

## 15.2: THE HISTORICAL DEVELOPMENT OF PRIVACY LAW

In 1890, the Harvard Law Review published an article which addressed the “right to be let alone.” It was co-authored by two legal scholars, Samuel Warren and Louis Brandies. Louis Brandies was a law professor at the time, but went on to later become one of the more respected U.S. Supreme Court justices. Perhaps in some ways, what they mention as “Recent inventions and business methods...” is as pertinent today regarding social media and smartphones as it was to cameras and newspapers in 1890.

“Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right “to be let alone” Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.”

In 1960, the California Law Review published an article entitled “Privacy.” It was written by widely recognized legal scholar William Prosser. In this law review article, Prosser discusses the Warren and Brandies law review article mentioned above in some detail. He also compiled and reviewed the various privacy cases from the various courts and jurisdictions. Prosser concluded that there are four distinct but related actions that violate a person’s right to privacy.

- **Intrusion:** The intrusion, whether physically or otherwise, upon the solitude of another in a highly offensive manner is a violation of one’s privacy.
- **Private Facts:** The publication of private information about a person who is not a public figure is a violation of one’s privacy.
- **False Light:** The publication of a highly offensive and false impression of another is a violation of one’s privacy.
- **Appropriation:** Taking and using a person’s name or likeness for financial or other advantage without that person’s consent is a violation of one’s privacy.

Prosser argued these various privacy violations in terms of tort actions and the right to sue. While Americans most likely would overwhelmingly agree that all four actions, intrusion, private facts, false light, and appropriation are violations of one’s privacy, with the everyday use of social media, are those lines being blurred voluntarily?

**GRISWOLD v CONNECTICUT, 381 U.S. 479 (1965):** As already mentioned, the U.S. Constitution does not include the word privacy in it. However, 1965, the US Supreme Court held in *Griswold v. Connecticut* that the right to privacy does exist. The case involved a Connecticut doctor who had been arrested and fined \$100 by a Connecticut trial court for counseling married couples about birth control devices. Such advice violated a Connecticut statute making birth control counseling a misdemeanor.

The U.S. Supreme court overruled the conviction and declared the Connecticut statute to be unconstitutional. The Court found that the spirit, structure, and specific provisions of the Bill of Rights created ‘zones of privacy’ which are broad enough to protect aspects of personal and family life, in this case, marital privacy. The Court declared “...that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”

**ROE v. WADE, 410 U.S. 113 (1973):** One could argue the *Roe v. Wade* is the most politically and socially controversial landmark U.S. Supreme Court cases of our time. The 1973 decision authored by Justice Harry Blackmun enunciated a woman’s right to privacy.

The question before the court was whether a Texas statute that criminalized all abortions except those necessary to save the mother’s life was constitutional. The Court declared, in a 7-2 majority opinion, that the Texas statute was unconstitutional as it violated a woman’s right to privacy stating, “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

The Court also acknowledged the legal tension between a woman’s privacy right and the State’s interest in the life of the unborn child. In addressing this legal issue, the Court constructed the following trimester framework.

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due

#### Process Clause of the Fourteenth Amendment.

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

A syllabus version of this case can be found in Chapter 4.

**PLANNED PARENTHOOD v CASEY, 505 U.S. 833 (1992):** In 1992, the U.S. Supreme Court again took up the issue of abortion in the *Planned Parenthood v. Casey* case. The state of Pennsylvania had passed legislation regulating abortions requiring the following:

- Informed consent with a 24-hour waiting period prior to the procedure.
- Minor's seeking an abortion need the consent of one parent or a judge's order.
- A married woman must sign off that she notified her husband.

In a 5-4 decision, Court reaffirmed the core principle of *Roe v Wade*, but replaced the trimester framework with the "undue burden" test." This new standard is that any law that places an "undue burden" on a woman's right to obtain an abortion before viability is unconstitutional. Under this new standard, the only section of Pennsylvania's statute found to place an undue burden on a woman's right to have an abortion before viability of a child was the requirement that a married woman must inform her husband of her intent to have an abortion.

"The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."

A syllabus version of this case can be found in Chapter 4.

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