

constitutional protections have been judicially elaborated over decades of concentrated attention to the proper equilibrium between an identified public need and the claim to private property.

There has been no comparable abundance of legislative or judicial attention to the balance between the public need and the claim to private personality. The application of the first, fourth and fifth amendments of the federal constitution to the claim to private personality is in a very early stage of evolution.¹³ More than thirty states have now recognized some form of a common law right of privacy; four have created at least a limited right by statute.¹⁴ Yet, another four states have rejected the existence of a right of privacy at common law,¹⁵ although the rejection may be more verbal than substantive.¹⁶ Thus, in terms of a sophisticated system of protections for the claim to private personality—protections discriminately balanced to permit reasonable interference with privacy in appropriate circumstances—it is clear that our law has not yet matured.

II. THE NATURE OF PRIVACY

What then is this emerging claim to private personality?

Private personality is as complex and many-faceted as human beings themselves, but two principal aspects of the claim to privacy are clear. The one most frequently expressed is the "right to be let alone." This facet of the claim to privacy, first formulated by scholars¹⁷ and repeated by judges,¹⁸ was given widest currency by Justice Brandeis in his magnificent dissent in the *Olmstead* case.¹⁹ But there is another, and obverse, facet of the

13. The law on this issue appears, however, to be in an active phase of transition. See, e.g., Judge Sobel's opinion in *People v. Grossman*, 45 Misc. 2d 557, 257 N.Y.S.2d 266 (1965) and Justice Brennan's dissent in *Lopez v. United States*, 373 U.S. 427, 446 (1963). See also the new constitutional right of privacy announced by Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Massiah v. United States*, 377 U.S. 201 (1964) (sixth amendment held to have been violated when an eavesdropping device was used to elicit information from a defendant in the absence of counsel).

14. See, e.g., the listing in Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386-89 (1960). For a better analysis, see Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964). See also *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964); *Truxes v. Kenco Enterprises, Inc.*, 119 N.W.2d 914 (S.D. 1963).

15. See Prosser, *supra* note 14.

16. In New York, for example, where the common law right to privacy is thought not to exist, the same result may be reached by more tortuous routes—e.g., actions for libel, slander, trespass, or unfair labor practice, or the common-law remedy to safeguard mental tranquility from the intentional infliction of distress. See *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Scheman v. Schlein*, 35 Misc. 2d 581, 231 N.Y.S.2d 548 (Sup. Ct. N.Y. Co. 1962). See also RESTATEMENT (SECOND), TORTS § 46 (1965), and especially the caveat and comment thereon. Consider also the possibility of basing civil remedies on criminal statutes such as N.Y. PEN. LAW § 738 (eavesdropping) or § 834 (holding a person up to ridicule). See RESTATEMENT (SECOND), TORTS § 286; see also *Reitmaster v. Reitmaster*, 162 F.2d 691 (2d Cir. 1947).

17. See COOLEY, TORTS 29 (2d ed. 1888).

18. See, e.g., *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 544, 64 N.E. 442, 443 (1902).

19. *Olmstead v. United States*, 277 U.S. 438, 478 (1927). See also Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).