The Right of Privacy and Some of Its Recent Developments

Earl Handler

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Foster v. Farra case, the fact that the defendant had sanctioned use of a chattel which proved defective was the concern of the court.

The authorities discussed reflect a trend contrary to the position taken by the Restatement in that they either impose or favor imposition of a duty to inspect in absence of any benefit accruing to the bailor from the bailment. The Restatement does not require even a cursory inspection; it requires only that defects which are known or should be realized be disclosed to the bailee. Although it is difficult to determine whether the decisions presented are products of factors peculiar to bailment of automobiles, since the principles upon which they are based are principles of general application, they merit attention.

Pennsylvania's position cannot be definitely ascertained. The courts, generally speaking, favor the Restatement in situations where there is no clear precedent. Unless the Restatement prevails, it is a fair conclusion that the rights of third persons against a gratuitous bailor, who has bailed a defective chattel, are not bounded by the same limits which determine the bailor's liability to the bailee and those claiming through him. The gratuitous bailor may well be required to exercise reasonable care in inspecting the bailed article for defects, in order to avoid liability to third persons he should reasonably expect to be in the vicinity of its use.

Thomas Wood

THE RIGHT OF PRIVACY AND SOME OF ITS RECENT DEVELOPMENTS

The scope of this note is the nature and history of the right of privacy with special consideration of the cases where the doctrine has been the controlling factor. The jurisdiction of equity as it relates to this particular right involves complexities too numerous for a simple note.

Nature and History

The right of privacy is the right of an individual to be let alone, or to live a life of seclusion or to be free from unwarranted publicity or to live without unwarranted interference by the public about matters with which the public is not concerned. Where the right is recognized, its violation is a tort, it being the complement of the right of immunity of one's person.

2Warren and Brandeis, Right of Privacy (1890) 4 HARV. L. REV. 193.
An analysis of a collection of recent cases indicates that the right of privacy possesses the following incidents:

1. The right was unknown to the ancient common law, subject to the possible qualification that eavesdropping was a crime at common law.
2. It is a personal right and not a property right, thus it dies with the person.
3. The right does not exist where the person publishes or consents to the publication of the matter in complaint.
4. The price of being a public figure is a waiver of the right.
5. The right is subject to the same defenses of privilege applicable to the torts of slander and libel.
6. The right cannot be violated by word of mouth.
7. The publication must be made for gain or profit. (This is doubtful logic and is not mentioned in most of the cases.)
8. It is not necessary to recovery that special damages be shown.

These observations might give rise to the supposition that the invasion of this right is similar to the tort of libel. However, beyond the point of the common form of action (tort) and defense (privilege) such similarity ceases to exist.

It has been suggested by contemporary opinion that the concept of privacy is of modern origin, that it is a product of recent legal development evolved to meet the problems of the individual who is served and yet enslaved by the telephone, photography, newspaper, radio, and other twentieth century ingenuities. While this explanation is pragmatic, investigation indicates that it is not historically correct.

One of the most cogent decisions recognizing the right is the Pavesich case, which not only was among the first directly to recognize the right, but also was an unequivocal answer to the Roberson case, which denied the existence

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7 Ibid.
8 Ibid.
10 Ibid.
11 Ibid.
of the right. The Pavesich case advances the theory that privacy is but an ancient right re-discovered by Samuel Warren and Louis Brandeis, in their article. "The Right of Privacy," published in 4 Harvard Law Review 193. In the Pavesich case the court observed that the right was recognized in Roman Law and further that:

"It may be said to arise out of these laws sometimes characterized as 'immutable' because they are natural and so just at all times and in all places that no authority can either change or abolish them."17

The court describes the right as liberty which embraces far more than freedom from physical restraint and declares that it includes the right against search and seizure.18 This concept seems to approach closely the "self-evident" truths of the Declaration of Independence, or at least to approximate the theoretical dignity of the individual about which Rousseau wrote so eloquently. In at least one case this has been relied on for the ratio decidendi.19

The rediscovery of this so-called ancient right and its application to modern law was first fully advanced by Messrs. Warren and Brandeis in 1890,20 when they collected and analyzed a number of cases which established that the courts had been protecting the right for years, under the guise of either a property or contract right or a fiduciary relation. The significance of the authors' conclusion was that the only common ground upon which these decisions could rest was that of protection of a right of privacy.21

This bold pronouncement almost immediately precipitated a legal tempest in the judicial teapots of the country, provoking a number of decisions, many of the earliest decisions dealing with the unauthorized use of photographs. New York denied the existence of the right, declaring that it would give rise to endless litigation, and that it was only within the province of the legislature to formulate protection for privacy.22 In accordance with the suggestion the legislature did enact laws for that purpose, which laws promptly gave rise to endless litigation, as a glance at any digest will show.23

18 Ibid; cf. Annenberg v. Roberts et al., 333 Pa. 203, 2 A. (2d) 617 (1938), in which the court says: "None of the rights of the individual citizens has been more eloquently depicted and defended in the decisions of the Supreme Court of the United States than the right of personal privacy as against unlimited and unreasonable legislative or other governmental investigations."
20 Warren and Brandeis, Right of Privacy (1890) 4 HARV. L. REV. 193.
21 Ibid.
23 New York Civil Rights Law, Sec. 51, Chapter 6 and amendments. Also see cases thereunder. This enactment forbids anyone to use another's name or portrait for advertising or purposes of trade, subject, of course, to certain exceptions.
Other jurisdictions such as Georgia,\textsuperscript{24} Kentucky,\textsuperscript{26} and Louisiana\textsuperscript{26} recognized the right both in law and equity. Still other jurisdictions complicated matters by refusing to recognize any rights but property rights in the equity court, and since much of the litigation concerning privacy arose in this tribunal, it found no redress.\textsuperscript{27} Some other jurisdictions ease the property right requirement by quickly conjuring up a property right in many cases.\textsuperscript{28} This certainly does not clarify the law of privacy, because it is a personal right and should not depend on property rights for recognition. It might also be well to add that the equity courts have further complicated matters by dismissing "privacy" suits on the basis that the remedy at law is adequate.\textsuperscript{29}

Pennsylvania is a jurisdiction which has given voice to some rather vague pronouncements on the subject. The law side of the court has declared in the old case of \textit{Owen v. Henman,}\textsuperscript{30} where an action had been brought against the defendant because he made noises outside of church during the services, resulting in considerable annoyance to the plaintiff, that:

\begin{quote}
"The injury complained of is not the ground of an action. . . . There is no damage to his property, health, reputation or person.\textsuperscript{31} . . . Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse, or any other mental exercise, by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance."
\end{quote}

But most of the litigation in this State has been in the equity courts, and much of it has not dealt so much with the pure right of privacy as with certain personal rights closely akin to privacy. In such cases the court has invariably refused to act because of the twofold reason that equity protects only property rights, and that the remedy at law is adequate.\textsuperscript{32} These decisions cannot be dismissed lightly, but, on the other hand, they cannot be regarded with too much conviction, because a certain line of them deal with the protection of a political right (the right to hold public office) and the decisions in these cases are affected

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\item \textsuperscript{24}Pavesich \textit{v. New England Life Ins. Co.}, 122 Ga. 190, 50 S. E. 68 (1905).
\item \textsuperscript{25}Brens \textit{v. Morgan}, 221 Ky. 765, 229 S. W. 967 (1927).
\item \textsuperscript{26}Denn \textit{v. Kirby Lumber Company}, 162 La. 671, 111 So. 55 (1926).
\item \textsuperscript{27}Hutchinson \textit{v. Goshorn}, 256 Pa. 69, 100 Atl. 586 (1917); Ashinsky \textit{v. Levenson}, 256 Pa. 14, 100 Atl. 491 (1917).
\item \textsuperscript{28}Edison \textit{v. Edison Polyform Mfg. Co.}, 73 N. J. Eq. 136, 67 A. 392 (Ch., 1907); Munden \textit{v. Harris}, 153 Mo. 652, 134 S. W. 1076 (1911).
\item \textsuperscript{29}Chappel \textit{v. Stewart}, 82 Md. 323, 33 Atl. 542 (1896); cf. Ashinsky \textit{v. Levenson}, 256 Pa. 14, 100 Atl. 491 (1917).
\item \textsuperscript{30}1 W. and S. 548 (Pa., 1841).
\item \textsuperscript{31}This sentence certainly indicates that the court at this time had no concept of the right of privacy as a right which could be redressed in the courts.
\item \textsuperscript{32}Hutchinson \textit{v. Goshorn}, 256 Pa. 69, 100 Atl. 586 (1917); Ashinsky \textit{v. Levenson}, 256 Pa. 14, 100 Atl. 491 (1917).
\end{itemize}
by collateral factors, rather than substantive considerations.3

There are two late decisions in this state which are quite interesting and which, if followed, might change our position completely on both the subject of privacy and the protection of personal rights by equity. In the case of *Waring v. W. D. A. S. Broadcasting Station*4 an interesting situation arose. Waring's famous orchestra had made certain phonograph recordings under a contract with a certain producer of records, whereby they were to be sold to persons for private use only. Each record carried the legend across its face, "Not licensed for broadcast purposes." The defendant company used some of the records for that very purpose, and a suit was instituted in equity for an injunction. The Supreme Court sustained the injunction on the basis of a property right for which an elaborate synthesis of reasoning was advanced. Mr. Justice Maxey in a concurring opinion based the decision on the right of privacy, carefully defining and reviewing the subject. It might be well to recall some of his statements because this seems to be the only case in Pennsylvania in which the right has been recognized as such. In his opinion, the Justice writes as follows:

"I think plaintiff's right which was invaded by the defendant was his right to privacy, which is a broader right than a mere right of property. A man may object to any invasion of his right to privacy or to its unlimited invasion. He may choose to render interpretations to an audience of one person in a private home or to an audience in a great amphitheatre. When a writer of a letter objects, as he may, with legal effectiveness to any publication of that letter by its recipient, or to its publication more widely than he authorized, his purpose is not to protect his property but his privacy. The publication of his letter might not and probably would not cause him one cent's worth of damage, but it might upset his peace of mind and disturb his social relations exactly as would the tapping of his telephone wires or the rifling of his diary or his correspondence. . . A person who asks a court of equity to prevent his photographs or his artistic renditions from being indiscriminately distributed is likewise seeking the repulsion of intrusions . . . whether a "star" is brilliant or dim, equity should prevent unauthorized persons from mechanically hitching their wagons to it."

The other case which mentions the right is that of *Annenberg v. Roberts et al.*5 This case deals with the attempt of a legislative committee authorized by

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3 This is well illustrated by the lack of agreement of the lower courts on the power of equity to protect political rights, and by the scarcity of appellate opinions on the subject.
4 327 Pa. 554, 194 Atl. 651 (1937).
5 327 Pa. 203, 2 A. (2d) 612 (1938).
statute to investigate the affairs of the plaintiff with reference to his transmission of certain racing information to professional gamblers. The Supreme Court of Pennsylvania held that the statute was unconstitutional and gave as one of its reasons that it constituted an unreasonable search and seizure. But in discussing this constitutional safeguard, the court clearly states that there was a violation of the plaintiff's right of privacy:

"It would seem scarcely necessary to marshal authorities to establish . . . that a witness cannot be compelled under a guise of a legislative study of conditions bearing upon proposed legislation to reveal his private and personal affairs."

Certainly this language is indicative of a desire on the part of the court to protect the plaintiff's desire to be "left alone," or to conduct his private affairs "free from unwarranted interference." At least one Justice on our high court recognized this fact because he wrote a supplemental opinion pointing out that there were sufficient reasons other than the invasion of the plaintiff's private and personal affairs to warrant the decision and also noting that the equity court in this jurisdiction does not protect purely personal rights, that is to say, the right of privacy.*

In the face of these recent departures into the unexplored realm of the right of privacy, what would be the chance of its recognition in Pennsylvania? To answer this would be to speculate, but since this is a popular diversion, expected, in fact, of law-note writers, this writer will indulge in the usual soothsaying. It is our opinion that on the basis of these two decisions, the right would still go unredressed in our state. True, the Waring case spoke clearly of privacy, but only in a concurring opinion.

The decision also loses much of its weight because the facts in the case are such that it is questionable whether Mr. Waring's privacy was being disturbed. Discounting any waiver on his part, it is understandable that his "right to be let alone" might be seriously injured if his private diary were read over the radio as the feature of some soap or baking powder hour, but it is not readily conceivable how this same right could be disturbed by the unauthorized broadcast of recordings, tens of thousands of which had been pressed out and sold for the use of the devotees of popular American music all over the country. Then, too, the doctrine of literary property, upon which the majority of the court rests its decision, is too firmly entrenched in our court-made law and statute law to be disregarded in favor of the rarer right of privacy. The Annenberg case is of still more dubious character. The case does not seem to say that the plaintiff's right of privacy had been invaded, but it must be remembered that the case in-

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*Stern, J. wrote the supplemental opinion.
volved the constitutionality of a statute passed by a legislature whose policies had already been repudiated at the polls by the people of the state; and it follows that any court would be loathe to permit a legislative committee to function with a view to proposed legislation when it had been thus repudiated.

THE RIGHT OF PRIVACY AS APPLIED TO CERTAIN FACTUAL SITUATIONS

The practical aspect of this right is to be most readily observed in a study of the factual situations in which it has been invoked. Generally speaking, it belongs to those rights termed as personal rights and specifically, it has been called into use in cases arising from the unauthorized use of photographs, names and in a group of miscellaneous situations which deal with privacy in its most literal sense, that is, in the interference with one's desire and right to live in seclusion free from unwarranted publicity.

The cases in which the right was first made a subject of controversy were cases dealing with the unauthorized use of photographs, and this type of situation has been litigated frequently enough to be well settled as a matter of law in most jurisdictions. For this reason, the cases dealing with photographs will not be considered any further. The cases dealing with unauthorized use of names have also been considered in a number of cases and the tendency is to protect a person's name on another basis than the right of privacy. The name cases like the photograph cases have been protected frequently on the reasoning of courts that a person has a property right in his name and face.

The situations dealing with the "pure" right of privacy are so diversified that they cannot be classified with any facility. The only manner which remains is to detail the various situations specifically and then attempt to lay down some general observations. The first case to be considered is *Deon v. Kirby Lumber Co.* In this case the plaintiff conducted a merchandising business in competition with the defendant, who was the largest employer in that vicinity. The plaintiff brought an action for damages against the defendant charging it with using coercion on its employees to prevent them from trading with the plaintiff.

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88 See 33 ILL. L. REV. 87 (1938) which considers in detail the question of photographs as the subject of legal protection. The note points out that the use of photographs might give rise to: (a) an action for libel; (b) an action involving the right of privacy based on either common law or statutory enactments, as in New York State.
89 Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (Ch., 1907), in which the court protected the plaintiff's name because defendant's unauthorized use of it might subject him to certain legal disabilities.
90 Edison v. Edison Polyform Co., 73 N. J. Eq. 136, 67 Atl. 392 (Ch., 1907); Munden v. Harris, 153 Mo. 652, 134 S. W. 1076 (1911). Cases involving the unauthorized use of names have been decided on the theory of unfair competition also.
91 162 La. 671, 111 So. 55 (1926).
and further alleging that these activities had ruined his business as well as subjecting him and his family to great notoriety and social ostracism. The action was brought under the authority of a Louisiana statute prohibiting activities in restraint of trade. Although the court refused to sustain plaintiff's action under the statute, it suggested that if the plaintiff had suffered social ostracism, he had a remedy in an action for the violation of his right of privacy:

"It is the legal right of every man to enjoy social relations with his friends and neighbors. . . . The free unhampered exercise of the right is necessary to his happiness, comfort and well-being. If he be unlawfully deprived of the right by others, he is entitled to redress."4

The case of *Brents v. Morgan*48 deals with a different situation but reaches a similar result. This action grew out of the placing of the following sign by the defendant in his place of business:

**NOTICE**

Dr. W. R. Morgan owes an account here of $49.67 and if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid.”

The court carefully points out that this publication was true, so that no action for libel was available, and it repudiates the doctrine that there are certain civil libels to which truth is not a defense. The court then declares that the proper theory by which the plaintiff may be protected is the right of privacy:

"We are content to hold that there is a right of privacy and that the unwarranted invasion of such right may be made the subject of an action in tort to recover damages for such unwarranted invasion. The legal path which has written at its entrance 'Privacy' or 'Right of Privacy' is new and by no means well-trodden, and for that reason we venture upon it with some hesitancy and with all safeguards.”

The noteworthy feature of this case is that the courts had sufficient courage to discard the makeshift libel doctrine advanced in some quarters, and adopt the "right of privacy" rule.  

*Melvin v. Reid*44 embodies a novel situation. In this case, the plaintiff, a rehabilitated prostitute, who had through her own determination achieved respectability, was confronted with a movie depicting an incident from her scarlet

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48221 Ky. 765, 299 S. W. 967 (1927).

past. The material employed in the picture was true, and the plaintiff suffered the scorn and hatred of her erstwhile friends because her maiden name was used. The plaintiff brought an action for injunction and damages. The court attached great importance to the use of the plaintiff's true name:

"The incidents were taken from the public record, therefore they were not actionable. But plaintiff's true name was used in connection with the facts and this is an invasion of a right of privacy."

The court however weakened its decision by relying for authority on provisions of the state constitution, but this does not seem entirely unreasonable in view of what was said in the Pavesich case. In the case under consideration the court speaks thus:

"... The publication of unsavory incidents in the past life of the appellant... was a direct invasion of her inalienable rights guaranteed to her by our constitution [California] 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 or needlessly invaded by others."

We come now to several cases of a different character, in that they do not involve a violation of the right by representations, but by actual interference with the privacy of the persons injured. The case of Brex v. Smith involved a situation similar to that in the Annenberg case. Here a public prosecutor demanded that the bank accounts of all the members of the police force be submitted to him for examination, giving as his reason that he was making a certain investigation. The plaintiff sought an injunction which the court granted. The court said:

"... not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right all other rights would lose half their value."

The other case, that of Rhodes v. Graham et al, is perhaps the best example of the violation of the right. In this situation, the defendants tapped the plaintiff's telephone wire for the purpose of listening to his conversations, and also

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46104 N. J. Eq. 386, 146 Atl. 34 (Ch., 1929).
47Quoting from In re Pacific Ry. Comm., 52 Fed. 241, 250 (C. C. N. D. Cal., 1887).
48Cf. Annenberg v. Roberts et al., 333 Pa. 203, 2 A. (2d) 617 (1938). This decision has more validity, in the opinion of the writer, because New Jersey has recognized the right of privacy at least tacitly in the cases of Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (Ch., 1907); and Edison v. Edison Polyform Corp., 73 N. J. Eq. 136, 67 Atl. 392 (Ch., 1907).
49238 Ky. 225, 37 S. W. 2nd 46 (1931).
employed a stenographer to transcribe the conversations. The court sustained the plaintiff's suit for damages, saying:

"The evil incident to the invasion of the privacy of the telephone is as great as that occasioned by unwarranted publicity in newspapers and by other means—whenever a telephone line is tapped the privacy of those talking over the line is invaded and conversations wholly proper and confidential may be overheard."

**Summary**

These cases are useful in determining what the courts have said. What the courts will say in the future is a difficult deduction, because the decisions are as yet quite meager and equivocal. But from the Deon, Brents and Melvin cases, we can see a tendency to protect a person from representations which injure his personality, even though the representations be true. Thus in those jurisdictions which recognize the right of privacy, an individual's remedies do not cease with libel. This certainly will open new vistas of litigation.

The Brex and Rhodes cases give a hint of the limits to which the courts may go to protect an individual's private affairs. In both of these cases, the right of privacy seems to manifest itself as a refinement of one of our constitutional guarantees, and indeed this seems to be consciously expressed in the Annenberg case. In fact, no one can read the cases on this subject without feeling that in the final analysis, privacy is a type of constitutional immunity from the unreasonable activities of either an individual or the government.

There is some doubt as to the utility value of the right when considered in its broadest aspect. As has been said earlier, a public character waives his right of privacy. Thus, though he will be harassed most by persons who seek to burden his life, he will have the least recourse to the courts. In this respect, the right of privacy is valueless, and it is evident that a legal device which aids least those whose need is greatest is deficient. The right will of course always be curtailed when it conflicts with freedom of the press, which is only as it should be. Finally, the problem presents itself in pure privacy cases as to the extent of protection afforded when a governmental agency is conducting an investigation presumably for the public good. This, of course, presents the court with the dilemma of whether the law is seeking to protect the public from one who is preying on the public, or the individual from the government which is preying on him. It is safe to say that no hard and fast rule can be framed in such a situation.

EARL HANDLER