LEGISLATION

NECESSITY OF STATUTORY PROTECTION OF THE RIGHT OF PRIVACY—The urge to profit by satisfying and further stimulating prurient tastes through the dissemination of the intimacies of private lives, the aggression with which super-salesmen invade otherwise secluded surroundings, and the appropriation of attributes of personality for advertising and commercial purposes make it timely to ascertain whether or not existing judicial authority is competent to afford relief to the unfortunate who has been injured by such activity.

To say precisely what is meant by the "right of privacy" is a difficult matter. In theory, the injury done by a violation of this "right" is an injury to feelings or state of mind.[1] It is an injury to the individual subjectively, and not to his property or reputation. Therein privacy may be distinguished from libel and slander, which deal "only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows."[2] The right of privacy deals with painful mental effects. Moreover, truth is no defense in this type of case.

An invasion of the right of privacy may be distinguished from an assault in that the element of fear or apprehension of bodily harm, necessary to an assault, need not be present as an essential element of privacy invasion. It differs from "the interest in the freedom from disagreeable emotions" (though invasions of privacy result in disagreeable emotions) in that, in the latter interest, there is no desire on the part of the injured person to keep himself or some attribute of his personality *secret* and *secluded* from outsiders.

No evidence of pecuniary loss need be introduced to recover damages for an invasion of the right of privacy.[3] Proof of the invasion of the right carries with it a presumption of damages, the amount of which is to be ascertained by the jury.

The leading article on this subject[4] was written, in 1890, by Professor Samuel Warren and Mr. Justice Brandeis. The innovation of the "yellow press" was to a great extent responsible for its appearance. Therefore, to these authors a violation of privacy meant, roughly, the publication of that which the person concerned desired to keep to himself, and which, when made public, injured his mental state or feelings. They did not deal with activities directed against a person himself, such as personal intrusion into the solitude of his physical surroundings, or shadowing by detectives. A summary of their conception of the right of privacy and its limitations is as follows: regardless of truth or malice, no one shall, without the permission of the individual concerned, make public by written, printed, or photographic representations, the likeness of, or anything concerning the peculiarities of personality, the intimate mode of life, and intimate relations and actions of that individual, unless necessary to be disclosed in a court of law or other governmental body, or unless pertinent to his life as a candidate for or holder of public office, or to his "quasi-public" avocation, *i. e.*, one naturally attendant with publicity. Oral representations were not included in the "right" since it was felt that they did not present a problem sufficiently serious for the courts' concern.

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[1] Warren and Brandeis, *The Right to Privacy* (1890) 4 HARV. L. REV. 193, 197.

[2] *Ibid.*

[3] Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68 (1905); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918).

[4] *Supra* note 1.

The interests usually included in the right of privacy are analyzed and classified in a recent article[5] by Dean Leon Green. He first points out the general recognition that the interests involved in "privacy" cases are interests of personality, rather than property interests or "interests in relations with other persons". "The tort cases", he says,[6] "which courts most frequently bring under the 'privacy' rubric, or else treat as anomalies, involve an interest of personality which has been subjected to the harm of appropriation" (as contrasted to the harm of "defamation" or "physical harms"). He then subclassifies interests of personality as follows: (1) Physical integrity, (2) Feelings or emotions, (3) Capacity for activity or service, (4) Name, (5) Likeness, (6) History, and (7) Privacy. "Privacy", he believes, is only one of several interests brought under the "right of privacy". To him, "privacy" means a seclusion, isolation, solitude with regard to the person himself, as distinguished from his name, likeness, history, *etc.* This interpretation of the word may best be understood by noticing the nature of the complaints in the cases classified by him under "privacy":[7] shadowing by detectives, intrusion into the plaintiff's stateroom, defendant's gaining admission into the plaintiff's bedroom during childbirth by representing that he was a doctor, and finally, listening to plaintiff's telephone conversation by means of wire-tapping. These, therefore, are to Green the true "privacy" cases. He contends that "to bring cases involving the appropriation of all phases of the personality under this title [privacy] creates a disturbing sense of artificiality. The term is too narrow and too lacking in descriptive coloring".[8]

It is believed that such limitation on the meaning of the word "privacy" is too great. The Warren-Brandeis article, which really formulated the "right of privacy", did not as much as mention that interest which Dean Green calls "privacy". Under his classification, the interests for which these earlier writers advocated protection are name, likeness, and history. Thus, Green seeks to give the word a meaning which entirely excludes the meaning that was originally attributed to "right of privacy". Even if we assume that the word "privacy" is, in a dictionary sense, too lacking in descriptive coloring and too narrow in import, it should be realized that judicial decisions have broadened its scope, and, by using the word in connection with certain types of cases, have given it such color that today when the phrase "right of privacy" is used, it gives a rather definite connotation of what is involved. Without being inaccurate, the phrase may be used to include what Dean Green calls "history, name, likeness, and privacy". Such is what the lawyer believes it to mean. Why cast that meaning aside?

"Interests in relations with other persons" have been treated under the "right of privacy".[9] Suppose, for example, a tabloid newspaper publishes an unsavory story about a man who has recently died and his son sues for damages, alleging that his "right of privacy" has been invaded. Even a court which might otherwise recognize the right of privacy would probably deny recovery on the theory that the privacy invaded was that of the father, and, therefore, the tort died with him. Since the interest in this type of case is not clearly described by the phrase "right of privacy", the average court would probably fail to see that any interest of the plaintiff was harmed. "Family Privacy" might be more handy, even though less accurate, than Dean Green's "interests in relations with other persons".

[5] Green, *The Right of Privacy* (1932) 27 ILL. L. REV. 237.
[6] *Id.* at 239.
[7] *Id.* at 252 *et seq.*
[8] *Id.* at 239.
[9] Corliss v. Walker, 64 Fed. 280 (C. C. D. Mass. 1894); Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285 (1899); Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1895).

When Warren and Brandeis wrote their article, radio and talking pictures were unknown. Hence, they did not deem it necessary to advocate protection against any kind of oral representations. Today, however, it is obvious that protection should be given against abuse by these agencies.

Proceeding on the Warren-Brandeis conception of privacy, and incorporating into it oral representations both by radio and talking pictures, as well as Dean Green's strict "privacy", let us examine the cases usually cited as recognizing or denying the existence of the right of privacy, keeping in mind the distinction that the injury should be to the state of mind or feelings, and not to any property interests.

A careful study discloses that there are but four [10] American jurisdictions in which it may, with reasonable certainty, be predicted that relief at law on a

[10] *Georgia*—Pavesich v. New England Life Insurance Co., *supra* note 3 (use of plaintiff's picture for advertising defendant's business); Byfield v. Candler, 33 Ga. App. 275, 125 S. E. 905 (1925) (breaking into plaintiff's stateroom).

Kansas—Kunz v. Allen, *supra* note 3 (exhibiting plaintiff's likeness in motion picture which advertised defendant's business).

Kentucky—Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931) (tapping telephone wire and listening to plaintiff's conversations); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927) (publishing the fact that plaintiff owes money and won't pay). With regard to two other Kentucky cases usually cited for the right of privacy, the first, Douglass v. Stokes, 149 Ky. 506, 149 S. W. 849 (1912), was decided on the ground of breach of trust, and the other, Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909), on the ground of libel. Thus they are not true privacy cases.

New York—Legal and equitable relief to a limited extent (discussed in text) by virtue of a statute. N. Y. CIVIL RIGHTS LAW (1909) §§ 50, 51.

The Supreme Court of the District of Columbia (a lower court), in Peed v. Washington Times Co., 55 Wash. L. Rep. 182 (1927), granted relief at law on a pure question of privacy. This decision, of course, cannot be said to set the Federal *law*. Another federal court seemed to deny the existence of the right. See Vassar College v. Loose-Wiles Co., 197 Fed. 982 (W. D. Mo. 1912). No case has reached the United States Supreme Court.

An excellent decision of the Supreme Court of Baltimore City, Graham v. Baltimore Post Co. *et al.*, The Daily Record, Baltimore, Nov. 9, 1932, at 3, recognizes the right of privacy. The Maryland court of last resort has not decided a privacy case at law but has decided against equitable protection for privacy. Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896).

An anomalous California case should be noted. In Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931), the unsavory past life of a reformed and respectable plaintiff was taken from the court record of a murder trial and made into a motion picture which exposed her name. The court held no recovery could be had on the privacy theory because the matter contained in court records is public. But damages were allowed on the basis of the words of the state Constitution to the effect that all people shall be entitled to "pursue happiness," the court saying (at 292, 297 Pac. at 93) "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. . . ." In view of the fact that the complaint alleges that the plaintiff was exposed to "obloquy, contempt, and scorn" and also asked damages for "mental and physical suffering", it is difficult to know whether the damages were for injury to reputation, with mental suffering tacked on, as in libel, or whether they were purely for injury to feelings, as in the right of privacy.

In a recent article, Kacedan, *The Right of Privacy* (1932) 12 B. U. L. REV. 353, 646 n., the author says that "six states have recognized the right of privacy and three states have rejected it". He does not identify those states but refers the reader to his footnotes—"124 to 181". The cases that he discusses involve many types of interests including, among others, interests in relation with other persons, and defamation. Thus it is difficult to know which states he believes to recognize the right of privacy, and which not. One of the cases (cited p. 388) which Mr. Kacedan may have considered a privacy case is Magouirk v. Western Union Tel. Co., 79 Miss. 632, 31 So. 206 (1902) which seems to have been decided on the ground of defamation. Perhaps he includes California as recognizing the right of privacy on the basis of Melvin v. Reid (see discussion *supra* this note) where the court held that plaintiff's case was not within the right of privacy as recognized in other states, but gave relief on another ground. He also states (at p. 395) that "California protects the right of privacy by statute, making the publication of a person's picture a misdemeanor". This was CAL. PENAL CODE (Deering, 1923) § 258, and was repealed by Cal. Stat. 1915, p. 761, CAL. PENAL CODE (Deering, 1931) 110. Very probably the reason for the repeal was that the statute was so worded as to unduly restrict the reasonable use of photographs by the press. Ac-

pure question of privacy will be granted. In four jurisdictions [11] the existence of the right of privacy independent of statute has been denied. The remaining jurisdictions have either no cases on point, or the cases which seem to be on point do not accept definitely either of the above views. Among the latter class the case of *Munden v. Harris*,[12] often cited as recognizing the right of privacy, but which, in fact, seems to have been decided upon another ground, is important. In that case, the plaintiff sought damages for, and an injunction against, the unauthorized publication of his photograph in connection with an advertisement of the defendant's product. A demurrer to the declaration was overruled on the ground that the plaintiff had a *property right* in his photograph. *Quære,* what would this court say about *words* that invaded privacy?

The situation with regard to equitable relief is confused. It is believed that, beyond the limit of the statutory protection in New York,[13] there is only one jurisdiction, Louisiana, a civil law state, in which the injunction has been used to protect a right of privacy stripped of all property, trust, or contract interests. In *Schwartz v. Edrington*,[14] the plaintiff signed a petition to incorporate a village and later caused his name to be stricken off the petition. The defendant, a newspaper editor, continued to publish the petition without removing plaintiff's name. An injunction was granted which restrained the defendant from including the plaintiff's name upon the petition. This seems to be a pure case of equitable protection for one of the attributes of personality (*i. e.,* name) usually included in the right of privacy.[15]

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cording to its terms, no pictures, except those of public office holders and convicted criminals, were allowed to be published without consent. Mr. Kacedan also cites (at p. 386) *Ex Parte* Warfield, 40 Tex. Crim. 413, 50 S. W. 933 (1899) as protecting the "privacy of the marital relations". This case affirms the power of a court of equity to enjoin defendant from associating with plaintiff's wife. Hence the case involves the interest in relation with another person, and has the elements of alienation of affections and tendency to break the marriage contract. It is, therefore, distinguishable from the right of privacy.

[11] *Michigan*—Atkinson v. Doherty, *supra* note 9. Although this case involved the "interest in relation with another person"—plaintiff's dead husband's name and picture were used on defendant's cigar label—the court clearly indicated that it did not subscribe to the existence of the right of privacy. In so doing, it overlooked an earlier decision, DeMay v. Roberts, 46 Mich. 160, 9 N. W. 146 (1881), in which a woman recovered damages from a man who by posing as a physician, witnessed her delivery of a child.

New York—Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902) (plaintiff's likeness used to advertise defendant's flour). This case overruled Marks v. Jaffa, 6 Misc. 290, 26 N. Y. Supp. 908 (1893), which is cited as being in favor of protection against appropriation of likeness in Green, *supra* note 5, at 245 n., and in Note (1929) 43 HARV. L. REV. 297, 298 n.

Rhode Island—Henry v. Cherry, 30 R. I. 13, 73 Atl. 97 (1909) (use of plaintiff's photograph for advertising defendant's product).

Washington—Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594 (1911) (girl's photograph published with story of her father's arrest).

[12] 153 Mo. App. 652, 134 S. W. 1076 (1911), cited in SELECTED ESSAYS ON THE LAW OF TORTS (1924) at p. 122 as recognizing the right of privacy.

[13] *Supra* note 10.

[14] 133 La. 235, 62 So. 660 (1913).

[15] Another Louisiana case, Itzkovich v. Whitaker, 117 La. 708, 42 So. 228 (1906), which is usually cited for the right of privacy (see SELECTED ESSAYS ON THE LAW OF TORTS (1924) at p. 122), should be noted. In that case, a police-officer was enjoined from placing plaintiff's photo in police records, plaintiff having been acquitted of the criminal charge. The court discussed "personal rights", not "right of privacy". The facts of this case were exactly similar to those of Schulman v. Witaker, 117 La. 704, 42 So. 227 (1906), decided by the same judge on the same day. In the Schulman case the court cited the leading case against the right of privacy (Roberson v. Rochester Folding Box Company, *supra* note 11) and said (at p. 706, 42 So. at 228) that it was "remotely analogous to the case before us", neither approved nor disapproved it, but differentiated it by saying, "here the purpose [of the picture] goes much further. [It] is to remain as evidence of a damning nature." Later

In Indiana, a board of commissioners was ordered [16] to block up jail windows nearest the plaintiff's adjoining home, so that the prisoners and lunatics could not insult her and look into her rooms. The case was decided on the ground of nuisance,[17] although the court discussed privacy. Here was a true privacy case in which there was hesitation to grant an injunction without hanging the decision on the safer and more legalistic word "nuisance".

The unauthorized use of a plaintiff's name and picture for commercial purposes has been restrained on the theory that one has a property interest in his name and photograph.[18]

In *Von Thodorovich v. Franz Joseph Association,*[19] a lower federal court enjoined the defendant association from using, for business purposes, the name and picture of the Austrian Emperor. This case, brought by the Austrian Consul, was decided on the basis of an international treaty which empowered the consul to bring suits for the protection of Austrian nationals. It is obvious that the decision was designed to protect immigrants from fraud, rather than to alleviate the feelings of the emperor.

In *La Follette v. Hinkle,*[20] the late Senator Robert M. La Follette, who was the candidate of the "Progressive" party for the presidency, prosecuted a successful suit to enjoin the use of his name on the election ballot by a rival party, "The La Follette State Party". This decision was undoubtedly for the protection of political and pecuniary interests, rather than for an invasion of privacy.

The publication of intimate letters has been enjoined [21] on the theory that the writer has some vague species of property interest in the ideas expressed therein. The property interest theory was also the basis of the decision of the New Jersey Court in *Vanderbilt v. Mitchell,*[22] where the director of vital statistics was ordered to expunge from the public records a false statement of plaintiff's paternity of a certain child, lest it some day be used in evidence against him. By way of *dictum,* the court said [23] that it would enjoin even in the absence of a property right. It is interesting to note that in a later New Jersey case [24] the vice-chancellor disregarded this hopeful *dictum* and said that a property interest is a necessary prerequisite to the granting of the injunction. He then proceeded to find a property interest in the information contained in bank accounts in order to enjoin a public prosecutor from examining the accounts of all Newark policemen.

An injunction against "rough" (*i. e.,* open and with intentional notoriety) shadowing by detectives was granted in Wisconsin.[25] Again, unfortunately, the decision was not predicated on privacy. The magic used in this case was "conspiracy to libel".

In the famous case of *Chappell v. Stewart,*[26] the Maryland court refused to enjoin a detective from shadowing the plaintiff. The ground of the decision

in the opinion (at p. 708, 42 So. at 228) the court said, "The foregoing [reasoning] applies equally to the Itzkovitch case, handed down this day." It would seem, then, that the theory of these cases was not privacy, but the possibility of the pictures some day being used in evidence against the plaintiffs, or as damaging to their respective reputations.

[16] Pritchett v. Board of Commissioners, 42 Ind. App. 3, 85 N. E. 32 (1908).

[17] *Id.* at 131, 85 N. E. at 36.

[18] Edison v. Edison Polyform Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907).

[19] 154 Fed. 911 (C. C. E. D. Pa. 1907).

[20] 131 Wash. 86, 229 Pac. 317 (1924).

[21] Baker v. Libbie, 210 Mass. 599, 97 N. E. 109 (1912).

[22] 72 N. J. Eq. 910, 67 Atl. 97 (1907).

[23] *Id.* at 919, 67 Atl. at 100.

[24] Brex v. Smith, 104 N. J. Eq. 386, 146 Atl. 34 (1929).

[25] Schultz v. Frankfort Ins. Co., 151 Wis. 537, 139 N. W. 386 (1913).

[26] *Supra* note 10.

was that equity will not act to enjoin personal rights[27] in the absence of a property interest. The interest of personality involved in this case is Dean Green's restricted "privacy".

In the case of *Vassar College v. Loose-Wiles Co.*,[28] the federal court for the district of Missouri refused to enjoin the defendant company from using the plaintiff college's name and insignia as a candy advertisement. It was held that the plaintiff had no property right in its name and that the injury if any was "psychological rather than real". The plaintiff's theory was not right of privacy because, being a corporation, it had no feelings which were subject to injury. The appropriation of its name and the alleged consequent humiliation of its students and graduates was the gravamen of the complaint. Had the court been at all sympathetic with the plaintiff's situation it could have granted the injunction by stretching property concepts as had been so often done in other cases.[29]

In *Bazemore v. Savannah Hospital*,[30] the declaration averred that an abnormal child was born to the plaintiffs and taken to the defendant hospital for treatment. That after its death defendant took photographs of the child's body and published them. The plaintiffs asked for damages and injunctive relief. Defendants demurred to the declaration on the ground that it set forth no cause of action, it being argued that the "right of privacy" belonged to the child and died with him. The court in holding that the declaration was good said, "A petition will not be dismissed as a whole if it sets out a cause of action for any of the relief prayed". Since the injunction question was not argued, the cause of action held to be set out in the petition would seem to be the one for damages. Hence this case is not authority for any equitable proposition. Although the court talked in terms of privacy, it recognized that there was a tort committed against the plaintiffs. The case belongs to that class which Dean Green calls "interest in relations with other persons".[31]

Injunctive relief has been refused in cases involving "Family Privacy" or "interests in the relations with other persons": *e. g., Atkinson v. Doherty*,[32] where defendant used the name and photograph of plaintiff's dead husband on a cigar label, *Schuyler v. Curtis*,[33] where a statue to a dead woman's memory was about to be exhibited at a fair in spite of her family's protestations and wounded feelings, and *Corliss v. Walker*,[34] where defendant threatened to use the photograph of plaintiff's deceased husband in a biography.[35]

The refusal of the New York court, in the *Roberson* case, to protect against the appropriation of likeness, lead the legislature of that state to enact a statute,[36] which gives legal and equitable protection against the use "for advertising purposes and for the purposes of trade", of the name or picture of any living person, without his consent, and makes such use a misdemeanor. The extent of the statute's application may be ascertained from a glance at a few of the cases

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[27] In Ashinsky v. Levinson, 256 Pa. 14, 100 Atl. 491 (1917), the court refused to enjoin defendant from insulting a Rabbi on the street near his synagogue.

[28] 197 Fed. 982 (W. D. Mo. 1912).

[29] See Edison v. Edison Polyform Co., *supra* note 18, and cases cited therein.

[30] 171 Ga. 257, 155 S. E. 194 (1930); (1931) 79 U. OF PA. L. REV. 511.

[31] *Cf.* Witte v. Bauderer, 255 S. W. 1016 (Tex. 1923), where defendant was restrained from associating with plaintiff's estranged wife; Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929), where defendant was living with plaintiff's husband and representing that she was his wife, and the court refused to enjoin this appropriation of the plaintiff's name.

[32] *Supra* note 11.

[33] *Supra* note 9.

[34] *Supra* note 9.

[35] The ground of this decision was that plaintiff's husband had been a famous inventor and, as such, had become a public character.

[36] N. Y. CIVIL RIGHTS LAW (1909) §§ 50, 51.

decided under it. In *Kunz v. Bosselman*,[37] the defendant, a dealer in portraits and photographs, was restrained from selling the plaintiff's picture for commercial purposes. This, like the case of *Almind v. Sea Beach Ry. Co.*,[38] where the use of the plaintiff's picture to teach passengers how to alight from street cars was held actionable, is obviously within the statute. The court refused to enjoin the showing of a motion picture which depicted the plaintiff at her work as a street vendor [39] and of a news-reel containing plaintiff's picture.[40] The ground upon which these cases were decided was that the public had a legitimate concern in this type of motion picture since it presented current events and showed actual occurrences as they transpired, rather than fiction. Although each of these cases would seem to fit into the wording of the statute, the use complained of was only incidental to the commercial purpose, and the court's distinction seems both reasonable and, as a practical matter, necessary. The use of a pugilist's picture in connection with a newspaper biography [41] and a single reference to a plaintiff by name in a novel,[42] were held to be outside the statute on the ground that such uses were not for "purposes of trade". *Quære,* would the court have reached the same result in the latter case if the name had been one that was connected with a recent scandal which was obviously being capitalized by the novel?

Since feelings may be affected quite as seriously when a person's name or likeness is used non-commercially (*e. g.,* a debutante's photograph thrown in among the sex stories of a tabloid), it is obvious that the veil of protection set up by this statute is entirely too narrow. If we go a little deeper than the words of the statute, it would seem that the real purpose is to prevent profit-making by the appropriation of the name and likeness of another, rather than to establish substantial relief for invasions of privacy.

The desirability of statutory protection for the right of privacy has been questioned because of the way the New York courts have been departing from the words of the statute in order to arrive at a reasonable result. It may be suggested that if there is no statute, courts will, *a fortiori,* reach what they conceive to be the reasonable result. Hence if a court is inclined against the right of privacy, the existence of a statute will, if anything, deter it from dealing too harshly with the plaintiff's claim. It should also be noted in this connection that the New York statute has been strictly construed [43] because of the penal provision which it contains.

The desirability of criminal legislation for the protection of the right of privacy was suggested in the Warren-Brandeis article.[44] From a practical point of view, penal legislation [45] is required in at least one type of privacy case, *viz.,*

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[37] 131 App. Div. 288, 115 N. Y. Supp. 650 (1909).
[38] 157 App. Div. 230, 141 N. Y. Supp. 842 (1913).
[39] Blumenthal v. Pictures Classics Inc., 235 App. Div. 570, 257 N. Y. Supp. 800 (1932).
[40] Humiston v. Universal Film Co., 189 App. Div. 467, 178 N. Y. Supp. 752 (1919).
[41] Jeffries v. New York Evening Journal, 67 Misc. 570, 124 N. Y. Supp. 780 (1910).
[42] Damron v. Doubleday Doran & Co., 133 Misc. 302, 231 N. Y. Supp. 444 (1928).
[43] See Humiston v. Universal Film Co., *supra* note 40.
[44] *Supra* note 1, at 219.
[45] Mention should be made of some other penal provisions closely related to the right of privacy. A majority of states make it a crime to intercept a message sent by telegraph or telephone, whether the interception is by wire-tapping or otherwise. The statutes are collected in a note to Olmstead v. United States, 277 U. S. 438, 479, 48 Sup. Ct. 564, 573 (1927). A statute making it a felony to engage in the business of publishing or circulating a newspaper devoted mainly to scandal was held to be constitutional in State v. Van Wye, 136 Mo. 227, 37 S. W. 938 (1896). A statute providing that the publication of a scandalous newspaper is a nuisance, and may be abated by injunction, was held constitutional in State v. Guilford, 174 Minn. 457, 219 N. W. 770 (1928), but in Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1930), it was held unconstitutional as applied to a publication charging an official with corruption in office.

that in which the annoyance is petty but frequent and where the harm is not serious enough to impel a person to seek redress in a civil suit. An example of this type of legislation recently appeared in Wyoming, where a town council enacted an ordinance providing that it should be "a nuisance and misdemeanor" for solicitors, peddlers and salesmen to go "in and upon" private residences (unless by previous invitation of the occupants) for the purpose of soliciting orders for, or selling, goods. In a suit by the Fuller Brush Company [46] (door to door solicitors), the ordinance was held to be unconstitutional because it went beyond the police power and violated plaintiff's rights under the Fourteenth Amendment.

The constitutionality of this ordinance does not depend on whether or not the act prohibited is called a nuisance. Only two considerations are important. First, had the plaintiff a constitutional right to go onto all private residences for the purpose of selling its wares? Second, had those residents who desired salesmen to come to their homes a constitutional right that the salesman should come without previous invitation? Both questions are resolved in favor of the constitutionality of the ordinance by the decision of the United States Supreme Court in *Williams v. Arkansas.*[47] In that case, a state statute, prohibiting solicitors for hotels and physicians from soliciting on railway trains, was held valid. If such persons can be constitutionally deprived of their "right" to solicit on trains, *a fortiori* an ordinance prohibiting entrance upon private homes for solicitation should be valid. With regard to the second question, any people on the trains who might welcome the services of the solicitors were deprived of such services by the decision of the court in order that the greater number of people should be spared annoyance. This same reasoning should apply to those who want salesmen to call at their homes. It would be far less troublesome for those few persons to invite the salesmen, than for the rest of the population to be annoyed in trying to send them away.

It would seem that the purpose of this ordinance was to prevent one of those annoyances (*viz.*, annoyances by door to door salesmen) which are caused by invasions of privacy in Dean Green's strict sense, *i. e.*, solitude and seclusion. It sought to protect the same interest, by criminal provision, that the Georgia court recognized in *Byfield v. Candler,*[48] where plaintiff recovered damages for defendant's breaking into her stateroom. The invasion of privacy in that case was beyond mere annoyance, or petty vexation, because it was accompanied with manifestations of an intention, on the part of the defendant, to rape the plaintiff. Hence, the plaintiff had that motive to seek redress in a civil suit which is not present when the privacy interest is invaded by a mere intruder, such as a salesman.

This exposition of the cases, it is hoped, will reveal the paucity of honest progress that is being made with the true privacy concept. The reasons assigned by those courts which have definitely repudiated privacy as a legally protected right are, in the main, two. First, "It is unknown to the common law and to establish it is a legislative function".[49] Secondly, to protect privacy would encourage vexatious, absurd and trumped-up litigation.[50] The answer to the first objection is, obviously, legislation. And to the second, that the objection itself is invalid, since bona fide claims should not go unremedied merely because some dishonest ones might prevail.

[46] Fuller Brush Company v. Town of Green River, 60 F. (2d) 613 (1932).

[47] 217 U. S. 79, 30 Sup. Ct. 493 (1909). This case was overlooked by court and counsel in the Fuller Brush case, *supra* note 46.

[48] *Supra* note 10.

[49] Roberson v. Rochester Folding Box Company, *supra* note 11, at 556, 64 N. E. at 447; Hillman v. Star Publishing Co., *supra* note 11, at 696, 117 Pac. at 596.

[50] Roberson v. Rochester Folding Box Co., *supra* note 11, at 545, 64 N. E. at 447.

Probably the most cogent reason for denying equitable relief springs from Lord Eldon's unfortunate *dictum* in *Gee v. Pritchard* [51] to the effect that equity protects only property interests.

It is obvious that the need for equitable relief is especially urgent. The type of person who will object to the exploitation of his private life is at once the type whose wounded sensibilities will not be "made whole" by a judgment for money damages. Property may be sufficient to compensate property loss, but it is, in the very nature of things, inadequate to mend outraged feelings. The prevention of the occurrence of a threatened invasion of privacy and the enjoining of an existing invasion are essentials of real relief. It can hardly be hoped that the "beautiful growth of judge-made law" will aid in bringing about this result in view of the equity decisions since Lord Eldon's momentous *dictum* concerning the necessity of a property right. It is true that the courts have been breaking through that alleged rule by stretching property concepts. But, even disregarding the undesirability of this hypocrisy, what happens in those cases in which the concept of property rights cannot be sufficiently extended? Obviously, the magic disappears, the plaintiff goes without relief and the defendant may continue to offend with impunity. This fact, together with the paltry number of jurisdictions in which even damages at law may be recovered without injury to some sort of property interest, or confidential, trust or contract relation, and the additional fact that those courts which have refused to protect privacy assign lack of precedent as the main reason, indicates the present need for legislation. The chief objection to statutory protection would be one of definition and drafting. To what extent shall protection be afforded? What is legitimate news and what is not? Who is a public character, and how far can the statute go without violating the constitutional guaranty of freedom of the press? But need the statute go into all these details? It might well be drafted in such words as would leave the actual definitions of extent and general moulding of the concepts with the more flexible machinery of the court. Frequent use of the convenient word "reasonable" would not be amiss in such a statute. It would leave the courts to deal with cases as they arose and relieve the legislatures from anticipating all possible situations in which privacy questions might arise. In short, the statute would pull the courts over the "no-precedent" hurdle, and leave the rest to the judges.

E. A. K.

[51] 2 Swanston 403, 413 (1818).