SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 41 | Issue 3 Article 18

1991

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EPILOGUE: WHEN PRIVACY RIGHTS ENCOUNTER FIRST AMENDMENT FREEDOMS

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THE PHRASE "constitutional right to privacy" is a frequently used over-generalization for a narrow set of rights that are recognized by the federal courts in the context of governmental intrusion on individual decision making regarding peculiarly personal matters. In fact, the "zone of privacy" thus recognized by the courts is the freedom from intrusion by state regulation into those personal decisions, including marriage, procreation, and child-rearing. Carving out this niche for peculiarly personal matters does not mean the courts intended to swallow up an entire body of tort law into the Constitution.[1] Much less does it support any notion that the "right to privacy" is one of constitutional proportions for all purposes.

This symposium has raised issues of whether the right of privacy was intended to be or has been elevated to the level of a constitutional right. In this era of increasing news media coverage of daily events, these issues frequently crystallize in the context of the exercise of first amendment freedoms. When this clash occurs, however, the common law derivation of privacy rights becomes apparent: for there is no requirement to balance privacy right factors against first amendment considerations, as there would be in a proceeding that involved competing constitutional rights. The following discussion reflects upon the derivation and evolution of the right to privacy, assesses its development under recognized claims regarding newsgathering activities, and concludes with some observations on constitutional limitations to the honoring of individual privacy rights.

When Warren and Brandeis wrote their historic article on the

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1. *See* Travers v. Paton, 261 F. Supp. 110, 113 (D. Conn. 1966).

right to privacy,[2] they focused on the balance between the duty to refrain from disturbing or invading the private lives of individuals and the right each individual can legitimately claim to such privacy.[3] The right, in its simplest terms, meant " 'the right to be let alone.' "[4] The authors rejected the notion that this right to privacy was grounded only in property law, since that basis was viewed even in the common law of the time as too narrow.[5] For similar reasons, Warren and Brandeis also rejected the right as being based upon an alleged breach of an implied contract, trust, or confidence.[6] After extensive review, including consideration of "natural rights" as a source, Warren and Brandeis concluded that a "right of property in its widest sense . . . embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested."[7] Significantly, although they believed "[t]he press . . . overstepp[ed] in every direction the obvious bounds of propriety and of decency,"[8] they reached their conclusion without any reference to constitutional rights or doctrines as a possible source for the right of privacy.

During the next seventy years, courts continued to address privacy issues in terms of natural or common law rights and duties. Then, in 1960, based upon a review of some three hundred diverse cases in the general arena of invasion of privacy, Dean Prosser recategorized the conclusions of Warren and Brandeis and labeled them as a complex of four disparate categories, each of which was said to represent a separate tort:

> (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> (2) Public disclosure of embarrassing private facts about the plaintiff.
> (3) Publicity which places the plaintiff in a false light in the public eye.
> (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[9]

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2. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
3. *See id.* at 197.
4. *Id.* at 195 (quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).
5. *See id.* at 203.
6. *See id.* at 207, 211.
7. *Id.* at 211.
8. *Id.* at 196.
9. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

Each of the categories provided an opportunity to analyze the common law (or, if it existed, constitutional) derivation of the privacy claim in specific case situations. Undoubtedly, Prosser made a major contribution to the law of torts in placing a framework around an increasingly amorphous and seemingly boundless body of law. Like Warren and Brandeis, however, Prosser avoided any discussion of the constitutional aspects of privacy rights.[10]

Subsequent cases demonstrate the limits of the privacy rights that Warren and Brandeis first brought to the attention of the legal community and that Prosser then redefined as four separate torts. Decisional law over the past thirty years serves to underscore the important corollary to this historical analysis, namely that the right to privacy is not a constitutional right. It therefore typically yields to first amendment rights and—except when state action or regulation is involved—to other constitutional rights with which it comes into conflict.

Under the first of the recognized "invasion of privacy" torts, the protection against "intrusion upon seclusion," which Prosser identified does not fall within any constitutional "zone of privacy"[11] but rather derives from purely common law principles. The *Restatement (Second) of Torts* establishes liability for intrusion against "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[12] A typical example of such a claim in the context of modern day newsgathering is presented in the case of *Boddie v.*

10. While not postulating any constitutional derivation for a right of privacy, Prosser only briefly mentioned the matter of privilege afforded to news media reporting without referring to conduct in a constitutional context. *See id.* at 415-16.

11. Justice Douglas, in a burst of creativity, developed the penumbral theory of "zones of privacy" to apply in certain well-defined contexts of governmental intrusion. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The Supreme Court has reiterated this theory of "zones of privacy" in subsequent cases, such as Paul v. Davis, 424 U.S. 693, 712-13 (1976) ("While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power." (citing Roe v. Wade, 410 U.S. 113, 152-53 (1973))). The issue in *Griswold* was a state statute banning the sale of contraceptives. Similarly, state imposed restrictions on abortion are the primary focus of *Roe* and its progeny. Accordingly, an alleged intrusion does not implicate a right to privacy of a constitutional magnitude unless the very narrow categories of personal rights, such as matters relating to marriage, procreation, contraception, and child rearing, are the focus of the intrusion, *and* the intrusive activity is carried out by the state.

12. RESTATEMENT (SECOND) OF TORTS § 652B (1976).

American Broadcasting Cos.[13] The plaintiff in *Boddie* claimed that ABC broadcast, without her consent, an investigative report exposing judicial corruption that included a hidden camera interview of the plaintiff in her home.[14] Under the *Restatement* requirement that the intrusion be "highly offensive to a reasonable person," the jury determined that the plaintiff's right of privacy was not violated.[15]

However, the plaintiff in *Boddie* also attempted to assert an "intrusion" claim based on the Federal Wiretap Statute and a claim for damages based on the nonconsensual interception or recording of another's conversations as then proscribed by federal law.[16] After initial remand by the federal appellate court, this "right of privacy" claim was tested in the district court which found the statute to be in direct conflict with first amendment freedoms.[17] At the time the suit was brought, section 2511(2)(d) permitted a party to a communication to intercept and record a conversation without the other party's consent "unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act."[18] While the case was on remand, Congress deleted the "injurious purpose" clause, citing *Boddie* as a prime example of how that language placed an unconstitutional chill upon a reporter's exercise of his first amendment rights.[19] The district court granted defendants' motion to dismiss based both upon that legislative action and its determination that the deleted language was unconstitutionally vague.[20] The Sixth Circuit affirmed the decision that the "injurious purpose" language was impermissibly vague and a violation of the reporter's newsgathering rights.[21] The first amendment rights of the media thus nullified the plaintiff's attempt to assert a right of privacy in the context of a federal or constitutional claim to suppress newsgathering

13. 731 F.2d 333 (6th Cir. 1984), 694 F. Supp. 1304 (N.D. Ohio 1988) (holding for the defendant on remand from the Sixth Circuit), *aff'd*, 881 F.2d 267 (6th Cir. 1989), *cert. denied*, 1990 U.S. LEXIS 299 (1990).

14. *Id.*

15. *Id.* at 335.

16. Pub. L. No. 90-351, 82 Stat. 812, 814 (current version at 18 U.S.C. § 2511(d)(2) (1988)).

17. *See Boddie*, 694 F. Supp. at 1308.

18. Pub. L. No. 90-351, 82 Stat. at 814.

19. *See Boddie*, 694 F. Supp. at 1306.

20. *See id.* at 1308.

21. *Boddie*, 881 F.2d at 272.

activities.

The second invasion of privacy branch identified by Prosser—"publication of private facts"—raises perhaps an even more sensitive area for scrutinizing the possible application of constitutional protections to privacy. Yet it remains clear that the freedom of the press to publish true facts cannot be overcome by this form of privacy claim either. In *Cox Broadcasting Corp. v. Cohn*,[22] for example, the Supreme Court held that a state could not prohibit the publication of the name of a rape victim obtained by the media from judicial records maintained in conjunction with the prosecution and open for public inspection. The Court recognized that in "this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."[23] However, unlike its recognition of the first amendment freedoms, the Court clearly did not raise protection of "private facts" to an interest of constitutional proportions. Similarly, in subsequent cases where the Supreme Court has reiterated society's concern over inherently personal and sensitive matters, it has maintained the enforcement of constitutional press freedoms over the protection of those "private facts."[24]

The remaining two branches of "invasion of privacy" plainly do not place any limitations upon the exercise of first amendment freedoms. Indeed, the category of "false light in the public eye" was simply a name contrived by Prosser for an inherently amorphous grouping of decisions that did not fit neatly into the other "established" branches; and Prosser himself acknowledged that "false light" had made only "a rather nebulous appearance in a line of decisions."[25] Some courts have rejected the tort of "false

22. 420 U.S. 469 (1975).

23. *Id.* at 491.

24. Even when these issues have been presented in the most sensitive of situations, such as identification of rape victims in contravention of a state statute, the Court has upheld press freedoms and left open only the possibility that another case might present a "weighty" justification for a limitation on such publication of truthful information, which "may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ." Florida Star v. B.J.F., 491 U.S. 524, 541 (1989); *see* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 610-11 (1982) (holding a state statute, which excluded the press and general public from the courtroom during the testimony of a minor victim in a sex offense trial, violated the first amendment); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 105-06 (1979) (holding that a state cannot "punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper").

25. Prosser, *supra* note 9, at 398.

light" altogether because, while it purports to evade first amendment protections applicable in defamation cases, it seeks to protect reputational (rather than privacy) interests and is merely an imperfect and less-defined duplication of the long-recognized tort of defamation.[26] Further underscoring the common law derivation of "false light," as with the other privacy branches, courts are free to accept or reject these claims. States such as Ohio have thus refused to recognize "false light" as a viable theory of recovery.[27] The absence of a constitutional element to "false light" claims then becomes particularly evident when a plaintiff seeks to raise such a claim to overcome the news media's first amendment rights.[28]

The privacy branch labeled "appropriation"—and sometimes called the "right of publicity"—also has its roots in the common law rather than the Constitution. Courts alternatively address the issues relating to the unauthorized use of a name or likeness as involving a common law "right to be let alone" or some form of property right in the "commercialization" of one's image.[29] The "right of privacy" is invaded only when the plaintiff's image or likeness is appropriated for some commercial advantage; however, the claim will not lie in the context of the press fulfilling its responsibility to report to the public matters of newsworthy or legitimate concern regarding, for example, the operations of government.[30] In other words, the mere use of a plaintiff's name or image incidental to a news report cannot sustain a claim of "appropriation" for the paramount reason that exercise of the consti-

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26. *See* Sullivan v. Pulitzer Broadcasting Co., 12 Media L. Rep. (BNA) 2187 (Mo. 1986) (rejecting "false light" as a permissible action under the facts of that case only); Renwick v. News & Observer Publishing Co., 310 N.C. 312, 320-23, 312 S.E.2d 405, 410-12, *cert. denied*, 469 U.S. 858 (1984).

27. *See* Yeager v. Local 20, Int'l Bhd. of Teamsters, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666, 669-70 (1983).

28. *See* Angelotta v. American Broadcasting Cos., 12 Media L. Rep. (BNA) 1491 (N.D. Ohio 1985), *aff'd*, 820 F.2d 806 (6th Cir. 1987).

29. *See* Reeves v. United Artists, 572 F. Supp. 1231 (N.D. Ohio 1983) (misappropriation of image or right of publicity not descendible), *aff'd*, 765 F.2d 79 (6th Cir. 1985); Zacchini v. Scripps-Howard Broadcasting Co., 54 Ohio St. 2d 224, 351 N.E.2d 454 (1976) (right of privacy not violated by news broadcast of entire act of "human cannonball"), *rev'd*, 433 U.S. 562 (1977). Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (movie and novel rights to fictitious story based on plaintiff outweighed plaintiff's publicity rights).

30. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (rape victim's name is of legitimate public concern and broadcasting it is within the authority of the press).

tutional freedoms of the press cannot be so restricted.[31]

The recent case of *Brooks v. American Broadcasting Cos.*,[32] while rejecting an "appropriation" claim, also confirmed that there is no supposed "constitutional right of privacy" generally in a newsgathering context. In *Brooks*, the plaintiff sought to assert a civil rights violation under 42 U.S.C. § 1983 and, in order to do so, maintained that the federal rights violated were his "constitutional rights of privacy."[33] This provided the district court with the opportunity to focus on the well-settled proposition that the " 'right to be free from unwanted publicity . . . is protected, if at all, by the common law . . . [and this] right to be let alone . . . [is] . . . left largely to the law of the individual States.' "[34] In dismissing the civil rights claims, the district court not only upheld the reporters' newsgathering activities under the first amendment but also recognized that common law rights of privacy are not incorporated into or guaranteed under the Constitution.[35]

The fundamental principle is thus well-established that, except in those narrow "zones of privacy" involving not the exercise of press freedoms but the intrusion of governmental action, individual privacy rights are matters of limited state or common law protection. This brief overview does not afford the opportunity to analyze the multitude of additional privacy issues that arise in the many circumstances involving the media's requested access to public or judicial records or hearings, "locker room rights" in government supported facilities, or attempted limitations upon the exercise of other newsgathering and reporting activities.[36] However, whether those issues involve matters of due process, equal protection, consideration of alternatives to denial of access, or narrowly

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31. *See* Brooks v. American Broadcasting Cos., 737 F. Supp. 431, 435 (N.D. Ohio 1990).

32. *Id.*

33. *Id.* at 438-41; *see* 42 U.S.C. § 1983 (1988).

34. *Brooks*, 737 F. Supp. at 439 (quoting Reilly v. Leonard, 459 F. Supp. 291, 299-300 (D. Conn. 1978)).

35. *See id.* at 438-41; *see also* Paul v. Davis, 424 U.S. 693, 713 (1976); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76-77 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); Rosenberg v. Martin, 478 F.2d 520, 524-25 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973); Mimms v. Philadelphia Newspapers, Inc., 352 F. Supp. 862, 865 (E.D. Pa. 1972).

36. *See, e.g., In re* National Broadcasting Co., 828 F.2d 340 (6th Cir. 1987) (media requesting access to sealed court records); Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (policy of barring women sports reporters from locker rooms not substantially related to a sufficient government interest); State *ex rel.* National Broadcasting Co. v. Court of Common Pleas, 52 Ohio St. 3d 104, 556 N.E. 2d 1120 (1990) (overturning gag order to allow media access to witnesses).

tailoring restrictions on access, the freedoms of the press under the first amendment remain inviolate in the face of any privacy claims that might be raised in those circumstances. Only when the state seeks to regulate personal actions or decisions does the "right of privacy" become elevated to a discussion of constitutional dimensions. Thus, there are, indeed, limits to the "right of privacy," and those limits are apparent from an analysis of the right in juxtaposition to the first amendment and adverse publicity or newsgathering claims.

In analyzing matters of privacy from the era of Warren and Brandeis to the present, at times the claimed rights have been nebulous and the asserted duties unclear; but in the common law context states remain free to fashion with creativity and to protect with sensitivity the right of each person "to be let alone." On the other hand, when states intrude upon recognized, highly personal "zones of privacy," the Constitution will intervene as a protection against such state action. As a tribute to our form of government, however, the press remains unrestricted by any supposed "constitutional right of privacy," which might erode through some form of balancing or otherwise seek to diminish the well-recognized freedoms granted under the first amendment.