



## Case Western Reserve Law Review

---

Volume 13 | Issue 1

---

1961

# The Fourteenth Amendment and the Right of Privacy

Roscoe Pound

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

### Recommended Citation

Roscoe Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. Res. L. Rev. 34 (1961)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol13/iss1/6>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# The Fourteenth Amendment and the Right of Privacy

Roscoe Pound

*{Beginning with the common-law concept of trespass vi et armis, analyzing the cases which established the right, and examining the statutes which limit it, the author traces the origin and development of the right of privacy and discusses the extent of its present recognition. He maintains that the requirements of due process are satisfied by an equitable balancing of the right of the individual to be let alone against the often conflicting right of a free press protected by the fourteenth amendment. — Ed.}*

## EVOLUTION OF A NEW RIGHT: BY STATUTE OR BY JUDICIAL DECISION?

Under this title we raise some fundamental and far-reaching questions. How far may we introduce a new right into the body of those recognized and secured by law otherwise than by legislation? Are there

THE AUTHOR is University Professor Emeritus and former Dean of the Harvard Law School.

limits to the development of law by judicial decision, holding it to subjects for which the common law had definitely made provision, so that new

categories of secured interests must be recognized and provided with definitions, an apparatus of rights and duties, or at least assigned to treatment on specified lines or under specified categories, by legislation? How far is this established by the constitutional separation of powers? In a constitutional polity the science of law cannot ignore or evade these questions. Law may come into being through lawmaking by the legislature or through lawfinding by the courts. But on the one hand the province of legislation, lawmaking by laying down precepts for the administration of justice, extends to very much more than rules of policing — regulations of items of conduct. On the other hand, even in the world of the civil law, where law is in theory fully set forth in codes, admitting only of genuine interpretation and application, in the world of today it is recognized that judicial application is a creative function no less than juristic exposition, and in the common-law world judicial decision is a form of law.

Legal history has amply shown that the whole content of the legal order cannot be set forth, item by item for all time to come, in either legislatively prescribed or judicially found precepts. When I look back at what I was taught as the law of torts as a student of law in 1889 in comparison with what is taught today, or at what was then taken for granted as to the importance of local rules of law, laid down for local communities, and reflect on the steady growth of a law of the world, administered by local courts without imposition by Tennyson's Parliament of Man, I come to suspect that belief in and hope for world peace through world law imposed by a world superstate, and of self-sufficing local law imposed by local legislation, are delusive.

At any rate, as the matter stands today in this country, the law as to a right of privacy has not been helped by legislation to establish a right where it had been denied by judicial decision. The malleability of *stare decisis* does not apply to legislation. If the right of privacy is purely a creation for legislation, to be interpreted by the technique of statutory interpretation, response of the law to changing conditions of the time in what is beginning to be a subject increasingly before the courts will be greatly embarrassed.

We attain the ends of the law by recognizing certain interests, defining the limits within which these interests will be given effect through legal precepts, developed and applied by the judicial and administrative processes according to an authoritative technique, and endeavoring to secure the interests so defined within the defined limits. In this way of putting the task of the law, an interest is a demand or desire or expectation which human beings either individually or in groups or associations seek to satisfy, of which therefore the adjustment of relations and ordering of conduct must take account. There is no record of any time or society in which there has been a surplus of means of satisfying these demands or desires, or room for everyone to do all he sought or urged a claim to do, so that there has not been competition to satisfy them. Conflicts and competition of individuals with each other, of groups or associations or societies of men with each other, and of individuals with such groups or associations or societies in the endeavor to satisfy human wants and claims or desires, require the systematic adjustment of relations and ordering of conduct which may be called the legal order (*ordre juridique, Rechtsordnung*).

In civilized society as we know it there is a fundamental presupposition that individuals must be able to assume that others will commit no intentional aggressions upon them. Hence one who intentionally does anything which on its face is injurious to another is held liable to repair the resulting damage, unless he can establish a liberty, or privilege, by identifying his claim to do what he did with some recognized public or

social interest. It is here that we come upon serious difficulties for defining and fixing the limits of the right of privacy.

### EARLY HISTORY OF THE RIGHT OF PRIVACY

Injury to personality, aggression upon the physical person, was the first subject to be dealt with in the beginnings of law and furnished an analogy which long worked mischief in the development of legal procedure. It is true that physical attack was first thought of as an attack upon the honor of the person attacked. But as the law of delicts or torts developed that aspect was forgotten and the old writ of trespass *vi et armis*, which recited an attack with "swords, knives and staves," furnished the controlling analogy until the present century. Hence when in 1890 the memorable paper of Warren and Brandeis<sup>1</sup> expounded a right of privacy infringed without attack upon the physical person or deprivation of substance, it was regarded as a highly doubtful stretching of the supposedly fundamental analogy of trespass with force and arms.

In writing upon the right of privacy much is said not only about competition with other individual interests or individual interests of others than the complainant, and much has been said also as to conflict of an individual interest with "the public interest." But in treatment of competing interests we must not prejudge the question by the way in which we put it. There is a social advantage in securing the wants or claims of each as well as those of many or all of us, and because more of us read newspapers than are written up in newspapers, it does not follow that the feelings of each of us are to be wholly at the mercy of the press. The date of the first newspaper in English is usually put at 1622.<sup>2</sup> Sensational journalism in the United States is dated from Joseph Pulitzer's acquisition of the *New York World* in 1883 and William Randolph Hearst's acquisition of the *New York Journal* in 1895.<sup>3</sup> It is significant that we first hear of the right of privacy in 1890 in an argument for "the right of one who has remained a private individual, to prevent his public portraiture . . . from pen portraiture, from a discussion by the press of one's private affairs . . ." at this time.<sup>4</sup>

Indeed, twenty years before Warren and Brandeis, Thomas McIntyre Cooley, one of the ten judges who must be ranked first in our judicial history,<sup>5</sup> had written of "the right to be let alone."<sup>6</sup> Today, when the impact of social change on our principal legal institutions is attracting the

1. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. 16 ENCYCLOPEDIA BRITANNICA 337 (1961).

3. *Id.* at 350, 351.

4. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890).

5. See POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4, 30-31 n. 2 (1938).

6. COOLEY, *TORTS* 29 (2d ed. 1888).

attention of jurists,<sup>7</sup> the development of a legal right of privacy out of the prophetic article of Warren and Brandeis is especially significant. The right of privacy is a modern demand growing out of the conditions of life in the crowded communities of today. Publicity as to private matters of purely personal concern is an injury to personality in a time when modern means of gathering and transmitting news make everyone a next door neighbor of everyone else whether he will or not. Indeed, impairment of the peace and comfort of the individual may produce suffering more acute than that brought about by mere bodily injury. But since the injury is mental and subjective there are difficulties in securing the interest of the person whose privacy is invaded, which put limits to legal remedy. In many cases of weighing of interests, the over sensitive must give way, and the balance as between legitimate public curiosity and individual sensitiveness may be hard to attain or maintain. But the aggressions of a type of unscrupulous journalism, activities of photographers, and temptation of advertisers to sacrifice private feelings to their individual gain have been calling upon the law to do more by way of securing the individual interest than merely take incidental account of infringements of it.

Warren and Brandeis' article in the *Harvard Law Review* was cited within a year after its publication in a suit for an injunction brought by an eminent British physician whose name was used without permission in advertising a remedy for catarrh as recommended by him.<sup>8</sup> It was again cited two years later by a superior court of New York in granting an injunction at suit of an actor against the publisher of a newspaper who was publishing a picture of plaintiff and another actor and inviting readers to vote which was the more popular.<sup>9</sup> Both these cases might be said to involve to some extent infringement of an interest of substance, in that the plaintiff had a valuable professional reputation. The New York court quoted Cooley's saying that the plaintiff had a "right to be let alone."<sup>10</sup>

Almost ten years later the question came before the highest court of New York and it reached the opposite conclusion by a divided court.<sup>11</sup> The complaint alleged that the defendant Franklin Mills Company printed some twenty-five thousand lithograph prints of a portrait of the plaintiff, a young woman, without her consent, advertising a brand of

7. See FRIEDMANN, *LAW IN A CHANGING SOCIETY* (1959).

8. Brief of Simon Sterne, Esq., in *MacKenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 408 (N.Y. Sup. Ct. 1891).

9. *Marks v. Jaffa*, 6 Misc. 290, 292, 26 N.Y.S. 908, 909 (Super. Ct. 1893).

10. *Ibid.*

11. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). This decision was sharply criticised at the time in the *New York Times*, Aug. 23, 1902, p. 8, col. 3, and was defended by Judge Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

flour, and bearing in capital letters the names "Franklin Mills Flour and Rochester Folding Box Co.," that the portraits so printed were "displayed in stores, warehouses, saloons and other public places, were recognized as pictures of the plaintiff by her friends and others," so that she was "greatly humiliated by the scoffs and jeers of those who recognized the portrait" as hers, causing her great distress and suffering both in body and mind, a nervous shock, and illness compelling her to employ a physician. The trial court having overruled demurrers of the defendant the appellate court entered an interlocutory judgment for the plaintiff. In the highest court two questions were certified: (1) Did the complaint state a cause of action at law? (2) Did it state a cause of action in equity? A divided court (four judges to three) answered both questions in the negative.

In the opinion of the majority, Chief Judge Parker, after citing the article of Warren and Brandeis, suggested that a vast field of litigation would necessarily be opened up should the court "hold that privacy exists as a legal right enforceable in equity by injunction and by damages when they seem necessary to give complete relief." Next he pointed out that the right of privacy "as a legal doctrine enforceable in equity has not down to this time been established by decisions."<sup>12</sup> He then went over the English cases discussed by Warren and Brandeis and came to the conclusion that they did not in any way support the position of plaintiff. Nor could he find any support for the plaintiff in any prior decision in New York. Finding no support for a right of privacy in authority, he proceeded to deny its validity in principle.

Then he quoted an eloquent passage from Justice Lumpkin of Georgia.<sup>13</sup>

The law protects the person and the purse. . . . The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. . . . There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give, in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries.

For the rest he relied upon *Atkinson v. John E. Doherty & Co.*,<sup>14</sup> which no longer obtains as to the right of privacy in Michigan, and summed up thus:

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

12. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 563, 64 N.E. 442, 447 (1902).

13. *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 772-73, 15 S.E. 901, 903 (1892).

14. 121 Mich. 372, 80 N.W. 285 (1899).

There was a strong dissenting opinion by Judge Gray who said:

The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.<sup>15</sup>

A change in approach began in Georgia in 1904 with *Pavesich v. New England Life Insurance Company*.<sup>16</sup> In that case the insurance company published in a newspaper a likeness of the plaintiff, which was recognized by his friends and acquaintances, beside one of an ill dressed and sickly looking person. Above the likeness of the plaintiff were the words: "Do it now. The man who did," and below, "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." Above the other were the words: "The man who didn't," and a statement that he now realized his mistake. Below them both were the words: "These two pictures tell their own story." The picture of the plaintiff was made without his consent from a negative procured without his consent and the statement attributed to him was false. He had never made such a statement and had never been insured by the defendant company. He was an artist by profession and the publication was peculiarly offensive to him. The lower court sustained a demurrer. This was reversed. The court in a thirty page opinion followed the dissent of Judge Gray in the New York case and rejected the arguments of Chief Judge Parker.<sup>17</sup>

#### EXTENT OF RECOGNITION OF THE RIGHT OF PRIVACY

As late as 1949, when I wrote chapter fourteen of my book *Jurisprudence*, I could not say with assurance that the right was coming to be fully and adequately secured in American courts.<sup>18</sup> However, in the increasingly crowded society of today the lot of the individual who desires to be let alone has been coming to be made hard beyond reasonable limits of endurance on his part and the need for enlightenment or entertainment on the part of his neighbors. The advent of radio, television, and widespread telecommunication aggravates this. If a balance of conflicting or overlapping interests is becoming increasingly difficult, there is the more reason why it should be determined and maintained by law rather than left to the mercy of those who profit by the annoying activity.

15. 171 N.Y. 538, 563, 64 N.E. 442, 450 (1902).

16. 122 Ga. 190, 50 S.E. 68 (1905).

17. *Id.* at 213, 50 S.E. at 78.

18. As to the dates of the final draft of each chapter, see volume I, page xii.

Accordingly, the right of privacy today has become recognized by judicial decision in twenty-six states and the District of Columbia, is given wide, if limited recognition by statute in four states, and is wholly denied in but four. Moreover, in a number of others, where lower courts have recognized it, the highest court has at least spoken no word to indicate that it does not exist.<sup>19</sup> Also it has now come to be well recognized by American text writers.<sup>20</sup> It was discussed by a learned English law teacher in 1931.<sup>21</sup> Also it was shown that the German law on the subject was more effective than either American or English law,<sup>22</sup> and we are told much the same as to French law.<sup>23</sup> In the last edition of Sir Percy Winfield's book there is a section entitled "Doubtful Wrongs," which comes to the conclusion that "while the question is still open for legislation or in the House of Lords, there are strong arguments for some remedy."<sup>24</sup> In the eleventh edition of *Salmond on Torts* we are told that the right "is not yet recognized" in England,<sup>25</sup> and this is repeated cautiously in the twelfth edition.<sup>26</sup> Perhaps invasion of privacy has not become so frequent or so aggravated in England as yet as it has with us.

Moreover, recognition in England of "parasitic damages"<sup>27</sup> suggests that the parasite may yet become an independent self-sufficient cause of action. Street, who first called attention to this doctrine and gave it a name, said:

The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law.<sup>28</sup>

Harper and James have noted a like course of development in American law in cases where mental suffering was caused by conduct of the defendant which amounted to a technical trespass to real property, and courts before establishment of the right of privacy used the opportunity

19. The cases and statutes down to 1955 are fully set forth in PROSSER, TORTS 636-37 nn. 10-40 (2d ed. 1955). See also Prosser, *Privacy*, 48 CALIF. L. REV. 383-84 nn. 17-58 (1960), for subsequent cases and statutes.

20. PROSSER, TORTS ch. 20 (2d ed. 1955); 1 HARPER & JAMES, TORTS chs. 3-5 (1956); SEAVY, KEETON & KEETON, CASES ON TORTS ch. 14 § A (1957).

21. Winfield, *Privacy*, 47 L.Q. REV. 23 (1931).

22. Gutteridge, *The Comparative Law of the Right to Privacy: The Law of Germany and Switzerland*, 47 L.Q. REV. 203 (1931).

23. Walton, *The Comparative Law of the Right to Privacy: The French Law as to the Right of Privacy*, 47 L.Q. REV. 219 (1931).

24. WINFIELD, TORTS 775 (6th ed. 1954).

25. HEUSTON, SALMOND ON TORTS 19 n. 1 (11th ed. 1953).

26. *Id.* ch. 2 n. 56 (12th ed. 1957).

27. *Jackson v. Watson & Sons*, [1909] 2 K.B. 193.

28. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 470 (1906).



"as a peg on which to hang relief" although the real harm was to a right to be let alone.<sup>29</sup>

Today American law teachers and text writers have accepted the right of privacy as sound common-law doctrine.<sup>30</sup> Yet as late as 1942 an experienced law editor could tell us that "in a majority of the states even the existence of the right of privacy is still an undetermined question."<sup>31</sup> In the twenty years since that was written, in addition to the eight state supreme courts which had already adopted the right judicially, eighteen more jurisdictions have expressly adopted it by decisions of their courts. It has also been established, at least to a limited extent, by legislation in four more.<sup>32</sup> Also the Supreme Judicial Court of Massachusetts has asserted that whether there is a "legally protected right of privacy" is an open question in that state.<sup>33</sup> Finally, the American Law Institute in its *Restatement of the Law of Torts* laid down as an accepted proposition of American common law, under the heading "Interference with Privacy:"

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.<sup>34</sup>

In the *Restatement's* comment on this proposition it is explained that "modern decisions allow recovery in situations in which it is not possible rationally to use the older bases of recovery, and the interest is now recognized as having an independent existence."<sup>35</sup> The accompanying statement as to conflict of interests and protection of the interest in relation to the customs of the time and place and to the habits and occupation of the complainant, and the incidents of community life of which he is a part, such as the possibility that he be photographed as part of a street scene, is admirable both for its breadth and the carefully put details and limitations. The statement as to conditions of liability is also admirable. If these conditions are met, the conclusion is reached that "the fact that the plaintiff suffered neither pecuniary loss nor physical harm is unimportant. The damages whether nominal, compensatory or punitive can be awarded in the same way in which general damages are given for defamation."<sup>36</sup>

29. 1 HARPER & JAMES, TORTS 678 (1956), citing particularly *Adams v. Rivers*, 11 Barb. 390 (N.Y. Sup. Ct. 1851).

30. Seavey, *Can Texas Courts Protect Newly-Discovered Interests?*, 31 TEXAS L. REV. 309 (1931); PROSSER, TORTS ch. 20 (2d ed. 1955); HARPER & JAMES, TORTS § 9.5 (1956).

31. 41 AM. JUR., *Privacy* § 4 (1942).

32. The cases down to 1955 are cited fully state by state in PROSSER, TORTS 636-37 nn. 10, 12-31 (1955). Discussions in legal periodicals are cited at 636 n. 7. See Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386-88 (1960), for subsequent cases.

33. *Kelley v. Post Publishing Co.*, 327 Mass. 275, 277, 98 N.E.2d 286, 287 (1951).

34. 4 RESTATEMENT, TORTS § 867 (1939).

35. *Id.* at 399.

36. *Id.* at 401.

What we must take into account in considering the right of privacy as now secured in American courts is brought out by consideration of some typical cases in which it has come before our courts.

FACTORS IN ALLOWING OR DENYING RECOVERY FOR VIOLATION  
OF THE RIGHT OF PRIVACY

*Intrusion upon Privacy for Commercial Purposes*

Taking the cases up in order of time, in the pioneer case of *Pavesich v. New England Life Insurance Company*,<sup>37</sup> spoken of above, it will be remembered that the plaintiff, who was known to his neighbors in a community sensitive on personal honor, as a quiet, unobtrusive person, found his picture in a newspaper in an advertisement of an insurance company of another state with a wholly false statement that he was insured in that company and in receipt of an annual dividend on his paid up policy. The picture had been procured without his knowledge or participation, and there was no foundation whatever for publication of the picture or for the statement attributed to the plaintiff. There was no excuse whatever for thus publicly representing him as a cheap seeker for notoriety as a means of advertising the insurance company's business.

In *Kunz v. Allen*,<sup>38</sup> as stated in the opinion of the court, while plaintiff was in the store of defendant to make some purchases, defendant, without her knowledge, caused moving pictures to be taken of her face, form, and garments, and the films to be developed, enlarged, and used to advertise his business by public exhibition in a moving picture theater in the community where she lived. It was alleged that it was understood and believed among the people generally that she had for hire permitted her picture to be taken and used as a public advertisement. The trial court sustained a demurrer to this evidence. This was reversed.

An interesting question as to the extent of the right was raised in *Brents v. Morgan*.<sup>39</sup> The defendant put in the show window of his garage fronting on a principal street of the city where plaintiff lived, a notice posted on a sign five by eight feet and conspicuous to anyone passing on the street. It read: "Notice. Dr. W. H. 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." It was held that this was an unwarranted invasion of the right of privacy and that truth was no defense.

In *Flake v. Greensboro News Company* the court said that

the unauthorized use of one's photograph in connection with an adver-

37. 122 Ga. 190, 50 S.E. 68 (1904).

38. 102 Kan. 883, 172 Pac. 532 (1918).

39. 221 Ky. 765, 299 S.W. 967 (1927).

tisement or other commercial enterprise gives rise to a cause of action which would entitle the plaintiff, without allegation and proof of special damages, to a judgment for nominal damages, and to injunctive relief, if and when the wrong is persisted in by the offending parties.<sup>40</sup>

*Intrusion upon Privacy by the Press: A Constitutionally Protected Competing Right*

In *Barber v. Time, Incorporated*,<sup>41</sup> the court had to consider the right of privacy in relation to the guarantee of freedom of the press in the state constitution and to the fourteenth amendment, which must be considered presently. On the question of a right of privacy the court in a characteristically able opinion by Commissioner Hyde said:

Thus, establishing conditions of liability for invasion of the right of privacy is a matter of harmonizing individual rights with community and social interests. We think they can be harmonized on a reasonable basis, recognizing the right of privacy without abridging freedom of the press. The determination of what is a matter of public concern is similar in principle to qualified privilege in libel. It is for the court to say first whether the occasion or incident is one of proper public interest. (As it must say whether an occasion is one to which qualified privilege extends in libel.) . . . 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. We think this is the rule to be deduced from the best considered authorities . . . . We further hold that this rule (applied to the facts of this case) does not interfere with the freedom of the press or its effective exercise, but only limits its abuse; and does not violate any of the constitutional provisions upon which defendant relies.<sup>42</sup>

The case arose upon an article in a weekly news magazine, entitled "Starving Glutton," accompanied by a picture of plaintiff, Mrs. Dorothy Barber, under which was printed "Insatiable-Eater Barber," and "She eats for ten." It went on to recite that she came to General Hospital saying that she wanted to eat all the time; she could finish a normal meal "and be back in the kitchen in ten minutes eating again." The picture was taken against Mrs. Barber's will by trick after she had refused to allow it. The name and picture were not needed for any legitimate purpose of medical or scientific information.

A very significant point was made by the Supreme Court of Oregon in 1941. It said:

When Brandeis and Warren wrote in 1890, it was the unseemly intrusions of a portion of the press into the privacy of the home that was emphasized as the main source of evil; since then motion pictures and

40. 212 N.C. 780, 792, 195 S.E. 55, 64 (1937).

41. 348 Mo. 1199, 159 S.W.2d 291 (1942).

42. *Id.* at 1206-07, 159 S.W.2d at 295.

the radio have been perfected and have taken their places among our great industries, while instantaneous photography today accomplishes miracles scarcely dreamed of fifty years ago. Thus, the potentialities for this character of wrong are now greatly multiplied. A decision against the right of privacy would be nothing less than an invitation to those so inclined who control these instrumentalities of communication, information and education, to put them to base uses, with complete immunity, and without regard to the hurt done to the sensibilities of individuals whose private affairs might be exploited, whether out of malice or for selfish purposes.<sup>43</sup>

While an accused person was incarcerated awaiting trial the prosecuting authorities and the superintendent of state police were about taking his finger prints and photograph and forwarding copies to rogues' galleries in other states, to the Federal Bureau of Investigation, and to police departments of other countries. The trial court considered that taking photographs, finger prints, and other criminal investigation data before conviction was a justified precaution against escape, but enjoined publishing the data in advance of conviction unless the complainant became a fugitive from justice. The court considered unnecessary premature publication an invasion of privacy.<sup>44</sup>

Writers of fiction, depicting eccentric or striking personalities, have at times used habits or traits of particular persons, locally well known, as characters. Carefully and skillfully done this is an inevitable incident of legitimate literary activity. Dickens and Thackeray are known to have used personal oddities of identifiable individuals in this way. But today the opportunities for abuse are multiplying and the injuries to individuals through abuse are multiplying also. A notable case in which it came before the courts is *Cason v. Baskin*.<sup>45</sup> In that case a book called *Cross Creek*, written by and published for the defendant, and widely read in the locality where the plaintiff lived and was well-known, described her by name. As alleged the book contains "what purports to be a biographical sketch, description and partial life history of the plaintiff, in which the name, form, words and actions of plaintiff are reproduced by graphic descriptions, colored but, withal, creating a pen portrait of plaintiff." It was alleged that the book was widely sold and read by the public in the county and state where she lived. Calling her by her first name, the plaintiff is described as "an ageless spinster resembling an angry and efficient canary. She manages her orange grove and as much of the village and county as needs management or will submit to it."<sup>46</sup> It was written that those she helped were cursed loudly while being helped with their troubles. Indeed throughout the book she is represented as habitually

43. *Hinish v. Meier & Frank Co., Inc.*, 166 Ore. 482, 503-04, 113 P.2d 438, 447 (1941).

44. *McGovern v. Van Riper*, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945).

45. 155 Fla. 198, 20 So. 2d 243 (1944).

46. *Id.* at 202, 20 So. 2d at 245

using profane language, dirty and vulgar expressions, while full of good works. But, as the court says, her neighbors knew of her good works as well as her eccentricities, and the public outside would not have known that the person described in the book was a real, not a fictitious, character if it had not been for the lawsuit. The court sustained demurrers to each of four counts of the declaration. This was affirmed as to three. But as to the count which set up what is sketched above, the judgment was reversed and the case sent back to be tried. The question on that count is perhaps really one of the measure of damages.

A good example of limitation of the interest in privacy in view of legitimate public interest in events "part of the history of the community" was decided by a court<sup>47</sup> which had previously upheld the right in a proper case. A man disappeared under circumstances strongly indicating that he was murdered and the money he was known to have with him stolen, but the body was not found. Suspicion pointed to a man who had found the horses the supposed deceased had been driving when he disappeared, and he was prosecuted and acquitted. Twenty-five years later it appeared that the supposed murdered man had gone secretly to California, where he had accumulated property and died leaving a will in which one of his two daughters in Alabama was the principal beneficiary. This story was told by defendant fully but not unfairly in a weekly news broadcast program called "Tuscaloosa Town Talks." The consequent widespread notoriety and comment were very humiliating and painful to the daughters, who brought suit. The court admitted the existence of such a right, but denied an action on the ground that "the broadcast was the subject of legitimate public interest." The story "is a part of the history of the community."

## ENCROACHMENT UPON THE RIGHT OF PRIVACY

### *By Advertisers*

In a case<sup>48</sup> after the right of privacy was becoming well established in the American state courts, the Supreme Court of Michigan distinguished and refused to follow *Atkinson v. John E. Doherty & Co.*,<sup>49</sup> which had been relied upon by the New York Court of Appeals in rejecting the right of privacy. The facts in the case which has established the law in Michigan were that defendant, without the knowledge or consent of the plaintiff, obtained her photograph from a photographer and published it in a daily newspaper in an advertisement of cosmetics kept for sale by the defendant. The advertisement was eight by ten inches and

47. *Smith v. Doss*, 251 Ala. 250, 253, 37 So. 2d 118, 121 (1948).

48. *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W.2d 911 (1948).

49. 121 Mich. 372, 80 N.W. 285 (1899).

featured the photograph of plaintiff surrounded by printed matter describing brands of rouge, lipstick, and make up, by drawings of a bottle of make up, a lipstick container, and a rouge container, and an announcement that such articles were on sale at defendant's store. The case was dismissed by the trial court. The judgment was reversed, the court saying that there was

a fundamental difference between the use of a person's photographic likeness in connection with or as a part of a legitimate news item in a newspaper, and its commercial use in an advertisement for the pecuniary gain of the user. In the case at bar there is no involvement of freedom of speech or freedom of the press.<sup>50</sup>

*Continental Optical Company v. Reed*<sup>51</sup> involved loss or limitation of the right by "becoming a public personage." Plaintiff, an optical lens grinder, was inducted into the United States Army in World War II and attached to a mobile optical unit which operated near the front lines in France to supply and repair lenses for military use. He was used as a lens grinder in that unit. While he was so engaged the War Department took his picture for the purpose of publication in the United States as a news item in the Army's plan for bolstering home-front morale. Accordingly the picture was released by the Office of War Information and appeared in one or more publications, one of them a newspaper in plaintiff's home city. The defendant then appropriated the picture and used it for commercial purposes in its own private enterprise of selling optical instruments, representing that the plaintiff endorsed its products. Defendant's demurrer was overruled and there was verdict and judgment for the plaintiff. The appellate court affirmed the judgment upon remittitur of damages in excess of one thousand dollars. It said that when plaintiff was inducted into the army and attached to the optical unit he did not thereby become a public personage whose individual likeness, activities, and character became a matter of general interest and concern. He was "no hero, famous personality or individual of preeminent accomplishments whose doings are items of legitimate news and general interest;" the public could have no interest in him "other than as the symbol of an organization with which it was greatly concerned." It said that the situation "cannot be stretched into a license to private business to use . . . for advertising its wares for individual profit."<sup>52</sup>

### *By the Press*

There is a full discussion of the right of privacy as infringed by the press in a case involving the publication in an illustrated periodical of

50. *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W.2d 911 (1948).

51. 119 Ind. App. 643, 86 N.E.2d 306 (1949).

52. *Id.* at 650, 86 N.E.2d at 309.

wide circulation of a surreptitiously and unauthorizedly used photograph of plaintiff and his co-plaintiff wife with his arm about her and his cheek against hers, along with an article on "Love," carrying under the picture the caption "Publicized as glamorous, desirable, 'love at first sight' is a bad risk."<sup>53</sup> The article goes on to say that "love at first sight" is the wrong kind, is not long lasting, and will be followed by divorce. The plaintiffs operated a confectionary and ice cream concession in a market and each had a good reputation. The court took a strong position for a right of privacy, which until then had not been established in California, but worked out well the difficulties involved in relation of the right to other recognized and legally secured interests. The opinion of Justice Carter brings out well the conflicting considerations to be borne in mind. A judgment for the defendant was reversed.

### *By Landlords*

Definition of the right of privacy was involved in a case in which, in a verdict for the plaintiff, the jury expressly found no "compensatory damages" but went on to "assess as exemplary damages" a sum named.<sup>54</sup> For the defendant it was urged that "since the jury assessed no actual or compensatory damages against appellant, the verdict for exemplary damages cannot stand." The facts were that a landlord after serving an invalid notice to terminate a month-to-month tenancy, in which rent had been paid, moved with his wife into the leased small house in which the tenant and his wife were living, and lived there for seventeen days and nights, interfering with the home life, comfort, and sensibilities of the tenant and his family. The court treated this as an invasion of a right of privacy. In the last century it would have been treated as aggravated trespass upon the tenant's possession. To think of the interference with privacy as the real cause of action is a significant example of the effect of social change upon the law. In 1902, when *Roberson v. Rochester Folding Box Company*<sup>55</sup> was decided, the absence of any physical interference with person or property was deemed decisive. In 1952 the trespass upon the tenant's possession of the house as an interest of substance was ignored and five pages of the opinion of the court were given to discussion and exposition of the right of privacy.

### STATUTORY PROTECTION OF THE RIGHT OF PRIVACY: ITS LIMITATIONS

Rejection of the doctrine of a right of privacy by a divided court in New York was severely criticized at the time and led to legislation in that

53. *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 275, 239 P.2d 630, 632 (1952).

54. *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952).

55. 171 N.Y. 538, 64 N.E. 442 (1902).

state in 1903. As it now stands it has the form of three sections of the New York Civil Rights Law.<sup>56</sup> Section 50 makes use of the name, portrait, or picture of any living person for advertising purposes or for the purposes of trade, without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, a misdemeanor. Section 51 goes into no little detail in providing for an injunction and for an action for damages in cases within the preceding section, and also provides for exemplary damages in the discretion of the jury, in case of wilful use of name, portrait, or picture. This was held constitutional; the imposition of liability only upon publication of pictures taken after the passage of the statute was not considered an unreasonable discrimination.<sup>57</sup> The statute covers only one of many ways of infringing another's claimed "right to be let alone," and it is a curious commentary upon the argument of the majority of the court in *Roberson v. Rochester Folding Box Company* that recognition of a common-law right of privacy would give rise to endless litigation, that in fifty years after its enactment some one hundred and fifty reported cases under it had come before the court in New York, whereas there had been a scant three or four each in states where the common-law right obtained.<sup>58</sup>

There is more scope for controversy over interpretation of a line of a statute than over application of a much judicially applied principle of common law. Moreover, what is laid down as a rule in a statute does not admit of adjustment or application to circumstances of particular cases. This is brought out in a case in which the plaintiff willingly took part in the taking of her picture and the court was satisfied she knew the use to be made of it but the consent was not in writing. The court said the defendant which published the picture "infringed technically" the plaintiff's rights under the statute and, dividing three to two, reversed a judgment of dismissal and directed a judgment restraining use of the picture.<sup>59</sup>

After review of the decisions in New York down to 1955 Prosser says: "Within the limitations of the statute to commercial uses, the New York Courts seem to have arrived at very much the same conclusion concerning the right of privacy that other courts have reached at common law."<sup>60</sup> Since that statement an important case has raised the question again and been passed upon by a divided court.<sup>61</sup> In that case a manufac-

56. N.Y. CIV. RIGHTS LAW §§ 50-51, as amended, N.Y. CIV. RIGHTS LAW § 52 (Supp. 1961).

57. *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd*, *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502 (1911).

58. See cases under the New York statute set forth in N.Y. CIV. RIGHTS LAW §§ 50-51.

59. *Almind v. Sea Beach Ry.*, 157 App. Div. 230, 141 N.Y.S. 842 (Sup. Ct. 1913).

60. PROSSER, TORTS 641 (2d ed. 1955).

61. *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853 (1959); 74 HARV. L. REV. 1238-41 (1961).



turer of fireproof safes put forth an advertising circular in which it reproduced a photograph of a burning building and reprinted the news story which went with it. It described the plaintiff's carelessness, which was a cause of the fire. The court of first instance denied a motion to dismiss. The Court of Appeals certified the question whether the facts constituted a cause of action. The court held that the question should be answered in the affirmative. Chief Judge Conway said:

In view of the fact that defendant chose to reprint the entire original news coverage of the fire, including the entire news account which mentioned plaintiff's name several times and described how either he or the other person present started the fire by their carelessness or negligence, in a circular designed for the sole purpose of soliciting purchasers for the defendant's products, and since every fair intendment and inference must be given to the pleading on a motion to dismiss for insufficiency, we do not believe that it can be said that this complaint fails to set forth a use of plaintiff's name which is a violation of his statutory right of privacy as a matter of law.<sup>62</sup>

Judge Van Voorhis, for the two dissenting judges, said:

This is not a situation where particular individuals are advertised as sponsoring the product or where their names or pictures are merely published in connection with an advertisement rather than as participants in some public event to which the advertisement relates.<sup>63</sup>

In 1904 Virginia adopted a statute in substance the same as the original New York act, except that it provides for survival of actions upon it and limits protection to residents of the state.<sup>64</sup> It does not seem to have attracted the attention of the state courts but was the subject of an important article in the *Virginia Law Review*.<sup>65</sup> Before the statute a Virginia court had denied the existence of a right of privacy at common law.<sup>66</sup> Hence the writer considered that the course of decision in New York will be followed in Virginia.

Oklahoma in 1953 adopted a statute which is essentially the same as the New York act.<sup>67</sup> However, it not only provides for survival of right of privacy actions but also makes the offense a felony.

Utah in 1909 adopted a statute of three sections of which two are substantially the same as sections 50 and 51 of the New York Civil Rights Law.<sup>68</sup> One section, however, is peculiar to the Utah statute. It makes it a misdemeanor unauthorizedly to use for advertising purposes or for purposes of trade the name or picture of any public institution or

62. *Id.* at 284-85, 164 N.E.2d at 857.

63. *Id.* at 287, 164 N.E.2d at 859.

64. VA. CODE ANN. § 8-650 (1950).

65. Note, *The Virginia "Right of Privacy" Statute*, 38 VA. L. REV. 117 (1952).

66. *Cyrus v. Boston Chem. Co.*, cited in 11 VA. L. REG. 938 (1906).

67. OKLA. STAT. ANN. tit. 21, §§ 839-40 (1958).

68. UTAH CODE ANN. §§ 76-4-7, 8, 9 (1953).

public officer of the state. Thus the statutory misdemeanor covers much more in Utah than in New York, Virginia, or Oklahoma, while New York has since extended the misdemeanor to cover broadcasting, taking motion pictures, and televising of proceedings in which testimony under compulsory process is taken before any tribunal or administrative agency.<sup>69</sup>

In addition to what was said above as to the New York statute, it should be noted that it fell far short of the purpose for which it was enacted. Instead of undoing the mischief created by *Roberson v. Rochester Folding Box Company*<sup>70</sup> and giving a general starting point for reasoning about a rapidly developing type of injury to personality in the changing social and economic order of the time, the statute provided a rule for judicial relief for one particular type of injury to privacy. As a result all development of the law on that subject outside of the fixed limits of the statutory rule was foreclosed. Shortly after enactment of the New York statute the tide of judicial decision recognizing the doctrine set in. Only three other states have adopted the New York statutory limitation; only four have persisted in rejecting a right of privacy;<sup>71</sup> twenty-six and the District of Columbia have accepted and are developing it, and in seven states there is good reason to assume it will be accepted by the highest court.<sup>72</sup>

#### JURISDICTIONS WHICH HAVE DENIED THE RIGHT OF PRIVACY

Of the four states which appear definitely committed to rejection of the right, Rhode Island passed upon it in 1909,<sup>73</sup> when the right of privacy was still a novel right not to be found in the orthodox expositions of the common law. (*Roberson v. Rochester Folding Box Company* in New York and *Atkinson v. John B. Doherty & Co.* in Michigan had denied it; only the article by Warren and Brandeis and the Georgia court in *Pavesich v. New England Life Insurance Company* had accepted it.) The Rhode Island court found no warrant for accepting it as part of the legacy of the common law and denied any power of admitting it by judicial decision. Introduction into the law of the state of any new legal right, not recognized as such in the received common law, was reserved to the legislature, which had all the power of the British Parliament except as limited by the Constitution of the United States or of the state.<sup>74</sup>

69. N.Y. CIV. RIGHTS LAW § 52 (Supp. 1961).

70. 171 N.Y. 538, 64 N.E. 442 (1902).

71. Nebraska, Rhode Island, Texas, and Wisconsin.

72. The cases are collected in 1 HARPER & JAMES, TORTS, 682-83 (1956); PROSSER, TORTS 636-37 (2d ed. 1955); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386-88 (1960).

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

74. *Id.* at 30, 73 Atl. at 104.

As to Texas, the situation is well described and commented upon by Professor Seavey.<sup>75</sup> A Texas Court of Civil Appeals had denied existence of a right of privacy in Texas, saying:

Our Texas courts are limited to the enforcement of rights under the common law as it existed on January 20, 1840, unless changed, modified, added to or repealed by statute. . . . The right of privacy as such not being recognized under the common law, as it existed when we adopted it, and our Legislature not having given such right by statute, no recovery can be had in Texas under the facts in this record.<sup>76</sup>

This assumes that the common law received in America was a body of rules, rather than of starting points for legal reasoning. As Professor Seavey aptly puts it:

Anglo-American judicial theory of torts is based upon a broad principle, analogous to that stated in the codes of civil law countries, that compensation is to be given for harm caused by another whenever it is just as between the parties that this should be done.<sup>77</sup>

This alone makes it possible for the legal order to keep abreast of its tasks in a changing world.

In Wisconsin the question as to a legal right of privacy arose in 1936, when it was received outside of Georgia only in Kansas, Kentucky, and Louisiana, and was denied in New York, and Rhode Island, and supposedly in Michigan. Defendant, which had a small unpaid account against the plaintiff, caused a flaming orange hand bill to be printed and distributed stating: "Accounts for sale. The following accounts are offered by the undersigned as agents for sale to the highest bidder." It gave the name and address of plaintiff and twenty-three others and stated the amount of plaintiff's debt as \$4.23. It was held that there was no cause of action for libel stated and the court considered that if one was to be created for such cases it should be done by the legislature.<sup>78</sup>

In Nebraska the issue arose in 1955. Following the pattern of Rhode Island, Texas, and Wisconsin, the court refused to change the common law as received from England, reserving the creation of new rights to the legislature.<sup>79</sup>

---

75. Seavey, *Can Texas Courts Protect Newly-Discovered Interests?*, 31 TEXAS L. REV. 309 (1931).

76. *Milner v. Red River Valley Publishing Co.*, 249 S.W.2d 227, 229 (Tex. Civ. App. 1952).

77. Seavey, *Can Texas Courts Protect Newly-Discovered Interests?*, 31 TEXAS L. REV. 311 (1931).

78. *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936).

79. *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955).

NATURE OF THE NEW RIGHT: ITS PLACE IN A COMMUNITY  
OF COMPETING INTERESTS

Granted that there is now a common-law tort of invasion of privacy, what is its exact nature and what are its limitations? Prosser considers that it is a complex of four distinct wrongs: (1) intrusion on plaintiff's physical solitude or seclusion, as by invading his quarters or tapping his telephone wires; (2) publicity which violates the ordinary decencies given to private information about the plaintiff even though it may be true and no action would lie for defamation; (3) putting the plaintiff in a false but not necessarily defamatory position in the public eye; and (4) appropriation of some element of the plaintiff's personality for a commercial use.<sup>80</sup> Harper and James consider it "a catchall for a great number of cases in which mental suffering or other emotional distress was the primary injury sustained and for which no other substantive theory for relief was available."<sup>81</sup> Is not the development of the right of privacy a working out of the securing of individual personality?

How to adjust or reconcile the conflicting interests which must be considered in securing privacy is the real problem. We have always first to keep in mind the social interest in the general security. We have seen above how the general security calls for finger printing and photographing of accused persons who may escape before conviction and yet have a just claim not to have finger prints and photographs in rogues' galleries when they are acquitted.<sup>82</sup> Again, the public health may call for the advancement of medical knowledge. But it is quite possible to meet the exigencies of this interest and spare the victim of a shocking accident or harrowing disease a distressing publicity not necessary for medical record.<sup>83</sup> A public interest in general information, strong in a democratic polity, may call for full news of doings and events in relation to political conditions and controversies, which nevertheless may not justify involuntary publication of unpublished views of private individuals seeking only to be let alone.

Friedmann warns us that the law must respond to social changes if it is to fulfill its function as a paramount instrument of social order.<sup>84</sup> Prosser speaks of "new torts," recognized to meet conditions of life in the increasingly complex social order of today.<sup>85</sup> In the past the objection has been raised, when adjustment of legal liability to changed social con-

80. PROSSER, TORTS 637-39 (2d ed. 1955).

81. 1 HARPER & JAMES, TORTS 683-84 (1956).

82. *McGovern v. Van Riper*, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945). See note 44 *supra* and accompanying text.

83. *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930).

84. FRIEDMANN, LAW IN A CHANGING SOCIETY ix (1959).

85. PROSSER, TORTS 3 (2d ed. 1955).

ditions was urged, that such adjustment would have the effect of producing a "flood of litigation" beyond the power of the courts to control. The answer to this was given by Lord Holt in the famous case of *Ashby v. White*: "And it is no objection to say, that it will occasion multiplicity of action; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense."<sup>86</sup> Moreover, as to the bearing of the fourteenth amendment, the limitations upon liberty which recognition of a right of privacy imposes have to be weighed by the same measure in judicial fixing of the content and limits of the right. From any standpoint the limits and application of the legal right must be reasonable.

A leading case on competition of the individual interest in being let alone and a public interest in news and stories of unusual or striking personalities calls for special notice.<sup>87</sup> Here a former child prodigy, William James Sidis, who at the age of eleven had been able to discuss four-dimensional bodies with distinguished mathematicians, graduated from Harvard at sixteen, and for a time attracted much deserved notice, came to dislike publicity, strove to live unobtrusively, and for many years succeeded in his desire to be let alone. But twenty-seven years after graduation he was discovered by a news writer in his lodging in "a hall bedroom of Boston's shabby south end" and written up in a series of sketches of current and past personalities under the title "Where Are They Now?" The article on Sidis was given the sub-title "April Fool," his birthday having been the first of April; whether to show that as a child he had fooled the public into taking him for a prodigy or that he had fooled himself in belief that he could escape unwelcome notoriety does not appear. In addition, an advertisement published in a newspaper read: "Out Today. Harvard Prodigy. Biography of the man who astonished Harvard at the age of 11. Where are they now?" It was not contended that what was said in the article or in the advertisement was untrue. "But," the court adds,

the article is merciless in its dissection of intimate details of its subject's personal life, and this in company with elaborate accounts of Sidis' passion for privacy and the pitiable lengths to which he has gone in order to avoid public scrutiny . . . may be fairly described as a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life.<sup>88</sup>

One would feel better about this case if the author of the article had exercised what Mr. Dooley called "gintilminly resthraint."

Elsewhere I have said of this case, that as the injury was mental and

86. 2 Ld. Raym. 938, 955, 92 Eng. Rep. 126, 137 (K.B. 1792).

87. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (1940).

88. *Id.* at 807-08.

subjective, although it produced suffering more acute than that produced by a mere bodily injury, legal scrutiny of the interest must be confined to ordinary sensibilities. "Here, as in many other cases, in a weighing of interests the over-sensitive must give way."<sup>89</sup> But as I reread this case I have an uneasy feeling that we may have to curb to some extent the zeal of column writers and producers of news reels to bring forth (to them) profitable products at the expense of the timid who lack self assertion and shrink from avoidable publicity. The needless slaughter of a bull fight need not be an analogy for the purveyor of readable items of news.

A legal right of privacy has been established in America by reason applied to experience, and has become adjusted to and made compatible with other rationally discovered and developed interests by like application of reason to experience. The principle and its derivatives are clear. There remains a task for further development of details of a doctrine which must grow with increasing pressure of population and devising of apparatus of publicity in a crowded world.

#### THE FOURTEENTH AMENDMENT AND THE RIGHT OF PRIVACY

What long stood in the way of recognition of a right of privacy was its departure from the analogy upon and about which our common law of torts had developed, namely, the attack by one man upon another recited in the old writ of trespass *vi et armis*. As short a time ago as 1861 a great judge laid down the rule that the law did not pretend to redress mental pain "when the unlawful act . . . causes that alone."<sup>90</sup> But in the "endless race between the law and social change,"<sup>91</sup> application of reason to experience has led the law to see and recognize a wrong of intentionally inflicting mental suffering. The right here is limited to the person,<sup>92</sup> and does not attach to a child too young to suffer mental distress,<sup>93</sup> or to a corporation.<sup>94</sup> The right was discovered by reason, developed by reason, and is limited by reason. Thus it is within the limits of the fourteenth amendment, which forbids deprivation of the full freedom of one who acts, otherwise than by due process of law, that is, without due reason.

That amendment is declaratory of a fundamental proposition of what may justly be called natural law. What it comes to is that all interference by government with the natural freedom of the individual human

89. 3 POUND, JURISPRUDENCE 58 (1959).

90. Lord Wensleydale, in *Lynch v. Knight*, 9 H.L. Cas. 577, 598, 11 Eng. Rep. 854, 863 (1861).

91. FRIEDMANN, LAW IN A CHANGING SOCIETY ch. 1 (1959).

92. *Lawrence v. Ylla*, 184 Misc. 807, 55 N.Y.S.2d 343 (Sup. Ct. 1949).

93. *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930).

94. *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S.W.2d 369 (1943).

being is to be based upon a reasoned adjustment of relations and measuring of conduct. No one is to be restrained in his full and free exercise of his natural powers except upon a reasoned weighing of the interests involved. For our present purpose, the constitutional proposition was summed up by Mr. Justice Cardozo when he said that the phrase "due process of law" exacts all that is "implicit in the concept of ordered liberty."<sup>95</sup> What the fourteenth amendment demands of the courts in the recognition and enforcement of individual rights was well put by Mr. Justice Frankfurter in *Wolf v. Colorado*:

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society.<sup>96</sup>

Subsequent reflection by the Court on what was decided in that case does not affect the soundness of this proposition. Indeed, in *Mapp v. Ohio* the Court said:<sup>97</sup>

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be a "form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

A right discovered by reason, developed and shaped in its applications by reason, and held by judicial adjustment to the whole system of recognized legal rights by critical reasoning involves no quarrel with the fourteenth amendment.

---

95. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

96. 338 U.S. 25, 27 (1949).

97. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).