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NOTES

The Invasion of Privacy—Ohio's New Tort

INTRODUCTION

ANY ATTEMPT to define the relatively new tort of invasion of privacy is burdened at the outset by the embryonic state of the body of law now being formed about it. Essentially it protects the right to live as one chooses as long as one does not infringe upon the rights of others, and to be let alone in so doing. The law, in recognizing the right of privacy, seeks to prevent the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, and the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.¹

In an era of unprecedented progress in science and technology such as the twentieth century, the need for privacy is evident. Increasing technological advancement in all areas of communication and transportation makes possible myriad intrusions today, for the radio, television, motion picture and press are ubiquitous. The tort of the invasion of privacy reflects the contemporary struggle between the interest of the public and press in dissemination of news and the interest of the individual in the in-

¹ 138 ALR 32.

violateness of his personality.² From the conflict of these two forces, the right of privacy was born. The courts must now shape it with wisdom to an enlightened maturity.

HISTORICAL BACKGROUND

In Greek law, every infringement of the personality of another was contemptuous; the gravamen being the injury to honor or the insult, not the injury to the body. In Roman law, one of the forms of *injuria* was symbolic injury which did harm to the honor and dignity of a person, and such symbolic injury could be committed by acts, gestures or words which contained the element of insult, indignity, or disrespect.³ Thus in the ancient law we find rights that were essentially of the same nature as the right of privacy given recognition and effect. Although the extent of the right of privacy in the civil law is somewhat vague, some such right seems to be generally recognized.⁴

While the right of privacy has not been accepted in England as such, it has been given protection under the guise of some legally recognized interest such as property⁵ or contract.⁶ The same is still true of a few conservative American courts⁷ although the lack of precedent inspiring such fictions no longer exists. In 1890 there appeared in the Harvard Law Review an article by Warren and Brandeis.⁸ The authors reviewed a number of cases in which relief had been afforded on the basis of some other legally recognized right, and concluded that they were in reality based upon a

² See RIESMAN, *THE LONELY CROWD*, p. 74 (1950); "The wider ambit of taste socialization today is shown in still another decisive change from the era depending on inner-direction. Then, by the rules of etiquette and class, certain spheres of life were regarded as private: it was a breach of etiquette to intrude or permit intrusion on them. Today, however, we must be prepared to open up on cross-examination almost any sphere in which the peer-group becomes interested. Whereas etiquette built barriers between people, socialized exchange of consumer taste requires that privacy either be given up, or be kept, like a liberal theologian's God, in some interstices of one's nature. Before the peer-group jury there is no privilege against self-incrimination."

³ Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915).

⁴ See Guttridge, *The Comparative Law of the Right to Privacy*, 47 L. Q. REV. 203 (1931).

⁵ *Prince Albert v. Strange*, 1 Mac & G. 25, 41 Eng. Rep. 1171 (1849) (exhibition of etchings and publication of catalogue); *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (1818) (publication of private letters).

⁶ *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888) (sale of customer's photograph); *Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1824) (publication of oral lectures).

⁷ *McCreery v. Miller's Grocerteria*, 99 Colo. 499, 64 P.2d 803 (1937); *U.S. Life Insurance Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App. 1951).

⁸ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

broader principle which was entitled to independent recognition. They asserted the capacity of the common law for growth and expansion, and urged the courts to abandon the property and contract fictions and affirm the independent existence of the right of privacy.

The first American decision on this subject in a court of last resort, *Roberson v. Rochester Folding Box Co.*,⁹ reflected the resistance of conservative jurists to this incipient movement of tort law. But the vigorous dissent of the *Roberson* case recognized the new conditions of a more complex society, and the dissent was later followed in the leading case of *Pavesich v. New England Life Ins. Co.*,¹⁰ the first American case in a court of last resort to affirm the independent legal existence of the right of privacy. In a prophetic mood, the *Pavesich* court said: "We venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability."¹¹

THE LAW TODAY

As the law of privacy develops, greater crystallization of the situations in which the interest will be protected must necessarily follow. At the present time the right is protected in four basic instances:

- (1) Intrusion upon plaintiff's physical solitude, such as invading quarters¹² or tapping telephone wires;¹³
- (2) Publicity which violates the ordinary decencies, such as publishing pictures of plaintiff's humiliating illness,¹⁴ or of his deformed child;¹⁵
- (3) Putting plaintiff in a false but not necessarily defamatory light,

⁹ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). The court, fearful of the lack of precedent, a possible flood of litigation, and the mental character of the injury, said: "There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion."

¹⁰ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). In recognizing the plaintiff's right of privacy, the court said that the absence for a long period of time of a precedent for an asserted right is not conclusive evidence that the right does not exist. Where the case is new in principle the courts cannot give a remedy, but where the case is new only in instance, it is the duty of the courts to give relief by the application of recognized principles.

¹¹ *Id.* at 220, 50 S.E. at 81.

¹² *Walsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952); *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951), *Byfield v. Candler*, 33 Ga. App. 275, 125 S.E. 905 (1924).

¹³ *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931)

¹⁴ *Barber v. Time*, 348 Mo. 1199, 159 S.W.2d 291 (1942)

¹⁵ *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930)

such as signing his name to a letter,¹⁶ or including his picture in a rogues' gallery;¹⁷

- (4) The appropriation of some element of plaintiff's personality for commercial use, such as advertising.¹⁸

But the right of individual privacy is by no means absolute. It is attended by several limitations which represent the conflicting interests of society. Probably the most important of these limitations is the constitutionally protected freedom of the press to publish newsworthy items of public interest.¹⁹ Yet, under the better view, this privilege to disseminate news should not be abused so as to violate common decencies.²⁰

A further limitation on the right of privacy exists when the plaintiff is a public figure. Scrutiny is permitted of the private life of any person who has achieved or has had thrust upon him the vague and indefinable status of a "public figure"²¹ even after a lapse of time has resulted in his return to "private life."²² But under the better-reasoned cases a public figure does not surrender or waive his right of privacy completely.²³

¹⁶ *Hinrich v. Meier*, 166 Ore. 482, 113 P.2d 438 (1941).

¹⁷ *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *McGovern v. Van Riper*, 137 N.J. Eq. 24, 43 A.2d 514 (1945).

¹⁸ *Pallas v. Crowley-Milner and Co.*, 322 Mich. 411, 54 N.W.2d 595 (1948); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

¹⁹ In *Sidis v. F-R Pub. Corp.*, 34 F. Supp. 19 (S.D.N.Y. 1938), *affirmed*, 113 F.2d 806 (2d Cir. 1940), the court, while denying plaintiff relief because he was a "public figure," wisely recognized that the newsworthiness of the matter printed might not always constitute a complete defense, and that revelations may be so intimate and so unwarranted as to outrage the community's sense of decency.

²⁰ *Gill v. Curtus Pub. Co.*, 38 Cal.2d 273, 231 P.2d 565 (1951); *Barber v. Time*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (in which plaintiff was humiliated by having her illness publicized and her picture printed with the caption "starving glutton"); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931) (in which plaintiff was subjected to scorn and suffered severely because her former life as a prostitute was publicized in a film).

²¹ *Schnabel v. Meredith*, 378 Pa. 609, 107A.2d 860 (1954); *Stryker v. Republic Pictures Corp.*, 108 Cal. App.2d 191, 238 P.2d 670 (1952); *Cohen v. Marx*, 94 Cal. App.2d 704, 211 P.2d 320 (1950).

²² *Sidis v. F-R Pub. Corp.*, 34 F. Supp. 19 (S.D.N.Y. 1938), *affirmed*, 113 F.2d 806 (2d Cir. 1940) held that an infant prodigy who in later life sought to conceal his identity through his chosen career as an obscure clerk could not recover for invasion of privacy by a published autobiographical sketch, since his previous status as a public figure continued to make him newsworthy. *Accord*, *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948).

²³ *Garner v. Triangle Publications Inc.*, 97 F. Supp. 546 (S.D.N.Y. 1951); *Mau v. Rio Grande Oil Co.*, 28 F. Supp. 845 (N.D. Cal. 1939); *Melvin v. Reid* 112 Cal. App. 285, 297 Pac. 91 (1931).

A final limitation to the right is also discovered in the requirement that the plaintiff be a person of ordinary sensibilities,²⁴ and it cannot be extended to supersensitiveness or to recluses who desire to shun the world completely.

The right of privacy may be surrendered by consent or waiver,²⁵ and since it is a personal right which abates on death, the surviving relatives have no cause of action unless they themselves are brought into undesired publicity.²⁶ Unlike an action for defamation, truth is no defense in an action for invasion of privacy,²⁷ and, once the tort is established, no special damages are necessary: substantial damages will be awarded for mental suffering alone.²⁸

The law has attempted to guard privacy in several other forms, all of which fall short of the protection which the tort of invasion of privacy contemplates. The constitutional guaranty against unreasonable search and seizure found in both the federal and many state constitutions prevents only to a limited extent an unwarranted intrusion upon plaintiff's *physical* solitude, and even this guaranty has been held not to extend to the placing of a detectaphone in the wall next to plaintiff's room, since there was no physical entry on plaintiff's premises.²⁹ The Federal Wiretapping Statute,³⁰ which prohibits the unauthorized interception, publication or use of a communication, has been held to impose a civil liability, although not expressly, on one who publishes a telephone message without authorization,³¹ but again this protection of privacy is extended to only a very limited area. An action for defamation, in which truth is a defense, cannot cope with the many situations covered by the tort of invasion of privacy in which the plaintiff has been outrageously humiliated although the publication may be true,³² or where the plaintiff has been put in a false but not necessarily

²⁴ *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953)

²⁵ *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953).

²⁶ *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912). *Contra*, *Kelley v. Post Publishing Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951).

²⁷ *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243, (1944); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927)

²⁸ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

²⁹ *Goldman v. U.S.*, 316 U.S. 129 (1942). The dissent is obviously perturbed by the invasion of privacy now made possible by new scientific devices.

³⁰ 48 STAT. 1103 (1934); 47 U.S.C. § 605 (1946)

³¹ *Reitmeister v. Reitmeister*, 162 F.2d 691 (2nd. Cir. 1947)

³² *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931)

defamatory light.³³ The newer tort of "mental suffering," once recognized, may very well absorb a large number of the privacy cases, but at the present time it too is struggling for acceptance.³⁴ New York,³⁵ Utah,³⁶ and Virginia³⁷ have attempted to legislate protection of the right of privacy, but such statutory remedies are usually confined to appropriations of the personality for commercial use, and cannot possibly hope to meet the demands of countless fact situations arising now and in the future. It is evident, therefore, that the tort of invasion of privacy contemplates relief in circumstances not protected by other means, and affords a solution where other methods fail.

While it should be borne in mind that not every situation in which privacy will be protected has arisen in any given jurisdiction, and that each case must turn on its own particular facts, the majority of states which have discussed the problem have decided in favor of the right of privacy. It is now recognized in Alabama,³⁸ Arizona,³⁹ California,⁴⁰ Florida,⁴¹ Georgia,⁴² Illinois,⁴³ Indiana,⁴⁴ Kansas,⁴⁵ Kentucky,⁴⁶ Louisiana,⁴⁷ Michigan,⁴⁸ Missouri,⁴⁹ Montana,⁵⁰ Nevada,⁵¹ New Jersey,⁵² North Carolina,⁵³ Oregon,⁵⁴ South Carolina,⁵⁵ and the District of Columbia.⁵⁶ There are indications that the right will be recognized in several other jurisdictions where lower⁵⁷

³³ *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941).

³⁴ Note, *Mental Disturbance in the Law of Torts*, 6 WEST. RES. L. REV. 384 (1955).

³⁵ N.Y. CIVIL RIGHTS LAW §§ 50 and 51.

³⁶ UTAH CODE ANN. §§ 76-4-7 to -9 (1953).

³⁷ VA. CODE § 8-650 (1950).

³⁸ *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948).

³⁹ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945)

⁴⁰ *Kerby v. Hal Roach Studios*, 53 Cal. App.2d 207, 127 P.2d 577 (1942).

⁴¹ *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944).

⁴² *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930).

⁴³ *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952)

⁴⁴ *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949):

⁴⁵ *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918)

⁴⁶ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

⁴⁷ *Izkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905).

⁴⁸ *Pallas v. Crowley-Milner Co.*, 334 Mich. 282, 54 N.W.2d 595 (1952)

⁴⁹ *Barber v. Time Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

⁵⁰ *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952).

⁵¹ *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947).

⁵² *McGovern v. Van Riper*, 137 N.J. Eq. 24, 43 A.2d 514 (1945).

⁵³ *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

⁵⁴ *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941)

⁵⁵ *Holloman v. Life Ins. Co.*, 192 S.C. 454, 7 S.E.2d 169 (1940).

⁵⁶ *Peay v. Curtus Pub. Co.*, 78 F. Supp. 305 (D.C. 1948).

⁵⁷ *Friedman v. Cincinnati Local*, 6 Ohio Supp. 276, 20 Ohio Op. 473 (Com. Pl. 1941).

or federal⁵⁸ court decisions have accepted it, or the courts have at least avoided a decision that it does not exist.⁵⁹ The right is still rejected only in Rhode Island,⁶⁰ Texas,⁶¹ and Wisconsin.⁶² The Restatement of Torts⁶³ has approved a cause of action for "unreasonable and serious" interference with privacy.

OHIO

The Supreme Court of Ohio has recently decided that the right of privacy exists in this jurisdiction.⁶⁴ Prior to this significant recent decision, only four reported cases discussed the problem, and while there seemed to be a tendency toward acceptance of the tort, these common pleas decisions lacked the authority of a high court decision.

An interesting historical background appears in the early case of *Lakin v. Gun*.⁶⁵ Decided sixty years before the advent of the tort of invasion of privacy, this decision reflects the attitude of a court bound by precedent and suspicious of an injury more mental than physical. The plaintiff had been requested by a spinster to meet her in the woods at night and hear from her "secrets worth knowing." The defendants, who had bribed the woman to act as a decoy, were secreted at the appointed place, and surprised the plaintiff by suddenly rising, shouting, hallooing, blowing horns and ringing bells, to plaintiff's great disturbance. Not only did plaintiff suffer great humiliation and shock, but his status in the community was considerably lowered by defendants' acts. He was suspected of immorality by his neighbors, and his creditors refused to do business with

⁵⁸ *Levertov v. Curtis Pub. Co.*, 192 F.2d 974 (3rd Cir. 1951); *Hazlitt v. Fawcett Publications Inc.*, 116 F. Supp. 538 (Conn. 1953); *Berg v. Minneapolis Star and Tribune Co.*, 79 F. Supp. 957 (Minn. 1948).

⁵⁹ *McCreery v. Miller's Grocerteria*, 99 Colo. 499, 64 P.2d 803 (1936); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952); *Kelley v. Post Pub. Co.*, 327 Mass. 275, 98 N.E.2d 386 (1951); *Martin v. Dorton*, 210 Miss. 668, 50 So.2d 391 (1951); *Schnabel v. Meredith*, 378 Pa. 609, 107 A.2d 860 (1954); *Lewis v. Physicians and Dentists Credit Bureau*, 27 Wash.2d 267, 177 P.2d 896 (1947).

⁶⁰ *Henry v. Cherry & Webb*, 30 R.I. 13, 73 Atl. 97 (1909).

⁶¹ *McCullough v. Houston Chronicle Pub. Co.*, 211 F.2d 4 (5th Cir. 1954).

⁶² *Judevine v. Benzies-Montange Fuel and Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936).

⁶³ § 867.

⁶⁴ *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) In recognizing the right of privacy, the court said: "In Ohio the lower courts have acknowledged the right, but counsel are agreed that it still is a matter of first impression in this court. However, since both reason and authority are convincingly in favor of recognition of the right, it would seem that Ohio, too, should not hesitate to take the definite step of approving this salutary and progressive principle of law."

⁶⁵ *Wright 14* (Ohio Sup. Ct. 1831).

him, thereby causing him a substantial pecuniary loss. In refusing relief, the court said:

We have been much troubled upon examining the declaration, to find out what class of actions this belongs to. The counsel for plaintiff have not entirely relieved us, one of them contending the action is case for a nuisance, and the other contending it is an action on the case for defamation . what *right* was disturbed? We do not think good policy requires us, in this new country, to take such affairs into the cognizance of a court of justice.⁶⁵

In 1900 the case of *Reidy v. Deutsch*⁶⁷ appeared. The plaintiff grounded his cause of action in libel, and sought damages from the defendant for continuing to keep plaintiff's photograph in the rogues' gallery after the plaintiff had been released from any suspicion of crime. In holding that the defendant would be guilty of "libelously publishing" the plaintiff as a rogue or thief once he was aware of the released plaintiff's picture in the "mug books," the court anticipated the weight of authority which now gives relief in similar situations under the doctrine of privacy.⁶⁸ In such a case, one who has not violated the law may insist on being let alone.

The first case in Ohio to discuss the right of privacy as such was *Martin v. F.I.Y. Theater Co.*⁶⁹ The plaintiff, an actress on the legitimate stage, sought damages on two grounds, invasion of privacy and libel. The defendant theater operator had exhibited enlarged photographs of the plaintiff among so-called "nude" pictures of burlesque actresses on the facade of a well-known burlesque theater. In sustaining the defendant's demurrer to plaintiff's first cause of action for invasion of privacy, the court examined various aspects of the new tort, found that the weight of authority was against its recognition (erroneous, even at that time), and denied plaintiff's recovery because the plaintiff was a "public figure" and had therefore consented to publicity and waived her right of privacy. This decision seems wrong, for under the better-reasoned cases⁷⁰ a public figure does not surrender his right of privacy completely, but only consents to that type of newsworthy publicity which does not violate the common decencies. Humiliating publicity could do much greater injury to the career of a public figure than that of a private person, and is particularly odious in a case

⁶⁵ *Id.* at 16, 17.

⁶⁷ 7 Ohio N.P. 620 (1900).

⁶⁸ *State ex rel. Mavry v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *McGovern v. Van Riper*, 137 N.J. Eq. 24, 43 A.2d 514 (1945).

⁶⁹ 10 Ohio Op. 338, 26 Ohio L. Abs. 67 (Com. Pl. 1948).

⁷⁰ *Garner v. Triangle Publications*, 97 F. Supp. 564 (S.D.N.Y. 1951); *Mau v. Rio Grande Oil Co.*, 28 F. Supp. 845 (N.D. Cal. 1939); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931). *Contra: Sidis v. F-R Pul. Corp.*, 34 F. Supp. 19 (S.D.N.Y. 1938), *affirmed*, 113 F.2d 806 (2nd Cir. 1940).

such as the instant one where an aspect of plaintiff's personality was exploited for selfish commercial gain.

The second case to discuss the right of privacy in this jurisdiction was *Johnson v. Scripps Publishing Co.*⁷¹ The plaintiffs had signed a nominating petition for candidates in the Communist Party, and sought an injunction to restrain the defendant newspaper from publishing the lists of names and addresses of the signers. In refusing relief, the court emphasized the constitutional guaranty of freedom of the press and the inability of equity to control that freedom by prior censorship. Once the plaintiffs had filed their petition with the Secretary of State, it became a document of public record open to public inspection and publication. This is in line with the better view that the right of personal privacy is limited by the freedom of the press to publish genuinely newsworthy items of public interest. In certain cases the interest of society in free dissemination of information will outweigh the individual's interest in privacy.

The third case on the subject in Ohio, *Friedman v. The Cincinnati Local*,⁷² evidenced a desire to recognize the right of privacy, but in so doing went too far. The plaintiff restaurant owner was found to be entitled to an injunction restraining defendant pickets from taking pictures of plaintiff's customers as they entered and left his establishment. In its zeal, the progressive court did not take cognizance of the fact that the right of privacy is a personal one and may not be asserted by third persons unless they themselves are brought into undesired publicity, for while the plaintiff apparently was entitled to relief, the injunction should have been based on other grounds.

The fourth case to discuss the right of privacy in Ohio was *Schmukler v. Ohio Bell Telephone Co.*⁷³ The defendant telephone company suspected the plaintiff of using her non-metered social residence phone for business calls, when she had agreed to use her metered business phone for such purposes. The defendant monitored plaintiff's social phone in order to determine the type of call she was making, and after being confronted by defendant with the facts and the method used to obtain them, plaintiff sought damages for invasion of privacy. In denying relief, the court stressed the fraudulent actions of the plaintiff and the right of the defendant to protect its own interest. This argument is not persuasive. Under the better view, the plaintiff may recover for invasion of privacy where a receiving set has been placed in his room by a suspicious defendant,⁷⁴ or where his

⁷¹ 18 Ohio Op. 372, 32 Ohio L. Abs. 423 (Com. Pl. 1940).

⁷² *Friedman v. The Cincinnati Local*, 20 Ohio Op. 473, 6 Ohio Supp. 276 (Com. Pleas 1941), *reversed on other grounds*, 90 N.E.2d 447 (1941)

⁷³ 66 Ohio L. Abs. 213, 116 N.E.2d 819 (Com. Pleas 1953)

⁷⁴ *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

telephone wires have been tapped.⁷⁵ In the *Schmukler* case, the court probably wished to reach an equitable result, but the decision is not good tort law. The plaintiff's trivial deception seems to be outweighed by the frightening intrusions upon confidences made possible by such acts as the defendant's, and if intrusion on privacy can be justified by a defendant's pecuniary interest, its foundations are indeed built on sand.

The above decisions all seemed to indicate some awareness of the right of privacy, and that awareness could not help but increase. In the important recent decision of *Housh v. Peth*,⁷⁶ the Supreme Court of Ohio for the first time discussed the right of privacy as such and affirmed its independent legal existence. The plaintiff had been harassed by the defendant collection bureau in order to compel the payment of a debt owed by the plaintiff. She was subjected to numerous telephone calls by the defendant, some of them very late at night, dunning her for payment. A number of the calls were made to the plaintiff's superiors, informing them of the debt, and to the plaintiff at her place of business, with a resultant threat of loss of employment. The court recognized the fact that a creditor has a right to take reasonable action to pursue his debtor in order to "encourage" payment, although the steps taken may result to a certain degree in the invasion of the debtor's privacy. Simply informing the debtor's employer of the fact that the debt is owed, of itself, would not constitute an outrageous invasion of the right of privacy.⁷⁷ But the court distinguished the instant case on its facts. The campaign of harassment which the defendant conducted led the court to conclude that its actions fell outside the bounds of reasonable methods which may be pursued in an effort to collect a debt, and was therefore an actionable invasion of plaintiff's right of privacy.

The landmark decision in the *Housh* case should result in the Ohio Bar's realization that this heretofore little-used remedy is now definitely available in this jurisdiction. In spite of the fact that Ohio has shown resistance to accepting the new tort of "mental suffering,"⁷⁸ the *Housh* decision, in recognizing the right of privacy as an interest deserving protection, illustrates that an enlightened court will acknowledge the mental as well as the physical aspects of the human personality. In so doing, the

⁷⁵ *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931)

⁷⁶ *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

⁷⁷ *Lewis v. Physicians and Dentists Credit Bureau*, 27 Wash.2d 267, 177 P.2d 896 (1947); *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948); accord, *Davis v. General Finance and Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950). Some cases hold that the printed publication of a debt to the world constitutes an invasion of the right to privacy. *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927). *Contra: Judevine v. Benzies-Montange Fuel and Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936).

⁷⁸ *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948).