INVERTED PRECEDENTS

LEGAL REASONING AS 'MYTHOLOGIC'

David Howes

Most discussions of legal pluralism in industrialized societies begin with "a rejection of the law-centeredness of traditional studies of legal phenomena, arguing that not all law takes place in the courts", and end with the assertion that "other forms of regulation outside law constitute law" (Merry 1988: 874). As should be apparent, the meaning of the term 'law' shifts in the course of such discussions from the 'strict' definition a positivist would embrace to the 'fast and loose' definition the legal pluralist would like to see triumph. Not surprisingly, positivists are rarely moved to question their 'ideology of legal centralism' (Griffiths 1986) by such discussions.

It is time to devise a new strategy. Rather than resort to semantic subterfuge (for example, the use of such oxymorons as 'unofficial law' or 'customary law'), the legal pluralist could seek to show that the law itself (in the strict sense) has its own mechanisms by which difference (and hence pluralism) is generated and reproduced, and that chief among those mechanisms is the rule of *stare decisis*.

According to the rule of *stare decisis*, like cases should be decided alike. This rule forms part of the conscious intellectual armature of judges. By following it, judges claim to be restricting their domain to law rather than politics. Critical Legal Scholars (CLS) challenge this claim. They argue: "There is no legal reasoning in the sense of a legal methodology or process for reaching particular, correct results" (Kairys 1982: 3). The fact that some precedents are followed while others are not (i.e. precedents are not treated equally) can be pointed to as proof. Law, according to the CLS, is but a continuation of politics behind a façade of objective neutrality.

But as Rupert Cross (1968: 53) notes: "The extreme realist position [adopted by CLS proponents] can in fact only be supported on the assumption that our judges are capable of the grossest hypocrisy". Why should judicial regrets not be taken seriously? Cross asks. Cross has a point: judges do not feel entirely free to pick

© Copyright 1993 - David Howes.

and choose among (or ignore) the *rationes decidendi* of previously decided cases. For this reason their reasoning must be regarded as autonomous from politics.

But how then to explain the fact that not all precedents are treated equally, or seem to get distorted in the process of being applied? In this essay, I shall argue that the reason for this is that only part of the process of legal reasoning is governed by conscious rules, such as that of *stare decisis*. It is otherwise shaped by a series of unconscious laws analogous to those described by the French anthropologist, Claude Lévi-Strauss, in his studies of 'mytho-logic' (Lévi-Strauss 1967). Thus, my intention is to take what CLS scholars would call 'The myth of legal reasoning' (Kairys 1982) seriously. The legal anthropologist should not be too quick to dismiss the 'law-centeredness' of this approach, for as will become apparent presently, the end-result is a cultural account of legal reasoning.

According to Lévi-Strauss, the essential function of myth is to provide ideal-logical models capable of overcoming the (in fact) irresoluble contradictions of human life and society, such as the contradiction between life and death, the individual and the group, etc. (Turner 1979; Howes 1987). Every mythical schema is adapted to the mediation of the contradictions peculiar to the form of life which produced it. For this reason,

> when a mythical schema is transmitted from one population to another, and there exist differences of language, social organization or way of life, which makes the myth difficult to communicate, it begins to become *impoverished and confused.* But one can find a limiting situation in which instead of being finally obliterated by losing all its outlines, the myth is *inverted* and *regains part of its precision.* (Lévi-Strauss 1967: 42).

In illustration of the applicability of Lévi-Strauss' model for the analysis of mythic thought to the study of legal reasoning, this essay will examine the stages in the evolution of what is commonly known as 'the tort of appropriation of personality' or as it is also called 'the right of publicity' (Nimmer 1954). This right protects a man's pecuniary interest in his name, likeness, and voice (or 'personality') from appropriation for commercial or advertising purposes by unscrupulous others. It should be noted that should a man assign this exclusive right to the use of his personality to some other, the latter may enforce his rights not only against third parties but against the assignor himself (Ausness 1982: 986).

The history which follows being somewhat complex, let me begin by providing a brief overview of my argument. In their famous article, 'The right to privacy', Warren and Brandeis (1890) derived the notion of a common-law right 'to be let alone' from what they took to be the 'principle of an inviolate personality' implicit in a long line of English cases. The most noteable of these cases, *Prince Albert v. Strange* (1849), involved the court imposing a ban on the publication of a description of certain privately printed etchings. As the only 'principle' at issue in this as in the other cases was in fact that of private property (Irvine 1980), it follows that Warren and Brandeis' proposed 'right to privacy' was really a *confused and impoverished* version (to borrow Lévi-Strauss' expression) of the English common-law right to intellectual and artistic property.

In any event, the new right soon received judicial recognition. But because of its anomalous character -- a property right dressed up as a personal right not to have one's feelings hurt -- it could not remain stable. The most significant mutation occurred in 1953, when the right to privacy gave rise to its own antithesis (or *inversion*), the 'right of publicity'. For some time it remained uncertain whether the right of publicity was personal or proprietary in nature, but since 1973 most judges have come round to seeing it the latter way. Thus, the original English property doctrine has *regained part of its precision* - the difference being that there is no property in a name or personality in England, only in America (Frazer 1983: 283).

The implication of the preceding remarks is that the right to privacy was but a stage in the evolution or coming to be of the right of publicity. Of course, it was entirely necessary for Warren and Brandeis to create the confusion they did, since otherwise American celebrities would never have been able to acquire property in their personalities, at least not at common law. Imagine a world in which prominent persons could not 'capitalize' on their identities, or 'advertising power'! It is unthinkable, at least now. As Justice Bird recognized in *Lugosi v. Universal Pictures* (1979), "the sale of one's persona in connection with the promotion of commercial products has unquestionably become big business" (p. 438).

It is not my intention to moralize, but I must confess to some unease at the assumption on which Justice Bird's opinion rests - namely, that one's personality is alienable. Surely, this notion was banished from American law at the same time slavery was abolished. The fact that it has crept back in is an index of the extent to which the law (in the strict sense) undermines itself while giving off the appearance of growing organically to meet the needs of society.

I. To understand how Warren and Brandeis 'got it wrong' in 'The right to privacy' it may help to inquire into the history of some of the keywords in their and our discussion - particularly, the words 'individual', 'private' and 'personality'.

The word 'individual' comes from the Latin *individuus* (an adjective not a substantive), the meaning of which is best rendered as 'not cuttable, not divisible'. As the adjectival origins of this word imply, the quality of being an individual was traditionally conceived as being accessory to the quality of being human. Society was not, therefore, 'made up' of individuals, as we might say, but rather *resulted* in individuals. This pattern of thought would seem to have persisted until well into the eighteenth century, and even then "*individual* was rarely used without explicit relation to the group of which it was, so to say, the ultimate indivisible division" (Williams 1976: 133-36).

The meaning of the word 'private' has undergone a transformation in the same direction. This word comes from the Latin *privatus*, 'withdrawn from public life', which derives from *privare*, 'to bereave or deprive'. Initially, it was applied to religious, and from the fifteenth century on, to persons not holding an official position or rank, as in 'private soldier'. It was in the seventeenth century that the word lost its negative connotation (privacy as privation) and, as a result of its coming to be associated with 'personal' and opposed to 'public', began to take on the positive connotation that such words as 'private club', 'private school', or 'private property', possess today. What such institutions as the private club or school are valued for is the protection or seclusion they afford from 'others' - namely, the public. Thus, the history of the word 'private' can be seen as "a record of the legitimation of a bourgeois view of life" (Williams 1976: 203-4).

It will be appreciated that ever since the word 'individual' lost its adjectival status and became a singular substantive, the distance between individuals has grown. The distance between 'the public' and 'the private' has also increased in the centuries since the latter word took on a more positive connotation. This splitting process can be observed at work behind the evolution of the term 'person' as well. Originally, 'person' (from the Latin *persona*) meant 'mask'. It bears underlining that there are two sides to every mask - an inside and an outside. We moderns think of the person as the being behind the mask; that is, we turn inside when we think of personal identity, as if the outside, the roles we play in our relations with others, were not equally constitutive of our respective identities. This notion finds expression in the following quotation from a work by the American psychologist, Sidney Jourard (1971: 31): "It is possible to be involved in a social group such as a family for years and years, playing one's

roles nicely with the other members - and never getting to know the *persons* who are playing the other roles".

The distinction Jourard draws between person (or self) and role depends on a whole series of transformations in the Western notion of the person, as Marcel Mauss (1974) has demonstrated. Following Mauss, we would note that Jourard's distinction would have made no sense to the Kwakiutl Indians of British Columbia, for whom life was, literally, a masquerade. The Kwakiutl concept of the individual represents the primal form of the idea of the person, according to Mauss (1974: 73): "the notion of the personage, of the role played by the individual in sacred dramas" and in the organization of the clan.

Nor would Jourard's distinction have made any sense to the Romans, for whom the *persona* was a jural status: slaves (as well as foreigners) were excluded from this status, the reason being that "*servus non habet personam*. He [the slave] has no personality. He does not own his body; he has no ancestors, no names" (Mauss 1974: 81).

Jourard's distinction might have had some resonance for medieval Christian theologians. They were the first to conceive of the person (including the slave) as a unity of body and soul, an entity. But it bears underlining that the theologians used the term *personalitas* to refer to the general quality of being a person as opposed to a thing; i.e. for them 'personality' was synonymous with 'humanity' not 'individuality'. To put this another way, 'personality' was a quality one shared with others rather than something distinguishing you from them (Williams 1976: 195). Indeed, the distinction Jourard seems to regard as natural only became normal after Kant: the notion of the person, or self, as a 'psychological being', an 'ego', a 'conscience and a consciousness' is thus comparatively recent (Mauss 1974: 89).

I have telescoped Mauss' account of the progressive universalization and particularization of the notion of the person (from role to status, from status to entity, from entity to ego) into two paragraphs. I hope I have not done so much violence to his thought that the reader cannot appreciate "how recent is the 'category of the self', the 'cult of the self' (its aberration), and how recent is the respect for the self - in particular that of others (its normality)" (Mauss 1974: 62).

In what follows, my aim is to show how the 'cult of the self', which Mauss (speaking in 1938) could still regard as an aberration, has since become normality, and how this development paved the way for the emergence of the idea of the personality as a commodity - i.e. the arrival of a fifth stage in the evolution of the notion of the person.

II. Warren and Brandeis' 'The right to privacy' is one of the most influential law review articles ever written, and out of all proportion with the incident that provoked them to write it: Warren's irritation at the way the press covered his daughter's wedding in 1889 (Kalven 1966: 329). In the article, however, it is not 'we the Warren family', or even 'we Boston Brahmins', who are depicted as the ones for whose sensibilities' sake judges ought to recognize 'the right to be let alone', but *man*:

> The complexity and intensity of life attendant upon advancing civilization, have rendered necessary some retreat from the world, and *man* [emphasis added], under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual (Warren and Brandeis 1890: 196).

In view of this 'advance', there had to be some way to protect individuals from having their self-esteem or image of themselves impaired every time they picked up a newspaper and there found the details of their private lives trotted out for all to read.

Warren and Brandeis' insistence upon the importance of self-esteem to the civilized individual might seem to link up with the idea of *amour propre* in the social theories of Hobbes and Rousseau, but it does not. It is an '*amour propre* proper', as it were, since it is the individual's estimation of himself, not his comparative estimation of how others regard him (as in Hobbes and Rousseau), that is at issue.[1] Besides, there already existed a tort to protect against injury to the latter, the tort of defamation. But the problem with the tort of defamation was that it dealt only

> with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows ... [that is, by subjecting him] to the hatred, ridicule, or contempt of his fellow-men - the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. (Warren and Brandeis 1890: 197)

---

1 As Rousseau (1973: 104) wrote in the 'Discourse on Inequality', the "savage lives in himself; the man of society always out of himself; cannot live but in opinion of others, and it is, if I may say so, from their judgment alone that he derives the sentiment of his own existence".

The tort of defamation, limited as it was by the requirement of proof of injury to plaintiff 'in his intercourse with others' as opposed to himself had, therefore, to be supplemented by another according to Warren and Brandeis - the tort of 'invasion of privacy'.

It was at this point in their argument that Warren and Brandeis crossed categories, from the law of torts to that of property, in an effort to conceptualize what 'a general right to privacy' might look like. *Prince Albert v. Strange* provided them with what they took to be a precedent. This case concerned an injunction brought by the consort of Queen Victoria to bar publication of even so much as a written description of certain sketches the Royal Couple had done and arranged to have printed for their own private amusement. The injunction was upheld on the ground of breach of contract and confidentiality, and in particular the Royal Couple's 'artistic' property right in the prints.

While *Prince Albert v. Strange* can be said to have enlarged the common-law right to intellectual and artistic property to an unprecedented extent (i.e. so as even to include *descriptions* of printed materials), it did not for all that grant recognition to a claim to a right to privacy (supposing the Royal Couple to have made one). Indeed, the only way this case can be made to stand for the proposition that a right to privacy exists, independent of and in addition to a plaintiff's property or contractual rights, is by ignoring the *ratio* and focussing on 'the principle' of the affair, which is precisely what Warren and Brandeis did. "The principle which protects personal writings and all other personal productions not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality" (Warren and Brandeis 1890: 50). What subterfuge!

It will be appreciated that what Warren and Brandeis accomplished by means of this subterfuge was the translation of a rarefied version of Mauss' 'category of the self' (or ego-consciousness) into readily cognizable legal terms. The fact that they also laid the groundwork for the eventual reification of that category, its transformation into a commodity, should also be apparent. It was by virtue of their dressing a property right up as a personal right not to have one's feelings hurt that they did so. On account of this hybridization, or crossing of categories, 'the right 'to be let alone' could not remain stable: it had to mutate. Indeed, by 1960, it had spawned four distinct 'types of invasion' according to Dean Prosser's count, ranging from intrusion on a person's solitude to appropriation (for defendant's advantage) of a person's name or likeness (Prosser 1960).

Were they alive today, Warren and Brandeis would no doubt look upon this panorama (or smorgasbord) of protected interests as testimony to the fact that: "Political, social and economic changes entail the recognition of new rights, and

the common law, in its eternal youth, grows to meet the demands of society ... without the interposition of the legislature" (Warren and Brandeis 1890: 193-5).[2] Warren and Brandeis' use of the word 'growth' rings hollow, for the process of development their article precipitated is more aptly described as one of *erosion*. In effect, the recognition of a right to privacy has resulted in the withering away of any notion of society. George Grant (1985: 11) puts it best:

> The widespread concentration of most North Americans on private life, and their acceptance that the public realm is something external to them, takes us far away from the original liberal picture of autonomous and equal human beings participating in the government and production of their society.

The recognition of a right to privacy has also precipitated the erosion of the idea of the person as *hors de commerce*, as we shall see presently.

No less questionable, is Warren and Brandeis' notion of social change as 'entailing' the recognition of new rights, at least in view of the British experience with the privacy doctrine: as late as 1972 a British House of Commons Committee concluded "that there was no satisfactory definition that could be used for enacting a general law to protect privacy and that no such law was needed" (Marshall 1975: 242). This fact underlines the anomalous character of the Warren and Brandeis privacy doctrine, and leads one to suspect that the 'growth' or 'expansion' of this doctrine was not so much a response to the 'demands of society' as an effect of judges trying to come to terms with, or rationalize, a logically contradictory idea, that of a *general* right to *privacy*.

III. The work of rationalization got off to a bad start in *Roberson v. Rochester Folding Box Co.* (1902), but soon righted itself in *Paveisch v. New England Life Insurance* (1905), a Georgia case involving the unauthorized use of plaintiff's photograph to illustrate a life insurance ad. Justice Cobb, speaking for the Georgia Supreme Court, admitted that had the case been 'new in principle', he would have had no authority to grant a remedy; but the case was only 'new in instance', and so he proceeded. Of particular interest is the way in which Cobb derived the 'principle' in question from the natural law: "The right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence" (p.

2 Some legislatures have interposed, such as New York and California, thereby lending statutory recognition to the common law doctrine.

69). Unaware of the novelty of the 'consciousness' of which he spoke, Cobb went on to treat as precedents various instances of what he took to be the right to privacy in Roman Law!

With *Kunz v. Allen* (1918), a case involving a film clip of plaintiff shopping in defendant's store, injury to self-esteem caused by the unwelcome glare of publicity came to be understood as actionable *per se*, just as Warren and Brandeis thought it should be. However, the growth of their doctrine encountered a snag in *Flake v. Greensboro News Co.* (1938), a case very similar to *Kunz*, save that it involved a minor celebrity in place of an ordinary citizen. In view of the fact that celebrities actively seek out publicity, the court could not comprehend how more of the same could possibly ruffle their self-esteem, or for that that matter, be unwelcome. Relief was therefore denied.

The motivation behind a celebrity's action for invasion of privacy is obviously very different from that of an ordinary citizen - the harm, as far as the celebrity is concerned, "resides not in the use of his likeness but in the user's failure to pay" (Treece 1973: 641). The first to recognize this was Judge Jerome Frank in the landmark case of *Haelan Laboratories v. Topps Chewing Gum* (1953):

> it is common knowledge that many prominent persons (especially actors and ballplayers) far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in news-papers, magazines, busses, trains and subways. (p. 868)

Those in the entertainment industry must have felt deeply gratified to find a judge so understanding of their egos, their sentiments. But of far greater value and importance to them than his sympathetic ear was the judicial recognition Frank gave to the whole business of trafficking in personalities.

The facts in the *Haelan* case were as follows. Plaintiff obtained an exclusive contract with a certain ballplayer to use his photo on their bubble gum cards. Defendant, a rival chewing gum manufacturer, induced the ballplayer to enter a similar contract with them before the first one had expired. Defendant contended that "none of plaintiffs contracts created more than a release of liability, because a man has no legal interest in the publication of his picture other than his right of privacy, i.e. a personal and non-assignable right not to have his feelings hurt by such a publication" (p. 868). Judge Frank rejected this contention:

> We think that in addition to and independent of that right of privacy ... a man has a right to the publicity value of his photograph, i.e. the right to grant the exclusive privilege of publishing his picture ... Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth (p. 868).

Thus was the 'right of publicity' coined.

While the right of publicity is in fact an inversion of the right to privacy, the two are frequently invoked together, as in *Cepeda v. Swift* (1969). Cepeda granted the exclusive right to use his name, signature and likeness to Wilson Sporting Goods. The latter brought out a line of baseball equipment bearing Cepeda's name. Subsequently, Wilson sold 'Cepeda baseballs' to Swift Premium and agreed that Swift could use Cepeda's name in the promotion of its meat products. Cepeda was much angered at seeing his name being used to promote frankfurters and so brought an action in both privacy and publicity against Swift. His action failed. The court held that the original contract had granted to Wilson the exclusive world right to advertise and sell Cepeda baseballs. Cepeda had therefore ceded control of his personality, and privity of contract barred him from succeeding in his action against Swift. I doubt whether even Marx could have conceived of such a scenario: an individual who had alienated his very personality!

As will be recalled, Judge Frank was rather cavalier about the nature of the right he coined: "Whether it be labelled a 'property' right is immaterial ...". This ambiguity is significant since, as will also be recalled, Warren and Brandeis conceived of the right to private property and the right to an inviolate personality as quite distinct (the former protecting against physical, the latter non-physical interferences with the person). For Warren and Brandeis, the medieval distinction between personality and thinghood still made sense. But since their time this distinction has been lost.

Consider, for example, *Grant v. Esquire* (1973). Cary Grant brought an action for invasion of privacy and appropriation of personality against Esquire magazine for having cut his face out of an ad for cardigan sweaters it ran in the 1950s (for which he agreed to pose) and superimposing it on the torso of a man modelling a line of cardigans for the 70s. What is unique about this case is that Grant asserted that he did "not want anyone - himself included - to profit by the publicity values of his name and likeness" (p. 880). Grant was perhaps the last moral personality in America, the last not to make an exception of himself. But the only way the court could understand how it might grant relief was by

conceiving of his personality on the model of a piece of property: "If the owner of Blackacre decides for reasons of his own not to use his land but to keep it in reserve he is not precluded from prosecuting trespassers" (p. 880). As with Blackacre, so with Grant's face.

The Blackacre analogy would not have occurred to the court had there not been something vaguely proprietary (as opposed to personal) about the right of publicity, and behind it, the right to privacy, in the first place. As we saw earlier, the reason for this is that the right to privacy is in fact modelled after the English common-law right to intellectual and artistic property. It is therefore fitting that as the right of publicity has come to acquire more and more autonomy from the right to privacy, what remained submerged or latent in the latter has come increasingly to the fore. Witness how the court in *Ali v. Playgirl* (1978) defined the right of publicity:

> The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture ... of a prominent person ... and protects his proprietary interest in the profitability of his public reputation or 'persona'. (p. 728)

This quotation evidences the extent to which it has become normal for individuals to treat their personalities as capital (cf. also Ausness 1982: 1002).

But what if an individual neglects to capitalize on his personality during his lifetime? This was the question raised before the California Supreme Court in *Lugosi v. Universal Pictures* (1979): "if the right to exploit name and likeness can be assigned because it is a 'property' right (*Haelan*), is there any reason why the same right cannot pass to the heirs?" (p. 431) The court did think there was a reason, this being that "The very decision to exploit name and likeness is a personal one ... [and it is conceivable that some] will not during their respective lifetimes exercise their undoubted right to capitalize upon their personalities, and transfer the value thereof into some commercial venture, for reasons of taste or judgment" (p. 430). In other words, the right of publicity dies with the person, unless exercised during his lifetime.

The *Lugosi* case suggests that there remains at least one occasion on which a personality can express his true character, or conscience - the occasion of deciding whether or not to sign a contract for the marketing of his likeness. Obviously, the moment the contract is signed, the conscience in question becomes a commodity, as in the case of Orlando Cepeda who, once having assigned his personality, never was able to get it back.

There is an irony to the personal touch (or twist) given the right of publicity in *Lugosi*, however. The irony consists in the fact that Lugosi was himself an impersonator - or rather the personification - of Count Dracula. This was what made him a 'personality' in that very special sense this word has acquired in the late twentieth century.[3] Johnny Carson, Bill Cosby, Madonna - they too are personalities. As for the rest of us, we are like Lugosi's heirs - we are not personalities (in the most evolved sense of that word). We do not even make it into *People* magazine, which illustrates how 'people' has acquired a very exclusive connotation as well.

Indeed, most of humanity is excluded from ever bringing an action in appropriation of personality. The reason: you have to have a personality before it can be appropriated, at least in America. Already in 1954 this fact was known. Nimmer (1954: 217) put it baldly: "the right of publicity should be limited to those persons having achieved the status of a 'celebrity', as it is only such persons who possess publicity values which require protection from appropriation". This is simply understood nowadays, which perhaps makes us more like Roman slaves than Lugosi's heirs.

IV. In England, a person aggrieved by the unauthorized use of his name or likeness for advertising or commercial purposes has no right of action on that basis alone: he must also show injury either (1) to his reputation, or (2) to his property, business or profession, if he is to succeed (*Tolley v. Fry*, 1930). *Sim v. Heinz* (1959) illustrates the first branch of this rule. Sim brought an action against Heinz for using an actor's simulation of his very distinctive voice in the promotion of its beans. It was held that Sim had to show that the unauthorized use subjected him to public hatred, scorn or ridicule (as in the case of an action for defamation), a difficult burden of proof to discharge, and one in which Sim did not in fact succeed.

The second branch of the rule may be illustrated by *McCulloch v. May* (1947). This case involved a well known children's radio show personality by the name

3 As Williams (1976: 195-96) notes, the idea of 'personality' came unhinged from that of 'humanity'in the eighteenth century. Witness its use in the expression: "even a French girl of sixteen, if she has but a little personality, is a Machiavel". In the twentieth century the idea has been refined further, now it is equated with being a celebrity, like Johnny Carson. "These are perhaps now more often well-known than lively people, though the sense of liveliness is intended to be close. In this use, presumably, most people are not 'personalities'" (Williams 1976: 195-96).

of Uncle Mac, who sought an injunction to bar defendant from marketing a brand of breakfast cereal under the name of 'Uncle Mac's Puffed Wheat'. The action was dismissed because Uncle Mac did not succeed in bringing his claim within the scope of the tort of passing-off. The purpose of this tort is to protect the public from confusion as to the provenance of commodities. Accordingly, a plaintiff must prove that defendant presented his goods to the public as if they were plaintiff's own, thus creating confusion. What is more, the plaintiff must show that he and defendant share a 'common field of activity', that is, that they are 'rivals in trade'. This McCulloch could not do because, as the court pointed out, he was not in the business of marketing breakfast cereal. The defendant not being a 'rival in trade', it followed that there had been no injury to plaintiff's property.

The English courts have been denounced as reactionary for their failure to recognize appropriation of personality as actionable *per se* (e.g. Frazer 1983). We must try to understand why it is that British judges are so reticent. One good reason for not treating a name as property was pointed out over a century ago in *Du Boulay v. Du Boulay* (1869): "By treating a name as property which may be wrongfully taken from another ... one commits oneself to this ridiculous paradox. A takes from B his property while B still remains in possession of it" (p. 435). According to this reasoning, it would be illogical to treat an individual as separable from his name; rather, individual and name, person and personality, form an indivisible whole, a single entity (as in the medieval Christian notion of the person).

It could be said that as a result of their failure to give judicial recognition to a right of publicity, the British courts enforce self-respect even among British celebrities. You cannot use your self, or in other words, treat your personality as a commodity in the U.K. To understand the difference between this position and that which prevails in the U.S., it is useful to distinguish between the idea of an individual as '*having* a personality', which would seem to be the view of most American judges, and an individual as '*being* a personality', which would seem to be the view of the English judiciary. Possessions are alienable, beings are not.

In illustration of just how deeply ingrained the idea of 'having a personality' is in the American unconscious, consider the following quotation from the American psychologist Sidney Jourard (1971: 30): "The person has a self, or I should say, is a self". A slip of speech of this magnitude coming from the pen of a psychologist is a dire sign indeed. Erich Fromm (1969: 140-41), another psychologist, has given perhaps the best account of the rationality behind this lapse:

> In the Middle Ages man felt himself to be an intrinsic part of the social and religious community in reference to which he conceived his own self when he as an individual had not yet fully emerged from his own group. Since the beginning of the modern era, when man as an individual was faced with the task of experiencing himself as an independent entity, his own identity became a problem. In the eighteenth and nineteenth centuries the concept of self was narrowed down increasingly; the self was felt to be constituted by the property one had. The formula for this concept of self was no longer 'I am what I think' but 'I am what I have', 'what I possess'.
>
> In the last few generations, under the growing influence of the market, the concept of self has shifted from meaning 'I am what I possess' to meaning 'I am as you desire me'. Man, living in a market economy, feels himself to be a commodity. He is divorced from himself, as the seller of a commodity is divorced from what he wants to sell ... His self-interest turns out to be the interest of 'him' as the subject who employs 'himself' as the commodity which should obtain the optimal price on the personality market.

I am embarrassed, as a sociologist, to have to invoke the authority of so popular a psychologist as Fromm, but his description does appear to fit the situation in the United States.[4] In England, by contrast, the relation between an individual and his personality is not conceived on the model of the relation between a seller and a commodity. Rather, as the court affirmed in *Tolley v. Fry* (1930), "some men and women voluntarily enter professions which by their nature invite publicity, and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated ... almost as public property" (p. 477).

The public property analogy is singularly interesting. What it suggests is that one can no more own one's personality than one can own the air, or water, or any other public good. What this quotation also seems to recognize is the contribution the public makes to one's becoming a 'personality' in the first place, from which it follows that one cannot assert an exclusive right to same (cf. e.g. *Lyngstad v. Anabas Products*, 1977). This non-exclusive conception of

4 For example, Alicia Weisman (1982), who sees no harm in using another's personality (providing you bargain with them first) sees the right of publicity as essential to the maintenance of a 'free marketplace of autonomous individuals' (compare Grant 1985).

References

AUSNESS, RICHARD
1982 'The right of publicity', *Temple Law Quarterly* 55: 977-1035.
CROSS, RUPERT
1968 *Precedent in English Law* (2d ed.). Oxford: Clarendon.
FRAZER, TIM
1983 'Appropriation of personality - a new tort?' *Law Quarterly Review* 99: 281-310.
FROMM, ERICH
1969 *Man For Himself*. New York: Holt, Rinehart and Winston.
GRANT, GEORGE
1985 *English-Speaking Justice*. Toronto: Anansi.
GRIFFITHS, JOHN
1986 'What is legal pluralism?' *Journal of Legal Pluralism* 24: 1-51.
HOWES, DAVID
1985 'Property, god and nature in the thought of Sir John Beverley Robinson', *McGill Law Journal* 30: 365-414.
1987 'Inverted archetypes: a comparative study of the foundation myths of two Southeast Moluccan societies', *Culture* 7: 3-27.
1991 'An inquiry into the obliteration of precedent and appropriation of personality in Canada' (unpublished ms).
IRVINE, JOHN
1980 'The appropriation of personality', In Dale Gibson (ed.), *Aspects of Privacy Law*. Toronto: Butterworths.
JOURARD, SIDNEY
1971 *The Transparent Self*. New York: van Nostrand.
KAIRYS, DAVID
1982 'The myth of legal reasoning', In David Kairys (ed.), *The Politics of Law: A Progressive Critique*. New York: Pantheon.
KALVEN, HARRY
1966 'Were Warren and Brandeis wrong?' *Law and Contemporary Problems* 31: 326-342.
LÉVI-STRAUSS, CLAUDE
1967 'The story of Asdiwal', In Edmund Leach (ed.), *The Structural Study of Myth and Totemism*. London: Tavistock.
MARSHALL, GEOFFREY
1975 'The right to privacy: a sceptical view', *McGill Law Journal* 21: 242-67.
MAUSS, MARCEL
1974 'The category of the person', In *Sociology and Psychology Essays*. London: Routledge and Kegan Paul.
MERRY, SALLY

1988 'Legal pluralism', *Law and Society Review* 22: 869-96.
NIMMER, MELVILLE
1954 'The right of publicity', *Law and Contemporary Problems* 19: 203-34.
PROSSER, WILLIAM
1960 'Privacy', *California Law Review* 48: 383-412.
ROUSSEAU, JEAN-JACQUES
1973 *The Social Contract and Discourses*. London: Dent.
TREECE, JAMES
1973 'Commercial exploitation of names, likenesses and personal histories', *Texas Law Review* 51: 641-93.
TURNER, DAVID
1979 'Behind the myths', In David Turner and Gavin Smith (eds.), *Challenging Anthropology*. Toronto: Ryerson.
WARREN AND BRANDEIS
1890 'The right to privacy', *Harvard Law Review* 4: 193-237.
WEISSMAN, ALICIA
1982 'Publicity as an aspect of privacy and personal autonomy', *Southern California Law Review* 55: 727-65.
WILLIAMS, RAYMOND
1976 *Keywords: A Vocabulary of Culture and Society*. Glasgow: Fontana.

CASES

Ali v. Playgirl (1978), 447 F. Supp. 723.
Cepeda v. Swift (1969), 4 F. 2d 1205.
Du Boulay v. Du Boulay (1869), 2 P.C. 430.
Flake v. Greensboro News Co. (1938), 212 N.C. 780.
Grant v. Esquire (1973), 367 F. Supp. 876.
Haelan Laboratories v. Topps Chewing Gum (1953), 202 F. 2d 866.
Kunz v. Allen (1918), 102 Kan. 883.
Lugosi v. Universal Pictures (1979), 603 P. 2d 425.
Lyngstad v. Anabas Products Ltd. (1977) F.S.R. 62.
McConnell v. Multivision (1983), 69 C.P.R. (2d) 1.
McCulloch v. May (1947), 2 A.E.R. 845.
Paveisch v. New England Life Ins. Co. (1905), 50 S.E. 68.
Prince Albert v. Strange (1849), 41 E.R. 1171.
Roberson v. Rochester Folding Box Co. (1902), 171 N.Y. 538.
Tolley v. Fry (1930), 1 K.B. 467.
Sim v. Heinz (1959), 1 W.L.R. 313.