…

In 1819, the three ‘de Serre’ laws - from the name of the Keeper of the Seals of Louis XVIII - set out once again to liberalise the press and to distinguish for the first time between defamation and insult. The laws of 1819, accompanied by the famous Royer-Collard speech, develop the idea that honour and reputation are attributes of an individual. Royer-Collard states: ‘It is prohibited to tell the truth about someone’s private life,’ and he added: ‘that is, therefore, the walling-off of private life, and if I may be allowed to use the expression, a person’s private life is declared to be invisible and shut away inside people’s homes’. It was not until 1874 that the Court of Cassation attempted to define the content of ‘private life’ in a judgment. The Dijon Court of Appeal had found against a newspaper for having revealed the names of participants (including members of parliament) in a pilgrimage to Notre-Dame d’Estang. The judgment extended the concept of ‘private life’ outside the walls of a private home, covering everything relating to the ‘realm of the inner self’ or ‘freedom of conscience’. Subsequently, despite the fact that the law of 29 July 1881 on the press seemed to have continued the same principles as those of the laws of 1819, it finally brought about the fall of the ‘wall’ between public and private spheres, making it possible to look through it. However, it only applied to public figures, such as artists, politicians, etc. This change opened up the way to a new development in privacy during the 1960s, and then the 1970s, in order to protect the private lives of celebrities, along the lines of American law.

The English and French experiences thus served as starting-points on which Warren and Brandeis relied in order to promote a modern right aiming to protect individuals against undesirable intrusions into their private lives. Their above-mentioned article is key because it represents the first legal discourse recognising the right to privacy as a separate right. As soon as new commercial devices and practices (and in particular the development of photography, advertising and the tabloid press) started to threaten people in an unexpected way, American society also felt a marked need to obtain what Judge Cooley defined as the right ‘to be let alone’[[1]](#footnote-1).

The article by Warren and Brandeis showed not only that there were some infringements of privacy that were unconnected with property or defamation but also suggested a new legal perspective, where personal values ranked above economic values. However, it was not until 1905 that the Supreme Court of Georgia, in the case Paveish v New England Life Insurance Company, started the movement for the recognition of protection of privacy. It was therefore in a gradual, case-by-case process that the courts fashioned the law of tort and imposed sanctions on infringements of privacy. However, like all developments of common law, the starting point was existing law: ‘The right to privacy received the protection of common law, not as such, but rather as an extension of the natural right already protected by it, namely the right of property[[2]](#footnote-2)’. This judicial construction, however, is not without its weakness: when an individual is not, or is no longer, owner of items relating to his private life (such as records held by a bank), he is no longer protected. Thus, the Supreme Court held in the case United States v. Miller (1976) that the right to privacy could no longer be relied on when the items relating to an individual’s private life were in the hands of third parties. It was for this reason that the legislators intervened at the state and national levels to add to what the common law was not able to protect. The right to privacy has two aspects in American constitutional law: a ‘passive’ dimension relating to the protection of the confidentiality of personal affairs, and an ‘active’ dimension relating to the autonomy and free choice of private life. This dual dimension was enshrined in the well-known judgment by the Supreme Court in 1965, Griswold v. Connecticut.

To summarise, the system for protection of privacy in the US is significantly fragmented: it involves a legislative provision at federal level, many monitoring authorities, the constitutions of the States and specific laws on data at national level and, finally, varying interpretations by the courts. It is not surprising that such a complex system experiences difficulties in the digital age.

…

1. The idea was borrowed from Judge T.M. Cooley, who used the formulation for the first time in his work *Treatise on the law of Torts or the Wrongs Which Arise Independently of Contract* (1878), published by Callaghan & Company, 1907. [↑](#footnote-ref-1)
2. E. Zoller, ‘Le droit au respect à la vie privée aux Etats-Unis’ in F. Sudre (ed.), *Le droit au respect de la vie privée au sens de la Convention européenne des droits de l’homme*, Brussels, Bruylant, Coll. Droit et Justice No 63, 2005, p. 39. [↑](#footnote-ref-2)