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The Right of Privacy

dom of expression can hardly carry implications that nullify the guarantees of impartial trials. . . . The need is great that courts be . . . allowed to do their duty."[24]

The process of justice surely does not exhibit a perfect stability as it presently exists. It would appear unwise, therefore, to inject an additional variable into the multifarious problems already extant. That the education of the public is a valid, indeed a laudable, ideal, does not, of itself, excuse an intrusion into the normal courtroom procedure. Justice can not be made an experiment — that the televising of a trial *may not* be deleterious is obviously not a sufficient justification for the utilization of this technique.

A great segment of respected opinion rejects the entree of the television camera onto the trial scene. Moreover, the psychological effects of television coverage upon the defendant, the judge, the jury and the general public *could* vitiate the meaning of a fair and open trial. The mere possibility of this danger militates against television in the courtroom at this time. The same reasoning would reject any innovation which might tend to jeopardize the life or liberty of even a single accused.

[24] Bridges v. California, 314 U.S. 252, 284 (1941) (Frankfurter, J., dissenting).

THE RIGHT OF PRIVACY

The right of privacy has been defined as the individual's right to be free from unwarranted intrusions and publicity. It is, in essence, "the right of the individual to be let alone."[1] Although the right of privacy appears to be a recently emerging doctrine, its basis can be traced to the laws of ancient Greece and Rome, and to the Anglo-Saxon common law,[2] whereat protection was granted only from physical interference with life and property. In its development, a trend has evolved which

[1] Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

[2] HOFSTADTER, THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK 1-7 (1954); Pound, *Interests in Personality*, 28 HARV. L. REV. 343, 357 (1915). For example, subsequent to the passage of the New York statute, the Supreme Court of Georgia condemned the *Roberson* decision as repugnant to the ordinary concepts of justice, and espoused a concept that there was a distinct non-statutory right of privacy which is capable of judicial recognition. Despite the lack of common-law precedent or commentary as a determinative factor, support was found for the decision in the natural law and in the state and federal constitutional guarantees that no person shall be deprived of liberty. However, the use of constitutional guarantees as a foundation for the right has been criticized as being logically weak. The Constitution and Bill of Rights, although recognizing in the abstract the existence of the right of privacy, do not allocate to each individual his specific personal rights against such an invasion. These provisions furnish only the safeguards and bulwarks against governmental power.

evidences a fuller recognition and appreciation of the more intangible and spiritual values inherent in the scope of protection afforded by the right.[3]

The best known exposition of a "modern" right of privacy is found in the oftencited law review article by Samuel D. Warren and Louis D. Brandeis.[4] In reviewing early decisions granting relief for violation of privacy on the basis of defamation, invasion of a property right, and breach of contract or of implied trust, the authors determined that an underlying theory permeated such decisions; this theory was "the right of privacy."

The right of privacy is presently protected in the vast majority of jurisdictions in the United States.[5] In some jurisdictions the right is based solely upon statute; in others, the right finds its basis in the constitution, in the natural law or as an evolution of the early common law.[6] In either case, an expanded right of privacy is one that has received only recent recognition. Its development has been revolutionary, even in its most conservative form, and it has arisen in an area which, prior to 1890, was only scantily recognized. This note shall discuss the present status of the right of each individual to a share of privacy, and will attempt to predict the ultimate resolution of various problems created by the extension of the right.

Evolution and Scope of the Common-Law Right

Intrusion

In those jurisdictions which have recognized the common-law right of privacy, the developing case law has been penetrating and extensive.[7] Early in the common law of the United States, it was recognized that physical intrusion violated the right of privacy.[8] This concept of unauthorized intrusion was logically extended in the case of *Rhodes v. Graham*[9] to the tapping of telephone wires running *into* the plaintiff's home. The court held that such action constituted an unwarranted intrusion, ergo, an invasion of the right of privacy.

Exposition of Public Facts

Generally, an act will constitute a violation of privacy at common law if it constitutes a prying or intrusion into a private matter which would be *offensive to a reasonable man.*[10] On the other hand, if the matter is public, *e.g.*, a public docu-

[3] Nizer, *The Right of Privacy: A Half Century's Development,* 39 MICH. L. REV. 526, 527-28 (1941).

[4] Warren and Brandeis, *supra* note 1.

[5] PROSSER, TORTS § 112 at 831-32 (3d ed. 1964).

[6] Comment, 16 U. DET. L.J. 78 (1952). While some jurisdictions recognize the right as an evolutionary concept, others do not. New York, for example, rejected evolutionary foundations and pioneered in the statutory coverage. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (acceptance of evolutionary foundations); Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (rejection of evolutionary foundations).

[7] See generally Green, *The Right of Privacy,* 27 ILL. L. REV. 237 (1932).

[8] DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881) allowed recovery against a physician who allowed an unauthorized man to accompany him during a childbirth. See generally Ludwig, *"Peace of Mind" In 48 Pieces vs. Uniform Right of Privacy,* 32 MINN. L. REV. 734, 735 (1948).

[9] 238 Ky. 225, 37 S.W.2d 46 (1931); see also McDaniel v. Atlanta Coca Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939), wherein recovery was allowed for the use of microphones in a hospital room.

[10] Brex v. Smith, 104 N.J. Eq. 386, 146 Atl. 34 (Ch. 1929). An unauthorized investigation into a bank account was enjoined. See generally Prosser, *Privacy,* 48 CALIF. L. REV. 383, 389-92 (1960).

ment, death certificate, or photograph taken while part of the public scene, there is no recognized invasion because one impliedly consents to the revelation.[11] Therefore, under normal circumstances, if a fact is public in nature, there can be no intrusion or invasion of privacy in obtaining it. Analysis reveals that although the public record factor is of importance in determining the difference between public and private facts, it is not to be considered conclusive.

In the case of *Melvin v. Reid,*[12] the plaintiff, formerly a prostitute, had been a defendant in a sensational murder trial. After her acquital she abandoned her prior "profession" and became a virtuous member of society. Subsequently, a motion picture was exhibited which utilized her name and past as revealed on the record of the murder trial. The court held that even though the incidents used were part of the public record, the movie was a direct invasion of her right of privacy.[13] Thus, although the disclosure in *Melvin* was of a public record, the decision is indicative of the fact that there is something in the nature of a "mores" test by which liability exists for publicity given to those things which the customs and ordinary views of the community will not tolerate.

Disclosure

In addition to intrusion, the common-law jurisdictions have also held the public disclosure of embarrassing *private facts, e.g.,* publicizing delinquent accounts,[14] to be generally actionable as a violation of the right of privacy. In this situation, it is the publicity afforded the private matter which is actionable, not the invasion or intrusion. Hence, a garageman who notified the community that a customer's payment was past due by means of a sign posted in his window violated the customer's right of privacy.[15]

It is important to realize that truth, which is usually a defense to an action for defamation, is not a defense to an action for invasion of privacy. Thus, the fact that the plaintiff actually owed the money would not alter the determination. It appears, therefore, that the common-law jurisdictions have been able to develop, in the area of publications, an extension of the law of defamation which is not confined by the defense of truth.[16]

Appropriations

The most recently protected area, in common-law jurisdictions, deals with the individual's right to be free from the commercial exploitation of his identity.[17] In regard to this phase of the common-law right, it is necessary to note that it applies only to *natural living persons*; corporations, deceased persons and animals are thus excluded.[18] Generally, the exploitation takes

[11] Note, 44 VA. L. REV. 1303 (1958).

[12] 112 Cal. App. 285, 297 Pac. 91 (1931).

[13] Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); see Man v. Rio Grande Oil Co., 28 F. Supp. 845 (N.D. Cal. 1939). *Contra,* Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940).

[14] Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[15] *Ibid.*; see Kacedan, *The Right of Privacy,* 12 B.U.L. REV. 353, 376-79 (1932).

[16] Prosser, *supra* note 10, at 398.

[17] This area corresponds with that protected by statute, see Ludwig, *supra* note 8, at 747.

[18] See generally Nizer, *supra* note 3, at 549-53. N.Y. GEN. BUS. LAW § 397 prohibits the use of the name or identity of a nonprofit association or corporation organized exclusively for charitable, patriotic or religious purposes for advertising purposes or purposes of trade. This legislation

the form of appropriation of the plaintiff's name or likeness for the defendant's benefit.[19] Recovery for appropriation can be had if a photograph or likeness is published in or as part of an advertisement, or used in connection with an article of fiction, since either would have an advantageous commercial use. On the other hand, recovery has been denied when an identity is utilized in news or material which is educational or informative in nature since it is the public at large which reaps the benefit, and not the defendant. Between the poles of news and fiction there appear to be no guidelines by which the eventual determination of a specific case may be reached. However, courts have generally applied a *de minimis* rule in order to avoid the consequences of a violation of the right in extreme situations.[20] For example, a sailor who had posed for a recruiting poster which appeared as background in nine out of 8,500 feet of film was unable to recover.[21]

The Evolution and Scope of the Statutory Right of Privacy

Schuyler v. Curtis[22] was the earliest New York case acknowledging the possible existence of a right to privacy. In *Schuyler,* the trial court enjoined the display of a statue of a deceased person because she had not attained public notoriety. The Court of Appeals, however, held that if any right of privacy existed at all, it did not survive after death and could not be enforced by the relatives of the deceased. The tenor of the Court's opinion indicated that New York was not disposed, at that time, to recognize a right of privacy as a legal entity, or to entertain its invasion as the basis for an independent cause of action. In *Roberson v. Rochester Folding Box Co.,*[23] the Court of Appeals clarified the New York position when it declared that no common-law right of privacy existed in the state. This decision was primarily based upon three factors: (1) the lack of common-law precedent; (2) the mental character of the injury; and (3) the fear of a deluge of litigation.[24] In response to the storm of professional and popular disapproval following this holding, the legislature created a statutory right of privacy.[25] This highly specific enactment made it both a misdemeanor and a tort to make use of the name, portrait or picture of any living person for advertising purposes, or for

was mainly designed to operate in regard to services and sale of goods. University of Notre Dame v. Twentieth Century-Fox, 22 App. Div. 2d 452, 455-56, 256 N.Y.S.2d 301, 305 (1st Dep't), *aff'd,* 15 N.Y.2d 904, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965), 40 NOTRE DAME LAW. 330 (1965).

[19] Prosser, *supra* note 10, at 401.

[20] Ludwig, *supra* note 8, at 742.

[21] Freed v. Loews, Inc., 175 Misc. 716, 24 N.Y.S.2d 679 (Sup. Ct. 1940).

[22] 15 N.Y. Supp. 787 (Sup. Ct. 1892); see Pavesich v. New England Life Ins. Co., *supra* note 6, at 207-10, 50 S.E. at 75-76.

[23] *Supra* note 6. Defendant, without knowledge or consent of plaintiff, printed and circulated in public places about twenty-five thousand likenesses of plaintiff, a young woman, with the words, "Flour of the Family" and the name of the milling company on each print. The Court of Appeals refused to enjoin the defendant.

[24] Kacedan, *supra* note 15, at 621-22.

[25] N.Y. Sess. Laws 1903, ch. 132, §§ 1, 2 (embodied in N.Y. CIV. RIGHTS LAW §§ 50, 51). The statute was held constitutional in Rhodes v. Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd,* 220 U.S. 502 (1911). See generally HOFSTADTER, *op. cit. supra* note 2, at 12, 13; Note, 9 ST. JOHN'S L. REV. 159 (1934).

purposes of trade without the person's written consent.

Both the common-law and the statutory jurisdictions protect a living person's identity from commercial exploitation. In the statutory jurisdictions, however, the legislature provides the sole protection. The New York statute, and those patterned after it,[26] prohibit the use of the name, portrait or picture of any living natural person without his written consent for advertising purposes or purposes of trade.[27] Although the statutory right appears somewhat restricted, there has been no significant difference of application in this area as compared with the common-law jurisdictions.[28] Both statutory and common-law jurisdictions recognize that the unauthorized use of another's name or picture for commercial purposes cannot be countenanced.

The problems involved in determining an actionable violation of the right in a statutory jurisdiction are illustrated by the recent decision of *University of Notre Dame v. Twentieth Century-Fox,*[29] wherein the President of the University sought relief under Sections 50 and 51 of the New York Civil Rights Law. The court noted that he was named only in two brief passages in the book *John Goldfarb, Please Come Home,* and not at all in the film. In applying the *de minimis* rule, this was considered to be of "fleeting and incidental nature which the Civil Rights Law does not find offensive."[30] The University, being an incorporated institution was afforded no right of privacy under the statute. The court concluded by stating that since Notre Dame's grievances sounded in defamation, its remedy lay at law in libel, not in equity for invasion of the right of privacy.

Although the right-of-privacy statutes afford protection similar to that offered in common-law jurisdictions, they have an inherent defect since their applicability is severely limited to certain enumerated instances. While legislation encompasses the most common method of invasion of privacy, other flagrant abuses actionable at common law, such as wiretapping and eavesdropping, are outside the statutory protection. In addition, the statutes prohibit only the use of a name or likeness. The publication of embarrassing intimate details of private life is without their scope.

Viewing the New York statute mechanically, it appears to be plagued with a dual character. Its penal sanction and the fact that it is unrecognized in New York's common law require that it be given strict interpretation.[31] However, its remedial purpose would seem to foster an expansive liberal

[26] OKLA. STAT. ANN. tit. 21, §§ 839-40 (1958) which is similar to the New York legislation, except that it provides greater protection of privacy by requiring the written consent of descendants for fifty years after the subject's death or, if there are no descendants, it protects the memory of the deceased for fifty years. Violation is a felony. UTAH CODE ANN. §§ 76-4-7, 8, 9 (1953) follows New York generally but includes prohibition of commercial exploitation of public institutions and public officials. It also protects against the use of a deceased's likeness by requiring written consent of the personal representative or heir. VA. CODE ANN. § 8-650 (1957) limits protection to residents of the state.

[27] N.Y. CIV. RIGHTS LAW §§ 50, 51.

[28] Prosser, *supra* note 10, at 401.

[29] 22 App. Div. 2d 452, 256 N.Y.S.2d 301, *aff'd,* 15 N.Y.2d 904, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965).

[30] University of Notre Dame v. Twentieth Century-Fox, 22 App. Div. 2d 452, 454, 256 N.Y.S. 2d 301, 304 (1st Dep't 1965).

[31] Binns v. Vitograph, 210 N.Y. 51, 55, 103 N.E. 1108, 1110 (1913).

construction. The resulting stresses have caused confusion, and have narrowed its effectiveness by limiting and restricting its apparent purpose to the literal confines of the statute. It has been remarked that the statute "has never emerged from its shadow."[32] Thus, in an area where the statutory right could have surpassed the protection provided by the common law, the New York statute, instead, followed the common law by denying public institutions, corporations or deceased persons the right of privacy.[33]

The rationale for withholding recognition of a right of privacy in a deceased person appears to be that it is a personal right of the deceased[34] and further, that the exercise of such a right would impose burdensome restrictions upon the freedom of the press.[35] This reasoning, however, would seem fallacious in both respects. It is not the deceased's privacy, but that of his relations which is invaded by unwarranted disclosure concerning him.[36] In addition, recognition of the right would not impose upon the communications media any greater restriction than now exists for a living person, and the exceptions relating to public figures and newsworthiness would still be applicable. Statutory protection against the use of a deceased's likeness is already adopted to a limited degree in other states and by the federal government.[37] This type of legislation appreciates the continuing character of the deceased's identity, and protects his memory and those persons closely related to him from commercial exploitation.

The Federal Right of Privacy

Increased appreciation of the rights of the individual in general, must be accompanied by an increased sensitivity to the right of an individual to be "left alone." The United States Supreme Court recognized this right in *Griswold v. Connecticut*.[38] Although the facts of *Griswold* necessarily limit its conclusion and impact, the recognition of any facet of the right of privacy must be considered a significant development. The subject of the discussion in *Griswold* was a Connecticut statute which had historically made the use of contraceptive devices a criminal offense. In holding the statute to be unconstitutional, the Supreme Court declared that implicit in the United States Constitution is a right to privacy in the marital relationship; that the Connecticut statute abridged that right; and that this statute was also in violation of due process, as stated in the fourteenth amendment.

Thus, the Court has directly postulated that a right of privacy is extant in one sphere. Although this sphere is the marital relationship, an historically sacrosanct area,

[32] HOFSTADTER, THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK 13 (1954).

[33] However, it is interesting to note that N.Y. GEN. BUS. LAW § 397 does provide this protection for religious, benevolent and educational associations.

[34] Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895).

[35] Comment, 1953 WASH. U.L.Q. 109.

[36] Green, *Relational Interests,* 29 ILL. L. REV. 460 (1934); Note, 40 NOTRE DAME LAW. 324 (1965).

[37] For the states involved, see *supra* note 26. Federal law prohibits the registration of a trademark if it consists "of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or of the name, signature or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow." 60 Stat. 428 (1946), 15 U.S.C. § 1052(c) (1964).

[38] 381 U.S. 479 (1965).

the case may be the precursor of significant applications of the right in other areas.

It must be stressed that the right, as interpreted in the *Griswold* case, is a right to be free from *governmental* interference, at both the state and federal levels. Therefore, any extensions of the *Griswold* doctrine will be available only as rights of action against governmental agents. Invasions, by individuals, of the privacy of other individuals, whether that privacy be of the marital relationship or otherwise, is apparently not included in *Griswold's* impact. This conclusion flows from the fact that in other areas, where governmental interference with individuals has been proscribed as violative of the constitution, *e.g.,* illegal searches and seizures, similar actions by individuals have not been proscribed.

Conclusion

The need for legislative updating of the right of privacy in New York and other states with similar approaches, whether statutory or not, is evident. What is required is intensive examination of the current status of the position of these jurisdictions in relation to that of other states and foreign countries. Original legislation is necessary not only to place these jurisdictions at the level of the more liberal jurisdictions, but also to insure the proper development of this right within a dynamic society. The nationwide syndicated press and network communication systems require that the individual be afforded a more uniform protection, since these scientific advances have multiplied the potential for infringement of his privacy. In addition, the advent of electronic eavesdropping devices greatly increases the possibility of intrusions designed solely to acquire and disclose injurious information in order to satisfy personal vengeance. Such activity would not constitute commercial exploitation, and if the information was truthful, the injured party would lack a remedy. Lastly, if a New York revision is effected, there exists the distinct possibility that it may be adopted as the nucleus of uniform legislation. With this in mind, it seems that New York should enlarge the right of privacy and overcome the inadequacies created by anachronistic approaches, thereby creating a common denominator in an area otherwise without a standard.