



## Notre Dame Law Review

Volume 27 | Issue 4

Article 1

8-1-1952

# Right of Privacy: Its Development, Scope and Limitations

Leon R. Yankwich

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

### Recommended Citation

Leon R. Yankwich, *Right of Privacy: Its Development, Scope and Limitations*, 27 Notre Dame L. Rev. 499 (1952).

Available at: <http://scholarship.law.nd.edu/ndlr/vol27/iss4/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# NOTRE DAME LAWYER

*A Quarterly Law Review*

---

---

VOL. XXVII

SUMMER, 1952

No. 4

---

---

## THE RIGHT OF PRIVACY:

### ITS DEVELOPMENT, SCOPE AND LIMITATIONS

#### *A Memorable Fancy*

I was in a Printing house in Hell, & saw the method in which knowledge is transmitted from generation to generation.

In the first chamber was a Dragon-Man, clearing away the rubbish from a cave's mouth; within, a number of Dragons were hollowing the cave.

In the second chamber was a Viper folding round the rock & the cave, and others adorning it with gold, silver and precious stones.

In the third chamber was an Eagle with wings and feathers of air: he caused the inside of the cave to be infinite; around were numbers of Eagle-like men who built palaces in the immense cliffs.

In the fourth chamber were Lions of flaming fire, raging around & melting the metals into living fluids.

In the fifth chamber were Unnam'd forms, which cast the metals into the expanse.

There they were receiv'd by Men who occupied the sixth chamber, and took the form of books & were arranged in libraries.<sup>1</sup>

## I.

### *Introduction*

In his essay on legal reasoning, Dean Edward H. Levi characterizes Anglo-American legal reasoning as reasoning by example. He writes: <sup>2</sup>

---

<sup>1</sup> Blake, *A Memorable Fancy* in *THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE & THE COMPLETE POETRY OF WILLIAM BLAKE* 657 (Random House 1941).

<sup>2</sup> LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-2 (1949).

The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.

Some serious students have expressed doubt whether this method is adequate for the needs of our present expanding society, where the problem is not so much the adjustment of private interests, but the regulation of state and social rights and obligations.<sup>3</sup> Be that as it may, in the development of the right of privacy, we have a very good example of the process of which Dean Levi spoke. For it was gradual. It began with its assertion on the basis of common law principles by writers and jurists. And in its gradual adoption and application to the various problems which the swift means of communication and the modern newspaper technic asseverated by radio and television, seeking to mirror a great variety of activities, it unfolded, despite judicial reluctance in many quarters and impediments placed upon it by administrative limitations and legislative enactments. And, today, we can formulate very definite rules and criteria to apply to almost every ordinary assertion of the right.

## II.

### *The Origin of the Right*

The right of privacy has been defined by a court which declined to recognize its existence, in the absence of state legislation on the subject, as <sup>4</sup>

---

<sup>3</sup> Cooper, *The Common and the Civil Law — A Scot's View*, 63 HARV. L. REV. 468, 474-5 (1950).

<sup>4</sup> *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 443 (1902).

. . . founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise.

It is customary to trace the assertion of the existence of the right to a noted essay by Samuel D. Warren and Louis D. Brandeis, which appeared in 1890.<sup>5</sup> Theirs was the conviction that the press, even at that time was "overstepping in every direction the obvious bounds of propriety and of decency."<sup>6</sup> They particularized:<sup>7</sup>

Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

And, after analyzing the instances in which the common law had protected a person from the publication, without his consent, of his letters, papers or documents, which expressed his innermost thoughts, sentiments and emotions, they reached this conclusion:<sup>8</sup>

It is believed that the common law provides him with one [a remedy], forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always

---

<sup>5</sup> Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>6</sup> *Id.* at 196.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.* at 220.

recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands.

One may wonder why Brandeis, who, later as a crusader in many public matters, relied upon the press of the country to achieve public ends, should have taken so dismal a view of the evils of some types of modern intrusion on privacy and private affairs.<sup>9</sup> But there is no dichotomy between the two attitudes. For it is quite evident that, imbued with the spirit of the nineteenth-century liberalism, Brandeis feared many social or governmental actions which intruded upon that domain which he considered the privacy of the individual, into which no one should enter without consent. For we find that, later in 1928, in one of his noted dissents, he asserted as one of the protections guaranteed by the Bill of Rights even against the Government, “. . . the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.”<sup>10</sup> He added: “To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”<sup>11</sup>

Other writers have sustained the right in less absolute terms by insisting that a man's feelings are entitled to protection against injury. Roscoe Pound has written:<sup>12</sup>

A man's feelings are as much a part of his personality as his limbs. The actions that protect the latter from injury may well be made to protect the former by the ordinary process of legal growth.

---

<sup>9</sup> MASON, BRANDEIS, *A FREE MAN'S LIFE* 280-1, 329 (1946).

<sup>10</sup> *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928).

<sup>11</sup> *Id.*, 277 U.S. at 478.

<sup>12</sup> Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 363-4 (1915). While it is said that traditionally the mere injury to feelings is not recognized in the law of torts, there is, in reality, a constant enlargement of the approach to this problem. And many cases exist where injury to feelings has been held compensable. Illustrative are the cases where the intrusion of an innkeeper upon the privacy of guests accusing them of improper conduct have been held compensable although no others than strangers were present. *Emmke v. De Silva*, 293 Fed. 17 (8th Cir. 1923); *Magruder, Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1051-60 (1936).

## III.

*The Right of Privacy Before the Courts*

The first high court which considered the existence of the right of privacy was the Court of Appeals of New York.<sup>13</sup> The majority of the court refused to follow the reasoning of Warren and Brandeis and of the authorities on which they relied, as too nebulous to call for judicial recognition and too dangerous to be established by judicial *fiat*. Speaking for the majority of the court, Chief Judge Parker wrote:<sup>14</sup>

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seriously wound the feelings than

---

<sup>13</sup> *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

<sup>14</sup> *Id.*, 64 N.E. at 443. More than thirty years later the same court was to assert explicitly that: "except to the limited extent provided by statute (Civil Rights Law [Consol. Laws, c. 6], § 50), there is no right of privacy. *Roberson v. Rochester Folding-Box Co.*, 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828. Written words, the effect of which is to invade privacy and to bring undesired notoriety, are without remedy, unless they also appreciably affect reputation. This is the domain, not of positive law, but of obedience to the unenforceable. 'Law and Manners' by Lord Moulton, 134 *The Atlantic Monthly* 1. From such harms one is protected only by the code of common decency." *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 186 N.E. 217, 218 (1933). The article involved in the *Kimmerle* case stated that a woman conducting a rooming-house was "courted" there by a murderer later hanged. After ruling that no recovery could be had for violation of privacy, the court also held that the article was not libelous, saying: "Without a suggestion in the article to the discredit of plaintiff, how could any just and right-thinking person reading it entertain any feelings except regret and sympathy for plaintiff? Embarrassment and discomfort no doubt came to her from the publication, as they would to any decent woman under like circumstances. Her own reaction, however, has no bearing upon her reputation. That rests entirely upon the reactions of others." *Kimmerle v. New York Evening Journal*, *supra*, 186 N.E. at 218.

would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply.

Judge Gray, writing for the minority, felt that the plaintiff in the case, who sought injunction against the use of her likeness for advertising purposes, could be protected upon the same grounds on which courts had theretofore protected the right of privacy in cases relating to private writings or unauthorized publications. He wrote: <sup>15</sup>

It seems to me that the principle which is applicable is analogous to that upon which courts of equity have interfered to protect the right of privacy in cases of private writings, or of other unpublished products of the mind. The writer or the lecturer has been protected in his right to a literary property in a letter or a lecture, against its unauthorized publication, because it is property, to which the right of privacy attaches. . . . I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions.

The cases which recognize the right of privacy, — the right to be let alone, or "the liberty of privacy", — begin with a decision by the Supreme Court of Georgia rendered in 1905.<sup>16</sup> It, too, involved the use of a photograph for advertising purposes. In declining to follow the New York decision, the court asserted that the right existed and was entitled to recognition by the courts. Justice Cobb, writing for a unanimous court, stated: <sup>17</sup>

The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be

---

<sup>15</sup> *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 450 (1902).

<sup>16</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). There were, however, earlier recognitions of the right by lower courts. *Corliss v. E. W. Walker Co.*, 64 Fed. 280 (C.C.D. Mass. 1894); *Corliss v. E. W. Walker Co.*, 57 Fed. 434 (C.C.D. Mass. 1893).

<sup>17</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 72-3 (1905).

kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society.

The cases which followed have sustained the right either as a property right by analogy to property in private writings, or, *more broadly*, as a right to one's own personality.<sup>18</sup> At the present time, the right exists by virtue of judicial decisions in Alabama, Arizona, California, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, Montana, North Carolina, Oregon and Pennsylvania.<sup>19</sup> The Restatement of Torts now gives recognition to the right.<sup>20</sup>

---

<sup>18</sup> See, *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E. (2d) 306 (1949); *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W. (2d) 911 (1948); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P. (2d) 438 (1941).

<sup>19</sup> 41 AM. JUR. *Privacy* § 2 (1942); THAYER, *LEGAL CONTROL OF THE PRESS* §§ 69-71 (2d ed. 1950); YANKWICH, *IT'S LIBEL OR CONTEMPT IF YOU PRINT IT* 274 *et seq.* (1950); Annotations, *Right of privacy*, 14 A.L.R. (2d) 750 (1950), 168 A.L.R. 446 (1947), 138 A.L.R. 22 (1942); 22 So. CALIF. L. REV. 320 (1949); 13 So. CALIF. L. REV. 81 (1939). See complete list of cases to date supporting the right of privacy in *Gill v. Curtis Pub. Co.*, 239 P. (2d) 630, 632 (Cal. 1952).

In Montana, a landlord, who was offended by the fact that his tenants paid no attention to a notice terminating a month to month leasehold to a home, actually moved into the premises with his wife and remained in the living room for seventeen days and nights. A verdict in favor of the tenants was sustained on the ground that the intrusion was a violation of the right of privacy and actionable without proof of actual damage. The jury failed to award compensatory damages, but awarded exemplary damages. *Welsh v. Pritchard*, 241 P. (2d) 816 (Mont. 1952). The court said, 241 P. (2d) at 820, "The law presumes that the usurpation by strangers, as here, of a man's home, and their continued intrusion for 17 days and nights into the very heart and privacy of his family life, resulted in detriment and damage."

On June 11, 1952, the Illinois appellate court gave limited recognition to the right of privacy in the State of Illinois. It reversed a trial court which had dismissed a complaint for failure to state a cause of action. The complaint charged that the defendants, without the consent of the plaintiff, had used her photograph in an advertisement promoting the sale of dog food. *Virginia Eick v. Perk Dog Food Co.*, (No. 45461, Ill. 1952).

<sup>20</sup> RESTATEMENT, TORTS § 867 (1939).



## IV.

*Limitations on Creation and Expression*

The problem of privacy is, at times, treated as a part of the law of defamation. In reality, the relation between the two is rather remote, — the only similarity stemming from the fact that both are based on a recognition by the courts of certain rights inherent in personality. But there the similarity ends. For defamation is an injury to reputation — that is, injury in the eyes of others — while privacy is injury to one's own feelings — the right to be let alone. For this reason, different criteria obtain in determining when action lies.

In defamation, the publication must be such as to expose a person to hatred, contempt, ridicule or obloquy by imputing to him qualities which, in the minds of a segment of the population, are undesirable. But publications which invade the right of privacy may be actionable, although the persons who see the publication may find nothing objectionable in it. The important thing is that the publication injures the feelings of the person himself, although it may not have any effect whatsoever on his reputation.

*A. The Restrictions of the Law of Defamation:*

What has just been said indicates that the recognition of the right of privacy was not called for so much by the deficiencies of the law of defamation as by the desire to add a new right which rendered protection in a domain which the law of defamation did not enter. For it should be stated that the law of defamation has offered and does offer adequate protection against injuries to reputation perpetrated by the various media of communication and expression. One of the most important of these is the portrayal of a recognizable character in an objectionable way. These have been held to be actionable when they occurred in newspapers, books or

in motion pictures, although the particular person may not have been aimed at at all. Indeed, the rule has been applied in cases where the persons writing or producing the article, picture or play, did not even know of the existence of the person who claims to have been harmed. The answer of the courts to such plea has always been that it was enough if a jury could infer that one reading the newspaper article, seeing the play or motion picture, could draw the inference that the reference was to the plaintiff. An outstanding illustration comes from the field of motion pictures.

Years ago, there was produced a motion picture entitled "Rasputin, The Mad Monk." In it there was an episode in which the monk was supposed to either rape or seduce a noble woman of the court. The victim in the play was called Princess Natasha. Princess Irina Alexandrovna, wife of Prince Youssouppoff, a resident of Paris, brought suit in the English courts against the producers of the play, Metro-Goldwyn-Mayer Pictures, Limited. She asserted that the character of Natasha was patterned after her own life and that many persons recognized her portrayal in that character. A jury awarded her 25,000 pounds. On appeal, the judgment was sustained, the court holding that it was for the jury to determine (a) whether there was a recognizable similarity between the character in the picture and the princess, and (b) whether the producers intended the character in the play to represent her. Having reached that conclusion, the court said that the libelous character of the picture was evident, whether the lady was actually raped or seduced, in the sense in which that milder term is understood. Lord Justice Slesser summed up his reasoning on these issues in this manner: <sup>21</sup>

When the question is as propounded in *Hulton and Co., Limited v. Jones*, 26 *The Times* L.R. 128, [1910] A.C. 20, 16 *Ann. Cas.* 166, and later cases, what persons of a reasonable

---

<sup>21</sup> *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 *T.L.R.* 581, 99 *A.L.R.* 864, 876-7 (1934).

class might think about a matter, I can see no objection to the fact that it is sought to be proved that persons who read Russian books, persons versed in Russian history, and friends of the plaintiff all conceived this imaginary Princess Natasha to be the plaintiff. The fact that the matter was approached from several angles and that different persons from different points of view took the same view seems to strengthen and not to weaken her case, because, from all these angles, these persons came and all said, some with certainty, some with comparative doubt but at any rate in the end, that sooner or later in the film they made up their minds that this was meant to represent the plaintiff. . . .

I, for myself, cannot see that from the plaintiff's point of view it matters in the least whether this libel suggests that she has been seduced or ravished. The question whether she is or is not the more or the less moral seems to me immaterial in considering this question whether she has been defamed, and for this reason, that, as has been frequently pointed out in libel, not only is the matter defamatory, if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on her part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on her part. It is for that reason that persons who have been alleged to have been insane, or to be suffering from certain diseases, and other cases where no direct moral responsibility could be placed upon them, have been held to be entitled to bring an action to protect their reputation and their honour.

One may, I think, take judicial notice of the fact that a lady of whom it has been said that she has been ravished, albeit against her will, has suffered in social reputation and in opportunities of receiving respectful consideration from the world.

Other illustrations, which may be referred to without comment,<sup>22</sup> show that the limitation has been applied to all

---

<sup>22</sup> *Burton v. Crowell Pub. Co.*, 82 F. (2d) 154 (2d Cir. 1936) (publication of distorted photograph which placed the person in a ridiculous position); *Stanley v. Warner Bros. Pictures, Inc.*, 64 Ga. App. 228, 12 S.E. (2d) 441 (1940) (members of a prison board portrayed as inhuman in a motion picture taken from a book, *I Am a Fugitive From a Georgia Chain-Gang*); *Warner Bros. Pictures, Inc. v. Stanley*, 56 Ga. App. 85, 192 S.E. 300 (1937); *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932); *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E. (2d) 30 (1947) (verbal attacks on public persons by radio); *Brown v. Paramount Public Corp.*, 240 App. Div. 520, 270 N.Y. Supp. 544 (3d Dep't 1934) (motion picture portraying plaintiff as illiterate and neglectful of her daughter, whom she permitted

media of communication, and that, even in the absence of the right of privacy, actions will lie for libelous or distorted portrayals of one's actual personality or of a personality which jurors may believe represented him in plays, books, photographic reproductions, motion pictures and radio.

So, when dealing with cases which, aside from any libelous connotation, grant relief for violation of the right of privacy, it is well to consider them against this background. When so considered, it must be evident that the cases stemming from recognition of the right of privacy have added additional restrictions to the rights of expression and creation.

#### *B. Private or Public Matters:*

If, in the matter just referred to, there is a distinction between the law of defamation and the law of privacy, in other matters there is similarity. Early in the history of the law of privacy, the courts, by analogy with the law of defamation, adopted the distinction so well rooted in that branch of the law between purely private matters and matters which are the concern of the public because they relate to things of public interest or to persons in the public eye. Indeed, Warren and Brandeis noted that the recognition of

---

to have clandestine relations with a man); *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N.Y. Supp. 829 (1st Dep't 1915) (motion picture dealing with the white-slave traffic picturing the plaintiff's factory with his name on a sign and implying that the place was used for illicit rendezvous; *Cassidy v. Daily Mirror Newspapers, Ltd.*, [1929] 2 K.B. 331 (C.A.), 45 T.L.R. 485 (picture in newspaper of General Corrigan and a young lady at the races with a caption intimating that they were engaged, the General already being married); *E. Hulton & Co. v. Jones*, [1910] A.C. 20, 26 T.L.R. 128 (1909) (article about fictitious character named Artemus Jones libelous as to person so named); *Monson v. Tussauds Ltd.*, [1894] 1 Q.B. 671 (C.A.), 10 T.L.R. 227 (where the court enjoined as libelous the placing of an effigy of a person in Mme. Tussaud's famous wax works in London on top of "Chamber of Horrors" under circumstances that might intimate the person's connection with a murder). And see, *Wright v. R.K.O. Radio Pictures, Inc.*, 55 F. Supp. 639 (D. Mass. 1944) (where the right is recognized, although no actionable matter is found); *Feely v. Vitagraph Co. of America*, 184 App. Div. 527, 172 N.Y. Supp. 264 (2d Dep't 1918); 33 AM. JUR. *Libel and Slander* § 102 (1941); 53 C.J.S. *Libel and Slander* § 82 (1948); Annotations, *Legal aspects of radio communication and broadcasting*, 171 A.L.R. 765, 82 A.L.R. 1106, 76 A.L.R. 1272.

the right would not prohibit the publication of that which is of public or general interest,<sup>23</sup> or of matters which, under the law of defamation, would be privileged communications.<sup>24</sup>

This distinction is to be found in some of the earliest cases on the subject.<sup>25</sup>

The Court of Appeals of New York, in declining to give recognition to the right, refused to see any distinction between public and private characters.<sup>26</sup> But other cases draw a clear line between the two. We refer, in brief, to some cases old and new.

A California motion picture concern published a fictitious letter allegedly signed by the plaintiff, which read: <sup>27</sup>

“Dearest:

“Don’t breathe it to a soul, but I’m back in Los Angeles and more curious than ever to see you. Remember how I cut up about a year ago? Well, I’m raring to go again, and believe me I’m in the mood for fun.

“Let’s renew our acquaintanceship and I promise you an evening you won’t forget. Meet me in front of Warners Down-

If to this, we add publications which, although harmless, are actionable because they result in special damages, *Pollard v. Lyon*, 91 U.S. 225, 23 L. Ed. 308, 313-4 (1876); 53 C.J.S. *Libel and Slander* § 8 (1948), it is quite evident that the redress offered by the law of defamation for injury to reputation is very broad in scope. More, historical research is actually hampered by decisions such as *State v. Haffer*, 94 Wash. 136, 162 Pac. 45 (1916), in which a criminal prosecution was sustained for a libel on George Washington.

<sup>23</sup> *Warren and Brandeis, supra* note 5, at 212.

<sup>24</sup> *Id.* at 216.

<sup>25</sup> See note 16 *supra*.

<sup>26</sup> Judge Parker wrote: “This distinction between public and private characters cannot possibly be drawn. On what principle does an author or artist forfeit his right of privacy, and a great orator, a great preacher, or a great advocate retain his? Who can draw a line of demarcation between public characters and private characters, let that line be as wavering and irregular as you please? . . . Or is the right of privacy the possession of mediocrity alone, which a person forfeits by giving rein to his ability, spurs to his industry, or grandeur to his character? A lady may pass her life in domestic privacy, when, by some act of heroism or self-sacrifice, her name and fame fill the public ear. Is she to forfeit by her good deed the right of privacy she previously possessed?” *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 447 (1902).

<sup>27</sup> *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. (2d) 207, 127 P. (2d) 577; 579 (1942).

town Theatre at 7th and Hill on Thursday. Just look for a girl with a gleam in her eye, a smile on her lips and mischief on her mind!

“Fondly,

“Your ectoplasmic playmate,

“Marion Kerby.”

The name of the person was also the name of the chief feminine character of a motion picture, which the defendant was advertising. Although the coincidence was fortuitous, the court held that the plaintiff's right of privacy had been invaded, saying: <sup>28</sup>

As already indicated, the letter was circulated by defendants for the purpose of advertising a moving picture, and as far as appears *they had no intent* to refer therein to plaintiff and did not know of her existence, although they might easily have discovered it. These facts, which are stressed by defendants, tend to show want of malice and might avert an award of punitive damages, but they constitute no defense to plaintiff's action. The letter did, in fact, refer to plaintiff in clear and definite fashion, and would reasonably have been so understood by anyone who knew of her existence. The wrong complained of is the invasion of plaintiff's right of privacy, and such an invasion is no less real or damaging because the invader supposed he was in other territory. The case bears considerable analogy, both as to the right invaded and the nature of the injury inflicted, to one of libel. It is well established that inadvertence or mistake affords no defense to a charge of libel, where the defamatory publication does, in fact, refer to the plaintiff. . . . “The question is not so much who was aimed at as who was hit.” [Emphasis added.]

---

<sup>28</sup> *Id.*, 127 P. (2d) at 581. However, under N.Y. CIVIL RIGHTS LAW § 51, the mere use of a name does not give rise to a cause of action in favor of every person who bears the name. Thus, a person named “Rudy Nebb” could not sue for use of the same name for a fictitious character. *Nebb v. Bell Syndicate, Inc.*, 41 F. Supp. 929, 930 (S.D. N.Y. 1941). Here, Judge Goddard gave these reasons: “There must be an intent to capitalize another's name and identity or acts which tend to produce that result. The clear intent of the statute and its purposes is to prevent such a violation of another's right of privacy. Cf. *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097, 34 L.R.A., N.S., 1143, 127 Am. St. Rep. 945. . . . I take it that the words ‘his name’ in the statute apply to the use of a name coupled with circumstances tending to refer to the plaintiff and not to a mere similarity of names. Neither the use of another's name, which has acquired an unique significance or secondary meaning in a certain field, nor the trading upon the reputation of another, is involved here.”

In a more recent California case, the publication of the photograph of a husband and wife in an affectionate position in the Ladies' Home Journal as a part of an article on "Love" was held to be an invasion of privacy and not warranted by public need or the public character of the plaintiffs. The plaintiffs were owners of a confectionery and ice cream concession in the Farmers' Market in Los Angeles. The photograph depicted them as apparently seated on stools side by side at the patron's side of the counter of their concession. The plaintiff had his arm around his wife and was leaning forward with his cheek against hers. Under the picture appeared the caption, "Publicized as glamorous, desirable, 'love at first sight' is a bad risk."<sup>29</sup> Justice Carter, writing for a unanimous court, could see no justification for the use of the particular picture:<sup>30</sup>

Assuming it to be within the range of public interest in dissemination of news, information or education, and in a medium that would not be classed as commercial — for profit or advertising — there appears no necessity for the use in connection with the article without their consent, of a photograph of plaintiffs. The article, to fulfill its purpose and satisfy the public interest, if any, in the subject matter discussed, could, possibly, stand alone without any picture. In any event, the public interest did not require the use of any particular person's likeness nor that of plaintiffs without their consent.

The other side of the shield is presented by cases which hold that if the activities to which the publication or disclosure relates are public, or the person concerned is a public character, the publication or disclosure does not constitute an invasion of the right of privacy.

So, in conjunction with a news report of a woman's suicide, the invasion of the husband's right of privacy by his name

---

<sup>29</sup> Gill v. Curtis Pub. Co., 239 P. (2d) 630, 632 (Cal. 1952).

<sup>30</sup> *Id.* at 634. Similarly, the impersonation on a broadcast of a privately employed chauffeur who was held up by a robber and shot, was held to constitute an invasion of privacy under California law. *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939).

being mentioned in the publication was held to be an incident which was not protected.<sup>31</sup>

A similar conclusion was reached in another state which does not recognize the right of privacy. A Seattle, Washington, newspaper, in speaking of an arrest, published a photograph of the plaintiff's family, including that of his minor daughter. The court held that, as the publication was not libelous, there was no remedy for the invasion of any right.<sup>32</sup>

In a very recent federal case, Judge Nordbye of the United States District Court of Minnesota, reached a similar conclusion as to the unauthorized publication of a photograph of a courtroom scene showing two persons involved in a divorce proceeding. So doing, he emphasized the fact that, by present newspaper standards, matters of this character are of public interest:<sup>33</sup>

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

### C. *Persons in Public Life:*

The case for publication of articles concerning pictures of persons in public life is even stronger, and was recognized in

---

<sup>31</sup> *Metter v. Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939).

<sup>32</sup> *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911). In a later case, the same court enjoined the unauthorized use of the name of the late Senator Robert M. LaFollette on the name of a political party. So doing, the court, while not recognizing the law of privacy, used the following emphatic language as to the right of a person to his own name: "Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built up are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary that it be alleged or proved that such unauthorized use will damage him." *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 Pac. 317, 319 (1924).

<sup>33</sup> *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 962 (D. Minn. 1948).



the earliest cases on the subject.<sup>34</sup> A leading case arose in New York, which does not recognize the right of privacy. William J. Sidis was made the subject of a biographical sketch in *The New Yorker* for August 14, 1937. Sidis had once been considered a "boy genius," and the article dealt with his past and not his most recent career. It was argued that he, having lapsed into obscurity, had ceased to be a public figure, and was entitled to have this obscurity respected. The court, rejecting this contention, said:<sup>35</sup>

William James Sidis was once a public figure. As a child prodigy, he excited both admiration and curiosity. Of him great deeds were expected. In 1910, he was a person about whom the newspapers might display a legitimate intellectual interest, in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity. But the precise motives of the press we regard as unimportant. And even if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then Sidis has cloaked himself in obscurity, but his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern. The article in *The New Yorker* sketched the life of an unusual personality, and it possessed considerable popular news interest.

We express no comment on whether or not the news worthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

---

<sup>34</sup> See note 16 *supra*.

<sup>35</sup> *Sidis v. F-R Pub. Corp.*, 113 F. (2d) 806, 809 (2d Cir. 1940). See *O'Brien v. Pabst Sales Co.*, 124 F. (2d) 167 (5th Cir. 1942).

A man, who was a defendant in a nationally discussed sedition trial, became the object of legitimate public interest and comment on his life did not invade the right of privacy.<sup>36</sup>

The basis of these decisions is that when a person becomes a public character, he relinquishes the right of privacy so as to permit exploitation of his life without any limitation as to time.

In a recent California case, the plaintiff had entered the prize ring as a professional boxer in 1933, under the name of Canvasback Cohen. His ring career, a losing one, continued until 1939, when he abandoned it. On January 12, 1949, Groucho Marx, the well-known comedian, broadcast on the program "You Bet Your Life" of the American Broadcasting Company this statement: "I once managed a prize-fighter, Canvasback Cohen. I brought him out here, he got knocked out, and I made him walk back to Cleveland."<sup>37</sup> Upholding the trial court, which had sustained a demurrer to the complaint, the court ruled that there had been an absolute waiver of the right of privacy which the lapse of time did not reinstate. The court said:<sup>38</sup>

A person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy. . . .

Applying the foregoing rule to the facts in the present case it is evident that when plaintiff sought publicity and the adulation of the public, he relinquished his right to privacy on matters pertaining to his professional activity, and he could not at his will and whim draw himself like a snail into his shell and hold others liable for commenting upon the acts

---

<sup>36</sup> *Elmhurst v. Pearson*, 153 F. (2d) 467 (D.C. Cir. 1946). The representation in a non-fiction work of a recognizable woman character giving her first name, Zelma, identified as "the census taker," and depicting her as a strong, colorful personality, given to extensive use of profanity, which is likely to bring humiliation to her, is an invasion of the right of privacy. *Cason v. Baskin*, 155 Fla. 198, 20 So. (2d) 243 (1944).

<sup>37</sup> *Cohen v. Marx*, 94 Cal. App. (2d) 704, 211 P. (2d) 320, 321 (1949).

<sup>38</sup> *Ibid.*

which had taken place when he had voluntarily exposed himself to the public eye. As to such acts he had waived his right of privacy and he could not at some subsequent period rescind his waiver.

However, membership in the armed forces of the United States, even if accompanied by the release of a photograph by the War Department showing a person to be a member of a team of optical experts engaged in repairing lenses at the front, is not sufficient to warrant the unauthorized use of the photograph by a commercial concern. This upon the theory that the service as a member of the armed forces does not make one a public personage so as to make his likeness and activities a matter of general interest, and, that, while the Army might acquire the right to use the photograph for its purposes, there is no implied warrant for its use by others for commercial purposes. The court said: <sup>39</sup>

The complaint describes no hero, famous personality or individual of preeminent accomplishments whose doings are items of legitimate news and general interest. Under the facts pleaded the general public could have no interest in the appellee other than as the symbol of an organization with which it was greatly concerned.

In any event a waiver of the right justifies an invasion of privacy only to the extent warranted by the circumstances which brought about the waiver. *Pavesich v. New England*

---

<sup>39</sup> Continental Optical Co. v. Reed, 119 Ind. App. 643, 650, 86 N.E. (2d) 306 (1949).

A somewhat similar ruling was made under the law of Pennsylvania. The plaintiff, a minor, had been involved in an automobile accident and twenty months after, a newspaper photograph, as she lay in the street, was reproduced in a magazine. Holding that while the publication in the newspaper immediately after the accident may have been privileged, the republication in the magazine was not, the court said: "Granted that she was 'newsworthy' with regard to her traffic accident. Assume, also, that she continued to be newsworthy with regard to that particular accident for an indefinite time afterward. This use of her picture had nothing at all to do with her accident. It related to the general subject of traffic accidents and pedestrian carelessness. Yet the facts, so far as we know them in this case, show that the little girl, herself, was at the time of her accident not careless and the motorist was. The picture is used in connection with several headings tending to say that this plaintiff narrowly escaped death because she was careless of her own safety. That is not libelous; a count for defamation was dropped out in the course of the trial. But we are not talking now about liability for defamation. We are talking about the privilege to invade her interest in being left alone." *Leverton v. Curtis Pub. Co.*, 192 F. (2d) 974, 977-8 (10th Cir. 1951).

*Life Ins. Co., supra.* In the instant case the appellee had no right of privacy against the Army's use of his picture in the furtherance of its policy in building home-front morale but that situation cannot be stretched into a license to private business to use the same for advertising its wares for individual profits.

All these cases postulate a waiver of the private character either through public activities or through actual consent. In the latter respect, they follow the well-known rule that no one can complain of a tort to which he has assented.<sup>40</sup> But where the permission is limited, use beyond the agreed terms will be considered a violation of privacy.<sup>41</sup>

## V.

### *The Scope of Protection*

The instances which have warranted judicial interference may be divided into three groups. The first relates to cases of *intrusion* into a person's private life. In this category are: (a) use of a person's name, likeness or photograph or sale of a person's photograph; (b) the exhibition of x-ray pictures showing a part of a person's body; (c) the representation of a patient in a hospital; (d) the use of a name in a petition or in connection with other political or governmental matters; (e) unreasonable use of a person's name in a book; (f) use of a person's name in a literary production or a motion picture.

In the second group are publications of letters, private writings, or papers *belonging* to another. They are forbidden when (a) they are an infringement of one's right to the product of one's mind, or (b) their publication would amount to a breach of contract, confidence or trust.

The third group is what is called in the law of unfair competition, "palming off" or "holding oneself out." They

---

<sup>40</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E. (2d) 306 (1949).

<sup>41</sup> *Burton v. Crowell Pub. Co.*, 82 F. (2d) 154 (2d Cir. 1936); *Neyland v. Home Pattern Co.*, 65 F. (2d) 363 (2d Cir. 1933); *Corliss v. E. W. Walker Co.*, 57 Fed. 434 (C.C.D. Mass. 1893).

include assumption of the name, character or title of another and actual impersonation. In California, we had the case of a comedian who not only imitated the mannerisms of Charles Chaplin, but actually assumed the name of Charles Aplin. These cases are decided on the principles which underlie the law of unfair appropriation or unfair competition.<sup>42</sup>

In applying the law to these situations, the courts bear in mind the distinction already adverted to between use for commercial purposes and use as a part of legitimate attempts to disseminate news or information or exercise of a creative art. The line of demarcation is difficult to draw at times, but it exists nevertheless. And courts are more likely to see an invasion of the right when gain is the motive than when the object is dissemination of news by newspapers, radio, television and other media of communication, or fiction-alizing.

As a part of the right of privacy, courts have condemned eavesdropping, and its modern form, telephone wire tapping, if done by private individuals.<sup>43</sup>

---

<sup>42</sup> 21 AM. JUR. *Privacy* §§ 20-33 (1939); Annotations, *Right of privacy*, 168 A.L.R. 446, 456-64 (1947), 138 A.L.R. 22, 63-97 (1942). And see, Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 465, 480-1 (1952). Aside from the protection afforded by the law of literary property, our courts do not recognize what has come to be known in continental Europe as the "moral right of the author" — the right of an author *not to have* his product, be it art or literature, tampered with or deformed. See Roeder, *The Doctrine of Moral Right*, 53 HARV. L. REV. 529 (1940). Thus, a New York court refused to interfere with the use of the uncopyrighted music of the Russian composers Shostakovich, Khachaturian, Prokofieff and Miaskovsky in a motion picture which depicted conditions in Russia in a manner which the composers thought false and disloyal to their country. *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S. (2d) 575 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 692, 87 N.Y.S. (2d) 430 (1st Dep't 1949).

<sup>43</sup> *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E. (2d) 810 (1939); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W. (2d) 46 (1931); 41 AM. JUR. *Privacy* § 29 (1942). However, we have become accustomed to the thought that wire tapping is being practiced by the Government, and, in California, until stopped by the United States Supreme Court, we have shown so little respect for the person of one accused of crime as to pump his stomach for evidence of offense. *Rochin v. People of California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. \*154 (1952).

It should be added that the right being personal, and stemming from an assumption of injury to feelings, it does not exist in favor of a corporation unless it can show actual injury to its business.<sup>44</sup> However, corporations are protected against misuse of their names under the law of trademarks and unfair competition.

So, without giving in detail the differentiation which may exist in the application of the principles just given, the rules laid down by the cases may be summed up substantially in this manner:

(a) The right of privacy was unknown to the ancient common law.

(b) It is purely personal, an incident of the person and not of property. It is a recognition of the right to one's personality — a part of what Albert D. Schweitzer had called "the reverence for life."

(c) It does not exist where the person has either published the matter complained of, or consented to its publication. In such cases, there is a waiver.

(d) It does not exist where a person has become prominent or distinguished. By such prominence he has dedicated his life to the public and thereby waived his right to privacy. At present, this includes persons who, for the moment, may become the object of public interest.

(e) It does not exist in the dissemination of news and news events, nor in the discussion of events in the life of a person in whom the public has a rightful interest, permanent or temporary, nor where the information would be of general interest, as in the case of a candidate for public office, or of others seeking public approval or preferment, whether as athletes, performers, or political or social figures of the upper world or underworld.

---

<sup>44</sup> *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (W.D. Mo. 1912); *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S.W. (2d) 369, 370 (1943); 41 AM. JUR. *Privacy* § 15 (1942).

(f) A publication which, under the law of defamation, would be a privileged communication, cannot be an invasion of the right.

(g) The right of privacy can only be violated by printings, writings, pictures or other permanent publications or reproductions, and, ordinarily, not by word of mouth. However, broadcast by radio may be a violation.

(h) Generally, the right of action accrues when the publication is made for gain or profit. But courts now frown on unwarranted exploitation of the personality of others, even in the absence of the profit motive.

(i) The defense of truth — so important in defamation — is not available in a case involving violation of the right of privacy. Nor is motive and the presence or absence of malice or wilfulness material.<sup>45</sup>

---

<sup>45</sup> The foregoing is a revised and amplified version of the summary given in *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91, 92-3 (1931). The expansion finds support in the cases already referred to, and also the following: *Sidis v. F-R Pub. Corp.*, 113 F. (2d) 806, 809-10 (2d Cir. 1940); *Levey v. Warner Bros. Pictures, Inc.*, 57 F. Supp. 40 (S.D. N.Y. 1944); *Wright v. R.K.O. Radio Pictures, Inc.*, 55 F. Supp. 639 (D. Mass. 1944); *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 57 S.E. (2d) 225, 227 (1950); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 969-72 (1927); *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E. (2d) 753 (1940); *Warren and Brandeis*, *supra* note 5, at 218 *et seq.*

*Melvin v. Reid*, *supra*, which brought the first recognition of privacy to California, was a motion picture case. The defendants had produced a motion picture entitled, "The Red Kimono," allegedly based upon incidents in the life of the plaintiff. Feeling herself aggrieved, she brought suit. The trial court rejected her suit on the ground that invasion of the right of privacy was *not* recognized in California. The Court of Appeals reversed the ruling and held that, notwithstanding the fact that some of the incidents in the past life of the plaintiff were true, she was entitled to the benefit of her reformation and that the motion picture which depicted those incidents injured her. The court said: "The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation.

"The use of appellant's true name in connection with the incidents of her former life in the plot and advertisements was unnecessary and indelicate, and a wilful and wanton disregard of that charity which should actuate us in our social intercourse, and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society. . . . We believe that the publication by respondents of the unsavory incidents in the past life of the

## VI.

*Statutory Rights of Privacy*

By statutory enactment the right of privacy has been given recognition in certain states where it had not had judicial sanction. Legislation defining the right has been enacted in New York,<sup>46</sup> Utah,<sup>47</sup> Virginia<sup>48</sup> and Wisconsin.<sup>49</sup>

---

appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us, and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial, because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others." *Melvin v. Reid, supra*, 297 Pac. at 93-4.

As to the exclusion of matters of public interest from this protection, see *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. (2d) 133, 138-9 (1945); *Metter v. Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491, 495-6 (1939).

<sup>46</sup> N.Y. CIVIL RIGHTS LAW § 51.

<sup>47</sup> UTAH REV. STAT. ANN. tit. 103, c. 4, §§ 8, 9 (1933).

The Utah statute makes the invasion of the right of privacy for advertising or trade purposes a misdemeanor. It also allows civil recovery for violation. In this respect, it is patterned after the New York statute. But it goes further by making penal the use for advertising or trade purposes of the name, portrait or picture of a deceased person without the written consent of his heirs or personal representative. Damages may be recovered for injury sustained by violation of this provision, and further and continued exploitation may be restrained by injunction. Under this section, the United States Court of Appeals for the Tenth Circuit in *Donahue v. Warner Bros. Pictures, Inc.*, 194 F. (2d) 6 (10th Cir. 1952), sustained an action instituted by the heirs of Jack Donahue against the motion picture concern for exhibiting, without permission, a fictionalized portrait of Donahue as an entertainer.

The trial court had granted summary judgment. In reversing it, the court of appeals rejected the contention that Donahue had become a public figure, and that a statute forbidding the portrayal of a deceased public figure is a violation of freedom of expression, saying, 194 P. (2d) at 13, "If the statute undertook to restrict or forbid the publication of matters educational or informative or strictly biographical in character, or the dissemination of news in the form of a newsreel or otherwise, it would be open to challenge on the ground of objectionable restraint upon the freedom of speech and press. But it does nothing of the kind. It is content to forbid the appropriation of the name, picture, or personality of an individual for commercial purposes, or for purposes of trade, as distinguished from the publication of matters educational or informative or purely biographical in kind, or the dissemination of news in the form of a newsreel or otherwise. And the constitutional guaranty of free speech and free press in its full sweep does not undertake to create an inviolate asylum for unbridled appropriation or exploitation of the name, picture, or personality of a deceased public figure for purely commercial purposes, or solely for purposes of trade, with the state powerless to enact appropriate forbidding or remedial legislation."

<sup>48</sup> VA. CODE tit. 8, § 650 (1950).

<sup>49</sup> WIS. STAT. c. 348, § 412 (1951). This Wisconsin statute merely makes it a misdemeanor to publish, except as it may be necessary in the institution or



Under the New York Civil Rights statute, a civil action may be instituted for improper use of a person's name or picture for advertising or trade purposes. There is currently before the New York Legislature a bill <sup>50</sup> which would make it a misdemeanor to use the picture of any living person without his consent in connection with written matter tending to injure him. The existing New York law has been the subject of a very extensive jurisprudence. Because, in its application, the courts have come to recognize the legitimate purpose of publication of matters of public interest, a brief discussion of these interpretations is in order. The present section reads: <sup>51</sup>

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

The restriction in the New York statute to use for "advertising purposes" has been interpreted to mean any solicitation of patronage. And the word "trade" has been restricted and limited to continuous rather than occasional or single use.<sup>52</sup> By this broad interpretation, the courts have excluded entirely the publication of matters of public interest in news-

---

prosecution of a criminal proceeding, the name of a woman who may have been raped or subjected to criminal assault. Its constitutional validity has been upheld. *State v. Evjue*, 253 Wis. 146, 33 N.W. (2d) 305 (1948). For other similar statutes, see FLA. STAT. c. 794, § 03 (1951); GA. CODE tit. 26, c. 21, § 05 (1933); S. C. CODE § 1275 (1942).

<sup>50</sup> S. 267, as quoted in Gray, *Was Picture Necessary? Point in Privacy Case*, Editor & Publisher, March 1, 1952, p. 49, col. 1, 2.

<sup>51</sup> N.Y. CIVIL RIGHTS LAW § 51.

<sup>52</sup> *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919).

papers or newsreels as not a "trade" within the statute.<sup>53</sup> More particularly, the following have been held outside the statute: (a) the use of plaintiff's name in a motion picture of current events; (b) the use of a name in a novel of almost 400 pages; (c) the representation of plaintiff's factory on which his firm name clearly appeared, in a motion picture dealing with a white slave traffic; (d) the use of a name of an alleged strikebreaker in a book dealing with strikebreaking; and (f) the attribution of a fantastic adventure story to a well-known writer.<sup>54</sup>

A New York judge has summed up the law insofar as it relates to the unauthorized publication of photographs in a single issue of a newspaper in this manner: <sup>55</sup>

1. Recovery may be had under the statute if the photograph is published in or as part of an advertisement, or for advertising purposes.

2. The statute is violated if the photograph is used in connection with an article of fiction in any part of the newspaper.

3. There may be no recovery under the statute for publication of a photograph in connection with an article of current news or immediate public interest.

4. Newspapers publish articles which are neither strictly news items nor strictly fictional in character. They are not the responses to an event of peculiarly immediate interest but, though based on fact, are used to satisfy an ever-present educational need. Such articles include, among others, travel stories, stories of distant places, tales of historic personages and events, the reproduction of items of past news, and surveys of social conditions. These are articles educational and informative in character. As a general rule, such cases are not within the purview of the statute.

In the particular case, the court held that the use of the photograph of a Hindu musician to illustrate a semi-educational article on "the famous Hindu Rope Trick" had a legitimate relationship to the article which was of news in-

---

<sup>53</sup> *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E.D. N.Y. 1936).

<sup>54</sup> *Sarat Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y. Supp. 382, 386 (Sup. Ct. 1937).

<sup>55</sup> *Id.*, 295 N.Y. Supp. at 388-9.

terest, not to have been published for "advertising" or "trade" purposes. And, in a federal case already referred to,<sup>56</sup> the representation in a newsreel of a woman exercising in a gymnasium was held a legitimate exercise of the right to publish matters of a general interest.

## VII.

### *Prospects for the Future*

The analysis which precedes indicates that no matter how antipodal the approach to the problem of privacy is between courts which do and those which do not recognize its existence, means have been found to redress grievous wrongs. Courts, when confronted with a legislative enactment such as the New York statute, the object of which was to prevent exploitation of another's name for commercial purposes, have found no difficulty in interpreting it against the democratic background of American life which gives full recognition, as a constitutional guaranty, to the right of freedom of expression and communication and the freedom of information which are integral parts of the guaranty of the First Amendment.<sup>57</sup>

#### *A. Extremes of Approach:*

There are, of course, extremes of approach taken, not so much by jurists, as by persons who entertain diverse attitudes as to what decency in the realm of publicity and disclosure should be. Speaking in 1930, a well-known professor of journalism deplored the fact that some of the matters in the lives of public characters in the past, which were considered strictly the private business of such characters, would

---

<sup>56</sup> *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E.D. N.Y. 1936).

<sup>57</sup> U.S. CONST. AMEND. I. Liberty of circulation and diffusion is an essential part of the freedom of publication. *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 82 L. Ed. 949 (1938); *Ex parte Jackson*, 96 U.S. 727, 24 L. Ed. 877, 879 (1878). See the writer's opinion in *People v. Armentrout*, 118 Cal. App. 761, 1 P. (2d) 556, 560 (1931).

be exploited today with all the exaggerated techniques of the modern newspaper coverage. He wrote: <sup>58</sup>

Newspapers may have progressed in so-called enterprise during the past hundred years, but they have not progressed in their intelligence in their exercise of their legal rights. No such unseemly invasions are recorded of the incident of the sudden separation in 1829 of Governor Sam Houston of Tennessee and his bride of three months. True, gossip flew unrestrained, but there is no record that any newspaper attempted to invade the governor's room at the hotel, or the home of Mrs. Houston's parents, to which she had fled. To this day, very few persons know what occurred between Sam Houston and Eliza Allen.

Was it anybody's business but theirs? Only in that the separation caused the Governor to resign. What occurred to cause the separation was their own affair and no one else's. But could they have retained the secret six hours today in the face of modern newspaper practices represented by the hounding, spying, bribing, stealing, camera-clicking reporter? No.

Professor Crosman would protect a wife or child against the indiscretion of the husband or father, and would uphold, as he put it, "the right to mourn death and to bury their loved ones in peace and privacy." <sup>59</sup>

At the other end is a well-known writer on newspaper law who, while admitting that the courts have drawn a valid distinction between fictionalization and dramatization on the one hand and the dissemination of news and information on the other, has likened the right of privacy promulgated by Warren and Brandeis in 1890 to a cloud which "has been slowly casting its shadow over more and more of the decisions of the courts throughout the country." <sup>60</sup>

### *B. Living in Public:*

Those who would forbid publication entirely without consent overlook the proper function of the newspaper and other

---

<sup>58</sup> Crosman, *Freedom of the Press in 1930*, 2 Western Publisher No. 17, 1930, p. 7.

<sup>59</sup> *Ibid.*

<sup>60</sup> Gray, *supra* note 50.

media of communication and expression in modern democratic society. Whether we like it or not, we have no more privacy than the proverbial gold fish. If we participate in any manner in the life of a community, we live in public. What is news is a matter of place and circumstance. Society, through legislation, has invaded what we once considered the private domain. We have laws, both state and federal, which forbid political coercion and political tests for office, and even inquiry into a person's political or religious beliefs as a basis for private or public employment.<sup>61</sup> Yet, in recent years, laws have been sustained which require exculpatory oaths of one kind or another for organizations seeking governmental intervention or for persons serving the public,<sup>62</sup> and laws curtailing what would ordinarily be considered the legitimate exercise of political activities by government employees.<sup>63</sup>

So in modern American living, in many respects, the outside world has invaded what was once considered the individual's private domain. This being the pattern of our society, it was to be expected that the newspaper and other media

---

<sup>61</sup> 22 STAT. 403 (1883), 5 U.S.C. § 633 (2) (5) (1946) (forbidding prejudice in civil service for failure to make contributions for political purposes); 22 STAT. 403 (1883), 5 U.S.C. § 633 (2) (6) (1946) (prohibiting coercion); 60 STAT. 1030, 22 U.S.C. § 807 (1946) (prohibiting political tests and discrimination on account of race, creed or color in the foreign service of the United States); CAL. LABOR CODE § 1101 (Deering 1943) (prohibiting private employers from forbidding employees to engage in politics and be candidates for public office, or from controlling their political activities); CAL. LABOR CODE § 1102 (Deering 1943) (prohibiting coercion or influence on the political activities of employees). Any violation of these provisions is penalized as a crime. CAL. LABOR CODE § 1103 (Deering 1943). A civil action for damages is also authorized for injury suffered from violation. CAL. LABOR CODE § 1105 (Deering 1943).

<sup>62</sup> 61 STAT. 146 (1947), 29 U.S.C. § 159(h) (Supp. 1951), American Communications Assn., C.I.O. v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); Adler v. Board of Education of City of New York, ....U.S....., 72 S. Ct. 380, 96 L. Ed. \*295 (1952); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951).

<sup>63</sup> 53 STAT. 1148 (1939), as amended, 5 U.S.C. § 118i (Supp. 1951), United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947). We have become slaves of slogans. In his famous *Folkways*, William Graham Sumner remarked: "The power of watchwords consists in the cluster of suggestions which has become fastened upon them. In the Middle Ages the word 'heretic' won a frightful suggestion of base wickedness. In the seventeenth century the same suggestions were connected with the words 'witch' and 'traitor.'" SUMNER, *FOLKWAYS* 21 (Keller ed. 1940). Now it is "subversive."

of communication which mirror the activities of that society, should make a different approach to what news is.

Walter Lippman once defined news as "not a mirror of social conditions, but the report of an aspect that has obtruded itself."<sup>64</sup> Things unusual make news, according to the old saying of the newspaper profession that if a dog bites a man, it is not news, but if a man bites a dog, it is. Under the conditions just described, it is illusory to expect the newspapers and other media of communication and expression to retreat into the type of ivory tower to which those who sigh for the past would relegate them.

*C. The Freedom of Information and Communication:*

Through legislative enactments, administrative and executive decrees, grounded on security and other reasons, there is a constant attempt to limit freedom of information and communication. Many persons see in this a grave danger to freedom of expression. In October, 1951, the members of a Northwestern University Forum, representing leading newspapers in the Americas, declared that the integrity of freedom of information goes to the very roots of popular government in the United States. And they declared that this right was being constantly undermined by certain practices. The resolution read:<sup>65</sup>

That this fundamental right of the people is being steadily undermined by the growing practice of secrecy in government on national, state and local levels; the growing tendency of public officials to feel that they are not accountable to the public; that they may conduct the business of their offices in secret; that they may seal or impound public records; that they may divulge only such information as they think is good for the people to know; that they may extend "military security" into areas of news which have no bearing on the nation's security, as shown by the dangers in an executive order issued within the week.

---

<sup>64</sup> LIPPMANN, PUBLIC OPINION 341 (1922).

<sup>65</sup> Editor & Publisher, Oct. 6, 1951, p. 10, col. 1, 2-3.

This is the pattern by which the Fascists in Italy, the Nazis in Germany, the Bolsheviks in Russia, the Peronistas in Argentina began to limit the right of their people to know, forced their newspapers into complete subjection and were able to take from them all their other democratic rights as well.

And there is a movement to have the right embodied in a congressional enactment.<sup>66</sup>

So, in assaying the problem we are discussing, to me, as a believer in the democratic process, the solution lies not in curtailment of the right, but, rather, in its broader recognition by the courts. The social demands on the press and other media of communication and expression are becoming more and more exacting. In this, as in all other domains pertaining to democratic society, the relief from occasional abuses must come from the self-discipline of the media themselves, under the spur and pressure of an enlightened public opinion. The Report of the Commission on Freedom of the Press stated truly that "The press itself is always one of the chief agents in destroying or in building the bases of its own significance."<sup>67</sup> This is true also of other media of communication and expression.

The battle for truthful and responsible expression and creation is constantly on. In it the modern newspaper and other media of communication, expression and creation, are the main participants. They may become leading actors in its attainment if they live up to the responsibilities which their great powers in modern society entail.

*Leon R. Yankwich\**

---

<sup>66</sup> Editor & Publisher, Dec. 8, 1951, p. 18, col. 1.

<sup>67</sup> THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 133 (1947). And see, Miller, *Principles of Law Limiting Radio Broadcasting*, 9 F.R.D. 217 (1950).

\* Chief Judge, United States District Court for the Southern District of California. LL.B., 1909, Willamette University. Formerly, Judge, Superior Court of Los Angeles County, 1927-35; Lecturer in Law, Loyola University of Los Angeles, 1925-34; Judge, United States District Court for the Southern District of California, 1935-51. Author of numerous books and articles on defamation, state and federal procedure, anti-trust law and the law of copyrights.