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INVASION OF THE RIGHT OF PRIVACY— STATUS IN COLORADO

BY JOE C. MEDINA‡

The doctrine of invasion of the right of privacy represents a landmark in the annals of American jurisprudence. This modern doctrine is predicated on the premise that every man is endowed with a "right to be let alone"[1] and its evolution is a noteworthy indication of progressive legal thinking on the part of American jurists.

Scientific and technological advances in the fields of communications and transportation have created unlimited means of invading an individual's seclusion. At the same time, the closely guarded constitutional freedoms of the press and speech have given to publishers a nearly unrestricted right to publish anything at will and have, therefore, given impetus to the publication of an individual's private affairs. The coupling of these forces has augmented the opportunities and the means of intruding into one's privacy. In view of such a highly developed society, it was inevitable that a right of action would evolve to protect an individual from unwarranted intrusions into his private life.

HISTORY OF THE TORT

The tort of invasion of the right of privacy is one of the few doctrines among myriad legal concepts which enjoy the distinction of having been created in the minds of American legal thinkers. While some analogy to this tort may be drawn from Greek and Roman law which recognized *injuria* to a person's honor and dignity,[2] the common law of England was silent as to a cause of action for intrusions into an individual's private life. It thus fell upon American jurists to recognize the existence of a right of privacy and to create a cause of action for its invasion.

A famous article appearing in the Harvard Law Review in 1890[3] is generally credited for the widespread acceptance of the idea that an invasion of an individual's right of privacy constitutes a cause of action.[4] Following that article, New York was the first jurisdiction to consider the question whether a right of privacy exists as an independent legal concept. A divided court in *Roberson V. Rochester Folding Box Co.*[5] negatived the existence of the right by reasoning that recognition of a right of privacy would lead to myriad claims and absurdities in the law. The leading case affirming the existence of the right of privacy is *Pavesich v. New England Life Ins. Co.*[6] In the course of its opinion in the Pavesich case, the Georgia Supreme Court said: "We venture to predict that the American Bar will marvel that a contrary view was ever entertained by judg-

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1 Cooley, Torts 29 (2d ed. 1888).
2 Pound, *Interests of Personality*, 28 Harv. L. Rev. 343 (1915).
3 Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).
4 See, e.g., Prosser, Torts 635 (2d ed. 1955).
5 171 N.Y. 538, 64 N.E. 442 (1902).
6 122 Ga. 190, 50 S.E. 68 (1905).

es of eminence and ability."[7] Indeed, this prophecy has come to pass, for today the tort of invasion of the right of privacy is recognized by a majority of American jurisdictions.[8]

The Restatement of Torts[9] has adopted the majority view that a right of action under common law principles follows an invasion of the right of privacy. Four states, New York,[10] Oklahoma,[11] Utah,[12] and Virginia[13] have announced a limited statutory recognition of this right.[14] Of these states, only New York has rejected the cause of action under principles of the common law.[15] Several states, including Colorado, have avoided the question whether a right of privacy exists as a separate legal concept, but have allowed recovery for typical invasions of the right under the guise of other concepts, such as defamation[16] and breach of contract.[17] Only three states, Rhode Island,[18] Texas,[19] and Wisconsin,[20] have totally rejected the existence of the right of privacy as an independent concept of the common law.

UNDERLYING PHILOSOPHY OF THE TORT

The reasoning of the courts in arriving at a recognition of the right of privacy has been as impressive as the philosophical concepts which underlie the existence of our democratic system of government. Thus the courts have generally resorted to fundamental law as the basis for the existence of this individual right. The majority of the courts have reasoned that the right of privacy is rooted in natural instincts and the law of nature.[21] This reasoning appears to be predicated on the premise that man is endowed with an inherent right to live his life in seclusion if he so chooses.

7 *Id.* in 50 S.E. at 81.
8 See, e.g., Prosser, Torts 636-637 (2d ed. 1955).
9 § 867 (1939).
10 N.Y. Civil Rights Law §§ 50, 51.
11 Okla. Stat. §§ 839, 840 (Supp. 1955).
12 Utah Code Ann. §§ 76-4-7 to 9 (1953).
13 Virginia Code Ann. § 8-650 (1950).
14 E.g., N. Y. Civil Rights Law §§ 50, 51 limit recovery for the unauthorized use of the plaintiff's name, portrait or picture for advertising purposes or for purposes of trade.
15 Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).
16 Turner v. Brien, 184 Iowa 320, 167 N.W. 584 (1918); Thompson v. Adelberg & Berman, Inc., 181 Ky. 487, 205 S.W. 558 (1918); Hutchins v. Page, 75 N.H. 215, 72 Atl. 689 (1909).
17 McCreery v. Miller's Groceteria Co., 99 Colo. 499, 64 P.2d 803 (1936); Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932); Bennet v. Gusdorf, 101 Mont. 39, 53 P.2d 91 (1935).
18 Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909).
19 Milner v. Red River Valley Publishing Co., 249 S.W.2d 227 (Tex. Civ. App. 1952).
20 Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956); Judevine v. Benzies Montanye Fuel & Whse. Co., 222 Wis. 512, 269 N.W. 295 (1936).
21 E.g., Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905)(leading case).

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Other courts have based their decisions on the "life, liberty and pursuit of happiness" expressions of the Declaration of Independence[22] and in the due process clauses of the federal and state constitutions.[23] This reasoning, however, loses its significance when it is remembered that constitutional rights are restrictions placed upon the government in its official capacity and not upon individuals in the normal intercourse of society. The Supreme Court of the United States has significantly held that the Federal Constitution does not confer any right of privacy that is beyond the power of the states to restrict.[24]

Still other courts have based their decisions upon the theory that the right of privacy is a property right.[25] This theory advances the proposition that any element of an individual's personality is as inviolable as his tangible property. The "property right" theory might easily be explained as a fiction through which the courts have acquired equity jurisdiction for the protection of the purely personal right of privacy.

NATURE OF THE TORT

The doctrine of invasion of the right of privacy had its inception at the turn of the twentieth century; hence, it is a young doctrine which might properly be considered still to be in the embyronic stages of evolution. In considering the right of privacy cases, the courts have been primarily concerned with the question whether the law contemplates the existence of a right of privacy as a separate and independent legal concept. The nature of the tort of invasion of the right of privacy has thus enjoyed little discussion in the cases. It appears, nevertheless, that this doctrine permits a remedy for several distinct wrongs, each of which, although bearing little resemblance to each other, constitutes an unwarranted intrusion into an individual's private life.

One phase of the doctrine of invasion of the right of privacy affords a remedy for unauthorized appropriations of the plaintiff's personality for commercial purposes, as in advertising[26] or in exploiting the plaintiff's personality for profit.[27] It is significant to note that the statutory right of privacy[28] applies solely to this phase of the doctrine; i.e., it has been limited to permit recovery only for unauthorized commercial use of the individual's personality.[29]

A second phase of the doctrine of the right of privacy protects a person from intrusions into his physical solitude and seclusion. Thus a physical search in public of the plaintiff's person,[30] wiretapping,[31] compulsory blood tests,[32] unauthorized entries into the

22 Peed v. Washington Times Co., 55 Wash. L. Rep. 182 (D.C. 1927).

23 E.g., Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931).

24 Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

25 Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902)(dissenting opinion); Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895)(dissenting opinion).

26 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905)(leading case); 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); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

27 Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951); Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948); Metzger v. Dell Publishing Co., 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. New York County 1955)(decided under N.Y. statute).

28 See statutes cited in notes 10-13 *supra*.

29 See explanation cited in note 14 *supra*.

person's quarters,[33] and investigations of his private bank account records[34] have been held to be invasions of the right of privacy.

The doctrine of the right of privacy also provides a remedy for unauthorized publicity given to an individual's private affairs. This phase of the doctrine is designed to protect the individual from that type of publicity which violates ordinary decencies, as in publicizing the details of an embarrassing or humiliating illness,[35] or the notorious past life of the plaintiff,[36] or the fact that he has not paid his debts.[37] While commercialization of the individual's personality is not an essential element to this phase of the tort, it appears that a defamatory innuendo is indispensable to a good cause of action.

Still a fourth phase of this doctrine protects a person from that type of publicity which places him in a false, although not necessarily defamatory, light. Thus, liability for invasion of the right of privacy has been found in signing the plaintiff's name to a telegram without his knowledge[38] and in placing the plaintiff's picture in a rogue's gallery.[39]

It is demonstrated, therefore, that an unwarranted intrusion into an individual's private life is a necessary characteristic of each of the wrongs which comprise the tort of invasion of the right of privacy. The protection of a person's peace of mind or mental soli-

30 Bennet v. Norban, 396 Pa. 94, 151 A.2d 476 (1959).

31 McDaniel v. Atlanta Coca Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); Roach v. Harper, 105 S.E.2d 564 (W.Va. 1958).

32 Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940).

33 Walker v. Whittle, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (entry by sheriff to make unlawful arrest); Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924)(entry into woman's bedroom on steamboat and attempted rape); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952) (unauthorized entry by landlord).

34 Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936) (unreasonable search case where court said, at page 849: "(W)e regard the search here asserted as a violation of the natural law of privacy in one's own affairs . . . And that right extends to the records of his transactions from unreasonable inspection and examination thereof by unwarranted governmental search. If due protection of this natural right be denied him by the courts, his other rights and his citizenship lose their value.")

35 Sidis v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

36 Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931).

37 Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959). *Contra*, Goldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 100 S.E.2d 881 (1957)(letter to plaintiff's employer advising of contemplated garnishee action held not to be invasion of the right of privacy); Hawley v. Professional Credit Bureau, 345 Mich. 500, 76 N.W.2d 835 (1956)(letter to plaintiff's employer advising of plaintiff's debt held not to be invasion of the right of privacy in absence of defendant's bad faith). *But cf.*, Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (Ohio Sup. Ct. 1955), *aff'd* 99 Ohio App. 485, 135 N.E.2d 440 (1955)(extreme harrassment of plaintiff and repeated telephone calls to plaintiff's employer held to be invasion of the right of privacy).

38 Hinish v. Meier, 166 Ore. 482, 113 P.2d 438 (1941). *Cf.*, Schwartz v. Edrington, 133 La. 235, 62 So. 660 (1913) (when plaintiffs signed a certain document due to a misunderstanding and later repudiated their signatures, injunction against defendants to cease publication of plaintiffs' names as signers of the document was held to be properly issued).

39 State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); McGovern v. Van Ripper, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945), *aff'd* 137 N.J. Eq. 548, 45 A.2d 842 (Ct. Errors and Appeals 1945).

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tude also appears to be a vital characteristic underlying the cause of action.

The various combinations of wrongs which comprise the tort of invasion of the right of privacy appear to create an enigmatic haze as to just what it is that the cause of action is designed to protect. This enigma is further increased by the fact that the line of demarcation between the tort of invasion of the right of privacy and other tort actions such as nuisance, trespass, and intentional infliction of mental anguish is not as clearly drawn as the distinctions that exist between other legal concepts.

LIMITATIONS OF THE ACTION

The purpose for which the doctrine of invasion of the right of privacy is designed is further clouded by the numerous limitations to which it is subjected, for the right of privacy is by no means an absolute right. The foremost of these limitations is the public interest. This limitation in effect declares that any invasion of another's privacy is justified if it serves to promote the public interest. Thus the constitutionally-protected freedom of the press to publish newsworthy items is usually placed ahead of an individual's right of privacy.[40] But some of the better reasoned cases have allowed recovery of damages for the unwarranted publication of news items which violate ordinary decencies.[41] Thus it is generally held that a "public figure" who voluntarily places himself in the public spotlight becomes a legitimate subject of news and will not be heard to complain;[42] but the public interest does not go so far as to permit the personality of such a public figure to be exploited for commercial gain.[43] Similarly, one placed in the public limelight involuntarily is held to have surrendered his right of privacy for such a period as he remains a "public character."[44] The reason for this limitation is that the mere satisfaction of public curiosity transcends an individual's right to live in seclusion.[45] In any event, it is not difficult to see the problems which face the courts in attempting to balance the conflicting interests represented by an individual's right of privacy on the one hand, and the public interest on the other.

Since the right of privacy is a personal one, it is subject to the limitation that no right of action survives the individual whose privacy has been violated.[46] But a surviving relative may maintain

40 See e.g., Sidis v. F-R Publishing Co., 113 F.2d 806 (2d Cir. 1940).

41 See cases cited in notes 34-36 *supra*.

42 Thompson v. Curtis Publishing Co., 193 F.2d 953 (3d Cir. 1952)(inventor); Cohen v. Marx, 94 Cal. App. 2d 704, 211 P.2d 320 (Dist. Ct. App. 1950)(prize fighter); Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951)(public officer).

43 Bell v. Birmingham Broadcasting Co., 266 Ala. 266, 96 So. 2d 253 (1957)(radio personality); Jansen v. Hilo Packing Co., 202 Misc. 900, 118 N.Y.S.2d 162 (Sup. Ct. New York County 1952), *aff'd* 282 App. Div. 935, 125 N.Y.S.2d 648 (1953)(professional baseball player)(decision under N.Y. statute); Fisher v. Murray M. Rosenberg, Inc., 175 Misc. 370, 23 N.Y.S.2d 677 (Sup. Ct. New York County 1940)(dancer)(decision under N.Y. statute). *But cf.*, Toscani v. Hersey, 271 App. Div. 445, 65 N.Y.S.2d 814 (1946)(use of fictitious name in a play portraying plaintiff's life *held* not invasion of the right of privacy of a public official)(decision under N.Y. statute).

44 Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948)(one engaged in divorce proceedings); Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946)(one accused of crime); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929)(one present at the scene of a crime).

45 Restatement, Torts § 867, comment c (1939), " . . . until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."

46 Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (Dist. Ct. App. 1939); *cf.*, Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945)(death of defendant does not abate the action).

the action, if he too was affected by the invasion.[47] The personal element also dictates that neither a corporation[48] nor a dog[49] enjoys a right of privacy.

A cause of action for invasion of the right of privacy is further limited by the requirement that the plaintiff must be a person of "ordinary" sensibilities.[50] Still other limitations include the fact that the right of privacy may be surrendered by the consent of the plaintiff[51] and cannot be violated by an oral publication of the plaintiff's private affairs.[52]

STATUS OF THE RIGHT OF PRIVACY IN COLORADO

Colorado has generally been classified as a state which has avoided the question whether the right of privacy exists as a separate and independent concept of the law.[53] Nevertheless, the Colorado Supreme Court has permitted recovery for typical invasions of the right of privacy by employing other established doctrines. Recovery has been allowed for the unauthorized use of one's picture[54] and the picture of a plaintiff's decedent accompanied by the plaintiff's name[55] for advertising purposes. These cases stand for the proposition that substantial damages are recoverable for the "mental pain and suffering" caused by an intentional breach of contract. While the latter cases were decided by resorting to the fictional "implied contract" theory, the Colorado Supreme Court encountered little difficulty in avoiding the question of the existence of the right of privacy. Similarly, the Colorado Supreme Court has permitted recovery of damages for the "mental pain and suffering"

47 Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912).

48 Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S.W.2d 369 (1943); Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct. New York County 1947), *aff'd* 274 App. Div. 751, 80 N.Y.S.2d 724 (1947).

49 Lawrence v. Ylla, 184 Misc. 807, 55 N.Y.S.2d 343 (App. Div. 1945).

50 E.g., Johnson v. Boeing Airplane Co., 175 Kans. 275, 262 P.2d 808 (1953)(use of plaintiff's picture in advertising matter held not to be invasion of the right of privacy when embarrassment resulting from friends' teasing and "kidding" was the only evidence of damage).

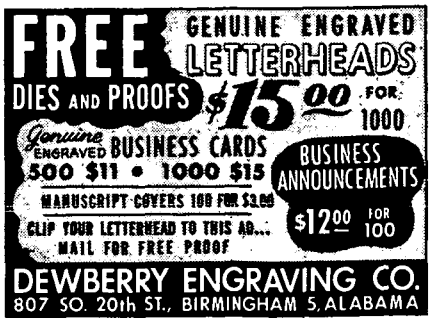
51 Marek v. Zanol Products Co., 298 Mass. 1, 9 N.E.2d 393, (1937); Thayer v. Worchester Post Co., 284 Mass. 160, 187 N.E. 292 (1933).

52 Lewis v. Physicians and Dentists Credit Bureau, Inc., 27 Wash. 2d 267, 177 P.2d 896 (1947). *But cf.*, Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (D. Cal. 1939)(right of privacy invaded by radio broadcast); Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959)(repeated oral publication of plaintiff's debt in the presence of numerous customers in a public restaurant where plaintiff was employed was held by the court to be so aggravated, that the general rule that oral publicity will not give rise to a cause of action for invasion of privacy was not applicable).

53 See e.g., Prosser, Torts 636-37 (2d ed. 1955).

54 McCreery v. Miller's Groceteria Co., 99 Colo. 499, 64 P.2d 803 (1936).

55 Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932).



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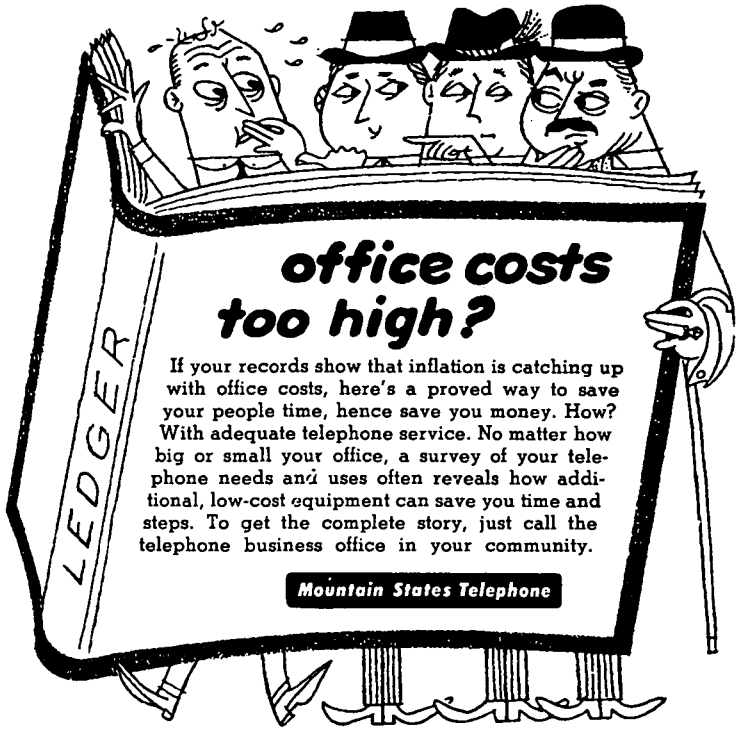
caused by an unauthorized physical intrusion into a person's quarters.[56]

An unreported Colorado district court decision permitted recovery of actual and exemplary damages and issued injunctive relief for intrusion into one's physical solitude by extreme harrassment over the telephone.[57] While the latter case did not proceed to

56 Sager v. Sisters of Mercy, 81 Colo. 498, 256 Pac. 8 (1927).
57 Cooper v. Backus, Docket No. B-1234, Denver Dist. Ct., Dec. 14, 1956 (case originally filed as Cooper v. John Doe. Defendants harrassed the plaintiffs by making numerous obscene telephone calls over a six month period).



the Supreme Court, it is not difficult to see that recovery could easily have been predicated under the laws of nuisance or intentional infliction of mental anguish.

It appears, therefore, that the Colorado courts have rendered substantial justice without the necessity of recognizing the existence of the right of privacy. Yet, an isolated Colorado case may be cited as authority for the proposition that substantial damages are not recoverable for the "mental pain and suffering" caused by a negligent or passive breach of contract.[58] In view of the latter proposition, it is conceivable that in future cases involving invasion of privacy, the plaintiff could be without a remedy if the attempted recovery is predicated on a breach of "implied" contract and the breach was not an intentional breach by the defendant.

It has been suggested that in *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*[59] the Colorado Supreme Court might have announced its recognition of the existence of the right of privacy.[60] True, the court alluded to the right of privacy in that case,[61] but it is inconceivable that mere allusion can be tantamount to recognition. In *Hearings Concerning Canon 35*, the Colorado Supreme Court held that radio and television broadcasting of trial proceedings is permissible at the discretion of the trial court. That decision is indicative of the constant vigilance which the courts exercise over the constitutional freedoms of the press and speech. Superficially at least, the situation in Colorado has remained unchanged and the near-absolute freedom of the press prevails over any individual's right to live in seclusion.

CONCLUSION

A doctrine of law which has gained acceptance by such a clear weight of authority, as has the doctrine of invasion of the right of privacy, is deserving of inquiry to determine its merits and the validity of its existence. It is hoped that the Colorado Supreme Court will embark upon such an inquiry, when the next invasion of privacy case is presented for adjudication, to settle the status of the right of privacy in Colorado.

58 Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 151 (1913).
59 132 Colo. 591, 296 P.2d 465 (1956).
60 Comment, 29 Rocky Mt. L. Rev. 272 (1957).
61 132 Colo. 591, at 599, 296 P.2d 465, at 470 (1956), the Supreme Court of Colorado, stated: "(W)hen one becomes identified with an occurence of public interest, he emerges from his seclusion and it is not an invasion of his right of privacy to publish his photograph or to otherwise give publicity to his connection with that event."

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