LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

Privacy has long impressed surveyors of the legal process as one of the great ideas with which the law has grappled in the last seventy-five years of its growth.[1] And the recent elevation of privacy in another of its manifestations to some kind of constitutional status in the Connecticut birth control case[2] has no doubt strengthened the conviction of some that the privacy idea bears witness to the vigor of our jurisprudence. Yet much of the history of privacy in the law is still ahead of us, and its future development seems likely to have a considerably broader influence on the individual lives of citizens.

After three quarters of a century, privacy still remains primarily a nonlegal concept. While it was introduced into legal thinking by two able advocates, operating in a law review rather than a courtroom,[3] they were moved in their effort by a personal grievance on the part of one of them against the yellow press.[4] Their work was thus something of a lawyer's catharsis rather than objective scholarship or judicial craftsmanship, and the law has never absorbed the privacy concept comfortably or made it altogether its own.[5] In our present age, popular books and journals and the mass press have seized upon the privacy idea to characterize a congeries of public fears and annoyances, and partly as a result privacy is increasingly used in legal contexts, even while scholarly disagreement continues over its utility and appropriateness.[6] Awkward as it may be as a tool for legal analysis, privacy is infiltrating the law and must be reckoned with.

The function of the privacy idea in the law is one of the central issues in this symposium. To a large extent it is viewed as a cultural norm which has been introduced into a variety of legal issues and which serves the purpose of providing a rallying point for those concerned about the encroachments of mass society on the individual. Its utility is thus much like that of "due process" or "equal protection" in galvanizing the legal system into recognizing and contesting specific threats to

[1] *E.g.*, PAUL J. MISHKIN & CLARENCE MORRIS, ON LAW IN COURTS 57-229 (1965).

[2] Griswold v. Connecticut, 381 U.S. 479 (1965).

[3] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[4] ALPHEUS T. MASON, BRANDEIS, A FREE MAN'S LIFE 70 (1946).

[5] *Cf.* MISHKIN & MORRIS, *op. cit. supra* note 1, at 57-229 *passim*; Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, *infra*, pp. 326-41; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV. 1 (1959).

[6] *Compare* sources cited note 5 *supra with* Beaney, *The Right to Privacy and American Law*, pp. 253-71 *infra*, and Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

freedom—in this case, deep intrusions on human dignity by those in possession of economic or governmental power. It is extremely interesting to witness the law's attempt to come to terms with an important societal value.[7]

In attempting to view privacy as a single right entitled to protection against a variety of conflicting interests in a wide range of legal disputes, the articles that follow for the most part use the term to refer generally to the supposed preference of individuals to live their lives and maintain their personalities and affairs free from undue intrusion by, or exposure to, the outside world; in addition, the authors recognize that privacy has a more positive side, reflecting each individual's psychological and practical need not only to withhold but also to share certain aspects of himself with others with a reasonable expectation that confidentiality will be preserved. The risks of dealing with privacy in this generalized form are obvious, but they are undertaken here upon the justification that courts are continually faced with the problem of defining and implementing the right to privacy for some limited purpose.

Courts confronted with an asserted individual interest in privacy do not always have the benefit of a constitutional or legislative evaluation of that interest or of judicial precedent suggesting its value. Analogies to recognized and established rights may be helpful, but circumstances and the nature of the interests found to be in conflict with an asserted claim to privacy are apt to vary so widely that the necessary policy determination cannot be made with assurance. For this reason, a primary purpose of the symposium is to suggest broadly the value of privacy in American society. Another purpose is to review several privacy problems in a functional setting against the background of a wide variety of conflicting interests. Scholarship of this kind is imperative if legislatures and courts are to confront the range of existing privacy problems with intelligence and insight and are to succeed in solving them with the least sacrifice of privacy values on the one hand and of legitimate countervailing interests on the other.

Much of the work done in recent years in calling attention to the number and complexity of privacy problems has been stimulated by the Special Committee on Science and Law of the Association of the Bar of the City of New York. In organizing this symposium, the Editor benefited greatly from the inspiration and advice of the Committee and its chairman, Oscar M. Ruebhausen, Esq. He takes this occasion to express his gratitude.

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[7] Reference should be made here to what promises to be the most systematic appraisal of the relation of privacy and law. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966) (pt. 1). The second part of the article has yet to appear, and we are promised that a fuller version will appear in book form.