The Right to Privacy One Hundred Years Later: New York Stands Firm as the World and Law Around it Change

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A century has passed since Samuel D. Warren and Louis D. Brandeis triggered the slow but inexorable evolution of the legal concept of privacy¹ with their seminal law review article, The

¹ See Black's Law Dictionary 1195 (6th ed. 1990). The right to privacy is the right to be let alone, to be free of unwarranted publicity, and to withhold one's self from public scrutiny. Id. Any reference to the "concept of privacy," however, necessarily risks suggesting that a fully satisfactory definition of that concept has been or could be formulated. Despite elaborate attempts to reduce the concept of privacy to words, the doctrine of privacy has been left inadequately defined. See A. Westin, Privacy and Freedom 7 (1967) [hereinafter Westin].

Although the exact parameters of this right are unclear, there have been many attempts to formulate a definition. See, e.g., Galella v. Onassis, 353 F. Supp. 196, 232 (S.D.N.Y. 1972) (right to shield intimate activities and have freedom from unremitting assaults of world so as to find peace of mind), aff'd in part and rev'd in part, 487 F.2d 986 (2d Cir. 1973); Office of Science and Technology, Executive Office of the President, Privacy and Behavioral Research 8-9 (1967) (right of individual to determine which of his beliefs are disclosed to others); Westin, supra ("the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421, 423 (1980) ("the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention").

By far the most widely accepted definition of the concept of privacy is the one advanced by William Prosser. See Prosser, Privacy, 48 Calif. L. Rev. 383 passim (1960). For Prosser, the concept of privacy was not a single concept at all but an amalgamation of four distinct torts:

The law of privacy comprises four distinct kinds of invasion[s] of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone" (footnote omitted) (quoting T. Cooley, A Treatise on the Law of Torts 29 (2d ed. 1888)). Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.
Right to Privacy.\(^2\) Warren and Brandeis argued that social, eco-

\(\text{id. at 389. Prosser's conceptualization was incorporated nearly verbatim into the Restatement (Second) of Torts and, as a result, has had a profound impact on the framework within which the concept of privacy is discussed. See Restatement (Second) of Torts § 652A (1976).}\)


Not all commentators, however, have taken a favorable view of the Warren and Brandeis article. See D. Pember, Privacy and the Press: The Law, the Mass Media, and the First Amendment 41 (1972); Barron, Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation, 13 Suffolk U.L. Rev. 875, 875 (1979); Kalven, supra, at 327, 328.


Despite the excitement the Warren and Brandeis article generated in the legal periodicals, actual judicial consideration of the concept of a right to privacy developed rather slowly. See Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 725, 731 (1937) (writing nearly 50 years after publication of the Warren and Brandeis article, author concluded right of privacy had almost completely failed to find acceptance); Prosser, supra note 1, at 384 (Warren and Brandeis article had little immediate impact upon judicial community).

It took nearly 12 years for the concept to come squarely before the court of last resort of any state in the country. See Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 543-44, 64 N.E. 442, 443 (1902); see also infra notes 11-17, 37-46 and accompanying text (discussing Roberson). It took three more years before a state court of last resort gave the concept its blessing. See Pavesich v. New England Life Ins. Co., 122 Ga. 190, 193-94, 50 S.E. 68, 80-81 (1905). By the late 1930's, however, recognition of the concept in the First Restatement of Torts provided substantial momentum to the trend toward acceptance of the doc-
nomic and political changes were causing increasingly outrageous assaults on "sacred precincts of private and domestic life" and that these invasions mandated the common law's recognition of an independent principle of the "inviolable personality." Just as the law had advanced gradually from its origins in protecting life and property toward a recognition of the less immediate but still fundamental need to protect man's feelings and intellect, Warren and Brandeis asserted that the common law, with its "beautiful capacity for growth," was being challenged to adapt and provide, for the first time, the legal weaponry with which an individual could repel these assaults upon his "retreat from the world." The conceptual seed for this right to be let alone, sown by the Warren and Brandeis collaboration, at first appeared to have found fertile soil in the New York courts, which provided part of the foundation for

trine. Prosser & Keeton, supra, § 117, at 851. Today, the concept is recognized to varying degrees in virtually every jurisdiction in the United States. Id.

5 Warren & Brandeis, Privacy, supra note 2, at 195.

4 Id. at 205. "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.'" Id. at 195 (quoting T. Cooley, A Treatise on the Law of Torts 29 (2d ed. 1888)).

Of all the political, social and economic changes of that time, the one development most responsible for providing the impetus for the landmark article was the rise of "yellow journalism" in which the press indulged in numerous excesses, including focusing considerable attention on society's bastions of wealth and power. See A. Mason, Brandeis: A Free Man's Life 70 (1946). The development particularly irritated Warren, who married into a prominent Boston family and had experienced firsthand some of the fourth estate's prying ways. See id. This sentiment was reflected in the Warren and Brandeis article where it was stated: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery." Warren & Brandeis, Privacy, supra note 2, at 196. Some commentators have traced this outrage to a particularly souring experience they claim Warren had concerning the press coverage given his daughter's wedding. See Prosser, supra note 1, at 383. This account, however, has been debunked rather authoritatively. See Barron, supra note 2, at 891-97.

5 See Warren & Brandeis, Privacy, supra note 2, at 193-95.

6 Id. at 195.

7 Id. at 195-96.

8 Id. at 195. When Judge Thomas Cooley coined the term "the right to be let alone," he was referring to the right to be free from physical assaults. See T. Cooley, supra note 4.

upon which the authors erected their new legal doctrine. Any prospect that the right to privacy would take root and flourish in New York, however, was unequivocally dashed twelve years after the article’s publication when the New York Court of Appeals, in Roberson v. Rochester Folding Box Co., became the first state court of last resort to consider directly the validity of the Warren-Brandeis thesis.

In Roberson, the court addressed the now-legendary travails of Abigail Roberson and her claim for invasion of privacy stemming from a flour mill’s unauthorized use of her photograph in a widely circulated advertisement. Noting the absence of precedent, wary of a flood of litigation, and conscious of the potential conflicts between the first amendment and privacy rights, the court dismissed Warren and Brandeis’s “clever article” and concluded that the “so-called ‘right of privacy’ has not as yet found an abiding place in our jurisprudence, and... the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.”

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10 See Manola v. Stevens & Myers (Sup. Ct. N.Y. County 1890) (unreported decision), cited in Warren & Brandeis, Privacy, supra note 2, at 195 n.7 (publication of unauthorized photograph of actress performing in tights prohibited); Woolsey v. Judd, 4 Duer 379, 384 (1855), cited in Warren & Brandeis, Privacy, supra note 2, at 200 n.3 (publication of private letter was infringement on writer’s right to control).

11 171 N.Y. 538, 64 N.E. 442 (1902).

12 Id. at 542, 64 N.E. at 442. The defendant circulated an estimated 25,000 copies of the advertisement featuring Roberson’s portrait and the slogan, “Flour of the Family.” Id. The slogan was designed to suggest that just as Miss Roberson was the finest flower of them all, so too was the defendant’s product the best flour. S. Hofstadter, The Development of the Right of Privacy in New York 10 (1954). The slogan may also have had something of a double entendre. See J.T. McCarthy, supra note 2, § 1.4, at 1-14.

13 Roberson, 171 N.Y. at 543-47, 64 N.E. at 443-44.

14 Id. at 544-45, 64 N.E. at 443.

15 Id. at 544, 64 N.E. at 443.

16 Id. at 547, 64 N.E. at 444.

17 Id. at 556, 64 N.E. at 447. The court asserted that the legislature was the appropriate forum for a movement toward the recognition of privacy rights. Id. at 545, 64 N.E. at 443. The court’s suggestion was acted upon shortly thereafter. See infra note 48 and accompanying text (New York’s statutory response to Roberson).

The Roberson decision almost immediately was interpreted as a total rejection of the notion of an independent common-law right to privacy. See Owen v. Partridge, 40 Misc. 415, 420, 82 N.Y.S. 248, 252 (Sup. Ct. N.Y. County 1903) (“After some vacillation... our Court
From Roberson onward, the New York courts have firmly refused to recognize a common-law right to privacy despite successive waves of political, social and economic changes that have raised threats to privacy of a magnitude Warren and Brandeis hardly could have imagined 100 years ago. In their refusal to join the majority of jurisdictions that have heeded Warren and Brandeis’s call to utilize the common law “in its eternal youth” in recognizing an individual’s right simply to be left alone, the New York courts have continued to rely on Roberson.2

of Appeals has finally repudiated the doctrine that the right of privacy has any existence in law or is enforceable in equity").

The Roberson court was deeply divided, reaching its decision by a four-to-three vote. Roberson, 171 N.Y. at 566, 64 N.E. at 451. In a strong dissent, Judge Gray argued that the absence of precedent should not preclude equitable relief where there is an alleged invasion of privacy. Id. at 561, 64 N.E. at 449 (Gray, J., dissenting). Judge Gray continued:

In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mould of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence, if equity were powerless to extend the application of the principles of common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or commercial conditions.

Id. at 561-62, 64 N.E. at 449 (Gray, J., dissenting).

See M. Mayer, Rights of Privacy 7-9 (1972) (technological advances have radically altered status quo in favor of intrusive forces so that “personal privacy is jeopardized today as never before”); Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 963 (1964) (“scientific and technological advances have raised the spectre of new and frightening invasions of privacy”); Note, Privacy, Computers, and the Commercial Dissemination of Personal Information, 65 Tex. L. Rev. 1395, 1395 (1987) (the “information age” threatens individual privacy in ways unimaginable 100 years ago).


See J.T. McCarthy, supra note 2, § 6.9[A], at 6-54.3 (recognizing that New York is “part of a tiny and dwindling minority of [jurisdictions] which still rejects any common law rights of privacy”); Prosser & Keeton, supra note 2, § 117, at 851 (privacy rights recognized in most jurisdictions, but exist only in limited form by statute in New York).

20 Warren & Brandeis, Privacy, supra note 2, at 193.

See Delan by Delan v. CBS, Inc., 91 App. Div. 2d 255, 258, 458 N.Y.S.2d 608, 612 (2d Dep’t 1983); Anderson v. Strong Memorial Hosp., 140 Misc. 2d 770, 773, 531 N.Y.S.2d 735,
The unacceptable consequences of the New York courts' reluctance to discard the dated analysis of Roberson and failure to embrace a more expansive view of privacy rights was forcefully illustrated recently in Hurwitz v. United States. In Hurwitz, the Second Circuit addressed a claim of invasion of privacy stemming from a covert Central Intelligence Agency ("CIA") operation, through which the agency, over a period spanning three decades, intercepted, analyzed and retained copies of more than 200,000 letters mailed between the United States and the Soviet Union. Among the intercepted letters was one Leo Hurwitz had written in 1963. Hurwitz was unaware of the interception until fourteen years later when, pursuant to an unrelated request for access to his CIA files, he discovered a copy of the letter. Hurwitz subsequently commenced an action against the CIA under the Federal Tort Claims Act ("FTCA"). Under the FTCA, Hurwitz was entitled to relief only if the federal government would be liable, if it were a private party, under the laws of the state in which the alleged tortious conduct occurred. The Second Circuit, then, was...
left to determine the status of Hurwitz's privacy rights under New York law—a question the court had addressed under identical circumstances, but with dramatically different results, eleven years earlier in *Birnbaum v. United States*.

In *Birnbaum*, three plaintiffs brought suit against the CIA for invasion of privacy based on the same covert operation that gave rise to the claim in *Hurwitz*. In surveying the state of privacy rights in New York, the Second Circuit acknowledged *Roberson* but concluded that the decision neither expressly nor impliedly precluded a cause of action for invasion of privacy by intrusive means. The *Birnbaum* court further noted that the sanctity of an individual's right to seclusion free from unreasonable intrusions has been widely respected, if not judicially recognized, since before the American Revolution. In finding for the plaintiffs, Judge Gurfein wrote, "In the light of the current jurisprudence, it is hard to believe that the New York Court of Appeals today would apply the rationale of the 1902 *Roberson* decision to bar an action based on intrusion upon privacy."
Eleven years later, however, the *Hurwitz* court found Judge Gurfein's assessment of New York law untenable.\textsuperscript{33} Writing for the court, Judge Cardamone noted that despite the *Birnbaum* court's optimistic view, the New York courts had continued to maintain an unwavering allegiance to *Roberson*.\textsuperscript{34} "Time has proved [the *Birnbaum*] judgment wrong," Judge Cardamone wrote. "The complaint in this case presents the same fact pattern as *Birnbaum* [but] [t]his time we make no prophecy."\textsuperscript{35} The court then proceeded to apply New York law as it undoubtedly stands today—leaving Hurwitz, on the eve of the centennial of the right to privacy, without recourse to a remedy for one of the most fundamentally offensive invasions of one's right to be let alone.\textsuperscript{36}

for privacy invasion, the court stated that if it had been required to do so, it would have concluded that the New York Court of Appeals was likely to "modify or distinguish" *Roberson*. Id. at 995 n.12; see Spock v. United States, 464 F. Supp. 510, 515 (S.D.N.Y. 1978) ("that the New York Court of Appeals would recognize an invasion of privacy cause of action beyond the parameters of *Roberson* . . . is not without precedent"); Socialist Workers Party v. Attorney Gen. of the United States, 463 F. Supp. 515, 524-25 (S.D.N.Y. 1978) (New York law would recognize privacy rights of group subjected to intrusive FBI techniques).

\textsuperscript{33} *Hurwitz*, 884 F.2d at 685. The Second Circuit had articulated this conclusion previously but, it is submitted, less emphatically and under circumstances less dramatic than the juxtapositioning of nearly identical fact patterns in *Hurwitz* and *Birnbaum*. See Mack v. United States, 814 F.2d 120, 123 (2d Cir. 1987) (court stated that *Birnbaum* assessment of future of privacy rights in New York had proved inaccurate in ruling against former FBI agent who claimed his privacy rights were violated by mandatory urinalysis); Allen v. National Video, Inc., 610 F. Supp. 612, 620 (S.D.N.Y. 1985) (recent New York decisions indicate no shift in courts' traditional position on common-law right to privacy).

\textsuperscript{34} *Hurwitz*, 884 F.2d at 685. The court stated that the New York Court of Appeals had "consistently reminded litigants" that a common-law right to privacy did not exist in New York. Id. The court cited two post-*Birnbaum* decisions. See Freihofer v. Hearst Corp., 65 N.Y.2d 135, 140, 480 N.E.2d 349, 353, 490 N.Y.S.2d 735, 739 (1985) ("We have in the past recognized that, in this State, there is no common-law right of privacy"); Arrington v. New York Times Co., 55 N.Y.2d 433, 440, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982) (court consistently has adhered to position that no common-law right to privacy exists in New York), cert. denied, 459 U.S. 1146 (1983). However, neither the Freihofer nor Arrington courts even acknowledged the *Birnbaum* prediction that the *Roberson* rationale would eventually be rejected. But see MacDonald v. Clinger, 84 App. Div. 2d 482, 484, 446 N.Y.S.2d 801, 803 (4th Dep't 1982) (court denied right to privacy action but acknowledged "current predictions" of a possible expansion of those rights under New York law) (citing *Birnbaum* and Spock). No New York court has yet acknowledged that the Second Circuit, in *Hurwitz*, retreated from the *Birnbaum* assessment.

\textsuperscript{35} *Hurwitz*, 884 F.2d at 685.

\textsuperscript{36} Id. at 688. Some commentators assert that a plaintiff whose right to privacy has been rejected by the New York courts may still have access to a remedy. See Comment, Privacy Tort Law in New York: Some Existing Routes to Recovery, 31 BUFFALO L. REV. 255, 264-71 (1982). Further, it has been suggested that a plaintiff victimized by an unreasonable intrusion may still recover under an implied action pursuant to N.Y. PENAL LAW § 250.05 (McKinney 1989) (anti-eavesdropping statute), N.Y. PENAL LAW § 240.25 (McKinney 1989).
This Note will suggest that New York’s continued refusal to recognize a common-law right to privacy is becoming increasingly troublesome as the twenty-first century draws near and the threat to individual privacy mounts with the emergence of new technologies capable of ever more intrusive applications. In addition, this Note will assert that this refusal to recognize a right to privacy is rendered all the more distressing by the fact that, despite the extraordinary number of privacy-related cases that have filtered through the New York courts, there is an undeniable paucity of decisions in which the courts have satisfactorily explained the reasoning behind this continued refusal to embrace a right so fundamental to American society. Finally, this Note will suggest that there are ways to provide substantial legal protection against the more extreme forms of privacy invasion without, as the Roberson court feared, doing violence to established principles of law.37

I. THE ROBERNON COURT’S THREE-PRONGED OBJECTION

Prior to reaching the New York Court of Appeals, Abigail Roberson, as well as Warren and Brandeis’s nascent concept of the right to privacy, had found an ally in New York’s lower courts.38 The trial court in Roberson, for example, concluded that, despite the absence of precedent, to deny Roberson some form of relief would “be a blot upon our boasted system of jurisprudence” and would be “at war with the principles of justice and equity.”39 In affirming the decision, the Appellate Division found “no reason why a person who... interferes with the desire of another person to be left alone, is to be any more regarded than the person interfered with who is desirous to have his feelings protected.”40

The Court of Appeals, however, identified three specific rea-
sons for finding against Roberson and rejecting what it suggested was the lower courts' excursion "far outside of the beaten paths of both common law and equity." Writing for a divided court, Judge Parker concluded that the absence of precedent was, indeed, a formidable barrier to the recognition of such an untested legal concept. Secondly, the court noted its fear that judicial recognition of a concept as amorphous as a right to privacy would precipitate a flood of unwarranted and even absurd litigation. Thirdly, the court alluded to the first amendment tensions inherent in permitting individuals to proscribe that which may be written, published or even spoken about them.

Notwithstanding attempts to justify its rejection of Roberson's claim, the court's refusal to grant relief to a plaintiff depicted as a young innocent violated at the hands of unscrupulous business interests sparked a swift and decidedly negative reaction. It was precisely this "storm of public disapproval" that spawned the enactment of legislation that today, as embodied in New York Civil

41 Roberson, 171 N.Y. at 547, 64 N.E. at 444.
42 See supra note 17 (discussing dissenting opinion in four-to-three Roberson decision).
43 Roberson, 171 N.Y. at 545-47, 64 N.E. at 443-44.
44 Id. at 544-45, 64 N.E. at 443.
45 Id. at 544, 64 N.E. at 443.
46 See generally Savell, supra note 2, at 11-12 nn.52-53 (listing various periodicals and law journals with articles criticizing Roberson).
A typical reaction from the popular press was that of The New York Times, which described the Roberson decision as "amazing" and suggested that the outcome in such privacy cases would have been different had Judge Parker's daughter been in the victim's shoes. See N.Y.' Times, Aug. 23, 1902, at 8, col. 3.

The response from the legal community also was harsh. The Georgia Supreme Court, for example, virtually broadsided the Roberson court when it subsequently became the first state court of last resort to adopt the notion of a common-law right to privacy. See Pavesich v. New England Life Ins. Co., 122 Ga. 190, 193-94, 50 S.E. 68, 77-79 (1905). The Pavesich court suggested that the Roberson decision was the result of an "unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel." Id. at 213, 50 S.E. at 78. The court stated that while perhaps understandable, such conservatism "should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right." Id.

The widespread public outcry prompted a member of the Roberson majority to take the unprecedented step of defending the decision in a law review article. See O'Brien, The Right of Privacy, 2 Colum. L. Rev. 437 (1902). Judge O'Brien asserted that the negative public reaction was due at least in part to an inaccurate perception of the court's decision. Id. at 438. The judge argued that the right to privacy, while perhaps an attractive concept to the minds of laypersons, was still "quite too fanciful for judicial recognition as a legal principle." Id. at 442.

47 Prosser, supra note 1, at 385.
Rights Law sections 50-51, remains the sole source of privacy rights under New York law.\textsuperscript{48} Enacted less than one year after Roberson and with Abigail Roberson's predicament clearly in mind,\textsuperscript{49} the statute prohibited the unauthorized use of a person's name, portrait or picture.\textsuperscript{50} The statute, however, was silent as to the panoply of other circumstances in which an individual's privacy could be invaded.\textsuperscript{51} Although the statute could be interpreted as a narrow response to Roberson's plight and not as the sole embodiment of protected privacy rights,\textsuperscript{52} the New York courts con-

\textsuperscript{48} See N.Y. Civ. RIGHTS LAW § 50 (McKinney 1976); N.Y. Civ. RIGHTS LAW § 51 (McKinney Supp. 1990). Section 50, the penal arm of the statutory right to privacy, provides that:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.


Section 51 provides for a civil remedy and states, in relevant part:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained [as specified in section 50] . . . may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.


The statutes, which have not been significantly amended since their adoption, were the first of their kind in the nation. See S. HOFSTADTER & G. HOROWITZ, supra note 2, at 28.


\textsuperscript{50} See supra note 48 and accompanying text (quoting N.Y. Civ. RIGHTS LAW §§ 50-51 (McKinney 1976 & Supp. 1990)).

\textsuperscript{51} See id. The statutory right to privacy guards against the invasion of privacy Prosser defined as the unauthorized appropriation of another's name or likeness, but is silent as to Prosser's remaining classifications of invasion by intrusion, disclosure of private facts and portrayal of another in a false light. See supra note 1 (discussing Prosser's analysis of concept of right of privacy).

\textsuperscript{52} See Greenawalt, supra note 36, at 162 n.13. One team of commentators suggested that the legislature drafted the statutory right narrowly in the belief that the courts, if faced with a more egregious claim of privacy invasion than the one presented in Roberson, would move to embrace the broad concept of privacy rights and thus make more drastic legislative action unnecessary. See Brooks & Rolfe, Interference With Privacy—In What Forms Might It Be Actionable in Virginia?, 13 U. Rich. L. Rev. 487, 492 (1979). The authors conceded, however, that the validity of such an argument is weakened by the fact that the legislature has done nothing in light of the courts' refusal to recognize a common-law privacy right over the last 90 years. See id. at n.21.
sistently have limited privacy rights strictly to those encapsulated in the statute. The result, ironically, has been that the legislative action that in 1903 appeared to signal the dawning of a more enlightened age of privacy rights in New York is now a cornerstone of the New York courts' ultra-restrictive view of those rights.

Despite the questionable validity of their initial interpretation of the intent behind the legislature's response to Roberson, the New York courts have continued to apply the following boilerplate rationale for dismissing claims that do not fall neatly within the parameters of Civil Rights Law sections 50-51: There is no common-law right to privacy in New York and individual privacy rights exist solely by virtue of the statute. Although a lively debate over the proper scope of the concept of privacy unfolds around them, some of the courts have barely masked their ennui at having to reaffirm their opposition to any departure from Roberson. As a result, although the New York courts have fielded as many privacy cases as the courts of all the other states combined, the subtleties of the contemporary rationale behind this allegiance

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54 See J.T. McCARTHY, supra note 2, § 1.4[A], at 1-16. "What had been envisioned... as an innovative step eventually became a straitjacket locking New York law into the factual pattern of the Roberson case. Today, New York law is still haunted by the face of the young Abigail Roberson." Id.
56 See PROSSER & KEETON, supra note 2, § 117, at 850 (host of writers have focused on concept of privacy); G. TRUBOW, PRIVACY LAW AND PRACTICE § 1.01 (1990).
57 See Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379, 383, 472 N.E.2d 307, 308, 482 N.Y.S.2d 457, 459 (1984) (reasoning that history of statutory right to privacy has been recited before and need not be repeated); Welch v. Group W. Prod., 138 Misc. 2d 856, 859, 525 N.Y.S.2d 466, 468 (Sup. Ct. N.Y. County 1987) (fact that no common-law right to privacy exists is so well recognized that it requires no citation other than Roberson).
58 See J.T. McCARTHY, supra note 2, § 6.5[A], at 6-55 (author estimates that New York courts have generated as many as 200 reported privacy cases).
to a doctrine clearly out of step with the majority view remain largely inaccessible.\textsuperscript{59}

In a handful of decisions, however, the courts have transcended the conventional boilerplate rationale to offer some insight into the nature of the reservations that prevent them from endorsing even a modest expansion of privacy rights.\textsuperscript{60} It is asserted that in each of these decisions, the Roberson court's emphasis on the absence of precedent and its fears of opening the floodgates to litigation have been eclipsed by a heightened emphasis on the third prong of the analysis—the potential conflict between first amendment and privacy rights.

In Waters v. Moore,\textsuperscript{61} for example, the plaintiff's claim that his statutory privacy rights were violated by a motion picture that included a character based on him was rejected by the Supreme Court, Nassau County, on the grounds that the film had not used the plaintiff's name or likeness as required under the statutes.\textsuperscript{62} More importantly, now-Chief Judge Wachtler explained the court's decision, in part, by referring to the first amendment ramifications of any decision to the contrary,\textsuperscript{63} when he wrote: "New York's privacy statute strikes a delicate balance between the free dissemination of ideas and individual privacy. The former is paramount. The latter, though applied liberally to achieve its laudatory purpose, is subordinate to the principle of a free press."\textsuperscript{64}

Judge Wachtler's emphasis on the third prong of the Roberson analysis was echoed in Arrington v. New York Times Co.\textsuperscript{65} Arrington, a successful, black financial analyst, claimed his statutory right to privacy had been violated by the unauthorized use of his photograph to illustrate a newspaper article suggesting that members of the black middle class were becoming estranged from lower-income blacks.\textsuperscript{66} The Court of Appeals rejected the claim on

\textsuperscript{59} See id.
\textsuperscript{62} Id. at 375-77, 334 N.Y.S.2d at 433-34.
\textsuperscript{63} Id. at 377, 334 N.Y.S.2d at 434.
\textsuperscript{64} Id.
\textsuperscript{66} Id. at 437-38, 434 N.E.2d at 1320, 449 N.Y.S.2d at 942.
the grounds that the statutory right to privacy does not prohibit the unauthorized use of one's photograph in connection with a publication of public interest. Judge Fuchsberg wrote that a narrow application of the statutory right to privacy "has not been without sensitivity to the potentially competing nature of the values the Legislature, on the one hand, served by protecting against the invasion of privacy . . . and, on the other, the values our State and Federal Constitutions bespeak in the area of free speech and free press." In addition, it is suggested that this apparent narrowing of the focus of the courts' objection to a broad concept of privacy rights to one based primarily on first amendment concerns is entirely consistent with the judicial trend over the past quarter-century toward bolstering first amendment protections even at the risk of subordinating certain rights of individuals. In addition, it is suggested that the apparent diminution in importance of the remaining two prongs of the Roberson analysis—fears of a torrent of litigation and the lack of precedent—is consistent with post-Roberson New York decisions in which such arguments have been dismissed as inadequate grounds on which to decline to forge ahead into un-

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67 Id. at 440, 434 N.E.2d at 1322, 449 N.Y.S.2d at 944.

It is important to note, however, the willingness of the United States Supreme Court to expand the concept of the right to privacy when first amendment concerns are not at issue. See, e.g., Stanley v. Georgia, 394 U.S. 557, 568 (1969) (possession of obscene material in one's own home permissible, noting fundamental right to be free from unwarranted governmental intrusions on privacy).
charted legal territory given sufficiently compelling circumstances. 70

II. INTRUSION UPON SECLUSION: FILLING THE GAP

Invasion of another’s privacy by intrusive means, such as illegal wiretapping, excessive surveillance or, as in Hurwitz, illegal interception of private correspondence, is perhaps the most offensive of William Prosser’s four species of privacy invasions. 71 By violating the victim’s seclusion, solitude or private affairs, these intrusive acts constitute an assault on human dignity itself. 72 The gravity of such an intrusion did not elude Brandeis who, as a Supreme Court Justice, wrote that the right to be free of intrusive governmental forces was “the most comprehensive of rights and the right most cherished by civilized men.” 73 Given the particularly repugnant nature of the intrusion form of privacy invasion, the failure of the New York courts to recognize an independent right to be free of unreasonable intrusions may be the most glaring gap in New York’s extremely constricted view of privacy rights. 74 It is submitted, however, that this most glaring of shortcomings may, in fact, be the least difficult to overcome.

The intrusion form of privacy invasion is free of the first amendment ramifications inherent in the other forms of invasion classified by Prosser as: the unauthorized appropriation of another’s name or likeness, disclosure of private facts concerning another, and portrayal of another in a false light. 75 Since intrusion upon one’s seclusion occurs regardless of whether any information

70 See infra notes 78-81 and accompanying text (discussing two prongs of Roberson analysis).
71 See supra note 1 (discussion of Prosser’s concept of four distinct forms of privacy invasions).
72 See J.T. McCarthy, supra note 2, § 5.10[A], at 5-91; Bloustein, supra note 18, at 974. The intrusion is a “blow to human dignity, an assault on human personality.” Id. A man whose privacy has been intruded upon “is less of a man, has less human dignity . . . [h]e who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.” Id. at 973-74.
Although the intrusion form of privacy invasion was not expressly discussed in the landmark Warren and Brandeis law review article, it is submitted that the intrusion upon another’s seclusion was the epitome of the type of assault the authors railed against.
74 See Greenawalt, supra note 36, at 172.
gained from the act subsequently is disseminated, publication clearly is not an element of the cause of action.\textsuperscript{76} Thus, a recognition by the New York courts of this urgently needed privacy protection would not implicate the first amendment concerns that figure so prominently in those few contemporary decisions in which the courts have discussed their reservations about broadening privacy rights.\textsuperscript{77}

In addition, it is asserted that a lack of precedent no longer stands as a genuine impediment to a modest expansion of privacy rights, such as one recognizing the intrusion-upon-seclusion form of privacy invasion. The hard line the Roberson court maintained on the absolute necessity of precedential authority clearly is at odds with the more liberal pronouncements of the New York courts that have abandoned the traditional reverence for precedent in making important advancements in other areas of the law.\textsuperscript{78} These courts have acknowledged that the doctrine of stare decisis is not designed for rigid application and should be departed from under sufficiently compelling circumstances.\textsuperscript{79} It is submitted that

\textsuperscript{76} See Restatement (Second) of Torts § 652B (1981). Intrusion "does not depend upon any publicity given to the person whose interest is invaded or to his affairs." Id. at comment a.

\textsuperscript{77} See supra notes 61-68 and accompanying text (discussion of first amendment concerns expressed in New York decisions); see also Nimmer, supra note 75, at 987 ("Intrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression").

\textsuperscript{78} See Woods v. Lancet, 303 N.Y. 349, 351, 102 N.E.2d 691, 692 (1951) (court rejected traditional rule barring recovery for injuries negligently inflicted prior to birth). In Woods, the primary rationale for the traditional rule was the lack of precedent. Id. at 353, 102 N.E.2d at 693. The court rejected this reasoning, noting that the common law had been modified and updated in many other cases. Id. at 354, 102 N.E.2d at 694. The court noted that "it had not only the right, but the duty to re-examine a question where justice demands it." Id. (citing Rumsey v. New York & N.E.R.R. Co., 133 N.Y. 79, 85-86 (1892) and Klein v. Maravelas, 219 N.Y. 383 (1916)). If, the court stated, lack of precedent "were a valid objection, the common law would now be what it was in the Plantagenet period." "Id. at 355, 102 N.E.2d at 694 (quoting Winfield, The Unborn Child, 4 U. TORONTO L.J. 278, 292 (1941-42)); see also Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). Prior to taking his position on the United States Supreme Court, Justice Oliver Wendell Holmes wrote: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Id.

\textsuperscript{79} See Babcock v. Jackson, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 751 (1963) (mechanical application of precedent should be avoided if it would lead to unjust or anomalous results); Bing v. Thunig, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957) (long-standing precedent rejected because it was "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing"); Klein v. Maravelas, 219 N.Y. 383, 386, 114 N.E. 809, 811 (1916) (Cardozo, J.) (court considered it
the near universal recognition of a common-law right to privacy, along with the growing threat of intrusion posed by technological developments and other changes in recent decades, present the New York courts with a sufficiently compelling scenario in which to make at least a modest departure from Roberson.

Similarly, it is asserted that the fear of a potential flood of litigation no longer can justify the refusal to recognize a common-law right to be free of unreasonable intrusions upon one's privacy. The New York courts, in addressing other areas of the law, have recognized that if an individual has sustained an injury, the courts have an obligation to consider that claim regardless of whether it may be floating amid a sea of similar, though perhaps less worthy, claims.

Finally, it is suggested that a move to recognize the intrusion form of privacy invasion would benefit from the New York Court of Appeals' early exploration of the concept in Nader v. General Motors Corp. In Nader, consumer advocate Ralph Nader claimed that, in retaliation for his public criticisms of General Motors, the automotive giant had invaded his privacy rights under District of Columbia law through the use of wiretaps, eavesdropping and other intrusive tactics geared toward obtaining information that might discredit him. Although the court was only required to decide whether Nader had established a cause of action under District of Columbia law, Chief Judge Fuld considered at length the imperative to reconsider prior decision that stood in conflict with "uniform convictions of the entire judiciary of the land".

See Restatement (Second) of Torts § 652A (1981). "[T]he existence of a right of privacy is now recognized in the great majority of the American jurisdictions that have considered the question." Id. at comment a.

See Bovsun v. Sanperi, 61 N.Y.2d 219, 230-31, 461 N.E.2d 843, 848-49, 473 N.Y.S.2d 357, 362-63 (1984) (court rejected floodgates argument to adopt zone-of-harm rule); Battalla v. State, 10 N.Y.2d 237, 241, 176 N.Y.S.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961) (dismissing floodgates argument because it denies "a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one." (quoting Green v. T. A. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1902))); Ferarra v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 1000 (1958) (floodgates concerns are valid, but "[t]he problem is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false").


Id. at 564-65, 255 N.E.2d at 767, 307 N.Y.S.2d at 650. District of Columbia law was applied because Nader resided and most of the acts in question occurred in that jurisdiction. Id. at 565, 255 N.E.2d at 767, 307 N.Y.S.2d at 651.

Id. at 568, 255 N.E.2d at 769, 307 N.Y.S.2d at 653.
“new and developing” legal concept of intrusion-upon-seclusion before concluding that some acts Nader had complained of constituted an invasion of privacy. Judge Fuld’s opinion was widely viewed as an attempt to establish an inroad for the eventual broadening of privacy rights in New York. While the New York courts have resisted such a move, it is suggested that Judge Fuld’s analysis, which remains in harmony with the contemporary view of privacy, provides an appropriate point of departure from which the courts could reappraise at least some aspects of privacy rights, particularly the right to be free from unreasonable intrusions upon one’s solitude, seclusion and private affairs.

It is noted that nothing would prevent the New York courts from departing from Roberson in an incremental fashion. In delineating the scope of the right to privacy, Prosser stressed that his four species of privacy invasions were in fact independent torts with nothing in common other than that each constituted a general interference with another’s right to be left alone. In light of the New York courts’ emphatic position on the supremacy of first amendment rights over privacy rights, it is suggested that the most pragmatic approach to securing a broadening of privacy rights in New York may be to press for recognition of the narrow—but, by virtue of its freedom from first amendment complications, more judicially palatable—right to be free of unreasonable intrusions. Holding out for a sweeping recognition of privacy rights is likely to result in the continued denial of any expansion of those rights. Recognition of a right to be free of unreasonable intrusions, on the other hand, is a more conservative and, jurisprudentially, more consistent step for the courts to take and therefore one more likely to be forthcoming.

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85 Id.
86 Id. at 567-71, 255 N.E.2d at 769-71, 307 N.Y.S.2d 652-56.
88 Judge Breitel was critical of Chief Judge Fuld’s decision to expound on an issue not directly before the court. See Nader, 25 N.Y.2d at 571, 255 N.E.2d at 771, 307 N.Y.S.2d at 656 (Breitel, J., concurring).
89 See J.T. McCarthy, supra note 2, § 6.3[B], at 6-16 (chart of various state privacy statutes, showing which of the four distinct torts each state has adopted).
90 It is submitted that the above analysis also could be applied to the argument favor-
The reluctance of the New York courts to recognize a common-law right to privacy, while of questionable wisdom when first pronounced nearly ninety years ago in Roberson, is today clearly at odds with contemporary jurisprudence and the exigencies of modern society. The incongruity of the New York position is most apparent in the courts' refusal to use the common law to guard against the intrusion-upon-seclusion form of privacy invasion at a time when emerging technologies present a threat to privacy so profound as to make the CIA's intrusive techniques in Hurwitz appear more crude than stealthy, and the matters that so exercised Warren and Brandeis a century ago appear more like commonplace annoyances than substantial invasions of one's right to be let alone. While recognition of the broad spectrum of privacy rights is complicated by legitimate and perhaps insuperable first amendment concerns, there is no genuine obstacle to the recognition of an individual's right to be free of unreasonably intrusive assaults upon his seclusion, solitude and private affairs. The dehumanizing effects of such intrusions are only exacerbated by the failure of the New York courts to confront this most egregious of privacy invading legislative initiatives in broadening privacy rights in New York. Some commentators suggest that legislative action is the only likely means of achieving an expansion of privacy rights in New York. See Savell, supra note 2, at 2 n.4; Comment, Torts-Civil Rights—The Right of Privacy Under the New York Statute, 4 N.Y.L.F. 229, 233 (1958). Unlike the circumstances facing the legislature at the turn of the century when it enacted the nation's first statutory right to privacy, the legislature today would not be testing unchartered legal terrain should it decide to press ahead in recognizing even a modest expansion of those rights. The legislature would benefit from the experience of those states that have recognized the intrusion-upon-seclusion tort in their privacy statutes. See J.T. McCarthy, supra note 2, § 6.3[B], at 6-16. More importantly, the legislature already has a proposed draft of an expanded privacy statute submitted 15 years ago by the New York Law Review Commission but never enacted. See N.Y. Law Rev. Comm'n Rep. 26, 29, 43, 56 (1978); Leg. Doc. (1976) No. 65D accompanying 1976 Senate Bill No. 7693 and 1976 Assembly Bill No. 10351; Greenawalt, supra note 36, at 162-65 (author of report used in drafting proposal discusses proposed expansion of statutory privacy right). The Commission proposed that the state's narrow statutory right be expanded to recognize a virtually open-ended tort under which an individual would be entitled to relief for "highly offensive" invasions of his privacy. See Greenawalt, supra note 36, at 162-65. A narrowing of the proposed legislation to focus on adding only the intrusion-upon-seclusion tort would conflict with the Commission's desire to maintain a level of generality so as not to preclude future expansions of the right. See id. at 186. It is asserted, however, that a call for such modest expansion of privacy rights is more likely to meet with success in the legislature than a more open-ended proposal, for the same reasons suggested above with respect to the judiciary.
sions and provide the public with the legal safeguards it not only deserves but, increasingly, needs.

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