

The Right of Privacy

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THE RIGHT OF PRIVACY

The right of privacy has only recently received legal recognition in the courts. It was unknown to the common law, and has existed in legal contemplation little more than a half century. Since its inception into the law, it has enjoyed a constantly expanding body of jurisprudence, upon which is being based the enlarged protection of one's private affairs against intrusions which are unwarranted and unauthorized.

As a legally recognized concept, by far the most widely accepted definition of the right of privacy is that submitted by Professor Cooley, who described it as "the right to be let alone."¹ This phraseology was adopted and expanded by a Kentucky court in the leading case of *Brents v. Morgan*,² where it was held to be:

. . . the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned.³

Although the common law courts took no cognizance of a "right to be let alone," mainly because there was little need to develop such a right in an English society which was loosely organized and in which news traveled so very slowly,⁴ American courts, in applying the common law, found it their duty to determine that such a right existed therein, whether found in prior decisions or not.⁵ The necessity for such

¹ 1 Cooley, Torts 360 (3d ed., 1906). Prosser defines the right of privacy as one "which will be protected against interferences which are serious, and outrageous, or beyond the limits of common ideas of decent conduct. The right has been held to cover intrusions upon the plaintiff's solitude, publicity given to his name or likeness, or to private information about him, and the commercial appropriation of elements of his personality." Prosser, Torts 1050 (1941).

² 221 Ky. 765, 299 S.W. 967 (1927).

³ *Ibid.*, at 772 and 970. Similarly, a New Jersey court has said, "The right of privacy is the right of an individual to be free from unwarranted publicity, or in other words, to be protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." *McGovern v. Van Riper*, 137 N.J. Eq. 24, 32, 43 A. 2d 514, 518 (1946). See also *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942).

⁴ 41 Ill. Bar J. 121 (1952), noting *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952): "Contrast the society of today in which modern inventions project news and advertising into the minds of millions of persons every day, making it possible for one's private affairs to be laid before millions in a matter of minutes." *Ibid.*, at 121.

⁵ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P. 2d 438 (1941). A more complete analysis of the courts that have recognized the existence of the right of privacy will be found *infra.*, in text above n.29.

protection is clearly evident in a society as complex as ours, and in which the media of mass communication play so great a part. "Certainly some aspects of a man's life may be entirely claimed by him as his own."⁶

With one exception,⁷ no state that has dealt with the problem has expressly denied the existence of the right of privacy. The *Restatement of Torts* gives recognition to the right and defines it, as follows:

A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.⁸

Contributing greatly to the establishment of the right of privacy as a legally cognizable interest was an article written by Samuel D. Warren and Louis D. Brandeis, which appeared in 1890.⁹ Therein the authors introduced and defined the right as one independent and distinct from other rights, and argued for its recognition as such.¹⁰ Nevertheless, many courts were reluctant to establish a distinct right of privacy on the theory that to do so would be to engage in judicial legislation. Thus in the case of *Roberson v. Rochester Folding Box Co.*,¹¹ the court denied the existence of the right and refused injunctive relief when the defendant made use of a picture of plaintiff to advertise its flour, but suggested that a legislative body might ". . . provide that no one should be permitted for his own selfish purpose to use the picture or name of another for advertising purposes without his consent."¹² In apparent conformity therewith, the New York legislature, at the next session, enacted a statute giving a right of action to one whose name or portrait has been used for advertising or trade purposes without his consent.¹³ Similar statutes have been enacted in Utah¹⁴ and Virginia.¹⁵

Three years after the *Roberson* case, the Supreme Court of Georgia,

⁶ Harper, *Torts* § 277 (1933), wherein it was stated further, "The decencies of civilization require a certain consideration on the part of society for the desire of an individual to live, in some respects, to himself, quite as they require, in certain respects, that he live unto others." *Ibid.*, at 601.

⁷ *Henry v. Cherry and Webb*, 30 R.I. 13, 73 Atl. 97 (1909).

⁸ *Rest.*, *Torts* § 867 (1939).

⁹ *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890).

¹⁰ *Ibid.*, at 214. It has been said, "The recognition and development of the so-called 'right of privacy' is perhaps the outstanding illustration of the influence of legal periodicals upon the courts." Prosser, *Torts* 1050 (1941).

¹¹ 171 N.Y. 538, 64 N.E. 442 (1902).

¹² *Ibid.*, at 545 and 443.

¹³ N.Y. Civil Rights Law § § 50, 51.

¹⁴ Utah Code Ann. § 103-4-9 (1943).

¹⁵ Code of Va. § 8-650 (1950).

in *Pavesich v. New England Life Ins. Co.*,¹⁶ was confronted squarely with the question of whether or not there existed a legally recognized right of privacy. The court determined that the right existed and that the unauthorized use of the photograph of another for advertising purposes was a violation of that right. Since that time, more and more courts have taken cognizance of the right of privacy, and today decisions have established the right in approximately twenty jurisdictions,¹⁷ exclusive of those states which have enacted the above-mentioned statutes.

Not all of the courts, however, have recognized the existence of an independent right of privacy. A number have predicated recovery upon the violation of some other right, such as contract, express or implied,¹⁸ defamation,¹⁹ or some property right.²⁰ One of the important factors contributing to the reluctance of the courts to recognize the right earlier, and which today hampers the courts in granting relief without the aid of a fiction is the famous decision in *Gee v. Pritchard*.²¹ There it was said, in effect, by way of dictum, that equity will not grant its relief for the protection of personal rights, except as an incident to the protection of a property interest. Adhering to this principle, the court in *Prince Albert v. Strange*²² held that relief could not be granted where there was no property right being invaded. Likewise, the Missouri court in *Munden v. Harris*²³ expressed a similar view when it said:

One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?²⁴

¹⁶ 122 Ga. 190, 50 S.E. 68 (1905).

¹⁷ Alabama, Arizona, California, District of Columbia, Florida, Georgia, Indiana, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, and South Carolina. Although Minnesota has not as yet allowed recovery, a federal court sitting in that state seemed to assume the existence of the right in *Berg v. The Minneapolis Star and Tribune Co.*, 79 F. Supp. 957 (D.C. Minn., 1948).

¹⁸ *McCreery v. Miller's Grocerteria Co.*, 99 Colo. 499, 64 P. 2d 803 (1936); *Bennett v. Gusdorf*, 101 Mont. 39, 53 P. 2d 91 (1935); *Pollard v. Photographic Co.*, 40 C. Div. 345 (1888).

¹⁹ *Turner v. Brien*, 184 Iowa 320, 167 N.W. 584 (1918).

²⁰ *Brex v. Smith*, 104 N.J. Eq. 386, 146 Atl. 34 (1929); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); *Prince Albert v. Strange*, 2 De G. & S. 652, 64 Eng. Rep. 293 (1849).

²¹ 2 Swans. 402, 36 Eng. Rep. 670 (1818).

²² 2 De G. & S. 652, 64 Eng. Rep. 293 (1849).

²³ 153 Mo. App. 652, 134 S.W. 1076 (1911).

²⁴ *Ibid.*, at 659 and 1078. It is noteworthy that in the later Missouri case of *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942), *Ibid.*, at 1205-6 and 295, the

Warren and Brandeis²⁵ recognized this problem and pointed out that protection had been given the right of privacy for many years under the guise of a violation of property interests, trust relationships, and contractual rights. In 1905 the Supreme Court of Georgia,²⁶ in recognizing the right of privacy as one distinct from other rights, further pointed out that prior to 1890,

. . . every case in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim independent of a property or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision.²⁷

The majority of courts that have had the question before them, however, have taken what would seem to be the more enlightened view, and have acknowledged the existence of an independent right of privacy without declaring the fictional presence of a property or contract right upon which to base incidental recovery. This ever-expanding number of jurisdictions may be said to have adhered to the view that in every human being there resides the inalienable legal right, based upon natural law, to be free from unwarranted exploitation of his personality.²⁸ Thus, in line with the modern trend, decisions which acknowledge the right to privacy as a basic human right may be found in Arizona, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, and South Carolina,²⁹ though other prior decisions within many of

court threw off the fiction that cloaked the right and said, "If the court decides that the matter is outside the scope of proper public interest and that there is substantial evidence tending to show a serious, unreasonable, unwarranted and offensive interference with another's private affairs, then the case is one to be submitted to the jury."

²⁵ *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890).

²⁶ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

²⁷ *Ibid.*, at 191 and 69.

²⁸ Consult 41 Am. Jur., *Privacy* §§ 20-33 (1942); also Annotations, *The Right of Privacy*, 138 A.L.R. 22 (1942); 168 A.L.R. 446 (1947); and 14 A.L.R. 2d 750 (1950).

²⁹ *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.C. Dist. Col., 1948); *Reed v. Real Detective Publ. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E. 2d 755 (1946); *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *Pallas v. Crowley Milner & Co.*, 322 Mich. 411, 33 N.W. 2d 911 (1948); *Frey v. Dixon*, 141 N.J. Eq. 481, 58 A. 2d 86 (1948); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *Friedman v. Cincinnati Local Joint Exec. Bd.*, 20 Ohio Ops. 473 (1941);

those same jurisdictions have recognized the right of privacy as an "incident" of the protection of some other right, such as a property or contract right or trust relationship, which has been violated.³⁰ Illinois, the most recent jurisdiction to take legal cognizance of the right to privacy,³¹ has joined the ranks of the majority of courts and has repudiated fictional bases for the right, declaring that the ". . . law will take cognizance of an injury even though no right of property or contract may be involved and even though the damages resulting are exclusively those of mental anguish."³² Somewhat analogous to the theory of a natural right are the arguments advanced by those jurisdictions which predicate recovery upon the violation of the constitutional guarantee of life, liberty and the pursuit of happiness.³³

The scope of the right, in its practical application as reflected by the decisions, is varied indeed. By far the greatest number of cases have involved the appropriation of the plaintiff's likeness for some unauthorized commercial use,³⁴ but this is by no means the only interest of personality protected. In *Barber v. Time, Inc.*,³⁵ where the defendant magazine printed in its medicine department a picture of plaintiff in her hospital gown, with a caption of "Starving Glutton," and a paragraph or two identifying the plaintiff and explaining the nature of her illness, the court affirmed a judgment for plaintiff and said:

While the plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who had suffered this ailment was not. Whatever the limits of the right of privacy may be, it seems that it must include the right to have information given to a physician in the

Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P. 2d 438 (1941); *Waring v. W.D.A.S. Broadcasting Station*, 327 Pa. 433, 194 Atl. 631, concurring opinion Justice Maxey (1937); *Holloman v. Life Insurance Co. of Va.*, 192 S.C. 454, 7 S.E. 2d 169 (1940); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

³⁰ *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930): A relationship of trust and confidence; *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912): Breach of trust and confidence; *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881): Assault and Battery; *Brex v. Smith*, 104 N.J. Eq. 386, 146 Atl. 34 (1929): A property right; *Pritchett v. Board of Comm's of Knox County*, 42 Ind. App. 3, 85 N.E. 32 (1908): Nuisance; *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911): A property right.

³¹ *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

³² *Ibid.*, at 299 and 745.

³³ *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

³⁴ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Foster Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 68 (1905); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

³⁵ 348 Mo. 1199, 159 S.W. 2d 291 (1942).

treatment of an individual's personal ailment kept from publication which would state his name in connection therewith without such person's consent.³⁶

In a recent California case³⁷ the court allowed recovery for the publication in the *Ladies' Home Journal* of a photograph of a husband and wife in an affectionate position as a part of a story on "Love," as not being warranted by public need. The picture was captioned "Publicized as glamorous, desirable, 'love at first sight' is a bad risk." The court said:

Assuming it to be within the range of public interest in dissemination of news, information or education, and in a medium that would not be classed as commercial—for profit or advertising—there appears no necessity for the use in connection with the article without their consent, of a photograph of the plaintiffs.³⁸

Similarly, the District Court for the District of Columbia, in a case involving the unauthorized publication of plaintiff's photograph in conjunction with a satirical article appearing in a national magazine, decided that the plaintiff's right of privacy had been invaded.³⁹

It is not necessary, however, that it be one's likeness which is appropriated without consent. Disclosures by other means of incidents of the plaintiff's life have also been held to be within the purview of the protection afforded by the right of privacy, such as placarding a debtor, as in *Brents v. Morgan*, where the defendant, a creditor of the plaintiff, placed a sign covering a space five feet by eight feet in his shop window informing the public that the plaintiff owed him a bill of \$49.67 which was long overdue.⁴⁰ Likewise, in a Louisiana case recovery was allowed when the court found that the improper and unnecessary display of a photograph of a person suspected of a crime in a "rogues gallery" was an invasion of the right of privacy.⁴¹ Similarly, the plaintiff was given a right of action where the defendant installed an apparatus in his hospital room to hear the plaintiff's conversations.⁴²

While being far from exhaustive, the cases mentioned above serve to illustrate the diversity of situations which come within the right of privacy doctrine. As we have said, the great bulk of the cases have

³⁶ *Ibid.*, at 1207-8 and 295.

³⁷ *Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 239 P. 2d 630 (1952).

³⁸ *Ibid.*, at 634.

³⁹ *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (Dist. Col., 1948).

⁴⁰ 221 Ky. 765, 299 S.W. 967 (1927). The sign read, " 'Notice' Doctor W. R. Morgan owes an account here of \$49.67. And if promises would pay an account, this account would have been settled long ago. This account will be advertised as long as it remains unpaid." *Ibid.*, at 767 and 970.

⁴¹ *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905).

⁴² *McDaniel v. Atlantic Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E. 2d 810 (1939).

involved the unauthorized appropriation of some element of the plaintiff's personality for a commercial use, as where the plaintiff's photograph is used in the defendant's advertising.⁴³ One of the most recent cases, and one of first impression in Illinois, is that of *Eick v. Perk Dog Food Co.*,⁴⁴ where the defendant, in conducting a prize contest to advertise and promote the sale of its product, printed a picture of the plaintiff, a blind girl, on various contest entry blanks, posters, and newspaper advertisements, as well as on labels of its dog food. The court allowed recovery and held that the unauthorized appropriation and use of a person's likeness for commercial purposes is such a violation of that person's right of privacy as to give rise to a cause of action sounding in tort for damages.

Of equally great weight and importance are the limitations put upon the right of privacy. It is well settled that the right is subject to certain limitations and that it will not prohibit the publication of matter which is of legitimate public interest.⁴⁵ Warren and Brandeis recognized the need for these limitations in their article⁴⁶ and the *Restatement of the Law of Torts* points out that "One who is not a recluse must expect the ordinary incidents of community life, of which he is a part. . . ."⁴⁷ Certainly, the right of the individual to privacy must be balanced against the interests of society. Privacy, therefore, is not an absolute right, in the sense that it is always paramount to the rights of the public. While the courts have been quite liberal in finding a violation of the right where there is no legitimate public concern,⁴⁸ they have steadfastly held that the right does not exist as to persons and events in which the public has a rightful interest.

⁴³ *Supra* note 33; see also *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W. 2d 911 (1948); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E. 2d 306 (1949).

⁴⁴ 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

⁴⁵ *Berg v. Minneapolis Star and Tribune Co.*, 79 F. Supp. 957 (D.C. Minn., 1948); *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

⁴⁶ *Op. cit.* *Supra* note 9, at 218.

⁴⁷ § 867 Comment (c) (1939). "Likewise if he submits himself or his work for public approval, as does a candidate for public office, a public official, an actor, an author, or a stunt aviator, he must necessarily pay the price of even unwelcome publicity through reports upon his private life and photographic reproductions of himself and his family, unless these are defamatory or exceed the bounds of fair comment."

⁴⁸ That is to say, once established, truth is no defense, *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); malice need not be shown, *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944); and mistake as a defense is without merit, *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942).

In *Berg v. Minneapolis Star and Tribune Co.*,⁴⁹ where the plaintiff's photograph, taken in a courtroom, was published in a newspaper, the court said:

By the accepted standards of most of the newspapers in this country . . . court proceedings such as the Berg contest over the custody of the children constitute legitimate news in view of the circumstances related, and the publication of Berg's picture in connection with the legitimate news was within the scope of the accepted prerogatives assumed by the press, which is charged with the responsibility of furnishing news to the public.⁵⁰

Similarly, where the plaintiff's name was mentioned in connection with a news report of his wife's suicide, the court held that there was no violation of the right of privacy.⁵¹ Thus we see that the individual's right of privacy must give way to the paramount interests of the public in obtaining information of public concern.

So, too, must it give way where the publication concerns people in public life. It is obvious that a man in public life may not claim the same immunity from publicity as may a private citizen. One who engages in public affairs to an extent which draws the public interest upon him may be deemed to have consented to the publication of his picture.⁵² This was clearly pointed up in *O'Brien v. Pabst Sales Co.*,⁵³ where the plaintiff, who was a well-known football player, was denied recovery on a cause of action arising out of the publication of his likeness in an advertisement. We see, then, that whether by actual or implied consent, or by estoppel, it is well settled that the protection afforded by the right may be lost or waived.⁵⁴

In any event, the establishment of conditions of liability for the invasion of the right of privacy is a matter of harmonizing individual rights with community and social interests. As yet, however, no rigid line of demarcation has enclosed the right, and, at the present time, it may be said that an ever-expanding number of American states have now given definite legal cognizance to the right of an individual "to be let alone."

⁴⁹ 79 F. Supp. 957 (D.C. Minn., 1948).

⁵⁰ *Ibid.*, at 962.

⁵¹ *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939).

⁵² *Edison v. Edison Polyform & Mfg. Co.*, 73 N.J. Eq. 136, 67 Atl. 392 (1907).

⁵³ 124 F. 2d 167 (C.A. 5th, 1941).

⁵⁴ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E. 2d 306 (1949); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911).