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The Right of Privacy To-Day

Roy Mitchell Moreland
University of Kentucky

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THE RIGHT OF PRIVACY TO-DAY

Forty years ago a paper entitled "The Right To Privacy"[1] appeared in the Harvard Law Review.[2] In that article, which has been called one of the classical examples of creative juristic effort,[3] the right to privacy, a new category in the law of torts, was suggested. The article became the fountain-head of discussion, comment, criticism, litigation, and even legislation. Forty years having passed, perhaps the time has now arrived for a re-examination of "this new chapter in the law of torts,"[4] sufficient decisions involving the right having been made to justify such an examination.

It is the purpose of this paper to make such a study. An analysis of the problem will be attempted, and the leading cases will be examined at length. Although it will be necessary to inquire into the substantive right of privacy, the emphasis will be placed upon the remedial side of the problem. This latter question will involve a consideration of whether equity protects personal rights as such, in the absence of a property right, upon which to base the relief. In connection with this question it will be found fitting to inquire whether, if the substantive right itself has been able in some jurisdictions in these forty years to

[1] The following citations will be found helpful in a consideration of this problem: The Right To Privacy, Warren and Brandeis, 4 Har. L. Rev. 193; The Right of Privacy, Ragland, 17 Ky. L. J. 85; The Right To Privacy Today, note, 43 Har. L. Rev. 297; The Right of Privacy, and Its Relation to the Law of Libel, Adams, 39 Am. L. Rev. 37; Right of Privacy and Equity Relief, Edwards, 55 Cent. L. J. 123; 3 Mich. L. Rev. 559; 2 Col. L. Rev. 437.

[2] 4 Har. L. Rev. 193.

[3] "What may almost be called the classical example (*of creative activity*) is the paper on the Right of Privacy in which Mr. Justice Brandeis, then at the bar, was a collaborator. A bit of juristic reasoning on the analogy of the legal rights that secure other interests of personality, showing that there was an interest or claim to privacy as a part of personality, and postulating a legal order that secures personality completely, created first discussion, then a conflict of decisions, and finally through decision or statute, a new chapter in the law of torts." Pound, Interpretations of Legal History, 137.

[4] *Ibid.*

acquire an independent status, apart from those fictions which attend the early development of any branch of the law, the time has not come when the remedial phase of the problem should be relieved in a similar manner of its fictional encumbrances.

Let us suppose that a court of equity is confronted with a request for an injunction based upon a violation of the "right of privacy." There are several questions which the court will find it necessary to consider in deciding the case. An analysis of these questions will aid us in a consideration of the problem. These questions are, first, *Is there such a thing as a substantive right of privacy, which finds any sort of protection in our law?* If the court answers this question in the affirmative, it is then necessary to consider, second, *Will equity lend its aid in protecting this right by injunction?* The answer to the second question is dependent upon several points:

1. *Is the remedy at law adequate?*
2. *Is it necessary that a property right be involved?*
3. *Is it expedient to grant relief by injunction?*

I. *Is there such a thing as a substantive right of privacy, which finds any sort of protection in our law?*

(a) *Recognition of the substantive right at law.*

It may be stated that in a few states there is such a thing as a substantive right of privacy the violation of which gives rise to a tort action for damages. While the actual cases which decide the question are relatively few in number and come from few jurisdictions they accept the right and cannot in any sense be summarily dismissed as sports. On the other hand, a few jurisdictions have definitely rejected the right as unknown to the common law. Most states have not, as yet, passed upon the question.

For convenience, the discussion of the cases which accept or reject the substantive right will be considered as follows:

(1) Cases which accept the right and reasons therefor.
(2) Cases which reject the right and reasons therefor.

Apparently, four jurisdictions have accorded the right of privacy a common law standing—Georgia in 1905 and again in 1924, Kentucky in 1909 and again in 1912 and 1927, Missouri

in 1911 and Kansas in 1918. Louisiana, a civil law state, recognized the right in 1905. Four states have definitely refused to accept it as a common law substantive right—Michigan in 1899, New York in 1902, Rhode Island in 1909 and Washington in 1911.

These decisions and the courts' reasons for the acceptance or rejection of the right will now be examined.

(1) Cases which accept the right and the reasons therefor.

In *Pavesich* v. *New England Life Ins. Co.*[5] the petition contained two counts, one for a libel, and the other for a violation of the plaintiff's right of privacy. The court considered that the plaintiff was entitled to have the question of libel submitted to the jury. The court further considered that the right of privacy count was not subject to a general demurrer as not setting forth a cause of action. The decision cannot be taken as other than a complete recognition of the substantive right of privacy, and has been consistently accepted as such by the courts.

The facts of the case are interesting. The defendants published a likeness of the plaintiff, which would be easily recognized by his friends and acquaintances, in a newspaper as a part of an insurance advertisement. Above the picture were the words: "Do it now. The man who did." By the side of the plaintiff's picture was the likeness of an ill-dressed and sickly looking person. Above this picture were the words: "Do it while you can. The man who didn't." Below the two pictures were the words: "These two pictures tell their own story." The plaintiff's name was not used. The picture of the plaintiff had been obtained from a photographer without plaintiff's consent or knowledge. The court might have considered breach of trust, but this was not alleged, and the court faced squarely the count for the violation of the right of privacy, which was before it.

The rationale of the court's decision is not difficult. It considered that a right of privacy is a right derived from natural law,[6] "recognized by the principles of municipal law and

[5] 122 Ga. 190, 50 S. E. 68 (1905). See comments on the case, 3 Mich. L. Rev. 559; 18 Har. L. Rev. 625.

[6] "The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is

guaranteed to persons in this state both by the Constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law."[7] What about the natural law[8] as a repository of legal principles? Of course change or growth in the law must come from some source other than by legislative enactment if there is to be appreciable progress. It was at one time thought that such growth came by way of natural law, a superior body of legal principles, into which judges could dip to correct and supplement the existing law. The present view is to consider the common law as sufficiently flexible to adapt itself to a changing world, to adjust itself to and recognize those rights which a proper consideration of history, custom and the demands of social, economic and moral progress require.[9] The

not presumed to surrender all those rights, and the public has no more right without his consent, to invade the domain of those rights which it is necessarily to be presumed that he has reserved, than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents an encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law." Id. 69.

[7] *Id.* 71.

[8] "Natural law, the great agency of juristic development of law, is a fiction of a superior body of legal principles, existing in reason, of which the actual body of law is but an imperfect reflection and by which, therefore, the actual law may be corrected and supplemented. The theory is an expression of the jurisconsult's desire to improve and to add to the existing legal materials, in order to achieve definite ends in litigation, without impairing confidence in the law as of unchallengeable authority and in such a way as to persuade tribunals to accept his results." Pound, Interpretations of Legal History, 133.

[9] "The materials which the court will first examine in its search for the rule to be applied are prior judicial decisions. If it finds an applicable precedent, it will ordinarily determine the controversy accordingly; if it can find no previous adjudication on all fours with the case in hand, it will try to ascertain whether any available decisions have sufficient elements in common with it to require or justify an application of the rule used therein. If it finds a precedent squarely in point or applicable by analogy, but determines nevertheless that it ought not to be followed, or if it finds no pertinent precedent, it ought to and generally will, decide the case as it believes a proper consideration of history, custom, morals, and sound public policy require. Obviously in this process it does and must resort not only to judicial decisions of non-common law courts, but also to non-legal materials; it gives due weight, in so far as it is able, to the known truths of all the sciences

relation between the common law and natural law is a problem for the philosophically inclined, but to say the least natural law as a basis for the recognition of rights, has fallen into disfavor.

Itzkovitch v. *Whitaker*[10] decided the same year in Louisiana, which has inherited the civil law instead of the common law of England, held that an injunction would be granted to restrain a police officer from placing in the rogues' gallery the photograph of a prisoner not convicted of crime, who alleged that he was innocent and an honest citizen. The court said:[11]

"Every one who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute. It must be said that there is some limit to this right, which it is not necessary to discuss in this case. A person may be arrested, imprisoned, and acquitted, without right to damages. All of this is true, but it bears no application to the issue in hand. Where a person is not guilty, is honest (and that is the only light upon which to consider this case with the issues before us) he may obtain an injunction to prevent his photograph from being sent to the rogues' gallery. He has the personal right to the restraining order, at least for the time being. The theory in opposition to this view is substantially that the picture should be taken and exhibited for the public good. There can be no public good subserved by taking the photograph of an honest man for the purpose before mentioned. The court had jurisdiction to issue the preliminary injunction, and to make it perpetual if the evidence justifies the decree."

It is interesting to consider whether several paragraphs near the end of the opinion in the case affect or limit the above statement. At that point the court said:

"There are decisions of recent date on the subject of the 'law of privacy,' especially *Roberson* v. *Rochester Folding Box Co.*, (N. Y.) 64 N. E. 442. . . . . The decisions to which it has given rise are lengthy and interesting. We have read them only to arrive at the conclusion that *they are not germane to the subject to which we have here given attention.*" (Italics are ours.)

The language quoted first from the opinion would indicate that the court had considered the right of privacy germane to the subject under discussion. Consequently this language coming later in the same opinion is confusing. When the case

affecting human experience and human conduct. The resort to non-legal materials is not confined to the solution of common law problems; it is made, though perhaps to a less degree, in the interpretation and application of statutes." Morgan, The Study of Law, Chapter II, Nature And Sources of Law, at page 29.

[10] 115 La. 479, 39 So. 499 (1905).

[11] *Id.* 500.

was before the court again eleven months later[12] the right of privacy, as such, was not mentioned. The court did say at that time that rights exclusively personal could be protected by injunction and affirmed its position that placing the picture of one accused but not convicted of crime in the rogues' gallery, should be enjoined.

Apparently the court by its language merely meant that cases like *Roberson* v. *Rochester Folding Box Co.,* which denied relief, were not in point with *Itzovitch* v. *Whitaker,* where relief, in the opinion of the court, should be given. At least, the same court in the subsequent case of *Schulman* v. *Whitaker,*[13] which involved like facts, and was written by the same judge, speaking for the court, once more gave relief. The opinions, poorly written as they are, seem to recognize the right of privacy, and there are others who have been in accord with the writer in this conclusion.[14] The rationale of the court's decision in the Pavesich case is not difficult, since the court attempted to reason out a justification for the protection of the right of privacy. This was not done in the Itzkovitch case. The court's reasons for protecting the right are not stated and so are unknown.

The first Kentucky case to recognize the right of privacy was *Foster-Milburn Co. v. Chinn.*[15] The defendant published in an advertising pamphlet a forged testimonial of a patent medicine purported to be signed by the plaintiff, Col. J. P. Chinn, a prominent resident of Harrodsburg, Kentucky. It read: "I join in endorsing Doan's Kidney Pills. . . . . A few boxes effectually routed my ailment, and I am glad to acknowledge the benefit I have derived." Col. Chinn's picture was also

[12] 117 La. 708, 42 So. 228 (1906).

[13] 115 La. 628, 39 So. 737 (1905), 117 La. 704, 42 So. 227 (1906).

[14] See, for example, 43 Har. L. Rev. 297, 298 (1929). Accord, 17 Ky. L. J. 85, 104, where Prof. Ragland Says: "While not all of these cases have been placed squarely on the right of privacy, and while it has been doubted whether any of them should have been so placed, it is undeniable that some of the more important of them were so placed by the courts."

[15] 134 Ky. 424, 120 S. W. 364 (1909). The case was before the Court of Appeals again in 137 Ky. 843, 127 S. W. 476 (1910). The Foster-Milburn Company refused to pay the judgment. Suit was brought in the Federal Court at Buffalo, N. Y. and the decision of the Kentucky Court of Appeals was sustained, 195 Fed. 158 (1912). The defendant took an appeal to the Circuit Court of Appeals, where the judgment was again upheld, 202 Fed. 175 (1913). For a discussion of the case see Smith, 4 Ky. L. J. No. 3, 22; Wigmore, 4 Ky. L. J. No. 8, 3.

used. There was a notorious custom of selling such testimonials and Col. Chinn spurred by the raillery of his friends and the insinuations of his enemies was highly indignant. He brought suit asking for $25,000 damages, charging that he had neither written, signed nor authorized the testimonial nor the publication of his picture and that it had brought him into ridicule and otherwise damaged him. The court held that it was a question for the jury to determine whether the plaintiff had been subjected to disgrace, ridicule, odium or contempt. If the jury so found, it would follow that there was a libel and damages would lie. But the court went further and held that the plaintff could recover although the jury might find that he had not been subjected to disgrace, ridicule, odium or contempt, because of a violation of his right of privacy, where recovery may be had without proof of special damages. This distinction between libel and the right of privacy should be emphasized. As pointed out by the authors in the original article in the Harvard Law Review, an action of tort for damages lies in all cases for violation of the right of privacy without showing special damages.[16] In order for the plaintiff to recover in libel

[16] It is necessary to keep in mind that special damages may be of two kinds. In the one case special damages must be shown before there is a substantive right of action; in the other case, and this is the usual use of the phrase, special damages are additional damages over the ordinary loss which plaintiff has suffered. It is to special damages as a necessary element in the substantive right of action to which reference is here made rather than as "additional damages." The difference in the two kinds of special damages is shown by the following extracts:

"In fact special damages may be of two kinds: First, in certain classes of cases, such damages must be shown in order that there be any substantive right of action at all, as for instance in certain forms of slander; and, second, in the ordinary case above stated, where additional damages over the ordinary loss which is presumed are being claimed by the plaintiff." Clark on Code Pleading, page 228.

"SLANDER AND LIBEL. . . . Where the defamatory words are considered, by reason of their serious nature, to be 'actionable per se' it is not necessary to set forth special damages in order to recover; but, where the words are not actionable per se the special loss to the plaintiff must be alleged with particularity." *Ibid.* page 217.

See also the following statement:

"But even in these jurisdictions the plaintiffs could not have recovered for since the publication was not libelous per se, special damages had to be proved." 41 Har. L. Rev. 1071.

See, also, the following:

"SPECIAL DAMAGES DEFINED. Special damages are such as the law

in the principal case which is not a case of libel per se, it would be necessary to show that he had been subjected to ridicule, contempt or odium. This would not be necessary to recover for a violation of the right of privacy. Simply to show that the testimonial was published without his consent for the exploitation of the defendant's business would be sufficient. It follows that the plaintiff could recover for a violation of the right of privacy where a libel did not exist. *A fortiori* a recognition of the right of privacy as a substantive right marks an extension of the law in the protection of full personality. The value of this case which explicitly recognizes the right is thus apparent.

The extension in the protection of full personality which the right of privacy gives, not given under the existing law of libel where truth is a defense, is further illustrated in the subsequent Kentucky case of *Brents* v. *Morgan*.[17] In that case defendant caused a notice five feet by eight feet to be placed in a show window stating that "Dr. 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 not actionable as a libel since truth is a defense in Kentucky. But the court held that it was a violation of Dr. Morgan's right of privacy for which an action could be sustained

will not infer from the nature of the words themselves; they must therefore be especially claimed in the pleadings, and evidence of them must be given at the trial. Such damages depend upon the special circumstances of the case, upon the plaintiff's position and upon the conduct of third parties. In some cases special damages is a necessary element in the cause of action. When on the face of them the words used by the defendant clearly must have injured the plaintiff's reputation, they are said to be actionable in themselves; and the plaintiff may recover a verdict for a substantial amount without giving any evidence of actual pecuniary loss. But where the words are not on the face of them such as the law will presume to be necessarily prejudicial to a person's reputation, evidence must be given to show that as a matter of fact some appreciable injury has followed from their use. The injury to the plaintiff's reputation is the gist of the action; he must show that his character has suffered through the defendant's false assertions; and where there is no presumption in his favor, he can only show this by giving evidence of some special damage." Newell on Slander and Libel, 2nd ed. page 849.

[17] 221 Ky. 765, 299 S. W. 967 (1927). See comments on the case, 13 Corn. L. Q. 469; 41 Har. L. Rev. 1070; 23 Ill. L. Rev. 295; 16 Ky. L. J. 364; 26 Mich. L. Rev. 682; 12 Minn. L. Rev. 426; 1 So. Cal. L. Rev. 293; 6 Tenn. L. Rev. 291; 14 Va. L. Rev. 652; 37 Yale L. J. 835.

for damages. Here then, is a further illustration of the fact that the substantive right of privacy gives relief in certain cases, where recovery for a libel is impossible.

It remains to discuss the basis for the protection of the right of privacy in Kentucky. In the Foster-Milburn case the court cited the Pavesich case as sole authority. No further attempt to justify the decision was made except to say that the publication of such a testimonial was a fraud on both the public and the plaintiff. But in the Brents case the court in a lucid, logical opinion, made a real attempt to rationalize the holding. The court remarked that a new right, the right of privacy, had been developed in the last few years, which while not yet capable of concrete definition, was generally recognized as the right to be let alone, to be free from unwarranted publicity in matters with which the public is not necessarily concerned. The opinion then states that the rule or principles upon which it is based are stated in the original article in the Harvard Law Review. In other words the court adopted the reasons for the protection of the right suggested by Warren and Brandeis.[18]

Missouri recognized the right of privacy in 1911 in *Munden* v. *Harris*.[19] This is another "picture ad" case and would add little to the discussion were it not for the fact that the opinion illustrates the inability of some courts to distinguish between the recognition of the substantive right and the problem of devising remedies to protect the right. A court could well recognize the right and give damages for its breach by way of remedy, but refuse because of lack of precedent, to give an injunction by way of remedy, since no property right was involved.

[18] See also the Kentucky case, *Douglas* v. *Stokes*, 149 Ky. 506, 149 S. W. 849 (1912), where a photographer was held liable for using a photograph of plaintiff's dead malformed child contrary to agreement. Apparently there are two grounds for this dicision—the violation of a contractual obligation and a violation of the right of privacy. The court considered that if the publication of a photograph of the living was actionable the same rule should apply to the publication of a photograph of the dead. The case is especially interesting in that it gives a right of action to the parents of the dead child—the right is generally considered to be personal and to die with the individual. But this court evidently considered that the parents as well as the child had a right of privacy which had been violated. This indicates that there are separate rights—one "to the individual and another to the parents." On this phase of the case see, Ragland op. cit. *supra*, note 14, at 103.

[19] 153 Mo. App. 652, 134 S. W. 1076 (1911).

Overlooking this fact, courts are sometimes doubtful whether there is a substantive right of privacy in a case where there is no "property right" to be protected. To repeat, this is an error, since the court can well recognize the substantive right of privacy and give damages for its violation without searching for some fictional or real property right upon which to base the result. Law courts have long protected personal as well as property rights. But when a court faces the further question, whether equity will protect the right by way of injunction this question must be met and answered, for it is the theory that equity protects only property rights. To state it differently, the question whether there is a property right to be protected will be met only where an injunction is asked and should not be a problem for the court where damages alone are asked.

That was the situation in the Munden case. The plaintiff asked for damages alone. There were two counts, one for libel and one for the disturbance of the right of privacy. The defendant demurred to the right of privacy count on the ground that there was no property right to be protected—that the law does not afford redress for an invasion by one person of another's privacy, unless it is accompanied by some injury to his property. Although the plaintiff did not ask for an injunction the court considered that this objection must be met and found a property right in one's picture. This was unnecessary. The explanation of the error in the Munden case is likely due to the fact that the attorneys for the defendant argued that a property right was necessary, if damages were to be given, and the court was led off by the suggestion. This error on the part of the court makes the case of little value in the general problem of determining the reasons given by the courts for the protection of the substantive right of privacy.

Kansas recognized the right of privacy in 1918 in the case of *Kunz* v. *Allen*.[20] In that case the defendant caused moving pictures to be taken of the plaintiff without her permission while she was making some purchases in his store. These were later used to advertise his business in a local moving picture theatre. She asked damages. The court held that they should be allowed, and apparently based its decision on the authority of the Pave-

[20] 102 Kan. 883 172 Pac. 532 (1918).

sich and Munden cases,[21] not attempting to discuss the reasons for giving protection as an original matter.

Georgia, which had protected the right of privacy in 1905, affirmed its position by protecting the right again in 1925 in the case of *Byfield* v. *Candler*.[22] In that case the defendant entered the plaintiff's stateroom and sought to debauch her. The court instructed: "I charge you that this action is for assault and battery upon the plaintiff and not for entering the plaintiff's room." It was held that the court erred in giving this instruction, since a passenger upon a vessel is entitled to the privacy of her room. This right the court considered to be separate from his right to be free from assault. The importance of the decision rests in the recognition of the right of privacy as an independent right and not an interrelated one. The case not only recognizes the right of privacy, it recognizes its violation as a separate and distinct tort. No formal opinion was rendered in the case, and the "syllabus by the court" does not attempt to give the reasons of the court for the protection of the right. Had this been done it is likely that the court would have relied upon the reasons given in the earlier Georgia case in 1905. In that case, we have found,[23] the court considered that the right of privacy is a right derived from the natural law.

After a consideration of the rationale of the decisions in the five states which have recognized the right of privacy, one concludes that little has been added to the reasons originally given for the recognition of the right by Warren and Brandeis. The Pavesich case suggests the natural law as the basis of the right. The Louisiana cases do not attempt to give reasons for the results reached. The Foster-Milburn case in Kentucky cites the Pavesich case as sole authority. But the subsequent Kentucky case of *Brents* v. *Morgan*, which seeks to make a real attempt to rationalize the holding states that the principles upon which the right of privacy rests are stated in the original article in the Harvard Law Review. Apparently Kentucky has adopted the reasons suggested by Warren and Brandeis. The Missouri case appears to rest upon the irrelevant issue of protection of

[21] Notes 5 and 19, respectively.
[22] 160 Ga. 732, 125 S. E. 905 (1924). Commented on in 10 Minn. Law Rev. 55.
[23] See note 6 *supra*.

property rights. The Kansas case is apparently based upon the authority of the Pavesich and Munden cases, and there is no attempt to discuss the reasons for giving protection as an original matter. With the exception of the doubtful basis of the decision in the Pavesich case, little has been added to the reasons suggested in the original article for the recognition of the right. Since that is true, those reasons will now be examined.

The thesis of the original article [24] was that the individual is entitled to an inviolate personality. This, the authors pointed out, had been partly gained by the protection which the law had given from physical battery in its various forms, and then successively, in addition, from assault, from nuisance, and finally from slander and libel. Starting with protection of the physical only, the law had progressed step by step. But sufficient progress had not yet been made, it was contended. The actions of slander and libel, based upon injury to reputation rather than upon injury to the individual's feelings or his lowered estimate of himself, were not a sufficient protection in many cases.

For some of these additional aspects of a full personality, the law had already attempted to vouchsafe its protection. This had been done by giving protection to thoughts, sentiments and emotions, expressed through the medium of writing or the arts. For example, the law protected private letters, whether or not they possessed literary value. But superficially, relief was granted under the guise of protecting things material. In reality, however, in many instances the objects of this protection were non-material in nature. Indeed, such things as emotions, feelings, in a word the intangible attributes of the higher man, were the actual recipients of protection.

The difference was between form and substance. In form the law had not departed from its established channel of protecting only material objects; in substance it had undergone an extension commensurate in character with the desire of people generally to "keep open the opportunity for more abundant life," by emphasizing the intangible qualities of personality. Although the courts continued to render "lip service" to protection of material things only, as a fact they were protecting the immaterial. In a word, the process was characteristically fic-

[24] 4 Har. L. Rev. 193.

tional—the law was protecting new things under established modes. It was suggested that the time to drop such fictions had arrived and that the courts should protect personality as such. What the courts had really been doing was protecting the right of privacy although refusing to do so in name. To recognize it in name would not call for the formulation of a new principle.

Thus by analogy, it was shown that the right of privacy had already been recognized, although not as such. It was suggested that the time had now come to recognize it as such and to extend it to the protection of the personal appearance, sayings, acts, etc., of the individual, and to personal relations, domestic or otherwise.

To summarize, it would appear that the protection of the right of privacy is based largely upon the following reasons:

(1) The principle of the right of privacy has already been recognized in the past through legal fictions. It should be expressly recognized and extended where necessary to give the individual an inviolate personality. This development of the law is necessary. An advancing civilization brings heightening susceptibility to injuries other than the strictly physical. Recent inventions and business practices give increased opportunity for, and instances of, the infliction of such injuries. The common law, flexible to meet the needs of this advancing civilization, must take another step and protect the individual in his right "to be let alone."

(2) The Pavesich case[25] adds that the right of privacy is a right derived from the natural law.

The decisions in the states which refuse to recognize the right of privacy will now be examined and an attempt made to determine the reasons of these courts for such refusal.

(2) Cases which reject the right, and reasons therefor.

Four states, Michigan, New York, Rhode Island and Washington have refused by decisions to accept the right of privacy.[26] Michigan led the way in 1899 in the case of *Atkinson* v. *Doherty*.[27] This was a suit in equity by the widow of Col. Atkinson, a well known lawyer and politician, to prevent the defendant, a manufacturer of cigars, from putting the "John Atkinson cigar" upon the market under a label bearing that name and a likeness of Col. Atkinson. An injunction was refused on the ground that there is no common law right of privacy. The case could have been decided on the ground that the

[25] Note 5.
[26] See also, *Corelli v. Wall*, 22 T. L. R. 532 (1906).
[27] 121 Mich. 372, 80 N. W. 285 (1899).

right of privacy is a personal right which dies with the individual, but the decision was not put upon this basis, and seems to be authority for the rejection of the right in its entirety. The decision is grounded upon the conclusion that an injury of this type not amounting to a libel or slander is remediless. For injuries to feelings alone, the court considered there is as yet no substantive relief, except in a few jurisdictions, where what is known as the "Texas rule" prevails. This rule the court felt to be a dangerous departure, not to be followed. So, in effect, the rationale of the decision seems to be that the right of privacy has not been recognized as a common law substantive right, and, in addition, that it should not be recognized as one, since the injury in such cases is essentially to the feelings, for which the law rightly allows, according to the prevailing rule, no action.

The leading case on the rejection of the right of privacy is the New York case, *Roberson* v. *Rochester Folding Box Co.*[28] The defendant published lithographed likenesses of the plaintiff without her consent upon posters advertising a certain brand of flour. These were conspicuously displayed in stores, saloons, and other public places. The posters were not alleged to be libelous, for in fact the likeness of the plaintiff was a good one, but she alleged that their display caused her great mental and physical distress. She asked for damages and for an injunction. Both were refused. This refusal was based upon two grounds:

1. Lack of precedent. The court considered that the "so-called right of privacy" had not as yet found an abiding place in the law and that it could not be incorporated without doing violence to long-settled principles.
2. The recognition of the right would bring about a vast amount of litigation.

The decision in the Roberson case was unpopular and was bitterly criticised in the press. As a direct result of the decision and its unpopularity, a statute on the subject was passed in New York within a year after the case had been decided. It may be found, Chapter 132 of the Laws of New York of 1903, page 308. The statute recognizes and enforces the right of a person to control the use of his name or portrait by others so far as advertising or trade purposes are concerned.

Rhode Island rejected the right of privacy in 1909 in the

[28] 171 N. Y. 538, 64 N. E. 442 (1902).

case of *Henry* v. *Cherry & Webb*.[29] The picture of the plaintiff was published without his consent as a part of a mercantile advertisement of automobile coats. The plaintiff was represented as apparently driving an automobile in which were seated several other persons all wearing such coats.

Beneath the picture was the statement that all persons in it were wearing auto coats of a certain quality and price. The declaration was in trespass *vi et armis*, but there was a specific allegation of a violation of the plaintiff's right of privacy, causing him great mental anguish. The defendant demurred. It was considered that this demurrer raised two questions of law:

> First. Has a person at common law a right designated as a "right of privacy," for the invasion of which an action for damages lies?
> Second. Is the unwarranted publication of a person's photograph for advertising purposes actionable at common law, where the only injury alleged is that of mental suffering?

Thus the right of privacy as a substantive common law right was placed squarely before the court for acceptance or rejection. The court squarely rejected it.

It is difficult to determine with exactitude the reasons for the decision. The court accepted the conclusion reached by the majority of the court in *Roberson v. Rochester Folding Box Co.*[30] that the right had not as yet found an abiding place in the law. In addition the court agreed with the case of *Atkinson* v, *Doherty*[31] that the action is essentially one for mental suffering alone and that the law as yet offers no relief for such injury. The basis of the decision in the Pavesich case[32] that the right of privacy is grounded upon natural law, was vigorously assailed and rejected as unsound. Apparently then, the case does not add anything by way of argument for the rejection of the right which had not already been given in the Roberson and Atkinson cases but it does contribute a penetrating analysis of the Pavesich case, rejecting the ground upon which it was decided.

In 1911 Washington rejected the right of privacy in the case of *Hillman* v. *Star Pub. Co.*[33] A newspaper published an

[29] 30 R. I. 13 73 Atl. 97 (1909). See comments in 9 Col. L. Rev. 641; 8 Mich. L. Rev. 221.
[30] 171 N. Y. 538, 64 N. E. 442 (1902).
[31] 121 Mich. 372, 80 N. W. 285 (1899).
[32] 122 Ga. 190, 50 S. E. 68 (1905).
[33] 64 Wash. 691, 117 Pac. 594 (1911).

article stating that the plaintiff's father was charged with the commission of a crime. In connection with the article, a photograph of the members of his family, including plaintiff, was published. Plaintiff asked for damages upon two grounds, statutory libel and a violation of her right of privacy. The defendant demurred. The lower court sustained the demurrer. The appellate court affirmed the judgment. The court's conclusion on the question of statutory libel has been strongly criticized.[34] The court refused to recognize the right of privacy as a substantive right, "not so much because a primary right may not exist, but because, in the absence of a statute, no fixed line between public and private character can be fixed." It is submitted that this conclusion is unsound. There is no invasion of personal privacy when the individual is a public character, it has been decided. It is admitted that the line between what constitutes a public and a private character is not a fixed and absolute one. But it is not an insuperable difficulty to determine it on the facts of a particular case in relation to a particular individual.

It is submitted, that the decision in its final analysis rests upon the fact that the court failed to find what it considered to be a sufficient precedent for a recognition of the right, although it did recognize that an injury had been committed. The court said:

> "The defense in this case is purely technical, a *call to precedent* as it has been established. A wrong is admitted, but it is said there is no remedy. We regret to say that this position is well taken. . . . We can only say that it is one of the ills that under the law cannot be redressed."

The decisions in the four states which refuse to recognize the right of privacy have been examined. Stripped of extraneous discussion, such refusal seems to be based upon the following reasons:

(1) The lack of precedent.
(2) The injury in such cases is essentially to the feelings, for which the law allows, according to the prevailing rule no recovery.
(3) The recognition of the right would bring about a vast amount of litigation.

These arguments will now be considereted in turn.

(1) *The lack of precedent.*

[34] 10 Mich. L. Rev. 335.

There are two approaches one may take in attempting to meet the objection that there is lack of precedent for a recognition of the right of privacy. One approach offers an answer to the objection by way of analogy. Analogous English cases had repeatedly set forth the basic rights which underlie the right of privacy. The original article by Warren and Brandeis pointed out these cases and urged that the law had no new principle to formulate when it extended its protection to cover the right of privacy. This position taken in the original article has been thus summarized by Dean Pound:[35]

"A bit of juristic reasoning on the analogy of the legal rights that secure other interests of personality, showing that there was an interest in or claim to privacy as a part of personality and postulating a legal order that secures personality completely, created. . . . a new chapter in the law of torts."

The above approach meets the objection defensively. It assumes that precedent of *some* kind *must* be found. Lip service is paid to precedent although it is apparent that in fact a new step has been taken in the law.

The second approach meets the objection aggressively. It may be boldly asserted that lack of precedent should not be a fatal cause for refusal to grant relief at the present day for a violation of privacy. This position, which was also suggested in the original article, is grounded on the proposition that "the beautiful capacity for growth which characterizes the common law,[36] should here manifest itself, and afford relief although heretofore relief has not been given. It is admitted that the right of privacy has no exact precedent in the common law, but nevertheless, it is urged that "political, social, and economic changes entail the recognition of new rights, and of new remedies to secure these rights, which the common law in its eternal youth expands to meet. Because of this growth, this continual adoption of new principles to meet new experience, the law never becomes entirely consistent and stable. Its roots reach back into the past, and its new blooms are budding, whilst yet the old wood is being sloughed off." [37]

The first approach is not new, for the books are full of

[35] Pound, Interpretations of Legal History, 137.
[36] 4 Har. L. Rev. 193, 195.
[37] 39 Amer. L. Rev. 37.

instances where analogies and fictions have been employed during a transition period to mask changes in the law. It was well for the authors of the original article to point out the analogous cases in order that too abrupt and novel a change in the law might not seem to be involved in a recognition of the suggested right. The second approach is more abrupt. It is true that the American rule of adherence to precedent is the safe rule and that departures from it should be the exception. But if the common law is to keep pace with a changing world exceptions *must* occur at intervals.[38]

The second reason for refusing to recognize the right of privacy will now be examined.

(2) *The injury in such cases is essentially to the feelings, for which the law allows, according to the prevailing rule, no recovery.*

The development of the law in giving relief for mental suffering where there is no physical impact has been slow and cautious. Where there is physical impact the law has long allowed recovery for mental suffering in connection with the physical injury. This has been true also in other situations where there was a separate right of action which might serve as a peg upon

[38] The following extract from the section on "Adherence To Precedent, in Judge Cardozo's book, *"The Nature of The Judicial Process,'* is illustrative of the attitude to be taken by the courts:

"There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. In such circumstances, the words of Wheeler, J., in *Dwy* v. *Connecticut Co.*, 89 Conn. 74, 99, express the tone and temper in which problems should be met: 'That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. *It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and should not be stationary. Changes of this character should not be left to the legislature.'* If judges have wofully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." (Italics are ours). Cardozo "The Nature of The Judicial Process" at page 151.

which to hang the element of mental suffering. Professor Goodrich in the leading article on the subject, cites several instances of these.[39] Having a right of action upon which to base relief, the courts are becoming more and more prone to allow mental suffering as a parasitic factor to be also considered as an element in determining damages. But all of these cases adhere to the rule of thumb requiring mental disturbance to be coupled with something else before redress is given. It is submitted that the time has come to allow recovery for mental disturbance where it is the sole element of damage. The trend has been gradually in that direction for some years; it only remains to mark out and limit the right.

One indication of the progress which has been made in this direction is shown in the cases where the mental shock complained of was inflicted intentionally. The better judicial view allows recovery where the wrong complained of is a wilful one intended to wound the feelings or from which such result should reasonably be anticipated.[40] But where the act is negligent rather than intentional, recovery is denied.[41] It would appear that most of the cases arising under the right of privacy will be cases where the mental suffering is caused by the defendant's negligence rather than by his wilful desire to inflict injury. Thus it is fairly difficult at the present stage of the development of the law to work out a recovery of substantial damages if it is admitted that the injury in right of privacy cases is essentially to the feelings, but the difficulty can be overcome. There are several channels of reasoning which will lead to that conclusion. The following modes of approach to the problem are submitted:

(1) The law has long allowed recovery for injury due to negligence where there is physical impact. But in the case where there was mental suffering without physical impact, it was considered that there was no legal injury. As a matter of fact, it is now understood that mental suffering has a definite physical side. The physical results to a degree are the same as where a physical impact has actually occurred. In other words

[39] Goodrich, *"Emotional Disturbances as Legal Damage,"* 20 Mich. L. Rev. 497, 510.

[40] See cases cited in annotation 23 A. L. R. 361; see discussion, Pound, 28 Har. L. Rev. 343, 361.

[41] 23 A. L. R. 361, 365.

a physical disturbance is a concomitant of every mental disturbance. There is an illuminating discussion of the effect of mental suffering upon the physical organism by Dean Goodrich in the article in the Michigan Law Review to which attention has previously been called.[42] Therein he convincingly points out that mental disturbance as a purely mental thing does not exist. If this be recognized, it does not entail the acceptance of a new principle, to allow recovery for mental suffering. It would simply stamp as inaccurate, judicial language formulated at a time when no one knew as much as we now do about the human organism.

(2) The second method of approaching the problem is more abrupt than the one which has just been suggested. In giving relief for mental suffering when coupled with some other claim the law has already recognized the possession of a peaceful mental state as a subject for protection. The law should now take the next step, eliminate the parasitic element in recovery for mental disturbance, and give relief for mental suffering as such. This would be to disregard precedent to an extent and would serve as another instance of the growth of the common law in its effort to meet new conditions.

These approaches are not in conflict. To a certain extent they embrace the same elements. They are given as instances of suggested channels of thought to be followed in working out a recovery.

As a matter of fact, the hesitancy of the courts to award damages for mental disturbance as such has not been due to any great difficulty in finding a need for the protection of a peaceful mental state or of finding a channel of thought which would lead from the legal conception of injury consisting only of material, tangible harm to a conception which would include injury to the feelings and emotions. An injury to them is often more painful and more serious in its permanent results. Apart from historical precedent, the reasons for the protection of the one are as strong as those for the protection of the other in many cases. The problem has not been whether relief should be given for mental suffering. It has been the practical difficulty of the seeming lack of ability to estimate such injury, to

[42] n. 39 *supra*.

measure it so that an assessment of money damages would not be too purely guesswork.

There can be no doubt that this practical difficulty is present and must be faced. But it is not overwhelming. To meet this problem the court has the aid of trained physicians and mental experts in estimating the extent of the damage in a given case. They will also be invaluable in checkmating the imposter. The practical problems to be met in measuring the amount of injury, in preventing fraud and in limiting the extent of protection to be given so that the interests of the individual and those of society will be properly balanced, are not easy of solution; but it is submitted that they are not more difficult than those which the law meets in other instances, and that the need justifies the effort to solve them.[43]

The third reason given by the courts for refusing to recognize the right of privacy remains to be considered.

(3) *The recognition of the right would bring a vast amount of litigation.*

It would appear that this objection can be briefly dismissed with the question, What of it? It is the business of the courts to handle legitimate litigation. This objection in more or less degree can be raised in bar of every development in the law. If in our social progress, the time has come for the recognition of the right of privacy, the courts are in operation for the purpose of taking care of any litigation that may arise.

Nor need it be feared that a recognition of the right will open the floodgates to redress all petty annoyances. The courts will show the same good sense in limiting the right that they have shown in other instances. The judges who preside over our appellate courts are members of a conservative profession. There need be little apprehension that they will extend relief beyond the bounds of justice and expediency.[44]

The three objections to a recognition of the right of privacy given by the four states which refuse to accept the right have

[43] In addition to the authorities cited *supra*, see Bohlen, "*Studies In The Law of Torts*," chapter V, entitled "*Right to Recover for Injury Resulting From Negligence Without Impact.*"

[44] On the objection that a recognition of the right of privacy would open the floodgates of litigation see 17 Ky. L. J. 85, 94; 3 Mich. L. Rev. 559, 562. See also the discussion, 20 Mich. L. Rev. 497, 512.

been considered, and an attempt has been made to answer them. It is submitted that the objections are not insurmountable.

To summarize, it would seem from this study of the adjudications on the right of privacy, that the substantive right has been accepted by decision in five jurisdictions. The suggestion of the Georgia court in the Pavesich case,[45] that the right is based upon natural law, not being acceptable, the reasons given in the original article for its recognition remain the ones upon which the right is best grounded in the jurisdictions accepting it. The right of privacy as a substantive right has been rejected by decision in four jurisdictions on account of reasons which, it is submitted, have been found to be not insurmountable. While the right has been rather slow in gaining recognition, it has attained a new stimulus in recent years. In several instances it has been applied to situations other than the original stereotyped set of facts where the defendant was using the plaintiff's name or picture for commercial purposes without his consent. It fills a distinct need in the law, giving relief in certain cases where without a recognition of the right there would appear to be no remedy. Although the cases accepting the right are not large in number, they do indicate that it has vitality and should open the way to its further recognition.[46]

B. Recognition of the substantive right in equity.

Is it necessary for the right of privacy to be recognized as a substantive right which a law court will protect before equity can give relief? Some courts have apparently so considered.[47] It is submitted that equity can give relief regardless of the defendant's liability at law, recognizing a substantive right in equity where there is no substantive right, necessarily, at law.

In discussing this problem, Professor Chafee cites as an illustration, the following right of privacy hypothetical case:

"A young woman has been receiving marked attention from a man whom she dislikes. When she refuses to see him, he sends her letters, although she requests him to desist. The letters are annoying, insulting and defamatory. The police decline to act. She has no remedy at law for the man's conduct does not constitute libel in the absence of

[45] Note 5 *supra.*

[46] See *"The Right To Privacy Today,"* 43 Har. L. Rev. 297, 302 (1930).

[47] For citations see Chafee, *"Does Equity Follow The Law of Torts?"* 75 U. Pa. L. Rev. 1, note 20 on page 7.

publication, and her mental anguish does not in this jurisdiction, at least, entitle her to sue for damages. Unless she can obtain an injunction, she must endure an indefinite continuance of the correspondence. May equitable relief be granted?"[48]

This situation raises the question, Does equity necessarily follow the law of torts? Suppose no tort to the plaintiff has been committed. May equity nevertheless grant an injunction?

Equity assumes the existence of the legal system and rights created by it. When equity came into existence the law court was a going concern. In theory and largely in practice, it was not the purpose of equity to operate in conflict with the existing system and its established principles, but to supplement it by giving relief in meritorious situations where there was not an adequate relief at law. Such a theory does not prevent equity from recognizing new rights not recognized as substantive rights at law.

There are instances where equity has done this. Professor Chafee concludes "that in many kinds of torts the court of equity defines the liability for itself without any prior determination thereof at law, and in at least four classes of cases where the law courts have denied relief, injunctions have issued to protect a legal right, viz., (1) several situations in waste; (2) causing breach of contract without fraud or coercion, which is not actionable at law in some states; (3) removal of cloud on title where an action for slander of title will not lie; (4) wrongful expulsion from unincorporated associations."[49]

It is not the purpose of this article to discuss the question in detail. That has been ably accomplished by Professor Chafee in the University of Pennsylvania Law Review article already referred to. His conclusion that equity recognizes rights in situations where courts of law do not recognize the existence of substantive rights is abundantly supported by the cases.

II. Will equity lend its aid in protecting the right of privacy by injunction?

The first part of this study has dealt with the substantive right. It has been found that in a few states there is such a

[48] Chafee, op. cit. *supra* note 47, at page 6. This hypothetical case seems to be founded largely on the facts of *Williams* v. *O'Shaughnessy*, 172 N. Y. Supp. 574 (1918), discussed *infra*. See *infra*, at note 73.

[49] Chafee, op. cit. *supra* note 47 at page 27.

thing as a substantive right of privacy. The remedial side of the question remains to be considered.

There are two remedies for a violation of the right of privacy. An action of tort for damages lies at law for a violation of the right without a showing of special damages. The second remedy is a preventive one by the use of the injunction in equity.

Once the right is recognized at law in a particular jurisdiction, the tort remedy presents no further problems. But when equity is asked to lend its aid in protecting the right by the use of the injunction, additional difficulties are encountered. A jurisdiction may well recognize the substantive right and be willing to award damages for its violation but refuse in a court of equity to give the preventive relief of the injunction.

Courts have not always recognized this distinction. For example, in *Munden* v. *Harris*[50] discussed supra, although the action was for damages alone the defendant demurred to the right of privacy count on the ground that there was no property right to be protected and the court erroneously considered that this objection had to be met when in fact such a question could only arise when an injunction was asked for. Such failure to recognize the distinction by courts is sometimes due to a failure to properly analyze the problem, sometimes to a desire upon the part of the court not to have to face squarely the question whether there is a substantive right of privacy in the particular jurisdiction.

If the action is in a law court in tort for damages, the problem before the court is to determine whether that jurisdiction recognizes a substantive right of privacy. If it does and a violation has occurred damages will be awarded.

The problem is much more difficult when the suit is in equity and an injunction is asked. There, as in the law court, the first question to be considered by the court is whether a substantive right of privacy is recognized in that jurisdiction. If the court answers that question in the affirmative, it is necessary to consider second, whether equity will lend its aid in protecting this right.

It is in a consideration of this second question that the three problems now to be considered arise.

[50] Note 19 *supra*.

1. Is the remedy at law adequate?

The true test of equity jurisdiction is the existence of a legal right for which there is not a full, adequate, and complete remedy at law. *Chappell* v. *Stewart* [51] illustrates the inadequacy of the remedy at law in most right of privacy cases.

In that case the plaintiff alleged that the defendant had employed detectives to follow him and that this caused him great annoyance, interfered with his social standing, and injured his business and financial credit. The court sustained a demurrer to a bill for an injunction. Apparently the allegations as to business and financial standing were not sustained by the facts, for the court considered the case as one not involving property rights but merely an invasion of personal rights. The decision is based partly on the rule that equity protects only property rights and partly on the opinion of the court that the remedy at law is fully adequate to redress all injuries of this kind.

But damages is clearly inadequate to compensate for an injury of this character. Money is often small compensation for injuries to the feelings. As suggested by Dean Pound, the plaintiff may be, for example, a clergyman, a man of refined and sensitive feelings. "To suggest that damages under such circumstances would be an adequate remedy is to use the term 'adequate' in a Pickwickian sense or to attribute to the law unnecessary obliquity of vision."[52] In certain types of personal injuries, such for example, as threatened assault and battery, the remedy at law may be adequate. In many right of privacy cases it will be very inadequate.

2. Is it necessary that a property right be involved?

Most of the cases which have definitely by decision passed upon the right of privacy were actions for damages.[53] We have

[51] 82 Md. 323, 33 Atl. 542 (1896).

[52] Pound, *Equitable Relief Against Defamation And Injuries To Personality*, 29 Har. L. Rev. 640, 669.

[53] In the following cases the right to damages was recognized: *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. 364 (1909); *Brents* v. *Morgan*, 221 Ky. 765, 299 S. W. 967 (1927); *Douglas* v. *Stokes*, 149 Ky. 506, 149 S. W. 849 (1912); *Munden* v. *Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911); *Kunz* v. *Allen*, 102 Kan. 883, 172 Pac. 532 (1918); *Byfield* v. *Candler*, 160 Ga. 732, 125 S. E. 905 (1924).

In the following cases a recognition of the substantive right was refused: *Henry* v. *Cherry & Webb*, 30 R. I. 13, 73 Atl. 97 (1909); *Hillman* v. *Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911); *Roberson* v.

learned that damage cases should involve only a consideration of whether a substantive right is recognized in the jurisdiction and do not raise the question, Is there a property right involved? Such a question is not before the court unless an injunction is asked.

In only four cases in these nine states were injunctions asked. Those cases were *Itskovitch* v. *Whitaker,*[54] *Schulman* v. *Whitaker,*[55] *Atkinson* v. *Doherty,*[56] *and Roberson* v. *Rochester Folding Box Co.,*[57] in which last case both damages and an injunction were asked. These cases furnish no aid upon the problem whether a property right is necessary. The two Louisiana decisions assume the substantive right of privacy and the remedy by injunction without a discussion of the problem involved. In the other two cases, injunctions were refused upon the ground that there is no substantive right, eliminating any need of discussing the power of a court of equity to protect purely personal rights.

Since the decisions which have passed upon the right of privacy, as such, do not furnish aid upon the problem, it is necessary to look elsewhere.

Is the jurisdiction of equity confined to securing rights of property? In the past this has not even been considered a moot question, for since *Gee* v. *Pritchard*[58] courts of equity have considered that their jurisdiction was limited to the protection of rights of property, and that rights of personality were without the pale of relief. Although there is no substantial reason today for such limitation,[59] and although able writers have argued to the contrary, courts have been slow to reject the doctrine, generally insisting upon some element of a property interest, however trivial. This may have been due to a mere prejudice based upon "the dicta of a great judge in the pioneer case" or upon a haphazard development of the cases, but at any rate the rule became firmly entrenched in the law of equity and although modern judges have strained at the leash of prece-

Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902), a case where both damages and an injunction were asked for and both refused.

[54] 115 La. 479, 39 So. 499 (1905).

[55] 115 La. 628, 39 So. 737 (1905).

[56] 121 Mich. 372, 80 N. W. 285 (1899).

[57] 171 N. Y. 538, 64 N. E. 442 (1902).

[58] 2 Swanst. 402 (1818).

[59] Clark, *Principles of Equity*, 314.

dent to get away from it, it still remains to be overcome. The courts in seeking to evade the rule have stretched the term "property" to a point where it has a meaning much broader than any which would make it of value as a standard. Often the property right protected has been so nominal as to be actually illusory. Such an attitude shows that the rule will be discarded and there is undoubtedly a marked tendency in this direction; but there is as yet very little actual authority for giving injunctive relief where the sole damage consists of injury to personality.

All discussion on the problem runs back to the leading case of *Gee* v. *Pritchard.*[60] The defendant in that case was the illegitimate son of Mr. Gee. He had been reared by Mr. Gee and his wife, the plaintiff, in their home. During the lifetime of Mr. Gee relations, among the three were apparently not only friendly but affectionate. But as might be expected under the circumstances, the affection of the plaintiff was not very deeply rooted, and after the death of Mr. Gee her motherly interest in the defendant waned. This, coupled with a dissatisfaction upon the part of the defendant in the provision made for him in Mr. Gee's will, caused them to cease to be on friendly terms. Defendant threatened to publish letters which the plaintiff had written to him while a member of the family. The cause came on before Lord Eldon on a motion to dissolve an interlocutory injunction.

In a colloquy with counsel it was stated by counsel for the plaintiff that an attempt would be made to sustain the injunction on the ground that the publication would be painful to the feelings of the plaintiff, but Lord Eldon replied that he would relieve counsel from that argument since the injunction could "not be maintained on any principle of this sort" and that relief could only be rested upon a protection of rights of property. Since there had been no claim that the letters possessed any literary value there was no property right of value before the court. Lord Eldon was not satisfied that there was, but since Lord Hardwicke and Lord Apsley in previous decisions[61] had decided that there was a sufficient property right

[60] 2 Swanst. 402 (1818) 36 Eng. Rep. 670. For a splendid analysis of this case see Pound, 29 Har. L. Rev. 640, 642, and Long, 33 Yale L. J. 115, 122.

[61] *Pope* v. *Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (1741) letters from

in private letters to entitle them to protection, Lord Eldon, feeling bound by these prior decisions, granted the injunction. Thus the case presents a situation where the court expressly denies by dictum its power to protect purely personal rights as such, but does protect them indirectly grounding the injunction upon a fictional property right dug up out of precedent.

In reading the case as a whole, it is difficult to decide whether Lord Eldon's action was bold[62] in that he *consciously* secured the right of privacy indirectly where he could not secure it directly, or whether he was not an *unwilling* protector of the right, forced by precedent into an acceptance of the strained theory of property rights in private letters. Likely the proper conclusion is that equity at the time had no jurisdiction to secure interests of personality but it had recognized the theory of property rights in private letters. Lord Eldon simply enforced the law as he considered it was, and should neither be censured nor lauded for the indirect result of the decision. Whatever his attitude, the writer considers that his emphasis upon protection of property, so often repeated by subsequent chancellors, has done much to retard the protection of personal rights as such. In particular, subsequent courts have continued to apply the rule of the case as to private letters so that now, more than a hundred years after *Gee* v. *Pritchard,* it is the prevailing rule that the publication of private letters can be enjoined on the fanciful theory of protection of property rights.[63] Such a result is good but the reasoning which leads to it is fictional in the extreme.

Whatever the personal attitude of Lord Eldon towards the protection of personal rights, his dictum in the pioneer case has much influenced subsequent judges. Only in recent years has it been seriously questioned. The recognition of the right of privacy in some jurisdictions has caused some of this questioning

Swift, Pope and others; *Thompson* v. *Stanhope,* Amb. 737, 27 Eng. Rep. 476 (1774), the celebrated letters from Lord Chesterfield to his son. In neither case was the court influenced by the fact that the letters were written by distinguished literary persons, or at least the reports of the cases do not so indicate.

[62] Pound op. cit. *supra* note 52, at 643.

[63] *Pomeroy's Eq. Jur.* (2d ed.), secs. 1353 and 1997; *Folsom* v. *Marsh,* Fed. Cas. No. 4901 (1841); *Woosley* v. *Judd,* 4 Duer 379 (1855); *Grigsby* v. *Breckinridge,* 2 Bush (Ky.) 480 (1867); *Baker* v. *Libbie,* 97 N. E. 109, Ann. Cas. 1912D, 551, 37 L. R. A. (N. S.) 944. *Baker v. Libbie* is the leading American case.

as has the general recognition of the value of personal rights in an advancing society. Some recent judges and text-writers have done more than question; they have rejected it.

Perhaps no greater extension has been made in the rule than is to be found in cases involving family relations. This problem has been discussed by the writer in a prior article.[64] There is strong language for the protection of personal rights in the celebrated dictum in the leading case of *Vanderbilt* v. *Mitchell*,[65] where the court said:

"If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion. And we should declare that the complainant was entitled to relief. . . . In many cases courts have striven to uphold the equitable jurisdiction upon the ground of some property right, however slender and shadowy, and the tendency of the courts is to afford more adequate protection to personal rights, and to that end to lay hold of slight circumstances tending to show a technical property right."

However, in the end the court insisted that the technical basis of the decision was the protection of property rights, and expressly said that whether the bill might not have been rested on the protection of personal rights was not decided, since the case presented the property feature sufficiently to rest the decision wholly on that. The remarks on the protection of personal rights, as such, are pure dictum, but they are illustrative not only of a method of growth and change in the law, but of the tendency of modern courts to discard the rule.

In *Ex parte Warfield*[66] the right to services and consortium was sufficient to ground an injunction upon, as upon the protection of a property right, but apparently the court was willing to, and did in this case, protect personal rights, as such. This conclusion is based upon the language of the opinion in various places as for example, the following:

"The growth of the principles of equity in this regard have been greatly enlarged, so that it may be said that where a court of equity

[64] Moreland, *Injunctive Control of Family Relations*, 18 Ky. L. J. 1.
[65] 62 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. (N. S.) 304 (1907); 21 Har. L. Rev. 54.
[66] 40 Tex. Crim. App. 413, 50 S. W. 933 (1899). See also *Witte* v. *Bauderer* (Tex. Civ. App.) 255 S. W. 1016 (1923).

has jurisdiction of the case, and a party shows that he is liable to suffer injury by some act threatened or that may be done pending the litigation, whether this has regard to property in issue or to some personal right dependent upon some personal act or conduct, the court will grant the writ. In such case, it cannot be said the court lacks the power, although in doubtful cases it may refrain from the exercise of such power." [67]

The statute, which the court construed as giving wide power to equity courts in granting injunctions, weakens this decision, but the language of the opinion indicates that the court considered it would have reached a like result in the absence of statute, the court saying, "This would be so under the liberal rules of equity, as now practiced in the courts," but more so under the provisions of the Texas statute. So we conclude that although the court had both the protection of property rights and the provisions of a broad statute as a basis for the injunction, it was willing to protect the personal rights involved, as such.

In the leading case of *Stark* v. *Hamilton*,[68] the court instead of basing its jurisdiction upon the power of equity to secure and protect the rights of infants, preferred to consider its power to protect property rights and rights of personality.

Apparently, this is another case where the court was willing to protect personality, as such. In fact a learned writer considers that this is "a square decision that equity will protect rights of personality."[69] But the case involved, as the court suggested, both personal and property rights. Having gained jurisdiction to protect property rights, the court could give complete relief which might include a protection of personality. But the court disapproved of giving protection to personality in this indirect manner, saying:[70]

"It is difficult to understand why injunctive protection of a mere property right should be placed above similar protection from the continual humiliation of the father and the reputation of the family. In some instances the former may be adequately compensated in damages, but the latter is irreparable; for no mere money consideration could restore the good name and reputation of the family or palliate the humiliation of the father for the continual debauching of his daughter."

Apparently the injunction here is for the protection of the

[67] Ibid. 937. Cf. also comment on case, *The Progress of the Law*, Chafee, 34 Har. L. Rev. 388, 413.

[68] 149 Ga. 227, 99 S. E. 861 (1919); affirming 149 Ga. 44, 99 S. E. 40 (1919).

[69] Chafee, op. cit. *supra*, note 67 at 412.

[70] Op. cit. *supra* note 68 at 862.

personal rights involved, which seemed to predominate in the mind of the court. Like *Ex parte Warfield,*[71] the case is weakened by state code provisions which give extended jurisdiction to equity, if interpreted by a liberal court.[72]

The court indicated a willingness to protect purely personal rights in *Williams* v. *O'Shaughnessy.*[73] In that case the plaintiff asked for a temporary injunction restraining the defendant from sending letters to her through the mails. The court said that it did not think an injunction would lie to restrain mere letters written as such, but if written for the purpose of annoyance and they had that effect, the restraining order might be granted. It did not appear that any of the letters had been written after the plaintiff had objected. The court concluded that if the defendant persisted after being requested to stop, the plaintiff could renew her application for a temporary injunction.

It is clear that in this case no property right, but only the personal right not to be annoyed was involved. In addition to the apparent willingness of the court to protect personality as such under the proper circumstances, the case presents several other interesting angles. In the absence of publication to third persons is there any tort here? This may be an instance where equity indicates a willingness to recognize a legal right where none exists at law.[74]

Protection of personal rights, though wthout a discussion of the question, was afforded in *Kirk* v. *Wyman.*[75] The plaintiff, an elderly lady, was affiicted with a mild form of leprosy contracted while serving as a foreign missionary. The health authorities were about to take her to the city pest house, which was unfit for her habitation. She asked for an injunction to restrain them from so doing. Clearly no property rights were involved, for she was not engaged in any business or occupation

[71] *Supra* note 66.

[72] The above discussions of the cases *Vanderbilt* v. *Mitchell, Ex parte Warfield,* and *Stark* v. *Hamilton,* as might be expected, follow closely the writer's article in 18 Ky. L. J. 1 cited *supra* at note 64. The facts of these cases though, will be found to be more fully discussed in that article.

[73] 172 N. Y. Supp. 574 (1918); commented upon 19 Col. L. Rev. 163.

[74] See article, Chafee 75 Univ. of Pa. L. Rev. 1, discussed *supra,* note 47.

[75] 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188 (1909); commented upon 33 Yale L. J. at 130.

with which such removal would interfere. The court considered that under all the circumstances, isolation in her home was sufficient protection to the health of the city, and gave an injunction. The injunction was granted on the ground that such removal would be an invasion of her personal liberty not essential to the public health, for which there was no adequate remedy at law.

Modern legal publicists more and more evince an attitude in favor of the protection of personal rights by injunction. Articles by Dean Pound, and Professors Chafee, Long and Ragland discussing the problem and advocating such protection, have been cited frequently in this paper. Modern text-writers take the same position. Clark, in his "Principles of Equity" indicates the trend of thought when he says:

"Where the sole damage suffered consists of an injury to personality, i. e., the feelings of the plaintiff—there is very little authority for giving injunctive relief, though the reasons for not giving it are hardly plausible." [76]

Lawrence on Equity Jurisprudence presents a similar attitude:

"Various dicta are to be found to the effect that equity protects property rights only, unless authorized by a statute, a theory which is hardly tenable unless the term 'property' be given a meaning much broader than any which would make it of value as a standard, and one which has been definitely repudiated in several cases." [77]

The recent book by Professor Walsh gives an entire chapter to equitable protection of personal rights. The author has contributed a brilliant analysis of the problems and the cases involved. He concludes that:

"It is clear that equity protects many rights of a personal character whenever they are rights of substance, often classifying them as property rights in order to bring them within the earlier cases holding that equity will protect property rights only. . . . It is logical to expect that the courts will extend relief in equity to these cases where damages would be inadequate, as exactly the same reasons exist therefor as in the cases referred to in which equity has given relief. If this position be taken, the true nature of the supposed rule that equity will not protect purely personal rights is disclosed as a mere prejudice based on a haphazard development of the cases rather than on any controlling principle." [78]

[76] Clark, *Principles of Equity*, sec. 239.
[77] Lawrence on *Equity Jurisprudence* (1929), sec. 53.
[78] Walsh on *Equity* (1930), secs. 50 and 52.

No more searching excoriation of the historic rule is to be found in the books than in a note to *Chappell* v. *Stewart* which has frequently been quoted:

"The above decision is based expressly on the existence of an adequate remedy, but there is an intimation that the rights affecting the complainant's person are beyond the scope of the powers of a court of equity. In this intimation the court is fully justified by repeated declarations of the courts and the writers on equity jurisprudence. *Yet a declaration of this sort taken literally and in its full meaning would make the system of equity suitable only to a semi-savage society which has much respect for property but little for human life. Our equity jurisprudence does not quite deserve so severe a reproach.* It does indeed, do much for the protection of personal rights, although it has not been willing to acknowledge the fact but has persisted in declaring the contrary."[79] (Italics are ours.)

It would appear that the doctrine that equity has no jurisdiction to protect personal rights is unsound in principle. The fundamental basis of equity jurisdiction is inadequacy of remedy at law. In many cases involving the protection of personal rights the remedy at law is just as inadequate as it is in cases involving the protection of property rights. Unless there is some rational basis for a different rule the same one should be applied in both situations. About the only basis for the difference at the present time is ill-considered precedent that equity protects only property rights. Such an unreasonable, arbitrary and unjust rule which results in equity protecting one in his property but refusing to protect him in his far more sacred and vital personal rights, is unsupportable and should be discarded. Equity has gone about as far as it can in its effort to evade the rule by the use of fictional and strained applications of the term "property." There remains but to cast off these familiar transitional methods of growth in the law[80] and to recognize the power of equity to protect personal rights as such.

[79] 37 L. R. A. 783.

[80] "But now I employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak of the English Case law and of the Roman Responsa Prudentum as resting on fiction. Both these examples will be examined presently. The *fact* is in both cases that the law has been wholly changed; the *fiction* is that it remains what it always was. It is not difficult to understand why fictions are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that

There has already accumulated a sufficient body of case and text authority to justify such a step.[81]

3. Is it expedient to grant equitable relief?

It is doubtful whether it is expedient to attempt to enforce certain personal rights by injunction. For example, it is problematical whether the beneficial results obtained justify the use of the injunction in cases where a third party has interfered with the marital relationship. Should equity attempt to force two people to continue such an intimate relationship when one of them emphatically desires to discontinue it? Perhaps, after all pros and cons are considered, it is better to adopt a policy of hands off in equity, and leave the parties either to a reconciliation or the remedial relief of a divorce. Perhaps after all, if damages are not a sufficient palliative, a divorce is the best solution for an eclipsed marital relationship. This may be the best solution from the standpoint of society, the parties, and even the children, if any.

But there are other instances in cases involving personal rights where the use of the injunction is not only expedient but the only adequate relief. This is particularly true in many right of privacy cases.

For example, a young woman is a student in a modern state university. She is a leader in various campus activities and occupies an enviable position in the university life. A local manufacturer of flour has obtained her photograph in a manner

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they do not offend the superstitious disrelish for changes which is always prsent. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law. . . . To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law." Maine on *Ancient Law* at pages 26, 27.

[81] *Itzkovitz* v. *Whitaker*, 115 La. 479, 39 So. 499, 117 La. 708, 42 So. 228 (1906); *Schulman* v. *Whitaker*, 115 La. 628, 39 So. 737, 117 La. 704, 42 So. 227 (1906). These two Louisiana decisions squarely recognize the right of privacy and its protection by injunction. *Vanderbilt* v. *Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97 (1907) dictum; *Ex Parte Warfield*, 40 Tex. Crim. App. 413, 50 S. W. 933 (1899), personal rights protected as such, but decision weakened by state code provisions which gave extended jurisdiction to equity; *Stark* v. *Hamilton*, 149 Ga. 227, 99 S. E. 861 (1919), personal rights protected as such, but this case likewise is weakened by state code provisions giving extended jurisdiction to equity; *Williams* v. *O'Shaughnessy*, 172 N. Y. Supp. 574 (1918) dictum; *Kirk* v. *Wyman*, 83 S. C. 372, 65 S. E. 387 (1909); Clark, *Principles of Equity*, sec. 239; Lawrence on *Equity Jurisprudence*, sec. 53; Walsh on *Equity*, secs. 50, 52; 37 L. R. A. 789.

not involving a breach of trust, and intends to use her picture upon every sack of a new brand of flour he is introducing to the public under the attractive name of "Sweet Maid Flour." This would cause her great mental suffering and lead to her social ruin upon the campus. Damages would not be an adequate remedy for such an injury.

Is it expedient to grant an injunction? It appears that the beneficial results obtained justify the use of the injunction in such cases. It may be questioned whether the court can effectively control marital relations by the use of the injunction. But the difficulties encountered there do not arise in most of the other cases where there is an attempt to enforce personal rights by injunction. It does not appear to be inexpedient to enjoin the use of a name or picture in connection with advertising or trade purposes. It is not only feasible but necessary to curb the dangers ever present in modern scurrilous journalism. Other situations occur to the thoughtful where the injunction would be of great practical aid in the protection of the right of privacy. Nor does it appear that unusual difficulties would be encountered in enforcing such injunctions. Contempt proceedings are the proper method of enforcing injunctive process and can be used here as effectively as elsewhere. This phase of the problem is not peculiar to this situation.

CONCLUSION

Five states have recognized the right of privacy as a substantive right. It appears that such recognition is based largely upon the reasons originally suggested by Warren and Brandeis, with the exception that the Pavesich case considers that the right is derived from the natural law. Four states have refused by decision to accept the right of privacy as a substantive right. Such refusal seems to be based upon lack of precedent, the fact that the injury in such cases is essentially to the feelings for which the law allows, according to the prevailing rule, no recovery, and the apprehension of certain judges that the recognition of the right would bring about a vast amount of litigation. It would appear that these objections are not insurmountable.

It should not be necessary for the right of privacy to be

recognized as a right which a law court will protect before equity can give relief. It is submitted that equity can give relief regardless of the defendant's liability at law, recognizing a substantive right in equity where there is no substantive right, necessarily, at law.

A court of equity having decided that a substantive right of privacy has been recognized or should be recognized in that jurisdiction, encounters additional problems in considering whether an injuncton will be granted. The injunction is not only an expedient remedy, but the only adequate one in many cases. The historical doctrine that equity protects only property rights, is unsound in principle, and there is sufficient case and text authority to warrant its discard.

It is concluded that all problems involved in a recognition of the right of privacy and in providing remedial relief by injunction may be met. The interesting thing is that in the forty years which have passed since the publication of the original article, only nine jurisdictions have definitely passed upon the acceptance or rejection of the right. Thus this new chapter in the law is not a long one. But the chapter, although not long, has vitality; and in a society which shows an increasing interest in the protection of full personality, it should attain added importance in the years to come. We are living in an age of ruthless standardization which has resulted in the suppression of human individuality. Coupled with this is the exploitation by the press and advertising agencies of all "human interest" materials available. The timely recognition by the courts of the right of privacy may aid in preserving the "self" as an institution of modern life.

ROY MORELAND

University of Kentucky.
College of Law,