

federal law, there has been no affront to an individual's constitutional rights. Yet, should the device be a spike microphone and penetrate an apartment wall by only a few inches, then a trespass³ has been committed and the fourth amendment violated.³

Just fifty years ago Dean Roscoe Pound published a paper in the *Harvard Law Review* on "Interests of Personality."⁴ There he identified the claim to private personality as "the demand which the individual may make that his private personal affairs shall not be laid bare to the world."⁵ But though he thought the interest was clear, the law, he found, had been slow to recognize such an interest and raise it to the dignity of a legal right.⁶

Even had society's developing awareness of the claim to privacy not been blunted by the then dominant commercial concern for tangible property as evidence of personal worth, the establishment of a right of private personality was destined to be slow. For this there are a number of reasons. The right of privacy is largely a subjective, incorporeal right, difficult to identify and incapable of measurement. Other more definable values—such as freedom of speech—loomed larger a century and less ago. Until recently, furthermore, science had not provided the devices which, circumventing the old concepts of property, make surveillance possible without an actual trespass. In addition, the modest range of governmental activities of a half century and more ago made the threat to the individual from government seem negligible. The formidable attributes of concentrated economic power were, also, only beginning to be appreciated. Indeed, the aggressive spirit of individual self reliance which prevailed in America would have made society's concern for the private personality seem incongruous.

It is reasonable, moreover, that the claim to privacy should evolve slowly, for privacy is in conflict with other valued social interests, such as informed and effective government, law enforcement, and free dissemination of the news. Whenever competing rights and values confront each other, it is always a slow and arduous process to evaluate the claim and counterclaim in real life situations. This process, however, is a classic function of the law. In time, therefore, the boundaries between the permissible and unreasonable

3. Lack of trespass was cited by the Supreme Court in refusing to invalidate the use of a detectaphone on the outer wall of a hotel room, *Goldman v. United States*, 316 U.S. 129 (1942); see *United States v. Pardo-Bolland*, 348 F.2d 316 (2d Cir. 1965), *petition for cert. filed*, 34 U.S.L. WEEK 3081 (U.S. Sept. 2, 1965) (No. 521); in allowing the use of a concealed transmitter by a government undercover agent in a suspect's laundry, *On Lee v. United States*, 343 U.S. 747 (1952); and in upholding the use of a concealed recorder by a tax agent in a suspect's place of business, *Lopez v. United States*, 373 U.S. 427 (1963). In *Silverman v. United States*, 365 U.S. 505 (1961), the decision excluding evidence was based on the actual penetration of an apartment wall by a spike microphone which, by making contact with a heating conduit, enabled the police to overhear every word spoken within the house.

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

5. *Id.* at 362.

6. To the extent that the claim to privacy has not yet been recognized or protected by law it cannot, at least in a technical legal sense, be called a "right."