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THE RIGHT OF PRIVACY (A CONTRA VIEW)*

One of the most interesting phases of the law today is the struggle of the alleged right to an inviolate personality, the right of privacy, to gain recognition as a common law right in the courts of the several American state and federal jurisdictions.

The doctrine that such a right has been indirectly, and should be directly, protected by the courts appears to have had its origin in that fountain-head of discussion, comment, criticism, litigation, and, perhaps, even legislation—The Right to Privacy, by Samuel D. Warren and Louis D. Brandeis.1

Since 1890, when this famous article first appeared, the right of privacy has been expressly accorded a common law standing in four jurisdictions—Georgia in 1905,2 Kentucky in 1909,3 and again in 1927,4 Missouri in 1910,5 and Kansas in

* This paper, presenting a view on "The Right of Privacy," contra to that taken by Professor Moreland in the preceding article in this issue, is presented in order that the reader may have both views of this interesting question.

2 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104. In this case the defendant company published plaintiff's picture in an insurance advertisement, together with statements purported to be made by the man whose picture was given. Plaintiff's name was not used. It was held that plaintiff had a cause of action for violation of his right of privacy, and for libel. This is the leading case recognizing the right of privacy.
3 Foster-Milburn v. Chinn, 134 Ky. 424, 120 S. W. 364. Plaintiff's picture and purported letter of recommendation were published in a patent medicine advertisement. Recovery was had for libel, and the court stated, obiter, that a man has a cause of action for violation of his right of privacy.
4 Brents v. Morgan, 221 Ky. 765, 299 S. W. 967. Plaintiff was a debtor of defendant. Defendant, a garage man, put a large sign, 8x5 ft., in his window, reading as follows: "Notice. Dr. W. R. Morgan owes an account here of $49.67, and if promises would pay an account, this account would have been paid long ago. This account will be advertised as long as it remains unpaid." In Kentucky, truth is a statutory defense to libel. Yet the court allowed recovery on the ground that defendant had violated plaintiff's right of privacy. This is merely an illustration of the almost unlimited scope of the doctrine of the right of privacy.
5 Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076. This was another "picture-ad" case. Picture of plaintiff, a five-year-old boy, was used in a jewelry advertisement. The court decided that plaintiff's property right in his picture was violated, and that libel also would lie. The property right element weakens the case as authority for recognizing the right of privacy, but the court seemed to think that this was the right it was protecting.
The right of privacy has been flatly rejected by the highest courts in four states—Michigan in 1899, New York in 1902, Rhode Island in 1909, and Washington in 1911. There is considerable doubt as to the status of the right in the federal courts, although in one case it was rejected. The question has never been passed on by the United States Supreme Court.

In many instances relief has been granted in cases which could have been placed on the ground that plaintiff's right of privacy was violated. This is a slightly different type "picture-ad" case. Defendant surreptitiously took motion pictures of plaintiff while she was making purchases at his store, then exhibited them at a local theater. Damages were allowed plaintiff for the violation of her right of privacy, on the authority of the Georgia and Missouri cases, supra, n. 2 and 5. The question has never been passed on by the United States Supreme Court.

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*Kuza v. Allen, 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D, 1151. This is a slightly different type "picture-ad" case. Defendant surreptitiously took motion pictures of plaintiff while she was making purchases at his store, then exhibited them at a local theater. Damages were allowed plaintiff for the violation of her right of privacy, on the authority of the Georgia and Missouri cases, supra, n. 2 and 5.

*Atkinson v. Doherty, 21 Mich. 372, 80 N. W. 285, 46 L. R. A. 219. In an action to restrain the use of her deceased husband's name and likeness on a cigar label, plaintiff was denied an injunction on the ground that there is no common law right of privacy. The case could have been decided on the ground that privacy is a personal right, hence is not available to the estate of her deceased husband; but the case was not put on this basis, and seems sound authority for rejecting the right in its entirety.

*Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 A. S. R. 828, 59 L. R. A. 473. An injunction and damages were both denied a young lady whose picture was, without her consent, used to adorn posters advertising a certain brand of flour. The right of privacy was refused recognition by a divided court. This is the leading case rejecting the right.

*Henry v. Cherry et al, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 15 Ann. Cases 1006. Defendant used plaintiff's picture in a raincoat ad. The declaration was in trespass vi et armis for invading plaintiff's right of privacy. The court held that it was powerless to give relief, since the right of privacy was unknown to the common law.

*Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595. The picture of a socially prominent young woman was published in connection with a news story stating that her father was accused of a certain crime. Recovery was sought on both libel and right of privacy grounds. The court held that there was no libel in this case, and that there is no right of privacy which the law will protect.

*Peck v. Tribune Co. (1907), 154 Fed. 330. A picture of the plaintiff, but not her name, was used in an advertisement indorsing a certain brand of whisky. The court refused to recognize the right of privacy as such, and held that there was no question of libel for the jury. The case was reversed on this latter holding, but the Supreme Court did not decide the right of privacy question. 214 U. S. 185, 53 L. ed. 969, 23 Sup. St. R. 554, 16 Ann. Cases 1075. But see Corliss v. Walker (1899) 64 Fed. 280, 31 L. R. A. 283; Von Thodorovich v. Franz Joseph Beneficial Co. (1907) 154 Fed. 911; and Vassar College v. Loose-Wiles Biscuit Co. (1912) 197 Fed. 582. In these cases, the courts took the attitude that there may be a right of privacy, but the particular case up for decision did not involve a violation of that right.
privacy was invaded, but were not so placed; or the ground of recovery is doubtful. In some jurisdictions, relief has been denied in cases where the plaintiff's right of privacy, if he has such a right, was violated, but the court does not discuss the right in handing down the decision. In a few cases, relief was denied because of the exceptions to the right of privacy, but the question of the existence of the substantive right was not decided.

Most of the literary property, and breach of contract or trust, cases which involve the publication of photographs or private writings can be classed here. A few of the leading ones are *Denis v. Leclerc* (1811) 1 Martin (La.) 297, 5 Am. Dec. 712; *Woolsey v. Judah* (1855) 4 Duer (N. Y.) 379; *Grigsby v. Breckinridge* (1867) 2 Bush (Ky.) 450; *King v. Sheriffs* (1905) 129 Wis. 468, 109 N. W. 656; *Douglas v. Stokes* (1912) 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 336. See also *Edison v. Edison Polyform Mfg. Co.* (1907) 73 N. J. Eq. 156, 67 Atl. 329, where the use of Edison's name and picture was restrained because it might expose him to liability; and *Vanderbilt v. Mitchell* (1871) 72 N. J. Eq. 310 (1907), where the illegitimate son of plaintiff's wife was restrained from using plaintiff's name or claiming to be his son. The decision was based on the fact that property rights of the plaintiff were jeopardized. Compare *Baker v. Libbie* (1912) 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 441, Ann. Cases 1912D, 551, where the literary property law gave protection when the right of privacy doctrine probably would not.


*Chappell v. Stewart* (1896) 82 Md. 323, 33 Atl. 542, 37 L. R. A. 783, 51 Am. St. Rep. 476. Injunctive relief was denied a man who was being shadowed by detectives. However, the court denied relief on the ground that equity had no jurisdiction of the case, since the remedy at law was adequate, and a personal right only was being invaded; and not because there is no right of privacy. In *Schulte v. Insurance Co.* (1913) 151 Wis. 537, 103 N. W. 386, however, "rough shadowing" was held actionable.

The exceptions set out by Warren and Brandeis are: (1) The right to privacy does not prohibit publication of matter of public or general interest; (2) the right to privacy does not prohibit the communication of matter under circumstances rendering it privileged according to the law of slander and libel; (3) the law would probably not grant redress for invasion of privacy by oral publication in the absence of special damage; (4) the right to privacy ceases upon the publication of the facts by the individual or with his consent. 4 Harvard Law Review 193 at 214; 216, 217, 218. These exceptions were recognized, obiter, in *Pavesich v. New Eng. Life Ins. Co.*, supra n. 2, and in *Brents v. Morgan*, supra n. 4.

The reasons for and against judicial recognition of the right are many and varied. The chief reasons advanced by Messrs. Warren and Brandeis seem to be: (1) The right has been protected in the past through legal fictions, and should be expressly recognized.\(^1\) (2) The logical development of the common law in gradually protecting more and more of the rights of individuals demands that the right to privacy be protected.\(^2\) (3) Modern social and scientific development makes it imperative that some such protection as that accorded by recognition of the right of privacy be given by the law.\(^3\) Pavesich v. New England Life Ins. Co. adds that the right of privacy is (1) based on natural law,\(^4\) and is (2) "recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.\(^5\)

*Munden v. Harris\(^6\)* was expressly placed on a property right basis, a ground relied on by Judge Gray, dissenting, in *Schuyler v. Curtis,*\(^7\) and in *Roberson v. Rochester Folding Box*

\(^1\) "These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone." 4 H. L. R. 193, 205.


\(^3\) "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person and for securing to the individual what Judge Cooley calls the 'right to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' Of the desirability—indeed the necessity—of some such protection, there can, it is believed, be no doubt." 4 Harvard Law Review 193, at 195 and 196.

\(^4\) "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. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society, there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents an encroachment by the public upon his rights which are of a private nature, as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law." 50 S. E. 68 at 69; 122 Ga. 190.

\(^5\) 50 S. E. 68 at 71; 122 Ga. 190.

\(^6\) *Supra* n. 5.

\(^7\) "I cannot see why the right of privacy is not a form of property,
Such an analysis, however, appears to be inconsistent with placing the case on a right of privacy foundation. From its inception, the right of privacy has been regarded as a personal right. If the Missouri court based its decision on plaintiff's alleged property right, the discussion of the right of privacy was either logically unsound or purely obiter.

The chief reasons against recognizing the right are ably advanced in two or three of the leading cases. In Roberson v. Rochester Folding Box Co., the main English cases relied on by the proponents of the right are analyzed and the conclusion (which this writer believes to be sound) was reached that the cases do not support the right of privacy as claimed. The court also concluded that recognition of the right by the courts would be contrary to the common law, but that appropriate remedies might be had by legislative action. The somewhat less persuasive reason that recognition of the right would neces-

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24 Supra n. 8. Judge Gray's searching for a property right may be explained by the fact that in both the New York cases equitable relief was asked. This was not the case in Munden v. Harris.


27 "In not one of these cases, therefore, was it the basis of the decision that the defendant could be restrained from performing the act he was doing or threatening to do on the ground that the feelings of the plaintiff would be thereby injured; but, on the contrary, each decision was rested either upon the ground of breach of trust, or that plaintiff had a property right in the subject of the litigation which the court could protect." 64 N. E. 442, 445; 171 N. Y. 538.

28 "An examination of the authorities leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have been long guided." 64 N. E. 442, 447; 171 N. Y. 538.

29 "The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent." 64 N. E. 442, 443. This is exactly what the New York legislature did within the following year. Chap. 132 of the Laws of New York of 1903, p. 308. Cahill's Consolidated Laws of New York, 1923, chap. 7, secs. 50 and 51.
sarily result in a vast amount of litigation was also advanced in support of the rejection of the right.30

In Henry v. Cherry, the court ably analyzed the leading case of Pavesich v. New England Life Ins. Co. and came to the sound conclusion that natural justice is not a valid foundation for present day law,31 and that there are no constitutional provisions warranting the courts in granting relief in right of privacy cases in the absence of a legislative declaration that such a right will be protected.32 As far as the federal constitution is concerned, the Rhode Island court has the support of the United States Supreme Court in saying that there are no constitutional guarantees to a right of privacy.33

Thus we see that the substantive right of privacy has been recognized in a few states, and expressly rejected in as many more. The reasons advanced pro and con are as contradictory as the various holdings. The nature of the right remains undefined, and, we fear, undefinable. Its status is still a moot question in most of the American jurisdictions.

THE REMEDIAL ASPECT OF THE PROBLEM

The problem of remedies for an invasion, or threatened in-

30 "If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering on the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of a publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits" 64 N. E. 442, 443; 171 N. Y. 538. That this objection of Chief Justice Parker was not entirely unwarranted is shown by the peculiar result reached by the Kentucky court in Brents v. Morgan, supra n. 4.

31 "It has been shown that natural justice is not law. To make it law is therefore a legislative act, forbidden by the constitution to the courts of this state." 73 Atl. 97 at 106; 30 R. I. 13.

32 "Under our Constitution (article 3): The powers of the government shall be distributed into three departments, the legislative, executive, and judicial.' The function of adjusting remedies to rights is a legislative rather than a judicial one, and up to the present time the Legislature of this state has omitted to provide a remedy for invasion of the right of privacy." 73 Atl. 97, 107; 30 R. I. 13.

33 "But, as we have stated, neither the 14th amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' or the 'liberty of silence;' nor, we may add, does it confer any right of privacy upon either persons or corporations." Prudential Insurance Company of America v. Cheek, 259 U. S. 530 at 543, 66 L. ed. 1044, 42 Sup. Ct. Rep. 516, 27 A. L. R. 27.
vasion of a person's right of privacy is relatively less important than the question of the recognition of the substantive right. The civil remedies are twofold: (1) Damages in a tort action for past invasion, and (2) An injunction in a suit in equity to restrain future invasion. Once the right is recognized as a substantive right, damages for its invasion will be allowed as a matter of course. But grounds sufficient to warrant the interference of equity would be more difficult to find.

It is a well established principle that equity interferes to protect only property rights. However, a court that wishes to protect the right of privacy should find no trouble in avoiding this rule. It can do as the Missouri court did in Munden v. Harris, and find a property right at stake; or it can cast aside the old restrictions, on the authority of the "rogues' gallery" cases, and the dicta in such cases as Vanderbilt v. Mitchell, and protect purely personal rights without resorting to the use of legal fictions.

A court which would be willing to depart far enough from the principles of the common law to recognize the right of privacy, could, with less deviation from established principles, concede that equity has the power to protect the right thus recognized. It is interesting to note, however, that in the right of privacy cases where an injunction was asked, relief was denied; but it was denied on the ground that the law knew no substantive right of privacy, and not on the ground that the right, if it exists, can not be protected in equity.

"If the right of privacy succeeds in establishing itself, injunction, as the only effective remedy, is likely also to establish itself for such cases." 29 Harvard Law Review 640, 672.
Supra n. 5.
Supra n. 13.
"If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificates, we should hold, and without hesitation, that an individual has rights, other than property rights which he can enforce in a court of equity and which a court of equity will enforce against invasion." 67 Atl. 97, 99.
Atkinson v. Doherty, supra n. 7; Roberson v. Rochester Folding Box Co., supra n. 8.
The right of privacy, by this or any other name, was unknown to common law. There are cases where a person's privacy has been protected, but this was not the ground on which relief was given, but coupled with some other, usually property, right of the plaintiff that was being violated.

The right of privacy is for the most part an unnecessary right. With the modern definitions of property, thoughts and emotions which have been recorded in permanent form will be protected from exposition to the public. Under the laws of slander and libel, recovery can be had if the plaintiff is in fact unjustly exposed to hatred, ridicule, obloquy, or contempt before the public. Under breach of contract or trust, recovery can be had in many other cases. In the first three of the five cases allowing recovery for violation of the right of privacy, the court also decided that libel would lie. In the fourth, libel was not alleged; and in the fifth, truth was a statutory defense.

Privacy, save in perhaps a very few phases, is adequately protected by existing rules of law. If additional protection is needed, it can be adequately supplied by legislative action, as was done in New York; and the courts will be saved the embarrassment of recognizing principles contrary to the common law, and principles which, when carried to their logical conclusions, will allow recovery in many unjustifiable cases.

However, the right of privacy has been given a common law standing in four state jurisdictions. Damages are given for its invasion, and the courts would probably not hesitate to give injunctive relief were the substantive right shown to be imminently in danger. What stand the courts in the jurisdictions where the question has not been decided will take is impossible to forecast. Authority is now available to support either side. A technical argument, at least apparently sound, can be worked out to support either position. Public policy arguments might well be offered for both sides, and a court should have no difficulty in upholding its desired position.

But the fact that only eight jurisdictions have unequivocally passed on the status of the right in the forty years since it was first propounded is persuasive evidence that the protection to be afforded by recognition of the right is not as badly
needed as is often supposed; and the existence of the so-called common law “right of privacy” will probably remain a moot, and for the most part an academic, question in most of the states for some time to come.

RUFUS LISLE.