Injunctive Protection of Personal Interests - A Factual Approach

Dale E. Bennett
Personal interests are often equally as important as the so-called "property" interests, which may be measured more readily by the pecuniary yardstick of dollars and cents. It is considerably more disturbing to the man of normal sensibilities to have his picture put in a rogues' gallery, or his daughter constantly solicited by a persistent male, than to have the sanctity of his vacant lot intruded upon by continuous and repeated trespasses or by a telephone wire crossing these premises at an altitude of twenty or thirty feet.

Consider then the much cited maxim that "Equity will not protect purely personal rights. Rights in property are the foundation of equitable relief." This canon is generally conceded to have originated in a decision by Lord Eldon in the case of Gee v. Pritchard,¹ where the court enjoined the publication of letters written to an adopted son concerning family matters. On its facts, the case presented a threatened invasion of a purely personal right—the feelings of the sender who did not want her family affairs and confidences made public. Yet Lord Eldon felt constrained to posit his decision on a more familiar ground, declaring:

"I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it."²

Like a snowball, this dictum has rolled merrily along the

---

² Swans. at 425, 36 Eng. Rep. at 678. (Italics supplied.)
judicial highway, gathering additional decisions at it went; and only being arrested a little, here and there, by a rebuke from some jurist who refused to subscribe to the solecism that only property rights are entitled to protection.

The writer is not particularly disturbed by the fact that our courts have seldom frankly protected personal interests directly and avowedly of their own right. From a practical standpoint, it is sufficient to note that the majority of courts have followed Lord Eldon's dictum in the spirit in which it was given. A court that will find a property right in private letters of no actual historical or literary significance, will have little difficulty in locating a satisfactory property right in any case where relief is deemed proper. Thus, in a case where a father sought to enjoin the seduction and debauching of his daughter, the fact that she performed services for the plaintiff (probably by filling his coffee cup in the morning and bringing his slippers in the evening) satisfied the property requirement. Having been born in an atmosphere of technicality and subterfuge, it is not surprising that, upon arriving at maturity, this maxim should bear the characteristics and limitations of its birth.

One may wonder why a principle, ostensibly inconsistent with the spirit of equitable relief, and bearing the ever present possibility of becoming a barb of injustice, has lived such a charmed life. This is especially remarkable in view of the disfavor with which equity ordinarily regards the obtuse fictions of the common law. Possibly the rule has survived because the courts found it a very useful tool in the time-honored process of judicial rationalization.

Prayers for injunctive relief have come from people in all walks of life, and covering every conceivable human wrong—

3. In Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896), Bryan, J., quoted from Bispham on Equity (5 ed. 1893) 534, note 2, to the effect that, "it is the rights of property, or, rather, rights in property, that equity interferes to protect. A party is not entitled to a writ of injunction for a matter affecting his person"; and from Kerr on Injunctions (1889) 1-2, for the proposition that "Injury to property, whether actual or prospective, is the foundation upon which its jurisdiction rests."

4. In Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97, 100 (1907), Dill, J., declared by way of dictum, "If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity . . . ."

some substantial, others distinctly frivolous. A Chicago fireman sought to enjoin his jealous wife from following him to fires, for the express purpose of throwing cold water on any romances he might be tempted with, while rescuing women in nightgowns in the course of his duties.\(^6\) A Boston court was asked to enjoin one party to a spite and jealousy-marked feud from making faces at or otherwise molesting her neighbor and erstwhile friend.\(^7\) A court at Boma, Belgian Congo, furnishes the extraordinary case of an important negro king, of cannibalistic tendencies, who sought to recover his amputated limb.\(^8\) A distracted father in New Jersey sought to restrain a lovesick rejected suitor of his daughter from carrying out his threat to commit suicide on the family doorstep.\(^9\) In Chicago, a mother petitioned the court to enjoin an aviation-minded father from taking their six-year old son on airplane trips.\(^10\) From Ohio, we have the case of a former member of the Amish Mennonite Church, who was "mited" because of his insistence on wearing rubber in his suspenders, against Church rules, and his subsequent withdrawal from the church. He asked the court to enjoin the Bishops and Preachers of the Church from further "miting" or boycotting.\(^11\) An Iowa husband alleged that his health was being endangered by his wife's use of profane and abusive epithets, and that she might take his life unless restrained.\(^12\) A Texas court was asked to restrain an employer from "associating with, calling on or having anything whatever to do with the plaintiff's wife," except as related to her duties as a part time bookkeeper.\(^13\) Early English cases include many instances where churchmen applied to the Chancellor for aid in suppressing witchcraft and sorcery when

---

7. Pound, Cases on Equitable Relief Against Defamation and Injuries to Personality (2 ed. 1930) 129. Injunction granted.
8. Id. at 130. The King, being somewhat of a local power, was given the relief sought.
9. Id. at 132. The court, in issuing the injunction, advised the ardent lothario to seek affection elsewhere.
10. Id. at 136. Clarence Darrow, in behalf of the boy's mother, pleaded that the boy's life was being endangered. Injunction granted.
11. Id. at 136. Plaintiff's testimony showed that, as a result of the "miting" order, he was unable to obtain farm help, cider mills refused his apples, and his daughter was unable to be married. Relief granted.
12. Moir v. Moir, 182 Iowa 370, 165 N.W. 1001 (1918). The court denied relief, giving "no serious consideration" to the petitioner's claims as to impairment of health, and pointing out the futility of an injunction if the wife was really a would-be murderer.
spiritual corrections proved ineffective. Individuals also sought relief in cases where property damage was thought to come from supernatural sources.

With petitions for equitable relief taking as many forms as there are irritating situations in life, numerous cases arise where an injunction should be denied. The wrong may be one of trifling significance, as in the case of a "nagging" wife. Again injunctive relief may be fraught with serious practical difficulties, as in the case where a husband seeks to prevent the flirtations of a "will-of-the-wisp" wife. In such instances it is very convenient and legalistically convincing to state, "Relief denied because no property interest is involved." On the other hand, where relief is expedient the court may fashion the necessary property right, and the technical or unsubstantial nature of that right is apparently of little or no importance.

This technique is subject to criticism by the legal purist. To persons seeking "rule of thumb" certainty with those clearly defined canons which are so nicely adapted to black-letter headnotes, it will prove a source of vexation. Yet, from the standpoint of results, the decisions have been unusually sound, and the "property" requirement has not operated to obstruct justice. Possibly it has served a useful function in providing a device by which the appellate tribunal, purporting to follow the strict mandate of stare decisis, may place a practical check on the unduly liberal issuance of injunctions by many trial judges.

The writer has approached the decisions with a hope of ascertaining those basic considerations upon which each particular group of cases turns; and incidentally, of noting the extent to which homage is paid to the property right concept. In cases where an injunction is sought to protect rights which are, at least according to the layman's understanding, primarily personal, two significant questions arise. First, the substantive law question: Is the defendant threatening to commit a legal wrong as distinguished from an act which is merely wrong from a moral or polite society standpoint? The court will not enjoin an act, the doing of which would not render the actor liable in damages (nominal or substantial). Secondly, the procedural question: Assuming a wrong to be threatened, is the injunction a practical

---

14. Martin, Archaeologia, 60 (Part II), 353 (cited in (1918) 31 Harv. L. Rev. at 853, n. 78).
16. In the instances just enumerated (notes 6-13, supra) the trial court usually granted the injunction.
and the proper remedy? The answer to these questions is more important than the drawing of any fine line of distinction between personal and property rights.

**Alienation of Affections**

Often a "devoted" wife seeks to enjoin an "attractive adventuress" from further alienation of a wayward spouse's affections. In such a situation the Texas courts have uniformly granted relief, either on the petition of a forsaken wife, or of a jilted husband. Likewise, courts in other states have occasionally sought, by means of the injunctive process, to restrain clandestine relationships threatening to break up a home. Here, the maxim that equity will only protect property rights, has not hampered the courts. They have found the requisite property right in the wife's right to support, or in the husband's right to the wife's services and society. Again, the right of consortium, which includes the

17. Smith v. Womack, 271 S.W. 209 (Tex. Civ. App. 1925), where the court restrained the defendant "from visiting with or accompanying B. G. Womack [the husband], and in person, by telephone, telegraph, or writing, or sign or symbol, from communicating with the said B. G. Womack . . ." The decision was noted with approval in (1926) 10 Minn. L. Rev. 163; and in (1925) 74 U. of Pa. L. Rev. 97 where the writer suggests that the decision may be supported on the general principle, established in the labor cases, that equity will restrain third persons from inducing a breach of contract.

18. Ex parte Warfield, 40 Tex. Crim. Rep. 413, 50 S.W. 933 (1899). The decision is slightly weakened by the fact that the petitioner was seeking a writ of habeas corpus, and hence would have to show that the decree was absolutely void, and would not be entitled to relief on a mere showing that it was erroneous. The court, however, in refusing the writ, clearly held that the injunction was properly issued. Accord: Witte v. Bauderer, 255 S.W. 1016 (Tex. Civ. App. 1923), noted in (1924) 24 Col. L. Rev. 431.

19. Hall v. Smith, 80 Misc. 85, 140 N.Y. Supp. 796 (1913), where the erring husband filed an affidavit, on behalf of the defendant, that when he stopped living with the plaintiff his "feeling toward her was such that there was no affection left that anyone could possibly alienate from her." [If this had been shown it would have precluded relief, as a cause of action for alienation of affections requires that at least some vestige of affection remain. Servis v. Servis, 172 N.Y. 438, 65 N.E. 270 (1902).]

In Dunham v. Dunham (1932), the Superior Court of Cook County, Illinois, issued an order whereby "the erring husband and his paramour were 'enjoined to desist, and refrain from seeing, communicating, talking, associating, and having sexual relations with each other.'" Note (1932) 23 J. Crim. L. 659.

In Soderlund v. Stoll (1937), the Nebraska court enjoined a woman from visiting, associating with, or communicating with the plaintiff's husband. Comment (1938) 17 Neb. L. Bull. 62.

20. Ex parte Warfield, 40 Tex. Crim. Rep. 413, 50 S.W. 983, 937 (1899), cited in note 18, supra. In discussing this decision Dean Pound declares, "It is significant that the property right of the husband in the wife's services, now thoroughly moribund for all substantial purposes, should acquire a temporary vitality to enable the courts to secure interests of personality which they hesitate to protect avowedly as such." Pound, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 Harv. L. Rev. 640, 675.
right to the sexual relationship, companionship, society and affections of the other spouse, is generally considered a "property" right.\textsuperscript{21} The Texas Supreme Court has even stated directly that it was unnecessary to predicate relief on any property right in such cases.\textsuperscript{22}

In \textit{Snedaker v. King}, a mother of four children alleged that the defendant, by her "alluring conduct" was causing the plaintiff to lose the love and affection of her husband. The plaintiff's plight appealed strongly to the trial court, and a sweeping injunction was issued, restraining the attractive intermeddler from associating with, being near to, or communicating with the wayward husband, or in any way interfering with the plaintiff's peaceful efforts to regain his love and esteem. The Ohio Supreme Court reversed the decree,\textsuperscript{23} declaring in a brief but emphatic per curiam opinion that such an effort to regulate and control domestic relations "is not supported by authority, warranted by sound reason, or in the interest of good morals or public policy."\textsuperscript{24} The court also stressed "the difficulty if not impossibility of such enforcement, and the very doubtful beneficial results to be obtained thereby."\textsuperscript{25} Judge Allen, in a concurring opinion,\textsuperscript{26} suggests that "it is difficult to see how the court can enforce the injunction granted herein without attaching a probation officer permanently to both Miss Snedaker and King."\textsuperscript{27} Judge Allen also

\begin{itemize}
\item \textsuperscript{21} Moreland, \textit{Injunctive Control of Family Relations} (1930) 18 Ky. L. J. 207, 215; Brown, \textit{The Action for Alienation of Affections} (1934) 82 U. of Pa. L. Rev. 472.
\item \textsuperscript{22} In the leading case of \textit{Ex parte Warfield}, 40 Tex. Crim. Rep. 413, 50 S.W. 933 (1899), Judge Henderson states, "Indeed, the interposition of courts of equity by restraining orders is a matter of growth, and keeps pace with advancing civilization, and courts are continually finding new subjects for the interposition of equitable relief by writs of injunction. Formerly, it seemed to be the rule that courts would only interfere where some property right or interest was involved; but now it seems that the writ will be applied to an innumerable variety of cases, in which really no property right is involved." (50 S.W. at 934-935.)
\item \textsuperscript{23} 111 Ohio 225, 145 N.E. 15 (1924). Chief Justice Marshall argued, in an elaborate dissent: (1) that the defendant had no standing on appeal, since the decree "takes nothing from her except the right to consort with this husband and father;" (2) that the defendant "would not lightly disobey the injunction;" (3) that the wife's rights of support and consortium are "property rights;" and (4) that in a great number of recent cases the courts have issued injunctions to protect "purely personal rights." (145 N.E. at 18-20.)
\item \textsuperscript{24} 145 N.E. at 17.
\item \textsuperscript{25} Ibid. (Italics supplied.) The decision is noted in (1925) 38 Harv. L. Rev. 396; and in (1925) 34 Yale L. J. 327 with approval of the court's argument as to the practical difficulty of enforcing such decrees.
\item \textsuperscript{26} 145 N.E. at 17.
\item \textsuperscript{27} An answer to this argument is suggested by Moreland, supra note 21, at 217, when he points out that, "A jealous wife or husband would be an untiring agent of the court in this situation."
\end{itemize}
declares that such an order "merely adds fuel to the flame, . . . will almost inevitably make the wrongdoing more alluring to the husband," and "would tend to defeat rather than accelerate the reconciliation of the husband and wife."

The *Snedaker v. King* decision focuses attention on the real problem in this group of cases—the practicability and social desirability of attempting to enforce matrimonial harmony by injunction. As a matter of fact, injunctive relief is seldom sought except in a spirit of jealous retaliation. A plaintiff who drags the family name and reputation through the muck of sordid publicity attending such an action, can scarcely entertain any genuine hope for domestic rehabilitation. Such is the perversity of human nature that the injunction, if granted, will almost inevitably drive the prodigal husband away from, rather than toward, the loving embraces of the legally victorious wife. Then too, many "domestic triangles" are traceable to deep-rooted family difficulties and incompatibilities, or to an inborn infidelity on the part of the wayward spouse, rather than to the importunities of any particular adventuress. Though the court may say "hands off" to the present recipient of the misdirected affections, it cannot effectively say "love your wife" to the erring spouse.

Judge Day, in a dissenting opinion in *Snedaker v. King*, expressed a serious doubt as to whether any actual benefit was to be derived from such a decree as that issued by the trial court, but thought that that was a matter for the discretion of the trial court.28

In considering that argument, let us examine the Texas case of *Witt v. Bauderer*,29 where the defendant, in an open and taunting manner, had been paying undue attention to plaintiff's wife who was employed as his part-time bookkeeper. An injunction was issued restraining the defendant from "associating with, calling on, or having anything whatever to do with plaintiff's wife," except as related to her duties as an employee of the defendant. By its decree, which was affirmed on appeal, the court sought to preserve the wife's meal ticket, and at the same time prevent the defendant from exceeding the proper bounds of their employer-employee relationship. The Texas court assumed an extremely

28. 111 Ohio 225, 145 N.E. 15, 22-25 (1924). Judge Day declared, "I am constrained to the conclusion that the equitable power exists, even though it should rarely be exercised." Judge Day's dissent was noted with approval in (1925) 25 Col. L. Rev. 373.
difficult if not impossible task. Even if the mandate of the injunction was meticulously obeyed, there was still slight probability that it would bring about plaintiff’s reconciliation with the wife who was already living separately and had filed suit for divorce.

In such situations appellate tribunals should place a definite check on the overly liberal tendencies of some trial courts. In addition to the difficulty of enforcement and doubtful beneficial results to be secured, there is a serious question as to the social advisability of attempting to extend the range of injunctive control into the field of family relations. The problems raised by these domestic maladjustments are of such a delicate nature that they will only be accentuated by a public airing in court. They can best be worked out in the closed vestibules of the home. Where such methods fail, a divorce, though not the proverbial happy ending, appears to be the normal and practical solution. As Professor Chafee aptly suggests, one may “doubt the wisdom and effectiveness of judicial interference with ‘the way of a man with a maid.’”

Louisiana jurisprudence is fortunately free from such cases. In the landmark case of Moulin v. Monteleone, Chief Justice O’Niell, in a scholarly and forceful opinion, held that Louisiana has never recognized a cause of action for alienation of affections. Other courts have recognized the evil and eight states have recently enacted statutes abolishing the common law cause of action for alienation of affections.

An analogous problem was presented in Stark v. Hamilton, where a father sought to prevent the further debauching of his minor daughter. The trial court enjoined the defendant from

30. Comment (1932) 27 Ill. L. Rev. 440.
31. Chafee, Equitable Relief against Torts (1920) 34 Harv. L. Rev. 388, 413.
32. 165 La. 169, 115 So. 447 (1928). The social policy underlying this decision is exemplified in the Chief Justice’s conclusion, “A law that would allow the husband compensation in money for such a wrong would be revolting to a majority of men, and might tend more to encourage blackmail than to protect the home.” (165 La. at 195.) For a recent reappraisal of Moulin v. Monteleone, see Comment (1938) 1 LOUISIANA LAW REVIEW 204.
33. In Miller v. Levine, 130 Me. 153, 154 Atl. 174, 178 (1931) the court declares, “such suits furnish a most convenient weapon for extortion and the right to bring them is a constant temptation to the unscrupulous.” For a contrary view, see Brown, supra note 21.
35. 149 Ga. 227, 99 S.E. 861 (1919), noted with approval in (1919) 19 Col. L. Rev. 413; (1920) 8 Corn. L. Q. 177. Note (1920) 20 Yale L. J. 344 suggests
further associating or communicating with the girl, basing its decree on the father's technical property right in her services. In affirming the decree, the Georgia Supreme Court frankly recognized that the real injury lay in the humiliation of the father and the damage to the family name and reputation.

The equities of a father who seeks to protect his minor daughter from a life of shame, appear considerably stronger than those of the average plaintiff in the alienation of affection cases. Then too, there is more probability that the injunction, if enforced, will effect a return of the stray to the family fold. Even so, such relief has seldom been granted. The acts complained of are commonly within the express prohibition of criminal statutes, and severe penalties are provided for such offenses as Statutory Rape or Contributing to the Delinquency of a Minor. The well settled maxim that "Equity will not restrain the commission of a crime," provides a cogent basis for refusing injunctive relief.

PARAMOUR'S ASSUMPTION OF MARITAL STATUS AND NAME

In the celebrated case of Bauman v. Bauman, the plaintiff had been living separate and apart from her husband under an agreement providing amply for her support. The husband had secured one of those legally invalid but socially acceptable Mexican divorces and had later married defendant, Mrs. Einstein. Plaintiff, the true Mrs. Bauman, brought an action for a declaratory judgment to declare the Mexican divorce a nullity, and for an injunction to prevent the husband and Mrs. Einstein from representing themselves as man and wife, and Mrs. Einstein from using the name "Mrs. Charles Ludwig Bauman." The lower court granted the full relief sought, but the Court of Appeals reversed the judgment insofar as it enjoined the defendants from representing themselves as man and wife, and defendant Einstein from using the name "Mrs. Charles Ludwig Bauman." Judge Hubbs pointed out that the plaintiff's matrimonial status, and any prop-

that the court might well have considered the "expediency" of granting an injunction in such cases.

Similar relief was granted in Aymar v. Roff, 3 Johns. Ch. 47 (N.Y. 1817). The decision is approved of by Moreland, supra note 21, at 220-224.

36. Moir v. Moir, 182 Iowa 370, 165 N.W. 1001 (1918) (court refused to enjoin would-be murderer); Heber v. Portland Gold Mining Co., 64 Colo. 352, 172 Pac. 12 (1918) (court refused to enjoin the buying of stolen goods); People v. Prouty, 262 Ill. 218, 104 N.E. 387 (1914) (decree prohibiting divorced parties from remarrying within a year held void, in view of the fact that such remarriage was already punishable under a criminal statute).

Property rights incidental thereto, was protected by the declaratory judgment; that there was no claim that Mrs. Einstein was alienating the husband's affections, as they were already living separate and apart under the separation agreement; and that "In the last analysis the only injury alleged is an injury to plaintiff's feelings." Judge Crane, dissenting, felt that the injunction was necessary to present usurpation of plaintiff's status as "Mrs. Bauman." While dissenting, Judge O'Brien discovered an "exclusive property right in a name."

In Somberg v. Somberg, the New York Court of Appeals followed its decision in the Bauman case with Judges Crane and O'Brien again dissenting. The refusal to grant injunctive protection in such cases is not based entirely upon the maxim that equity will not protect purely personal rights. It is largely predicated on the idea that no substantial right of any sort is involved. Apparently the plaintiff does not hope to regain the companionship or affection of her husband, her property rights are fully protected, and there is no real danger of confusion of identity. She is, however, humiliated, or should we say "resentful," at having her husband's more recent choice claim to be his lawful wife. The New York court has held, and properly so, that such an interest is not entitled to protection in equity. Little, except a vindictive satisfaction to the plaintiff, is to be gained by forcing the defendants to openly flaunt their illicit relationship.

Unfortunately, there has been a recent tendency to limit the application of the Bauman decision. In Gold v. Gold, a lower New York appellate tribunal held that an injunction would issue to restrain a husband and his paramour from living together as

38. 165 N.E. at 821, 822. Judge Hubbs further declared, "Equity cannot by injunction restrain conduct which merely injures a person's feelings and causes mental anguish. . . . The law does not remedy all social evils and moral wrongs. . . . Attempts to govern the morals of people by injunction can only result in making ridiculous the courts which grant such decrees." (165 N.E. at 821, 822.)
39. 165 N.E. at 822.
40. 165 N.E. at 823. Judge O'Brien also argued (p. 824) that "Pecuniary injury to her by confusion of identity is not improbable." Such injury appears decidedly improbable under the facts of the principal case.
41. 263 N.Y. 1, 188 N.E. 137 (1933). Declaratory judgment was also refused, since no fraudulent ostensible divorce had been obtained which might cast a shadow on plaintiff's property rights. An earlier case where the New York court refused to protect the name and status of a lawful wife was Hodecker v. Stricker, 39 N.Y. Supp. 515 (Sup. Ct. 1896).
man and wife, to restrain the feminine defendant from using the married name, and to restrain the husband from supporting her. The court attempted to differentiate the _Bauman_ decision by pointing out that in that case the husband had made no defaults in his annual payments under the separation agreement. In the case at bar the husband had failed to make such payments, alleging financial inability, while at the same time expending money for the support and maintenance of the domestic usurper. From this, the court reasoned that the true wife's right of support, a property right, was affected.

The causal connection between the wife's loss of adequate support and the use of her married name (which the court enjoined) is not very clear. Even the part of the decree enjoining the husband from supporting the other woman was hardly necessary. Without any special injunctive mandate, a husband may be punished for failure to support his lawful wife, and will not be permitted to plead inability to pay if it can be shown that he is "keeping" another woman. That the purported distinction was really an effort to evade and limit the rule laid down by the Court of Appeals, is evident from several statements in the court's opinion, which are directly in accord with the reasoning of the dissenting judges in the _Bauman_ case.

Again, as in the alienation of affection cases, it is not a question of finding a property right. It is a question of the social desirability of granting injunctive relief to salve the injured feelings or placate the vindictive spirit of the lawful wife. Viewed in its most favorable light, the interest to be protected appears rather inconsequential.

A similar wrong was involved in _Burns v. Stephens_ where a Michigan court enjoined a woman, with whom the plaintiff had lived illicitly for several years, from assuming his name and representing to friends and associates that she was his common-law wife. Dissenting Judge Snow very properly argued that the

---

43. Judge Schenck stated that although the defendant was not attempting to impersonate plaintiff, she had, by her representations that she was Mrs. Gold, "usurped a legal status which belongs exclusively to the plaintiff." As to the representations that Gold had obtained a divorce and married the defendant, the court declared, "May not such representations be the basis for injury to reputation as well as injury to feelings? Is not such representation a reflection upon the moral character of this plaintiff? I think so, and unless the injunctive relief prayed for is afforded the plaintiff she has no remedy." (287 N.Y. Supp. at 220.) Query—Did the representations cast any serious reflections upon the character or reputation of the lawful wife?  
44. 236 Mich. 448, 210 N.W. 482 (1926), criticized in Note (1927) 26 Mich. L. Rev. 111. Judge Snow's dissent was concurred in by two other judges.
plaintiff, in seeking to escape the entanglement of his prior im-
proper relation, when he became more enamored of another
woman, "does not come into equity with clean hands." However,
where plaintiff is not precluded by his own moral turpitude, there
is no good reason for refusing injunctive relief in a jurisdiction
where a declaratory judgment is not available.\textsuperscript{45} Likewise, equit-
able relief has been granted where a wife sought, by means of a
fraudulently procured birth certificate, to establish her adul-
terous offspring as a child of the plaintiff.\textsuperscript{46} In these cases the
court experienced no difficulty in finding a very substantial prop-
erty right. The possibilities that the plaintiff may be called upon
to support the alleged wife or child, and that such parties may
ultimately claim the plaintiff's property as against his lawful
heirs, make it important to have the pretender's rights deter-
mined while competent evidence is obtainable. In the background
lurked important personal rights—the plaintiff did not want an
adventuress posing as his wife; or a wife's illegitimate child
paraded as his son.\textsuperscript{47} Assuming the availability of a declaratory
judgment\textsuperscript{47a} to establish the legal invalidity of the pretended rel-
ationship, the personal right asserted in these cases appears more
substantial than that of the wife in the \textit{Bauman} case.

\textbf{SHADOWING AND OTHER FORMS OF PERSECUTION}

In \textit{Chappell v. Stewart}\textsuperscript{48} a plaintiff sought to enjoin open
shadowing by private detectives, alleging that this conduct
cause him great inconvenience and annoyance, interfered with
his social intercourse and his business, and caused grave suspi-
cions to be entertained about him, so as to greatly damage his
financial credit. Judge Bryan held that the plaintiff's bill, "as-
suming all its allegations were true, did not contain any matter
cognizable in equity ...." He based his decision on the maxim that
\textit{"Injury to property, whether actual or prospective, is the foun-}

\textsuperscript{45} Randazzo \textit{v. Roppolo}, 105 N.Y. Supp. 481 (Sup. Ct. 1906). The defendant
had gone through the form of a marriage ceremony with a man impersonat-
ing plaintiff, and had filed a certificate of marriage with the bureau of vital
statistics. Injunctive relief was granted.

\textsuperscript{46} Vanderbilt \textit{v. Mitchell}, 72 N.J. Eq. 910, 67 Atl. 97 (1907), noted in
(1907) 7 Col. L. Rev. 535; (1907) 21 Harv. L. Rev. 54.

\textsuperscript{47} See dictum by Dill, J., in Vanderbilt \textit{v. Mitchell}, 72 N.J. Eq. 910, 67
Atl. 97, 100 (1907), supra note 4.

\textsuperscript{47a} The movement for adoption of declaratory judgment statutes has
been active in the United States since 1921 when the Uniform \textit{Declaratory}
Judgments Act was proposed. For a list of states adopting the Uniform Act
see \textit{9 Uniform Acts Annotated} (Supp. 1938) 50, and \textit{Borchard, Declaratory
Judgments} (1934) 631-650. Even so, Louisiana and a number of other states
have not enacted such a statute.

\textsuperscript{48} 82 Md. 323, 33 Atl. 542 (1896).
dation on which its [Equity's] jurisdiction rests.” Assuming, as he did, that plaintiff's allegations were true, the court might have found a very substantial property right in the injury—to plaintiff's business and financial credit. The decision, however, may have been largely influenced by a belief that the acts complained of constituted only a moral wrong. Probably, where “open shadowing” is recognized as an actionable wrong, injunctive relief will be granted.

Occasionally unmarried girls seek equitable protection from the persistent and annoying attentions of rejected suitors. The cause presented in the Texas case of Hawks v. Yancey, should appeal to any court. The plaintiff, a nurse, had been living in adultery with the defendant, a married physician, for approximately six years. When she sought to terminate the illicit relation, the defendant objected and began a campaign of continuous persecution. He made a complete revelation of her past shame to her fiance, an upright young man; thus causing him to break off their engagement. By false charges of attempted blackmail, he caused her to be arrested, and caused her discharge from the sanitarium where she was employed and from the Nurses' Association. All the while, the defendant was attempting to force his unwelcome attentions upon the plaintiff at every opportunity. Finding the damage was clear and the legal remedy inadequate, the court held that an injunction should issue. It made no effort to predicate relief upon the usual property right, although an injury to such an interest could easily have been found in the facts that the plaintiff had lost her job, had been expelled from her professional organization, and had lost an opportunity to marry. Judge Looney declared that “personal rights of citizens are infinitely more sacred, and by every test are of more value than things that are measured in dollars and cents.”

49. Schultz v. Frankfort Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913), noted in (1913) 26 Harv. L. Rev. 658.
50. 265 S.W. 233 (Tex. Civ. App. 1924), noted in (1925) 19 Ill. L. Rev. 679.
51. 265 S.W. at 237. It has often been suggested that the extreme liberality of the Texas courts in these personal relations cases is due to a broad wording of the Texas injunction statute. Notes (1934) 2 Duke B. A. J. 71, 72; (1929) 25 Col. L. Rev. 373, 374; (1920) 5 Corn. L. Q. 177, 181; and others. This suggestion is justified by certain language in the Texas cases.

In 1922 the Texas Commission of Appeals definitely held that the Texas injunction statute was intended as a codification or restatement of general equity principles, subject to the self imposed limitations of the common law. Hill v. Brown, 237 S.W. 252 (Tex. Com. App. 1922), discussed by Professor McCormick, Will an Injunction be Granted in Texas when a Legal Remedy is Adequate? (1922) 1 Tex. L. Rev. 43. That this clarification will not alter the ultra-liberal attitude of the Texas courts in these family relation cases, is indicated by Judge Looney's declaration in Hawks v. Yancey that “The rule that...
Whether in the name of a "property right," or by a frank acknowledgment of a "right of privacy," courts should uniformly grant relief in such cases. Certainly a girl should have a right to protection from persecution and continued annoyances by a rejected suitor. Enforcement presents no serious problem in such cases. The plaintiff will keep the court informed as to violations. The remedy at law, by civil suits and criminal prosecution, holds forth a very hollow promise of relief to the beleaguered female. Even where the annoyances stop short of the systematic coercion employed by the defendant in Hawks v. Yancey, it may be quite disturbing and injurious to a girl of normal sensibilities.

Similarly, the court, in an extreme case, has enjoined a wife from continually harassing and embarrassing her husband, pending a suit to establish the invalidity of their marriage. But, where the conduct complained of merely amounted to what is commonly known and understood as "nagging," relief was refused. Sometimes, where the plaintiff seeks to enjoin continual

---

52. The idea that an individual has a "right of privacy" or "right to be let alone" is generally conceded to have originated in a much cited article by Warren and Brandeis, The Right of Privacy (1890) 4 Harv. L. Rev. 193.

53. Sullivan, Novel Uses of the Writ of Injunction (1902) 64 Albany L. J. 46, 47, interestingly describes an Ohio case: "A certain young lady, an elocutionist and reader, of Toledo, Ohio, has been greatly annoyed of late by the attentions of a certain well-known lawyer and politician of that city. He seizes upon every opportunity of pouring into her ear his tales of love. And, while no doubt, she was pleased with the first installments, she has sickened of his wearisome repetitions. After trying both entreaties and threats, she, as a last resort, appealed to the Court of Common Pleas, which has enjoined her persistent admirer from further advances. . . . Time and again has the writ of injunction protected the weak suffering from the aggressions of the rich and powerful, and today, at the beginning of the 20th Century, bachelor girls invoke its powerful aid to shield them from annoying attentions of undesirable suitors."

54. Blanton v. Blanton, 163 Ga. 361, 136 S.E. 141 (1926). The Court found a property right in the facts that defendant was always demanding money (the evidence did not indicate that she ever received any), was interfering with plaintiff's personal effects by taking charge of his hotel room, and was jeopardizing his position with the railroad by applying for numerous passes. Defendant would also appear late at night and wake up the other guests in the hotel where plaintiff stayed by hammering on his door.

55. Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920), noted in (1920)
acts of abuse, a criminal prosecution for disturbance of the public peace provides an effective and adequate remedy. In such situation the courts are reluctant to issue an injunction.\(^\text{66}\)

**Publication of Private Letters**

In *Pope v. Curl*,\(^\text{57}\) decided in 1741, Lord Hardwicke enjoined the unauthorized publication of private letters of the celebrated author, Alexander Pope. In answer to an objection by defendant's counsel that a letter was in the nature of a gift to the receiver, the Lord Chancellor declared, “It is only a special property in the receiver, possibly the *property of the paper* may belong to him; but this does not give a license to any person whatsoever to publish them to the world.” The letters of Alexander Pope, though written concerning purely personal matters, might have been found to have more than ordinary literary value, but the decision does not appear to have been based upon their

---

4 Minn. L. Rev. 538. The parties had been separated for some time, but the wife was continuing her campaign of abuse by going to plaintiff's office and hurling false accusations at him, and by creating a scene whenever she met him on the street or at church. Brown, J., declared that the court would not grant relief in such actions, which would involve “dragging into court for judicial investigation at the suit of a peevish, fault-finding husband, or at the suit of a nagging, ill-tempered wife, matters of no serious moment, which if permitted to slumber in the home closet would silently be forgotten or forgiven.” (177 N.W. at 625.)

It is doubtful whether the matters involved in the principal case would “slumber in the home closet” or were likely to “be forgotten or forgiven,” since the acts complained of went beyond the bounds of mere “nagging.” However, a criminal prosecution for disturbance of the public peace would probably prove an effective and adequate deterrent.

56. In *Drake v. Drake*, 145 Minn. 388, 177 N.W. 624 (1920) (note 55, supra) it would appear that a peace bond, secured in the local criminal court, would be the proper remedy. In *Ashinsky v. Levenson*, 256 Pa. 14, 100 Atl. 491, 493 (1917), the court stressed the adequacy of the plaintiff’s legal remedy, and refused to enjoin a member of a religious denomination from molesting the pastor near the house of worship or upon the public streets. But see dictum in *Williams v. O'Shaughnessy*, 172 N.Y. Supp. 574, 575 (Sup. Ct. 1918), to the effect that an injunction will lie to restrain the continuous sending of letters, if written solely for the purpose of annoyance. The dictum is criticized in Note (1919) 19 Col. L. Rev. 163.

Cf. *Reed v. Carter*, 268 Ky. 1, 103 S.W. (2d) 663 (1937), where the court enjoined the plaintiff's sister from molesting her when she visited their 90-year old mother who lived with defendant. There the plaintiff's "natural right" to visit her mother was "fortified by a written contract" wherein it was expressly provided that the plaintiff would have the privilege of visiting her mother without molestation or annoyance. The decision has been criticized in Note (1937) 51 Harv. L. Rev. 166, on the ground that "To determine what conduct would constitute a violation of the present decree . . . may well involve the court in endless difficulties."

distinctive character. Subsequently, in Gee v. Pritchard, Lord Eldon enjoined the publication of purely personal letters which did not have even the slightest literary qualities. Thus the general proposition became firmly entrenched in English law that where a person sent a letter it was a gift of the paper and ink to the receiver, but the sender retained a literary property right in his composition and the receiver could not publish the letter to the world.

This highly technical method of preserving the sender's "right of privacy" has been uniformly followed by American courts. The earliest recorded decision in this country was that by the Louisiana court in Dennis v. Leclerc where the court enjoined the publication of casual personal letters, written by a lawyer. The court cited instances in both French and Roman law where a letter was treated as "property," and followed the English case of Pope v. Curl for the proposition that the sender of a letter retains a property interest in it and can enjoin its publication, even though the letter has no particular literary value. That the court, in these cases, is really protecting personal rights, and that there is a substantial need for such protection, is clearly shown in the opinion.

In the leading case of Woolsey v. Judd the New York court decided that it would, in all cases, enjoin the unauthorized publication of private letters, and that the letters need have no real

58. 2 Swans. 402, 36 Eng. Rep. 670 (1818), discussed more fully at note 1, supra.
59. 1 Mart. (O.S.) 297, 5 Am. Dec. 712 (La. 1811). In Schwartz v. Edrington, 133 La. 235, 62 So. 660 (1913), the court cited and followed Dennis v. Leclerc in enjoining the publication of a signed petition where plaintiff's signature had been fraudulently obtained.
60. Pound, supra note 20, at 671. After pointing out situations where relief is granted, Dean Pound remarks: "Here, as we shall see presently, courts of equity generally insist upon some shadow of a property interest, however trivial; actually protecting the feelings but purporting to protect only the pocketbook."
61. The court poignantly remarks: "A brother may correspond with his brother, and grieve with him on the distresses of the family, occasioned by the misconduct of their father, and devise the means of alleviating the consequences of it. With secrecy he may succeed: but if a gazetter, in whose hands accident or knavery may place his letter, cannot be compelled to respect the privacy of these family secrets, the writer will innocently incur the odium of the conduct of the younger son of Noah.

"An injured wife may commit to paper, for the information of a parent, the cause of family disquietude; if the dishonest holder of a press may give publicity to the complaint, adieu to all her hopes of domestic felicity.

"If a father remonstrate with a daughter on the errors of her conduct, the remedy which parental fondness and solicitude had prepared, may, by the touch of a knavish printer, be turned into a deadly poison." (1 Mart. (O.S.) at 314.)
62. 4 Duer 379 (N.Y. 1855).
literary or pecuniary value.63 Again, as in Dennis v. Leclerc, the court felt bound to posit relief upon the property right which the sender has in "the products of his own labor," at the same time stressing the "mischievous consequences" that would result from allowing such publications.

The Massachusetts court has apparently accorded full and unqualified recognition to the "property interest" of the sender of private letters. In Baker v. Libbie64 the executor of Mary Baker Eddy's estate was granted an injunction to prevent the publication of letters written by the deceased to kinswomen concerning ordinary and personal subjects such as health and household matters. The decision was based on the theory that Mrs. Eddy retained a real property interest in her correspondence, which passed, as an asset, to her estate.65 The personal right of privacy, where recognized, has been held to terminate with the death of the person whose right is invaded.66

The recognition of a divided property in letters raises several questions as to the respective rights of the sender and the receiver. One court held that the author was not entitled to recover physical possession of his letters, the letters being likened "to separate jewels" belonging to the recipient.67 It also held that although the one receiving private letters may not in any way "multiply copies," she may read them to her friends.68

THE RIGHT OF PRIVACY

Modern science has produced the candid camera; modern journalism, the tabloid; and modern business, large scale adver-

63. The court rejected the distinction drawn in Wetmore v. Scovell, 3 Edw. Ch. 515 (Hoff. N.Y. 1842), and Hoyt v. MacKenzie, 3 Barb. Ch. 320, 49 Am. Dec. 178 (N.Y. 1848), where it had been held that an injunction would not issue unless the letters had a real value as literary compositions.

64. 210 Mass. 599, 97 N.E. 109 (1912), noted in (1926) 12 Va. L. Rev. 656. See also Dennis v. Leclerc, 1 Mart. (O.S.) 297, 302 (La. 1811).

65. Rugg, C.J., declares that the property of the sender of private letters "is as plain as property in the game of the hunter or in the grain of the husbandman." He also states, "This case does not involve personal feelings or what has been termed the right of privacy." (97 N.E. at 111, 112.)

66. See note 72, infra.

67. Grigsby v. Breckenridge, 65 Ky. 430, 92 Am. Dec. 509 (1867). The court enjoined the publication of letters written by plaintiff to his wife, and given on her death bed to defendant; but refused to allow their physical recovery. Williams, J., (dissenting) argued that the wife received only a life interest in the letters, and that on her death they became once more the entire property of the author.

68. Williams, J., (dissenting) argues that any public reading of a letter amounts to a publication and is not permitted. Certainly a reading in a crowded auditorium would not "multiply copies," but might be very harmful. What would Judge Williams say of the case where a girl receiving a love letter reads it to her room-mate?
tising. These recent developments have led to an exploitation, by a too enterprising press and commercial interests, of the beauty, name or peculiarities of private individuals. A society matron may come upon her picture in a scurrilous week-end magazine section, on the same page as that of a burlesque queen. A beautiful girl may discover her picture enhancing the attractiveness of an advertisement for patent medicine containing vitamins A to D. An outstanding athlete or a prominent political figure may find his name linked with some breakfast food or five cent cigar. A parent may find a picture of his malformed child in a widely read publication.

Whether the aggrieved individual is seeking damages or an injunction to restrain further publication, the question presented is essentially the same. Should the court recognize a relatively new interest—the right of privacy? This interest has been variously defined as "freedom from uncalled for and undesired publicity," as "the right to be let alone," and as immunity afforded against the use of one's personality "to feed a prurient curiosity." It had already received incognito protection in the private letter cases.

The decisions prior to 1902 were indicative, but not authoritative. In those denying relief, the only point necessarily decided was that a person's reputation did not, on his death, pass to his widow or surviving relatives in such a manner that they could sue to protect it. Where relief was granted, it was on the basis

69. Note (1938) 27 Calif. L. Rev. 84.
71. Note (1926) 12 Va. L. Rev. 656.
72. In Corliss v. Walker, 64 Fed. 280, 31 L.R.A. 283 (C.C.D. Mass. 1894), the court refused, on petition of the widow and children, to enjoin publication of a true biography of Corliss, the inventor; it stressed the idea that the deceased was a "public man" and had surrendered his right of privacy. In Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899), noted in (1900) 13 Harv. L. Rev. 415, the court refused to enjoin the use of the name and portrait of Col. John Atkinson, a well known lawyer and politician, on a cigar label. The action was by the widow, but the court distinctly held that "Colonel John Atkinson would himself be remediless, were he alive." In Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895), the court refused to enjoin the exhibition, at the Columbia Exposition of a statue of Mrs. Schuyler entitled, "woman as a philanthropist." The court based its decision on two grounds, (1) that "Whatever right of privacy Mrs. Schuyler had died with her," and (2) that the plaintiff's cause of action was "wholly fanciful" in view of the respectful and honorable purpose of the statue. Murray v. Gast Lithographic & Engraving Co., 8 Misc. 36, 28 N.Y. Supp. 271 (1894) held that a parent could not enjoin or recover damages for the publication of a portrait of his infant child.
of an implied contract or breach of confidence. However, the issue was squarely presented in Roberson v. Rochester Folding Box Company; and the New York Court of Appeals, by a 4-3 decision, refused relief, by way of either damages or an injunction, to a beautiful girl whose photograph had been conspicuously used as part of an advertisement for flour. In speaking of the right of privacy, Chief Justice Parker declared, "Mention of such right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law . . ." and he expressed a fear that the recognition of such a right would open up a "vast field of litigation."

The New York Civil Rights Law

As a result of a popular disapproval of this decision, and in response to a suggestion contained therein, the New York Legislature enacted sections 50 and 51 of the Civil Rights Law of 1903. This statute prohibited the unauthorized use of the name, portrait, or picture of any living person "for advertising purposes, or for the purposes of trade," and expressly provided that the aggrieved individual would be entitled to an injunction as well as damages.

The courts have had little difficulty in determining what constitutes a use for advertising purposes. Thus, an injunction has been issued to prevent the use of the name of the president emeritus of a great university, in connection with a set of books; to prevent the use of a stage actress's picture on a poster advertising a photoplay; and to restrain a street car company from using the picture of a lady and her six-year old son as an illustration of the proper way to enter a car.

73. Pollard v. Photographic Co., 40 Ch. Div. 345 (1888), where a photographer was enjoined from exhibiting or selling copies of a lady's photograph, on the ground that such publication constituted a breach of contract and of trust. Cf. Dockrell v. Dougal, 78 Law Times Rep. 840 (1898), affirmed 80 Law Times Rep. 556 (1899), noted in (1898) 12 Harv. L. Rev. 207, where the court refused to restrain the unauthorized use of the name of a physician and lecturer, as endorsing a patent medicine.
74. 171 N.Y. 538, 64 N.E. 442 (1902).
75. 64 N.E. at 443.
76. N.Y. Laws 1903, c. 132, § 2; Cahill's Consol. Laws of N.Y., 1930, c. 7, §§ 50, 51.
79. Almind v. Sea Beach Ry. Co., 157 App. Div. 230, 141 N.Y. Supp. 842 (1913). In answer to the defendant's argument that it expected no pecuniary return from the use of the photograph, Thomas, J., declared, "No cause is so alluring that it may allure by exposing the portrait of a person to the public gaze. The statute does not mean that the grocer may not without consent
In determining what constitutes use for purposes of trade, the New York courts have held that the use of a name or photograph in connection with a legitimate news item in the daily paper or the news reel is not actionable. It was not the purpose of the statute to stifle the true portrayal of current events. Beyond that the moving picture industry may not go. In Binns v. Vitagraph Co. the defendant had produced a fictitious film based upon the actions of plaintiff, a present national hero. The court held that he was entitled to damages and an injunction to prevent the use of his name for purposes of trade. Likewise, a street vendor has been granted relief, where a photographer had singled him out and taken his picture as part of a fictionalized film of New York street scenes. Such decisions appear in accord with the spirit and purpose of the New York statute. It is not asking too much to require the producer to secure the consent of the subject before incorporating his name or picture in a film.

On the other hand, relief was denied in the case of Colyer v. Fox Publishing Company to a professional diver whose picture had been published in “The National Police Gazette” on a page with four vaudeville performers. Under the pictures were the following words, “Five of a kind on this page. Most of them adorn the burlesque stage; all of them are favorites with the bald-headed boys.” Other decisions have shown a like tendency to limit the statute by a strict construction. Relief was refused where, in a picture depicting the life of those engaged in the white slave traffic, the plaintiff’s factory was shown with his name thereon. A plaintiff was held to have no cause of action for violation of the Civil Rights Law where the defendant had published a newspaper article, purporting to have been written by plaintiff concerning sensational and absurd adventures in Af-
Again, where the photograph of plaintiff, a Hindu musician, had been used to illustrate a newspaper article on "The Famous Hindu Rope Trick," the court declared that the article was educational and not within the purview of the statute. In another case, the court held that the use of plaintiff's name, at a single place in a book to lend "local color," was not actionable. All of the above cases presented situations where the court might well have held the statute applicable.

Originally of limited scope, the New York Civil Rights Law has not added to its stature as it ran the gamut of judicial interpretation. It has served as a basis for the granting of relief in many cases, but in an almost equal number of situations it has failed to provide protection from those interests which seek to capitalize on the personalities and peculiarities of private individuals. Complete security can best be afforded by the more flexible method of liberal judicial decisions.

Judicial Recognition—Unauthorized Use of Name or Photograph for Advertising Purposes

Brandeis and Warren pointed the way to judicial protection in an article, The Right of Privacy, published in 1890. They argued that in the private letter cases the courts, though stressing a technical property right, were really enforcing "the more general right of the individual to be let alone"; and that it was necessary and desirable to prevent the invasion of this right by the photographer or the press.

Some courts have continued to follow the anachronistic approach of the Roberson case, and have refused to protect the
right of privacy because no such interest was recognized by the early common law authorities. In a few cases, the courts granted relief, but chose to base their decisions upon an extremely shadowy property right, or upon a threatened breach of contract. On the whole, however, subsequent decisions have shown a remarkable willingness to accept and apply the logic of these pioneer writers.

The first complete judicial recognition of the recently discovered right of privacy came in *Pavesich v. New England Life Ins. Co.*, where the Georgia court unanimously held that an individual could enjoin a photographer and an insurance company from the unauthorized use of his photograph for advertising purposes. Judge Cobb relied on the article by Brandeis and Warren and quoted with approval from Judge Gray's able dissent in the Roberson case. He pointed out that the individual's right "to be let alone" was recognized in the ancient Roman law. Thus, the right of privacy was not a new right, but merely the adaptation of an old concept to the new problems created by modern scientific and economic development.

Four other jurisdictions have followed the way thus charted, and have held that the unauthorized use of one's photograph for advertising purposes constituted an actionable invasion of his personal rights.

---

91. Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909); Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (D.C. Mo. 1912), noted in (1912) 61 U. of Pa. L. Rev. 129. In Christian Hospital v. People, 223 Ill. 224, 79 N.E. 72 (1906), the court confused the right of privacy with the more limited right of reputation and applied the rule that "equity will not restrain a libel."

92. Edison v. Edison Polyform Co., 73 N.J. Eq. 136, 67 Atl. 392 (1907), where the court enjoined the unauthorized use of Thomas A. Edison's name, picture and endorsement on a patent medicine.

93. McCreery v. Miller's Groceries Co., 99 Colo. 499, 64 P. (2d) 803 (1937), noted in (1938) 18 Tex. L. Rev. 263, where the court enjoined the use of plaintiff's photograph in advertising coffee. The court stressed the idea that the photographs were secured by inducing the photographer to breach his implied and express contract not to display them. Three judges dissented, denying the existence of any "right of privacy."

94. 122 Ga. 190, 50 S.E. 68 (1905). Judge Cobb declared, "So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that 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, just as in the present day we stand amazed . . . that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women." (50 S.E. at 80-81.)
right of privacy. In Kunz v. Allen\textsuperscript{95} the Kansas court enjoined the unauthorized use of plaintiff's picture in an advertising motion picture short. In Munden v. Harris\textsuperscript{96} the Missouri court gave damages for the use of a child's picture in connection with a jewelry store advertisement. Judge Ellison treated the individual's exclusive right to his picture as a property right and concluded that where this right is invaded "he may have his remedy, either by restraint in equity or damages in an action at law."\textsuperscript{97} The North Carolina court, in the recent case of Flake v. Greensboro News Co.,\textsuperscript{98} allowed damages for the accidental use of a radio entertainer's picture in a joint advertisement for bread and a burlesque-type stage "revue." No injunction was sought, since the use had been discontinued. The decision is significant, in that the cause of action sustained was based squarely upon the violation of the plaintiff's "right of privacy."\textsuperscript{99} Similarly, the Kentucky court held that the use of a sketch and forged testimonial of a prominent gentleman, in connection with an advertisement for liver pills, was an actionable invasion of his right of privacy.\textsuperscript{100}

Once the court recognizes the existence of a legal right of privacy, little difficulty will be encountered in securing injunctive relief. Even where the plaintiff is motivated solely by the personal desire "to be let alone," the court may readily discover a satisfactory property interest. The Missouri court aptly suggests, "If there is a value in it, sufficient to excite the cupidity of an-
other, why is it not the property of him who gives it value and from whom the value springs?"101

Extensions of Judicial Protection

Commercial advertisers are not the only ones who threaten the individual's right of privacy. The Washington court, in *State v. Hinkle,*102 restrained a state political party from using the name of Senator La Follette.

Occasionally the court has been called upon to protect parties, accused but not convicted of crime, from the over-zealous efforts of police officials. It is customary and expedient for those charged with law enforcement to photograph, measure and fingerprint, so as to preserve the identity of those convicted of crime.103 The taking of such photographs and measurements in advance of conviction may sometimes be necessary for identification of a prisoner,104 or for the apprehension and re-arrest of an accused person who is likely to escape or "jump bail" before trial.105 There is no justification, however, for the indiscriminate photographing and measuring of all parties accused of crime. In the companion cases of *Itzkovitch v. Whitaker* and *Schulman v. Whitaker,*106 decided by the Louisiana Supreme Court, the plaintiffs had been arrested on charges of operating their pawnshops as "fences" for receiving stolen goods, had pleaded "not guilty," and had been released on bond. Although they had previously been apprehended a number of times, they had never been con-

102. 151 Wash. 86, 229 Pac. 317 (1924). Bridges, J., declares "Nothing so exclusively belongs to a man or is so personal and valuable to him as his name. His reputation and the character he has built are inseparably connected with it. Others can have no right to use it without his express consent, and he has a right to go into any court at any time to enjoin or prohibit any unauthorized use of it. Nor is it necessary to prove that the unauthorized use will damage him. This the law will presume." (229 Pac. at 319.) Cf. *Hillman v. Star Pub. Co.,* 64 Wash. 691, 117 Pac. 594 (1911), where the publication of plaintiff's photograph in connection with a newspaper article concerning her father who was accused of crime was held not actionable.
104. *Mabry v. Kettering,* 89 Ark. 551, 117 S.W. 746 (1909), 92 Ark. 81, 122 S.W. 115 (1909); *Bartletta v. McFeely,* 107 N.J. Eq. 141, 152 Atl. 17 (1930), noted in (1931) 11 B. U. L. Rev. 289 where the writer points out that the case went further than most jurisdictions in virtually approving a limitless right to photograph and fingerprint the accused before trial. For subsequent action in same case, see 113 N.J. Eq. 67, 166 Atl. 144 (1933).
106. 115 La. 479, 39 So. 499 (1906); 117 La. 768, 42 So. 228 (1906).
107. 115 La. 628, 39 So. 737 (1906); 117 La. 704, 42 So. 227 (1906).
victed; and there was no reason to suspect that they would jump bail and become fugitives from justice. Nevertheless, the inspector of police had taken their pictures and Bertillon measurements; and was about to place them in the local depository of criminal records, commonly known as the "Rogues' gallery," and to forward copies to galleries in other states. Upon proof of the above facts, the court enjoined any further showing or distribution of copies of the plaintiff's photographs and measurements.

The Louisiana decisions are commendable in that they afford the innocent person, accused of crime, a much needed protection from unnecessary humiliation and publicity. They are especially important, for purposes of the present discussion, in that the court frankly and openly recognized the plaintiff's purely personal right to "insist on being let alone," and protected the same by injunction. Whether the Louisiana court would consider the use of a beautiful girl's picture for advertising purposes as a sufficient invasion to justify relief, is not clear. The court discusses the Roberson case and dismisses it as "remotely analogous," and "not germane to the subject."

The principle of the Itzkovitch decision was approved by the Michigan court in Miller v. Gillespie. In that case, the court refused to order the delivery up and cancellation of a card which merely contained data as to the arrest, appearance and dismissal of the accused. The court declared that it did not deny the jurisdiction of equity to prevent an invasion of the right of privacy, but that some record of all arrests was justified and authorized by law, and did not impute the actual commission of any crime.

108. For a full discussion of this problem and a criticism of those cases refusing injunctive relief to the innocent person accused of crime, see Bronaugh, Right to Take and Retain Photographs, Etc. of Persons Accused of Crime (1919) 23 Law Notes 48. See Downs v. Swan, 111 Md. 53, 73 Atl. 653, 656 (1909), cited in note 105, supra.

That the plight of the innocent party accused of crime is not always a pitiable one, is shown by such cases as the Kidwelly poison case, Manchester, Eng., 1920, where several newspapers offered Mr. Greenwood, the innocent defendant, tempting sums for his "personal reminiscences of the affair." Pound, op. cit. supra note 7, at 127.

109. Itzkovitch v. Whitaker, 115 La. 479, 480, 39 So. 499, 500 (1905). Breaux, C.J., declares, "There is a right in equity to protect a person from such an invasion of private rights. Every one who does not violate the law can insist upon being let alone (the right of privacy)." The court then points out that an innocent person "may obtain an injunction to prevent his photograph from being sent to the rogues' gallery. He has a personal right to the restraining order. . . ."

110. Schulman v. Whitaker, 117 La. 704, 706, 42 So. 227, 228 (1906). Breaux, C.J., expressed a doubt whether there was any substantial injury to the beautiful girl seeking relief in the Roberson case.


112. 196 Mich. 423, 163 N.W. 22 (1917).
It is not surprising that, in Owen v. Partridge,\textsuperscript{113} the New York court refused relief in a situation similar to that presented in the Itzkovitch and Schulman cases. Although conceding that the police department had no right to photograph and measure one merely accused of crime, and that the injury to plaintiff's reputation and character might be irreparable, the court followed the Roberson case for the proposition that the right of privacy neither has any existence in law nor is enforceable in equity.

The Georgia court applied the rule of the Pavesich case to a new situation in Bazemore v. Savannah Hospital,\textsuperscript{114} where it enjoined the publication of a picture of plaintiff's child which had been born with its heart outside its body. The right to relief was based upon the humiliation and mental anguish suffered by the parents, and publication of the photograph was held to be a trespass upon their right of privacy. Two judges dissented, arguing from a dictum statement in the Pavesich decision, that the cause of action was only in the person photographed. Thus, the child, if living, would have a right to sue, but the parents had no right of action.

In essence, the question is—does the right of privacy include a right to be free from the humiliation and mental anguish which may result from undesirable publicity given to a deceased child, husband or other near relative. In granting damages to a parent for the unauthorized sale of photographs of the nude corpses of twins, born joined together, the Kentucky court pointed out that if such a right exists as to one's own photograph, it certainly exists as to the photograph of a dead child, for “The most tender affections of the human heart cluster about the body of one's dead child.”\textsuperscript{115}

\textsuperscript{113} 40 Misc. 415, 82 N.Y. Supp. 248 (1903). The lack of liberality of New York decisions led to the enactment of a statute specifically providing that upon determination of a criminal proceeding in his favor, the accused was entitled (upon demand) to the return of every photograph, etc., taken by police officers during the pendency of such action. N.Y. Penal Code, § 379a, N.Y. Laws 1907, c. 626. Even then the New York court refused relief where plaintiff had “mistaken his remedy” and applied for a writ of mandamus to compel the destruction of photographs and records wrongfully taken. Gow v. Bingham, 57 Misc. 66, 107 N.Y. Supp. 1011 (1907).

\textsuperscript{114} 171 Ga. 257, 155 S.E. 194 (1930), noted in (1931) 31 Col. L. Rev. 175, and (1931) 11 B. U. L. Rev. 143.

\textsuperscript{115} Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912), noted in (1918) 26 Harv. L. Rev. 275. The defendant was a photographer employed to take a photograph of the nude corpses of plaintiff's twin boys, and had expressly agreed not to make additional photographs. The decision was bottomed on the theory that the making and sale of extra copies constituted a breach of contract and abuse of confidence. The court relied on Follard v. Photographic
Although surviving relatives have no property right in the corpse of a deceased, and in many instances do not own the lot or monument, an injunction has uniformly issued to prevent the desecration of a grave. In such instances the court is protecting a personal right of those closely related to the deceased. Certainly such injury to feelings by desecration of a grave, is no more substantial than the mental anguish suffered by the unfortunate parents in the Bazemore case. Where the surviving relatives of a famous man or beautiful girl seek to prevent the use of a name or picture for advertising purposes, a closer case is presented, and previous decisions may preclude relief in some jurisdictions.

Probably the most significant extension of the "right of privacy" comes in two fairly recent decisions. In the Kentucky case of Brents v. Morgan a doctor sought damages for the "great mental pain, humiliation and mortification" caused by the publication of a large sign charging him with being a deadbeat. The petition did not state a cause of action for libel since the assertion was true, but the court held that it stated a good cause of action for violation of the right of privacy, which "is generally recognized as the right to be let alone, that is, the right of a person to

Co., 40 Ch. Div. 345 (1888) where, under similar circumstances, such unauthorized action was restrained by injunction.

116. Weld v. Walker, 130 Mass. 422 (1881); Finney v. Atlantic Transport Co., 220 N.Y. 249, 115 N.E. 715 (1917). In Sherrard v. Henry, 88 W. Va. 315, 106 S.E. 705 (1921) and in Snyder v. Snyder, 60 How. Pr. 368 (N.Y. 1880), the court held that since there was no property right in a dead body, the common law afforded no protection and equitable relief was necessary. Occasionally the court has found a "quasi property right," recognizing the absence of a property right in the burial place. Accord: Sherrard v. Henry, 88 W. Va. 315, 106 S.E. 705 (1921) (free church burial lot); Page v. Symonds, 63 N.H. 17, 56 Am. Rep. 481 (1883) (dictum, since the defendant's acts were held to be justified under the circumstances).

117. Choppin v. LaBranche, 48 La. Ann. 1217, 20 So. 681 (1896), where the court clearly stated that the plaintiffs had no title, servitude, usufruct or other sort of property right in the burial place. Accord: Sherrard v. Henry, 88 W. Va. 315, 106 S.E. 705 (1921); Page v. Symonds, 63 N.H. 17, 56 Am. Rep. 481 (1883) (dictum, since the defendant's acts were held to be justified under the circumstances).

118. Choppin v. LaBranche, 48 La. Ann. 1217, 20 So. 681 (1896); Mooney v. Coodlege, 30 Ark. 640 (1875); Trustees of First Evangelical Church v. Walsh, 57 Ill. 363, 11 Am. Rep. 21 (1870); Boyce v. Kalbaugh, 47 Md. 334 (1877); Kelly v. Tiner, 91 S.C. 41, 74 S.E. 30 (1912); additional cases are collected in Notes (1922) 21 A.L.R. 651 and (1924) 33 A.L.R. 1432.

119. The early cases refusing relief (note 72, supra) are not necessarily determinative as to the scope of the "right of privacy," since the courts deciding them refused to recognize such a right.

120. 221 Ky. 765, 299 S.W. 967 (1927), noted in (1928) 41 Harv. L. Rev. 1070; (1927) 26 Mich. L. Rev. 682; (1928) 37 Yale L. J. 835.

be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters, with which the public is not necessarily concerned."\textsuperscript{122}

In *Melvin v. Reid*\textsuperscript{128} the plaintiff had been a prostitute and had been tried, but acquitted, for murder. Immediately thereafter, she abandoned her life of shame, married, and had ever since led a virtuous and honorable life. Eight years later the defendants produced a film, "The Red Kimono," based upon court records of the plaintiff's unsavory early life. Plaintiff's maiden name was used therein and the picture was advertised as a true story of her life. The California court held that plaintiff had a cause of action for invasion of her purely personal right of privacy; pointing out that the Constitutional guaranty of the "right to pursue and obtain happiness" includes a right that a person may live free from unnecessary attacks on one's character or reputation.\textsuperscript{124}

In both *Brents v. Morgan* and *Melvin v. Reid* the court gave damages for the unwarranted publication of private matters, which were highly injurious to the individual's peace of mind and reputation; but, because of their truth, did not amount to actionable libel. With the recognition and protection of the individual's right of privacy in such situations, the way may be opened up for a wider use of the injunction in preventing defamatory publications. Under the historic general rule that "equity will not enjoin a libel,"\textsuperscript{125} the defamer is permitted to make his

\textsuperscript{122} 221 Ky. 765, 299 S.W. 967, 969-970 (1927).

\textsuperscript{123} 297 Pac. 91 (Cal. App. 1931) (action for damages).

\textsuperscript{124} Id. at 93. Marks, J., emphatically stated that the plaintiff had a right to continue her present honored status in society without having her name dragged through the muck of her former depravity "with no other excuse than the expectation of private gain by the publishers."

Cf. Monson v. Tussauds, [1894] 1 Q. B. 671, 63 L.J.Q.B.N.S. 454, where the court refused to enjoin the exhibition of a wax model of a person who had been recently tried and acquitted of murder, placed along with other figures representing notorious and infamous characters. The court treated the exhibition as a libel, and applied the rule of Bonnard v. Perryman, [1891] 2 Ch. 269, that the court's jurisdiction to enjoin a libel is "of a delicate nature and ought only to be exercised in the clearest cases." English cases where a libel has been enjoined are of rather rare occurrence. Note (1937) 10 Australia L.J. 418.

\textsuperscript{125} State v. Judge of Civil Dist. Ct., 34 La. Ann. 744 (1882); Brandreth v. Lance, 8 Paige 24 (N.Y. 1839); Singer v. Romerrick, 255 App. Div. 715, 5 N.Y.S. (2d) 607 (1938), noted in (1938) 88 Col. L. Rev. 1291; Ex parte Tucker, 110 Tex. 335, 220 S.W. 75 (1920). This rule is not based on the absence of property rights but upon a misconceived application of the fundamental Anglo-American principle of the right of "freedom of speech and the press." However, relief will be granted where the libel is coupled with some independent wrong. Davis v. New England Ry. Pub. Co., 203 Mass. 470, 89 N.E. 565 (1909); M. Steinert & Sons Co. v. Tagen, 207 Mass. 394, 93 N.E. 584 (1911) (illegal boy-
damaging statements, and the injured party is relegated to the theoretically adequate remedy of a damage action. After being humiliated and disgraced in the eyes of his friends and associates, the libelled party may secure a judgment for such damages as a jury may assess, and then try to collect it from the often impecunious wrongdoer. In protecting the individual's right to be free from the humiliation of unnecessary and distasteful publicity (right of privacy) rather than his reputation only (libel), the court may shake free from the old shackles which have limited injunctive relief. Of course there is still the property right requirement, but if the court desires to issue an injunction it can go through the usual motions of finding such an interest. Where the court has refused relief it has either been because it adopted the view of the Roberson case that the right of privacy was not entitled to any judicial recognition, or because it felt that the defendant's acts did not constitute an unreasonable invasion of that right, as in the case where a newspaper was merely recounting the plaintiff's innocent actions in an incident of current public interest.

CONCLUSION

Our judicial craftsmen are not carving in stone, but are fashioning of the plastic materials in an ever changing social order. Armed with rules formulated to meet the needs of a simple agricultural state, they seek to cope with the legal problems of a complex industrial state. In many situations current problems have outgrown the old measurements of the Chancellor's foot, and rules that were entirely satisfactory in the days of Lord Coke...
and Lord Ellesmere, would become instruments of injustice if strictly applied. Occasionally a rule has been completely repudiated. More often the ancient canon has been retained and adopted to its new surroundings by adroit manipulations and ingenuous distinctions. The court's decision thus becomes a rationalization of an instinctive reaction to administer practical justice. Such pioneering is essential if the law is to keep pace with the developments and needs of modern society.

The maxim that "Equity will only protect property rights" is bottomed on a principle that arose out of, and might well have passed with, the feudal system—a sort of caste system based on land holding. Since then the idea that property is the sole source of human satisfaction and power has given ground on every hand. Numerous personal interests have emerged and have been accorded legal recognition. Thus it has been urged that a maxim so redolent of obsolete concepts and situations must necessarily lead to confusion and injustice. Abstract logic supports such an argument. However, from the standpoint of results, it is of little consequence that courts have employed the usual and more subtle technique of confession and avoidance, than that of direct repudiation.

A bird's-eye reappraisal of the various groupings of decisions bears out the writer's major premise that the existence or non-existence of a *property* right is seldom a controlling consideration. It is upon those twin pillars of practicality and desirability that our modern jurisprudence is and should be developing. Where an injunction has been denied, the court has often urged the absence of a property interest. Where relief has been granted, the court has often felt duty bound to maintain the traditional illusion of protecting a property right. Most courts hesitate to admit frankly the superficial nature of the rule that "Equity protects only property rights," and are even more reluctant to discard it entirely. Is this because of blind adherence to an ancient shibboleth, or because the maxim serves as a very convenient argument in those innumerable cases where, for one reason or another, the protection of a personal interest is not expedient?

128. In a few isolated instances an unwary court has been induced to take the concept too seriously, and an anomalous decision has resulted. Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896) (see note 48, supra) where relief was improperly refused; Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912) (see note 64, supra) where relief should have been denied, since there was no showing of injury to those living, as in the Bazemore case, 171 Ga. 257, 155 S.E. 194 (1930) (see note 114, supra).