/vol_24/issue_3/EltisArticle24-3.pdf> at p. 489, footnote 11; See also, Karen Eltis, "La surveillance du courrier électronique en milieu de travail: le Québec succombera t-il à l'influence de l'approche permissive américaine?" (2006) 51:3 *McGill Law Journal* 475–502.
51. *Smyth v Pillsbury Co.* (USA E Dist PA, 1996), 914 *Federal Supplement* 97.
52. *Smyth v Pillsbury*, *supra* note 51. It should be noted that this case is somewhat peculiar, as the email in question had been sent to the employee's own supervisor, thus severely undermining a line of argument based on an expectation of privacy.
53. See sources mentioned in *supra* note 45.
54. Prosser, "Privacy," *supra* note 47 at pp. 388–390 summarizing the evolution of privacy causes of action.
55. *Restatement (Second) of Torts*, *supra* note 8 at para. 652A: "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."
56. See *Restatement (Second) of Torts*, *supra* note 8, para. 652, former comment C.
57. Ernest van den Haag, "On Privacy," in J Roland Pennock and John W Chapman, eds., *Privacy* (Atherton Press, 1971) 149–168 at pp. 150–151 (citations omitted). Also cited by Rothstein, "Privacy or Dignity," *supra* note 49 at pp. 381–382.
58. See Ruth Gavison, "Privacy and the Limits of Law," (1980) 89:3 *Yale Law Journal* 421–471.
59. As the wiretapping example, *supra* note 12, so plainly illustrates.

of privacy depends on whether an individual has a reasonable expectation that the information in question will remain private. Stated another way, the question is whether society recognizes the individual's claimed expectation of privacy as reasonable."[60]

This approach arguably discounts context. Indeed, the tendency to associate privacy with property and aloneness externally or spatially defined,[61] rather than with dignity inherent to personality, may not lend itself as well to realms outside the physical world (i.e. in cyberspace). Placing privacy in its historical context can serve to elucidate this seeming contradiction between the decreasing expectation of privacy in the information age and the common law privacy tort's misguided insistence on an expectation-based standard of libertarian ilk.

American scholars tend to embark on discussions of privacy with the origins of the invasion of privacy tort, born of Warren and Brandeis's seminal article titled *The Right to Privacy*.[62] Though seldom addressed, the historical roots of that very right at common law in England are particularly instructive. Under the English common law, the right to privacy was first recognized by virtue of its intricate link to personal property. This is best evidenced by the now infamous saying "the house of everyone is to him as his castle and fortress," first coined by the House of Lords in the *Semayne* case (now colloquially known as "a man's home is his castle").[63] This phrase alluded to the conception that a person's right to privacy fundamentally derives from his property rights.[64] In view of that, the right to privacy was initially recognized in relation to trespass,[65] thus confirming what for many years was the reigning conception of privacy as rooted in ownership.[66] This brief historical *aperçu* serves to shed some light on the narrow conception and repeated references to "seclusion" offered in contemporary tort law discourse. It similarly elucidates the understanding of privacy as the right to be left alone *in given spaces*, defined externally rather than inherently to personhood.[67]

But what role might the notion of seclusion play when, to paraphrase the Supreme Court of Canada in *Wise*, "many, if not the majority, of our activities are inevitably carried out in the plain view of other persons."[68] The view taken by civilian jurisdictions in this vein is particularly enlightening and may serve to guide the development of privacy tort law.

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60. Spencer, "Reasonable Expectations," *supra* note 11 at p. 847.
61. This is a hallmark of the highly individualistic American culture.
62. Warren and Brandeis, "Right to Privacy," *supra* note 1.
63. *Semayne's Case* (KB, 1604), 5 *Coke's King's Bench Reports* 91 a, 77 *English Reports* 194.
64. See Warren Freedman, *The Right of Privacy in the Computer Age* (Quorum Books, 1987) at p. 3 discussing the 1818 English case of *Gee v Pritchard* (36 *English Reports* 670) where the Court of Chancery restricted the publication of a personal letter "to protect a 'property right.'" Freedman discusses this and other English cases where courts "based their protection of the right of privacy upon the protection of a 'property right'".
65. Prosser, "Privacy," *supra* note 47 at pp. 389–392. See also, Alan F Westin, *Privacy and Freedom* (Atheneum, 1968) at pp. 311, 333.
66. See Eltis, "The Emerging American Approach," *supra* note 50 at p. 496.
67. For a general discussion, see Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977) at pp. 31-34. Horwitz observes how the conception of property changed from an eighteenth-century view that dominion over land conferred the power to prevent others' interference to the nineteenth-century assumption that the essential attribute of property ownership was the power to develop it irrespective of the consequences to others.
68. *R v Wise*, <http://scc.lexum.umontreal.ca/en/1992/1992rcs1-527/1992rcs1-527.html>, 1992:1 *Supreme Court Reports* 527 at pp. 564–565.

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3. THE CIVILIAN APPROACH

3.1. The General Codal Principle: Twin Pillars of Flexibility and Permanence

WHILE COURTS IN COMMON LAW COUNTRIES GENERALLY SET FORTH specific categories of the privacy tort within which plaintiffs must fit—and whose rigid, at times archaic, criteria they must satisfy—the civil law tradition sets out a broad Codal entitlement to compensation for all who successfully prove injury caused by the defendant's wrongful conduct.[69] At common law, specific interests once jurisprudentially recognized are protected by particular torts; in contradistinction, according to continental thinking, all interests are protected by a generally worded catch-all provision contained in the private law Code.[70] The tradition is therefore marked by the absence of nominate torts or delicts (a list of wrongs), under which each boasts distinct liability principles.[71] By reason of their generality, such Codal provisions are endowed with tremendous flexibility, allowing them to extend to a plethora of cases and withstand the test of time.[72] This effect is all the more pronounced, given that socio-economic considerations (*les faits sociaux*) are deemed sources of law by the civilian tradition, thus ensuring permanence and flexibility.[73]

As Craig puts it,

> [t]he inherent flexibility of the civil-law delict principle, which allows it to deal easily with new forms of fault, should be contrasted with the rigidity of the common law, where centuries of precedent have given rise to identifiable categories of fault (i.e., "torts"), each with specific criteria that must be met before a remedy can be awarded.[74]

In a few words, the constituent elements of civil liability, as set out in the general Codal provision that is typical of continental systems may be summarized as harm caused by wrongful conduct. In other words, and while it is beyond the scope of this paper to go into any greater detail, "three prerequisites [… must be] met: the defendant has committed a fault, the plaintiff has suffered harm, and there is a sufficient causal relation between these two events."[75] As a general

69. The proof is on a balance of probabilities.
70. Known as the *Code Civil* or colloquially, the "Napoleonic Code." The code ties in to a basic assumption of civilian thinking, namely: "codification presumes that legal rules can be expressed meaningfully at a degree of generality that ensures their relative stability and permanence, and that provides flexible baselines for self-regulation." John EC Brierley and RA MacDonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Emond Montgomery , 1993) at p. 99.
71. This is the case at common law, with distinct principles governing different torts such as trespass or nuisance etc.
72. Brierley and MacDonald, "Quebec Civil Law," *supra* note 70 at p. 435: "[T]he Code is not specific as to the nature of legally protected interests that may give rise to a claim in damages […] Indeed, rather than limiting the scope of recovery by creating particular categories for non-compensable damage, the Code achieves similar results through a flexible use of the principles of causation."
73. Craig, "Invasion of Privacy," *supra* note 6. Regarding the provision's flexibility, see also René Hurtubise, "La personne: Respect de la personne humaine," in Paul-André Crépeau *et al.*, eds., *Codification: Valeurs et langage, Actes du colloque international de droit civil comparé* (Service des communications du Conseil, 1985) 127–135, <http://www.cslf.gouv.qc.ca/publications/PubF115/F115A1.html#1>.
74. Craig, "Invasion of Privacy," *supra* note 6, p. 363.
75. Khoury, "Liability of Auditors," *supra* note 5 at p. 450.

rule, therefore, the Civil Code provides that the "tortfeasor" (to borrow common law parlance) is held to repair all "bodily, moral or material" injury attributable to her.[76] As the proximity requirement is alien to the civil law, a broad duty of care being owed to all—rather than to a specific "neighbour"—recognizing a broad category of potential claimants appears to pose few difficulties.

More specifically, in France, for example, the relevant provisions giving expression to these elements are articles 1382 and 1383 of the *Code civil* (French Civil Code):

> 1382. Any human deed whatsoever which causes harm to another creates an obligation in the person by whose fault it was caused to compensate it.
>
> 1383. Everyone is liable for the harm which he has caused not only by his deed, but also by his failure to act or his lack of care[77]

In Quebec, the equivalent provision is article 1457 of the Quebec Civil Code (CCQ): [78]

> 1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in his duty, he is responsible for any injury caused to another by the act or fault of another person or by the act of things in his custody.[79]

Relevant for our purposes is a general right of action (i.e. in the common law parlance, "tort actions") pertaining to civil liability,[80] and by no means specific to privacy. Not unlike other Codal provisions, this general norm is articulated at the highest level of abstraction in order to preside over an endless and timeless *évantail* of situations it is meant to capture. No reference is made to specific circumstances and there are "few restrictions […] on the nature of the damage that may be compensated" including purely "moral" (emotional) or economic loss.[81] Instead, the respective Codal norms cited above "aspire […] to provide meaningful generalities that can accommodate a [wide] range of future facts in

76. *Civil Code of Québec, Revised Statutes of Québec* ch. C-1991, <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ/CCQ_A.html> at arts. 1457, 1607 [CCQ].
77. *Civil Code* (FRA), <http://195.83.177.9/code/liste.phtml?lang=uk&c=22>. See Catherine Valcke, "Quebec Civil Law and Canadian Federalism," (1996) 21:1 *Yale Journal of International Law* 67–121; Eric H Reiter, *infra* note 86 "Personality and Patrimony: Comparative Perspectives on the Right to One's Image," (2002) 76 *Tulane Law Review* 673–726 at p. 684.
78. The hybrid character of the Quebec legal system, consisting of its relationship with French law from whence it derives and the neighbouring common law tradition makes it an important jurisdiction to study.
79. CCQ, *supra* note 76 at art. 1457.
80. "There is no liability without damage in the law of Quebec." Brierley and MacDonald, *Quebec Civil Law*, *supra* note 70 at p. 435.
81. Brierley and MacDonald, *Quebec Civil Law*, *supra* note 70 at p. 435. *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, *supra* note 32. According to Jacobs, "[i]n addition to interference with physical integrity (one's physical person), damages awarded for loss of or interference with moral integrity also abound in Quebec Civil law. Generally speaking, moral integrity comprises the subjective qualities that serve to define a person as an individual such as one's thoughts and sentiments. The Courts tend to place interference with all personality rights of a non-physical nature together under this title (including the rights to honour, reputation, privacy and dignity)." Jacobs, *supra* note 22 at 293 (hardcopy version) or 294 (online version). See for example, *Aubry v Éditions*, *supra* note 29, and *Deschamps v Renault* (QC Sup Ct, 1972), 18 *Les Cahiers de Droit* 937. According to Jacobs, p. 294 (online version) at footnote 42, dignity is an autonomous right, not a subset of integrity. Jacobs *supra* note 22 at footnote 42.

all their diversity."[82] Again, the philosophy underpinning this approach is the twin pillars of the civilian tradition: flexibility and permanence.

In fact, the relevant provisions enshrined in both the French and Quebec Civil Codes[83] stipulate a *general obligation* to compensate all damages caused by fault, rather than expressly naming the claimants entitled to sue on precise grounds. As noted, the provision's vagueness is attributed to a desire to ensure adaptability to changing social conditions.[84] Significantly, for our purposes, "[t]he mission of the Civil law is to situate the individual and his or her rights within the framework of the private law—that is to say, the regulation of the social interactions of citizens as private persons," regardless of technological changes.[85] The Civil Law where, as Reiter observes "the notions of person and property have been conceptually distinct since classical Roman law"[86] has since time immemorial recognized the right of third parties to damages resulting from infringements on privacy relating—even exclusively—to dignity.

For that reason, the requirement that the intrusion be "highly offensive" to a reasonable person set forth in the American privacy tort of Common Law lineage is absent in articles 1457 and 35–36 of CCQ (dealing with breach of privacy specifically)[87] and in articles 1382 and 1832 of the French Civil Code. This is significant in that it illustrates the greater generosity of the civilian approach in sanctioning privacy infringements more readily in "tort"/civil liability, as these lend themselves to a rather broad construction.[88]

This approach should come as no surprise in light of what appears as a

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82. Brierley and MacDonald, *Quebec Civil Law*, *supra* note 70 at p. 107.
83. See for example, Brierley and MacDonald, *Quebec Civil Law*, *supra* note 70 at p. 154, discussing the impact of the French Code on the Code of Quebec.
84. See Maurice Tancelin, "Le Silence du Code," (1994) 39:4 *McGill Law Journal* 747–760.
85. Brierley and MacDonald, *Quebec Civil Law*, *supra* note 70 at pp. 154–155.
86. Eric H Reiter, "Personality and Patrimony: Comparative Perspectives on the Right to One's Image," (2002) 76:3 *Tulane Law Review* 673–726 at p. 673 (abstract).
87. Article 35 of the CCQ reads:

> Every person has a right to the respect of his reputation and privacy. No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law.

Article 36 of the CCQ provides:

> The following acts, in particular, may be considered as invasions of the privacy of a person:
>
> 1) entering or taking anything in his dwelling;
> 2) intentionally intercepting or using his private communications;
> 3) appropriating or using his image or voice while he is in private premises;
> 4) keeping his private life under observation by any means;
> 5) using his name, image, likeness or voice for purposes other than legitimate information to the public;
> 6) using his correspondence, manuscripts or other personal documents.

See CCQ, *supra* note 76.

88. See Jacobs, *supra* note 22, at p. 297:

> A further general principle advanced in St-Ferdinand is that dignity incorporates both an internal and an external component. The internal component relates to the respect merited by a human being from others simply because the person is a human being, while the external component denotes one's self-respect including his sense of pride and honour. St-Ferdinand suggests that both components are normally to be considered and that in cases where the person is unable to appreciate his worth as an individual, the internal component must be given precedence. In St-Ferdinand, this meant that the fact that the patients may not have been able to appreciate that their dignity had been violated was of no consequence in determining that the violation had occurred.

convergence of personality rights and civil liability (tort in the civilian tradition).[89] At this juncture, it is therefore incumbent upon us to address the civilian notion of personality rights more specifically, with an eye towards stimulating reflection as to the pertinence of this theoretical approach elsewhere.

3.2. Personality Rights and "Tort" Privacy in Civil Law Reasoning [90]

As alluded to previously, the civil law tradition embraces a concept foreign to its common law counterpart, which it labels as personality rights. Personality rights, born in France and recognized throughout the civil law world,[91] are aimed at protecting human rights in private law. They are, according to the great French jurist Henri Mazeaud, "[f]undamental rights, indissociably linked to the human person",[92] or to cite Carbonnier,"*des droits de l'homme opposables aux autres hommes*" ("human rights opposable to fellow human beings").[93]

In effect "the objective of personality rights is simple enough: their *raison d'être* is to more adequately protect the attributes of the human person. The person is divided into different components to give him maximum protection against infringements by others."[94] Privacy, considered by both French and Quebec authors as a personality right,[95] is therefore assured by the existence of these subjective personality rights.[96] This finds explicit expression in both these systems' respective codes that enshrine the right to privacy as a personality right

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89. As discussed below in Part III (Section 3.2).
90. "In France, the first law review article on the matter can be traced back to 1909, written by EH Perreau. There is no doubt that German and Swiss scholars were the first to use the word *Persönlichkeitsrecht* during the nineteenth and twentieth centuries." Popovici, "Personality Rights," *supra* note 23 at p. 351. See also, EH Perreau, "Des droits de la personnalité," (1909) 8 *Revue Trimestrielle de Droit Civil* 501–536; François Rigaux, *La protection de la vie privée et des autres biens de la personnalité* (Bruylant, 1990) at pp. 611–617; Bernard Teyssié, *Droit Civil: Les Personnes* (Litec, 1983) at pp. 13–35; Alex Weill and François Terré, *Droit Civil: Les personnes, La famille, Les incapacités* (Dalloz, 1983) at pp.18–44; Raymond Lindon, *Les Droits de la Personnalité* (Dalloz, 1983); Pierre Kayser, "Les droits de la personnalité: Aspects théoriques et pratiques," (1971) 69 *Revue Trimestrielle de Droit Civil* 445–509; Gérard Cornu, *Droit Civil* (Montchrestien, 1980) at p. 19, footnote 500; Reiter, "Personality and Patrimony," *supra* note 85 at pp. 695–697.
91. Their recognition, however, was not without controversy. See Gregoire Loiseau, "Des droits patrimoniaux et de la personalité en droit francais," (1997) 42:2 *McGill Law Journal* 319–353 at 328. As the Quebec Court of Appeal discusses in *Aubry v Éditions*, *supra* note 29:

> Des thèses et des solutions contradictoires se sont affrontées; autonomie du droit à l'image ou assimilation au droit à la vie privée, caractère extra-patrimonial ou non de ce droit, rattachement au droit de la personnalité ou, parfois, au droit de la propriété sur la forme elle-même, distinction entre sphère publique et privée, interdiction de la pure capture de l'image ou exigence d'une diffusion pour qu'il y ait atteinte à la vie privée (D. Tallon, loc. cit., par. 108; P. Berchon, loc. cit. at p. 19, par. 62). D'études importantes, dont, entre autres, celles de […] Pierre Kayser, La protection de la vie privée (Economica, 1984) et […] Jacques Ravanas, La protection des personnes contre la réalisation et la publication de leur image (Libraire General De Droit et de Jurisprudence, 1978).

92. See H Mazeaud, "Preface," to Pierre Kayser, *La protection de la vie privée*, vol. 1 (Presses Universitaires d'Aix Marseille, Economica, 1984) at pp. 204–205 (author's translation).
93. Jean Carbonnier, *Les Personnes*, vol. 1 of *Droit civil* 17th ed. (Presses universitaires de France, 1991) at p. 117.
94. Though not without controversy in a different context. See, for example, Loiseau, "Des droits patrimoniaux," *supra* note 91. See also, Popovici, "Personality Rights," *supra* note 23 at p. 352. Regarding extrapatrimoniality, see Jacques Ghestin and Gilles Goubeaux, *Traité de droit civil: Introduction generale* vol. 1, 2d ed. (Librairie generale de droit et de Jurisprudence, 1983).
95. H Patrick Glenn, "Le droit au respect de la vie privée," (1979) 39:1 *Revue du Barreau* 879–916 at p.883; see also, Louise Potvin, *La personne et la protection de son image: étude comparée en droits québécois, français et de la common law anglaise* (Yvon-Blais, 1991); Gabriel Marty and Pierre Raynaud, *Droit civil et personnes*, vol. 2, 3d ed. (Sirey, 1976).
96. See Dabin, *Le droit subjectif* (Dalloz, 1952); Pierre Patenaude, "La zone de protection accordée a l'intimé au Canada," (1977) 8:1 *Revue de Droit de l'Universite de Sherbrooke* 121–137 at p. 128; Kayser, *La protection de la vie privée*, *supra* note 92.

and jurisprudence that intermingles such rights and civil liability ("tort").[97]

Indeed, personality rights are often—though not always—integrated into civil liability reasoning respecting privacy.[98] Since violating a personality right cannot but be unreasonable, such conduct is in principle said to constitute fault ("tort" literally signifying fault or wrong in French).

Again, history is elucidating. As Reiter highlights:

> Due both to the Roman reluctance to allow property rights in incorporeals and to the Christian conceptions of the human body and its attributes, the human being was not to be treated in market terms as property [….] [T]he premodern world lacked the technological means to commercialize attributes of the personality, so the alternative conception of the personality as property simply did not arise [….] The result is that this premodern view of property and its conceptual limitations continues to influence the treatment of the right to one's image and other attributes of personality in the civil law.[99]

Thus, while the conduct's wrongfulness in terms of privacy infringements—like any other—is assessed in reference to the objective standard of the reasonable person; the inherent unreasonableness associated with violating a personality right such as privacy in the private law realm ensures that such conduct more readily gives rise to a duty to compensate in "tort." Moreover, personality rights are in principle inalienable[100] and cannot in principle be reasonably violated[101] as they derive from human dignity.[102]

What is more, the "reasonableness" standard is said to refer to the alleged "tortfeasor's" behaviour (to borrow common law terminology) rather than a prerequisite to the plaintiff's cause of action (integrated within the nominal tort) or to recognition of the nature of harm suffered.[103] Finally, and perhaps most importantly, the *reasoning* to assess whether there has been a privacy infringement in tort/civil liability differs greatly under these respective traditions.

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97. Article 9 of the French Civil Code, *supra* note 77, and article 35 of CCQ, *supra* note 87. Article 5 of the *Quebec Charter of Rights and Freedoms*, as discussed below, similarly sets forth this principle. *Charter of Human Rights and Freedoms*, *Revised Statutes of Québec* ch. C-12, <http://www.cdpdj.qc.ca/en/commun/docs/charter.pdf> at art. 5.
98. See Potvin, *La personne*, *supra* note 95 at p. 56 and following, discussing "le cumul de la responsabilité civile et d'un droit subjectif d'une personne sur son image" [the cumulative remedies of civil liability and personality rights] in France.
99. Reiter, "Personality and Patrimony," *supra* note 86 at pp. 679–680. See also, Rigaux, *La vie privée*, *supra* note 90, at p. 115, observing that personality rights were first recognized by a German jurist Puchta (*Personalichkeiterecte*).
100. Popovici, "Personality Rights," *supra* note 23, at p. 355: "while one cannot give up one's right to bodily integrity, reputation, name, or privacy, one can at times renounce the punctual 'exercise' of these rights." For the debate pertaining to the divisibility of personality rights, see Loiseau, "Des droits patrimoniaux," *supra* note 91.
101. See also Madelaine Caron, "Le Code civil québécois, instrument de protection des droits et libertés de la personne?" (1978) 56:2 *Canadian Bar Review* 197–232; Glenn, "Le droit," *supra* note 95.
102. René David, *Les systemes de droit contemporains XII, Le droit francais, principes et tendances du droit francais*, vol. 2 (Libraire General de Droit et de Jurisprudence, 1960) at p. 16.
103. Brierley and MacDonald, "Quebec Civil Law," *supra* note 70 at p. 446: "A fault now amounts to the failure to take the precautions and exercise the care that a reasonable person would have taken and exercised if placed in similar circumstances." See also Jean-Louis Baudoin and Patrice Deslauriers, *La responsabilité civile des courtiers en valeurs mobilières et des gestionnaires de fortune: aspects nouveaux*, 6th ed. (Éditions Yvon Blais, 1999). In any event, some commentators observe that "the French courts have had and continue to have a tendency to find liability without much discussion of the reasonableness of the defendant's conduct." See Jeanne M Hauch "Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris (1994) 68:5 Tulane Law Review 1219-1301 at p.1233-1234.

Whereas in common law jurisdictions the process appears tainted by public law notions in the private law realm, prompting judges to ask whether a privacy violation is reasonable (and therefore justifiable),[104] in the civilian tradition, once a privacy violation has been detected, that process ends and the analysis turns to causation without further discussions of reasonableness.

Therefore,

> Civil law reasoning is as follows. The first question to ask is whether a fundamental protected right—such as privacy or liberty, for instance, was violated; second question: was this violation illicit (wrongful). Once plaintiff shows that an individual wrongfully/illicitly violated another's fundamental right, the defendant cannot justify his actions by arguing that despite everything, the violation was reasonable or proportional. The illicit infringement necessarily violates the right and indeed constitutes the violation of that right.[105]

The practical implication of this approach, which indirectly amalgamates civil liability (tort) and personality rights, is as follows. Conceiving the right to privacy as a personality right in civil liability ("tort"), allows the civilian legal method to grasp privacy as a zone of intimacy delineated not by space or ownership, but by the basic needs of personhood—as a right to preserve a *state of mind* of tranquility.[106] Instead of deriving from property or being akin to seclusion, the civilian notion of privacy relates to moral autonomy, such is encompassed by human dignity,[107] which inheres in legal personality and is considered an extension thereof.[108]

Finally, broadly speaking, the role of civil liability in protecting human rights prompted a number of authors to highlight the Code's importance in promoting values such as liberty and dignity in private law in civilian jurisdictions such as Quebec.[109] Thus, for instance, Madelaine Caron remarks: "Article 1053 of the Civil Code [1457 CCQ's predecessor] by itself constitutes a true bill of rights for it provides victims of human rights infringements with a cause of action

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104. June Mary Z Makdisi, "Genetic Privacy: New Intrusion A New Tort?" (2001) 34:4 *Creighton Law Review* 965-1026 at p. 987.
105. Popovici, "Le Rôle de la Cour Suprême en Droit Civil, *supra* note 14 at pp. 620–623 (author's translation). Popovici discusses a different subject, namely, what he considers to be the dangerous interpretation of Quebec Charter private law rights by public law common law standards.
106. Carbonnier discusses "a general right to tranquility" ("ce droit général à la tranquillité"). "Cette tranquillité, qui est une valeur psychologique protégée, revêt de multiples aspects concrètement dissemblables: demeurer inconnu; n'être pas épié, suivi, sollicité, questionné, dépeint; ne pas entendre prononcer son nom en public; ne pas voir divulguer sa biographie ou sa généalogie, l'état de sa fortune ou de ses dettes; ne pas être comptable des actes de son existence quotidienne, etc... " Jean Carbonnier, *Droit civil*, *supra* note 93 at pp. 137–138; see also, D Parent, "La reconnaissance et la limite du droit à la vie privée en droit québécois" in *Développements récents en droit administratif* (Éditions Yvon Blais, 1994) at p. 211. Gary Marx argues that privacy violations transcend four borders: natural; social; spatial or temporal; and ephemera. See Gary Marx, "The Murky Conceptual Waters: The Public and the Private," (2001) 3:3 *Ethics and Information Technology* 157–169.
107. Not coincidentally, dignity is the chief value in most continental constitutions. See also Whitman, "Two Western Cultures," *supra* note 30.
108. See Popovici generally, "Personality Rights," *supra* note 23 at p. 351.
109. See Irwin Cotler, "Remedies Against Racist Incitement in a Comparative Perspective," in *Mélanges offerts par ses collègues de McGill à Paul-André Crépeau—Mélanges presented by McGill colleagues to Paul-André Crépeau* (Éditions Yvon Blais, 1997) 221–227.

enabling them to be compensated for the harm they have suffered."[110]

While this was certainly true of the *Code civil* for time immemorial,[111] in Quebec, it is now reinforced by the symbiotic relationship between the CCQ, which houses the catch-all civil liability provision 1457 CCQ, and the Quebec Charter of Rights,[112] which applies to *private individuals* and requires that every law conform to its first thirty-eight sections in the absence of express derogation.[113] The extra-patrimonial personality right to both privacy and dignity are thus housed both in the Civil Code of Quebec and in the Quebec *Charter of Rights*, thereby reinforcing the bearing of personality rights on civil liability.[114].

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4. COMPARING APPROACHES: DRAWING ON COMPARATIVE ANALYSIS

LITTLE DOUBT SUBSISTS AS TO TORT LAW'S NEED TO ADJUST and respond to the imperatives of technological change.[115] While this is generally the case, it is

110. Caron, "Le Code civile," *supra* note 101 (author's translation). See also, Louis Baudouin, "La personne humaine au centre du droit québécois," (1966) 26 *Revue du Barreau de la province de Québec* 66–126. See also, LeBel, "La Protection des Droits," *supra* note 24; Louis Perret, *De l'impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de responsabilité au Québec* (1981) 12:1 *Revue Generale de droit* 121–171.
111. Succinctly, the CCQ's Preliminary Provision defines the "droit commun" (Quebec's corpus of private law) as the Civil code (CCQ) in harmony with the *Quebec Charter*. According to Craig, "[p]rivacy protection is flourishing in civil-law systems, and much can be learned in developing a Canadian common-law position," Craig, "Invasion of Privacy," *supra* note 6 at p. 358.
112. *Quebec Charter of Rights and Freedoms*, *supra* note 97. Each province of the Canadian federation features its own provincial legal system. Quebec boasts its own *Constitution*, the *Quebec Charter*, which has constitutional status in that province and applies equally to private action (unlike the Canadian *Charter of Rights and Freedoms* and the US Constitution). See Reiter, "Personality and Patrimony," *supra* note 86 at pp. 695–696.
113. Quebec *Charter of Rights and Freedoms*, *supra* note 97, s. 52.
114. For our purposes, section 5 of the *Quebec Charter* explicitly recognizes every person's right to respect for her private life. Specifically, section 5 states "every person has a right to respect for his private life." *Quebec Charter of Rights and Freedoms*, *supra* note 97. The provision, the courts have held, is to be generously construed. See the leading cases, *Godbout v Longueuil*, *supra* note 14; and *Aubry v Éditions*, *supra* note 29. See also, Reiter, "Personality and Patrimony," *supra* note 86, at p. 697, where Reiter deals with the matter in greater depth: "the Quebec Charter contained a number of other provisions relevant for the protection of privacy, such as section 7 on the inviolability of the home, section 8 on the respect for private property, and section 9 on various aspects of the right to secrecy." See also, Lebel, "La Protection des Droits," *supra* note 24 at p. 245. As Justice Lebel explains:

> we can observe that the CCQ now incorporates a number of very general principles that also recognize fundamental rights attaching to juridical personality and facilitating their application. In this vein, we can easily think of the Code's recognition of the right to physical integrity at article 10 or the right to reputation and privacy, for example, at article 35. These provisions reiterate or specify the fundamental rights enshrined in the Quebec Charter.

Lebel, "La Protection des Droits," *supra* note 24 at p. 245 (author's translation). Relevant case law in Quebec discussing the harmony between the Code and Charter is *Béliveau St-Jacques v Fédération des employés et employées de services publics inc.*, <http://scc.lexum.umontreal.ca/en/1996/1996rcs2-345/1996rcs2-345.html>, 1996:2 *Supreme Court Reports* 345; *Québec (Curateur public) v Syndicat national des employés de l'hôpital St-Ferdinand*, *supra* note 32; *Augustus v Gosset*, <http://scc.lexum.umontreal.ca/en/1996/1996rcs3-268/1996rcs3-268.html>, 1996:3 *Supreme Court Reports* 268; *Aubry v Éditions*, *supra* note 29.
115. Warren and Brandeis, "Right to Privacy," *supra* note 1 at pp. 195–196, presciently identified "modern technology" as a chief source of privacy intrusion.

particularly true with respect to common law privacy torts.[116] In most common law jurisdictions, as this article sought to highlight, a pigeonhole approach predicated on expectations and "aloneness" endures. This approach persists in a world where reasonableness of intrusions has taken on new meaning and spatial limits on seclusion are rapidly withering away. Rampant spam, repeated calls from telemarketers, often inadvertent public humiliation on dating websites, sale of customer data and misappropriation of personality have no doubt desensitized us by attrition to what constitutes a reasonable intrusion into "the seclusion" of another.

In emphasizing the common law's struggle for precious legitimacy in the eyes of the community, Graham Mayeda cites Justice Iacobbuci in *R. v Salituro*,[117] a case where the Supreme Court of Canada "considered the dynamic, changeable nature of the common law and the way in which the law evolves."[118] According to Iacobbuci J, "the court should make incremental changes to the common law to bring legal rules into step with a changing society."[119] In so doing, this paper invites common law courts to "weigh and consider the solutions of competing and neighbouring systems of law."[120]

In effect, while more publicized in the public law context, the migration of legal principles and the comparative perspective—supplemented by a historical overview—can play a valuable role in the effort to achieve this objective in respect of privacy tort. As this article endeavored to illustrate, a comparative examination of neighbouring legal traditions is of particular interest to the privacy tort—an area that might benefit from cogent evolution.

By proposing comparative analysis of privacy in civil liability/tort, focusing on the underlying rationale animating the civil law tradition, with particular emphasis on Quebec and also France, this article undertook to shine the light of comparative analysis on the dilemmas of the common law tort, faced by many jurisdictions given the onslaught on privacy. Plainly put, exposure to the civilian experience can help inform the coherent evolution of tort law across the common law world. More specifically for our purposes, bijuridical research such as this is offered to stimulate reflection on the merit and propriety of certain common law dogmas that may beg to be rethought.[121]

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116. Tort has come to play an increasingly important role in addressing modern injustice as government may no longer be the principal rights violator. As Macdonald explains, "in our day, the most grievous and most frequent abuses of civil liberties occur in the exercise of private power. The occasions for discriminatory state action are both comparatively few and subject to relatively formalized procedures for their exercise when contrasted with an employer's power to dismiss, a landlord's power to exclude the needy, or an entrepreneur's refusal to provide service." See Roderick A Macdonald, "Postscript and Prelude—the Jurisprudence of the Charter: Eight Theses," (1982) *Supreme Court Review* 321 at p. 347, cited in Frances Raday, "Privatising Human Rights and the Abuse of Power," (2000) 13:1 *Canadian Journal of Law and Jurisprudence* 103–136. Thus, the privatizing of human rights commands respect for their human rights, in Raday's words, "not only as against the power of the state but also in their dealings with one another" at p. 103 Frances Raday, "Privatising Human Rights and the Abuse of Power," (2000) 13:1 *Canadian Journal of Law and Jurisprudence* 103–136 at 103.
117. *R v Salituro*, <http://scc.lexum.umontreal.ca/en/1991/1991rcs3-654/1991rcs3-654.html>, 1991:3 *Supreme Court Reports* 654.
118. Graham Mayeda, "Uncommonly Common: The Nature of Common Law Judgment," (2006) 19:1 *Canadian Journal of Law and Jurisprudence* 107–131 at p. 127.
119. Graham Mayeda, "Uncommonly Common: The Nature of Common Law Judgment," *supra* note 118 at p. 127.
120. Alfred Mordechai Rabello, "Toward the Codification of Israeli Private Law," in Alfred E Kellermann, Kurt Siehr, and Talia Einhorn, eds., *Israel Among the Nations* (Kluwer,1998) at p. 307.
121. Questions remain as to whether the civilian approach can lend itself to a highly individualistic American culture. Of course these ideological differences between the pigeonholed libertarian and the principled dignity approaches to privacy reflect a profound difference in respective juridical cultures.

The civil law tradition's construction of privacy rights has been broad. Removed from the "reasonable expectations" doctrine, civilian jurisdictions' principled approach to civil liability is better able to protect individual privacy[122] in intangible spaces (such as cyberspace), regarding certain dignity-based personality rights as inalienable. Human beings enjoy personality rights such as privacy in private law by reason of their very personhood, regardless of express statutory or jurisprudential intervention or spatial or proprietary constraints. This is of great interest as a flexible (judicial) interpretation of tort best lends itself to the protection of privacy in an era of constant technological and social change. This is unlike the legislative response, which tends to be somewhat awkward in this respect. Statutory amendment (enshrining privacy rights) can be a tedious, inflexible process, which has difficulty keeping up with today's rapidly evolving relationships and the imperatives of modernity. In addition, legislation once passed, while addressing the issues of the day, may inadvertently omit problems arising from new discoveries, unbeknownst to its framers.[123] Hence, although some common law jurisdictions have chosen to explicitly protect privacy statutorily,[124] the common law's sluggish evolution respecting privacy torts has generated both uncertainty and lack of uniformity.[125] This piecemeal approach may prove ill-suited to addressing the multiplicity of privacy issues raised by increasing traceability and decreasing anonymity.

The civil law's conception of privacy as a personality right and the manner in which that impinges on "tort" law (or civil liability) appears to be commensurate with privacy management in an age of rapid technological advances. The privacy tort's coherent development away from the narrow "right to be left alone," inhibited by connotations of both physical space and proprietorship, may be informed by comparative inquiry.[126] Redefining privacy to focus on the subjective affective/psychological impact (i.e. tranquility) rather than spatial limits alone[127] better comports with the "simple idea" of corrective justice, according to which

122. Colin Bennett, *Regulating Privacy Data Protection and Public Policy in Europe and the United States* (Cornell University Press, 1992). "In this work, Bennet discusses how enforcement of privacy law principles varies considerably and is a function of culture. See also, Jon Bing, "A Comparative Outline of Privacy Legislation," (1978) 2 *Comparative Law Yearbook* 149–181; Steven Bellman, Eric J Johnson, Stephen J Kobrin, and Gerald L Lohse, "Regional Differences in Privacy Preferences: Implications for the Globalization of Electronic Commerce," Graduate School of Management, University of Western Australia, Working Paper Series.
123. See Craig, "Invasion of Privacy," *supra* note 6, for a detailed description of the normative framework in place in various US, Canadian, and European common law jurisdictions.
124. As Makdisi warns, "commentators worry that current statutory safeguards are inadequate to protect privacy." Her critique is voiced in the context of genetic information (for example, she observes that the US *Privacy Act* of 1974 seeks to protect privacy generally and does not specifically provide for the protection of genetic privacy). June Mary Z Makdisi, "Genetic Privacy," *supra* note 104 at p. 975. See also Patricia I Carter, "Health Information Privacy: Can Congress Protect Confidential Medical Information in the 'Information Age'?" (1999) 25:1 *William Mitchell Law Review* 223–286 at pp. 226 and 228.
125. Thus, for instance, the current lack of coherence in the common law world has prompted four Canadian provinces to resort to legislation to create a privacy tort, thereby accelerating the process of its recognition. See the privacy acts of British Columbia, Manitoba, Newfoundland, and Saskatchewan, *supra* note 6.
126. See Craig, "Invasion of Privacy," *supra* note 6 at p. 378: "In the United States, privacy was linked in *Pavesich* to the constitutional guarantee of liberty and to Fourth Amendment protection against state intrusions into private realms such as the home. In Germany, privacy was linked in *Schacht* to the constitutional protection of human dignity and personality."
127. Only in as far as American culture permits. As Israeli Supreme Court President Barak explained: "Comparative analysis is possible only if the two legal systems share a common ideological basis [….] A common basis of democracy is, however, a necessary but insufficient condition for comparative analysis. As judges, we must also examine whether there is anything in the historical development and social conditions that make the local and the foreign system different enough to render interpretive inspiration impracticable." Aharon Barak, "A Judge on Judging: The Role of the Supreme Court in a Democracy" (2002) 116:1 *Harvard Law Review* 19–162 at p. 113.

"the point of a tort action is to undo the injustice that the defendant has done to the plaintiff."[128]

Comparative analysis, as President Aharon Barak of Israel observes, is an "important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems."[129] Whereas courts in many common law jurisdictions, particularly in the US, have yet to make full use of such inquiry,[130] the preceding *aperçu* into the civilian legal method's use of personality rights in "tort" is tendered in the hopes that it might serve to do just that.[131]

128. Ernest Weinrib, "Correlativity, Personality and the Emerging Consensus on Corrective Justice," (2001) 2:1 *Theoretical Inquiries in Law* 107–159 at p. 108.
129. Barak, "Judge on Judging," *supra* note 127 at p. 114.
130. Barak, "Judge on Judging," *supra* note 127 at p. 114, citing US Supreme Court Justice Stephen Breyer.
131. Barak, "Judge on Judging," *supra* note 127 at p. 114.