

“Kodakers Lying in Wait”: Amateur Photography and the Right of Privacy in New York, 1885–1915

ROBERT E. MENSEL

Hanlon, Herzfeld & Rubin

RECENT POLITICAL DEBATES MAY SUGGEST TO SOME OBSERVERS THAT the right of privacy was cut out of whole cloth, or even more ethereal stuff, by the Warren Court in the 1960s.¹ The constitutional right of privacy, which provides protection from government intrusion, may arguably have such a recent pedigree. But the common law right of privacy, which protects against intrusions by other persons, finds its roots in certain cultural and technological developments which occurred during the Victorian age.²

In that period, as in our own, the need for privacy was linked to the ideas of selfhood and personal identity. Cultural historians have recognized that there were subtle and complex transformations in constructions of the self among bourgeois Americans during the late Victorian period. Their work indicates that the change largely concerned the enhanced role of feeling, emotion, or sentiment as aspects of selfhood. This same recognition of the importance of feeling or emotion contributed to the recognition of the legal right of privacy.

The modern scholarly literature on the right of privacy includes, for the most part, doctrinal histories and analyses, philosophical analyses, and combinations of the two.³ Scholars have debated whether the tort of invasion of privacy is composed of a number of distinct torts, each protecting a distinct interest, or whether it protects a single, broad interest.⁴ They have rehashed the debates of the Victorian era over

Robert E. Mensel, a former graduate fellow of Rutgers University, is an attorney with Hanlon, Herzfeld, and Rubin in Edison, New Jersey, and an adjunct instructor at Seton Hall Law School.

whether privacy and personality were protected at common law prior to 1890, or whether the early cases protected interests that were essentially property interests.⁵ Most of these mention the cultural ferment and technological change that characterized the era. However, the literature includes little detailed discussion of those aspects of technological and cultural change, beyond the bare facts of the cases, which prompted people to invoke or accept the idea that privacy should be protected by law.

The purpose of this essay is to discuss in some detail the cultural meanings of photography, especially amateur photography,⁶ in this period, and to suggest a link between those meanings and the evolution of the right of privacy in New York.⁷ Developments in New York were particularly important because the New York Court of Appeals, the state's highest court, was the first state high court to answer directly the question whether the right of privacy was protected at common law, in the absence of infringement of a recognized property interest,⁸ and the Legislature was the first to adopt legislation intended to protect that right. The evidence throughout indicates that amateur photographers played an important role in provoking the outrage among editorial commentators, judges, and legislators which eventually helped lead to the recognition of the right of privacy in New York.⁹

The late Victorian period was perceived by contemporaries as a period of unprecedented change, occurring at an unprecedented rate. The accelerating pace of urbanization, secularization, industrialization, and scientific discovery contributed to a sense of social and psychological dislocation among bourgeois Americans. The pace of technological change outstripped the average American's understanding, and the line between fantasy and the new reality became blurred and uncertain. Economic individualism was increasingly diffused into a complex web of economic interdependency. Secularization stripped many Americans of their most important personal and social ballast, leaving them, as Nietzsche had only recently predicted, with a disturbing sense of "weightlessness." As a result, according to T. J. Jackson Lears, late Victorian Americans, especially in the northeastern cities, suffered under a sense that authentic or "real" experience, feeling, and selfhood were increasingly elusive and perhaps even illusory.

"Unreality" and "weightlessness" were metaphors for the pervasive sense of social and psychological anxiety and dis-ease suffered by bourgeois Americans in this period. The fascination with private, inner

feeling that arose in response to this anxiety had many manifestations. It was reflected in the rise of what Lears has called the "therapeutic world view," and Karen Halttunen has labelled the formalization of sentimentalism. Its more tangible effects were the perceived increase in the psychological disease then labelled neurasthenia, sensationalist journalism, the cult of celebrity, and the rise of various therapeutic and antimodernist movements, each seeking, in its own way, to recover authentic experience and real feeling.¹⁰

Warren Susman has argued that the period from approximately 1880 to 1920 saw a subtle shift from a "culture of character" to a "culture of personality."¹¹ Susman focused on the public display of personality, which was as much an aspect of the fascination with inner feeling as were the phenomena discussed by Lears and Halttunen. Together, the work of these scholars demonstrates that the fascination with inner feeling in this period extended from the mind of the individual through the Victorian parlor and on to the public street. They all suggest the paradox that, in order for private inner feeling to be verified or understood, it must be made public on some level, whether in the relative privacy of the therapeutic encounter, in the semiprivate society of the drawing room, or in the public world of celebrities.

Personality manifested itself, according to Susman, in certain superficial and public qualities, such as "charm" and "beauty," and in their opposites. These qualities were aspects of "the performing self which attracts others," and became associated with the famous and infamous persons who were the era's celebrities.¹² The public presentation of personality or feelings necessarily involved some deliberate "packaging," whether by the individuals whose feelings were at issue, or by others, such as journalists or advertisers. Their purpose was usually to capitalize on the fascination with personality by linking it to a product.

Susman's choice of the terms "character" and "personality" is infelicitous, simply because a distinction between them, while discernible in many contemporary sources, is not consistently observed. It is, however, clearly discernible in the work of E. L. Godkin, editor of *The Nation* during this period. Writing in July 1890, he noted that character was narrowly understood as a measure of one's reliability in such matters as credit transactions, professional practice, and business in general. It was an economic trait, a metaphor rooted in the stodgy commercial ethos of Gilded Age individualism. In contrast, personality

was a complex of feelings which existed, according to Godkin, in the private confines of the mind. It was "that kingdom of the mind, that inner world of thought and feeling."¹³

Godkin was acutely aware of threats to both character and personality. He understood a person's reputation for good character to be a fundamental form of property, but felt that such property was adequately protected by the law of libel. He was disturbed, however, by a new and related issue. "Closely allied to it, [the inclination in the media to commit libel] and in fact growing out of it, is the disposition to intrude on privacy." Privacy, for Godkin, was "a distinctly modern product, one of the luxuries of civilization." It was based upon "respect for a man's personality as an individual."¹⁴

Privacy could not, however, be protected at law, according to Godkin. As a practical matter, the cure would be worse than the affliction, because legal vindication of the right of privacy would occur in a public courtroom. Moreover, juries were unlikely to grant relief, being composed of men drawn from the same "depraved" classes that made sensationalist journalism and intrusive photography profitable.¹⁵ Godkin's conclusion was correct. The protection of privacy was an issue of social propriety; it was recognized as a matter of etiquette,¹⁶ and perhaps even of morals. It was not recognized as a matter of law, however, because the law did not generally protect people from injuries to feelings.¹⁷

Later in 1890, Samuel Warren and Louis Brandeis wove the disparate threads of real property, contract, copyright, and libel law, which all protected forms of property, into an argument that the law protected more than property, character, and reputation, but that it also protected "thoughts, sentiments, and emotions," or, as they labelled it, the "inviolable personality."¹⁸ For those authors, the undisturbed enjoyment of private feeling or sentiment provided relief from the conditions of the public world.¹⁹ This was sufficiently important, according to their argument, that the law ought to provide a remedy for the threats to personality and feelings posed by "recent inventions and business methods," such as sensationalist journalism, advertising practices, and the previously unimagined intrusions made possible by the newly invented Kodak, and similar cameras.²⁰

Clearly, technological innovation and market expansion in the newspaper and photography industries provided some of the conditions for the development of the right of privacy, as Warren and Brandeis, and

many commentators since, have noted. In each of these industries entrepreneurs made deliberate efforts to create a market, and in so doing necessarily intruded on interests in privacy. The newspaper of the 1880s was a product of new technology and a widespread fascination with the actions and feelings of the powerful and notorious. Its success depended upon a deliberate marketing strategy based on "sensationalism," a focus on events "which stimulate[d] unwholesome emotional responses in the average reader." Joseph Pulitzer defended the propriety of such strategies, arguing that it was a newspaper's job "to talk to a nation, not to a select committee."²¹

The hand camera, and the Kodak in particular, also represented a dual triumph of technological innovation and marketing strategy.²² The inventor of the Kodak, George Eastman, was the consummate entrepreneur. His goal was nothing less than to build the largest photographic supply business in the country. He understood that "in order to make a large business we would have to reach the general public and create a new class of patrons."²³ His deliberate effort to create consumer demand for a new product was enormously successful. While other manufacturers built and marketed small cameras that were sufficiently simple and inexpensive to be suitable for a broad middle-class clientele, Eastman's product became the standard of the industry, and its name provided a slang term for all amateur photographers: kodakers.²⁴

The most important cultural consequence of the technological and marketing strategy which produced the Kodak was that it completely changed the conception of who was to practice photography.²⁵ Photography was no longer the province of the professional and affluent amateur, but was practiced by thousands upon thousands of people. The newspapers of the period indicate that there was a startling increase in the number of amateur photographers in New York. By 1889, the *New York Tribune* was able to report that "[a]mateur photography is rapidly approaching, if it has not already reached, the dignity of a 'craze.'²⁶ The *New York Times* also reported a remarkable increase in the popularity of photography as a hobby.²⁷ By the end of 1889, the *Times* carried regular notes on amateur photography in its Monday editions.

The boom in amateur photography was much more than a triumph of American consumer culture. In the late 1880s and early 1890s, New Yorkers responded to amateur photographers with exceptionally intense and remarkable feelings. The amateurs were positively Mephistophe-

lean: they belonged to a class of minor demons known as "camera fiends," or "Kodak fiends," and were said "to be in league with some evil spirit."²⁸ Their activities were mysterious, seductive, and intoxicating. The *New York Tribune* observed that

[a]mateur photography has the reputation of possessing in its various forms all those seductive charms in the enjoyment of which the weary, earthbound mortal is released from durance vile and translated, for the time being, into some seventh heaven of bliss. Opium, hasheesh, even the fascinations of Monte Carlo are supposed to pall before its many attractions.²⁹

Indeed, the pleasures of photography were offered as a cure for neurasthenia and as a means of preventing suicide.³⁰

Cameras themselves were objects of amazement far beyond what might be expected to be generated by the technical genius they reflected. They were described in terms that suggested their sinister, dangerous nature. They were "deadly weapons," and "deadly little boxes." The click of their shutters was "ominous" and "dreadful." The so-called detective cameras were especially disturbing: "many are never noticed, but they are just as deadly." This response to the new cameras was widespread. An English comedian described the Kodak as "an instrument of torture . . . which is driving the world mad." The photographers and their instruments were both dangerous and deceptive. "The young knights of the camera . . . [were] inoffensive in appearance, but well armed with dangerous weapons to those who may fall in their way." Even photography journals used this language of threat and violence.³¹

The frequent use of these metaphors suggests that they were more than casual verbal excess. Such rhetoric, while certainly hyperbolic, nevertheless expressed lurking feelings of fascination, discomfort, and anxiety provoked by photography. This response, so remarkable to our modern sensibilities, arose from a complex interaction between contemporary suspicions about the "reality" of photographs and uncertainty about the limitations of the technology, on the one hand, and contemporary bourgeois notions that unguarded facial expressions were reflections of deep and sincere feeling.

The possibility that "reality" was captured in a photograph was enormously unsettling to late Victorian Americans. Some maintained that photographs were too real to be considered as works of art; others implicitly echoed this view by treating the camera solely as an instrument of science or social science.³² Some New Yorkers apparently

took comfort in their trust that the camera was as reliable as George Washington himself, and reacted to the assertion that the camera distorts as if it were "an indictment against the camera."³³ This overwhelming sense that photographs capture reality gave the work of Jacob Riis its unique power.³⁴ In an era afflicted with a pervasive sense of "unreality," "weightlessness," and the quickening passage of time, photography enhanced reality by fixing it in time and space and giving it substance.³⁵

The reality of photographs was such a threat, under certain circumstances, that some photographers made awkward efforts to deny it. In an article carried by the *Times* and several magazines, the defenders of nude photography as an art form made the remarkable argument that the real physical flaws of particular human bodies that appeared in photographs, "a club foot, or the overlength or overshortening of an arm or leg," were merely the "optical exaggerations of the lens. . . . At best, photographs to the intelligent artist can be never anything [*sic*] more than reminders."³⁶ But it was precisely the threat that photography could be much more than a reminder that made some New Yorkers so anxious.

Uncertainty about the limits of the power of the new technology blurred the line between the real and the fantastic. *Anthony's Photographic Bulletin* reported in 1892 that one aficionado claimed to be able to induce hypnosis with a photograph, and then to pass the characteristics of the person pictured to the person hypnotized. If, for example, the hand of the person pictured showed a scratch, a scratch mark and a sensation of pain would appear in the hand of the hypnotized subject. "The sensibility [of pain] will continue for several days, but is not manifest unless the subject be in the neighborhood of the photograph."³⁷

In a world in which the newly invented X-ray, "the sensation of the day," provided the means to photograph the interior of the human body, it was not remarkable that bourgeois New Yorkers would pause before rejecting the hypnotist's claim as outlandish. Even so rational a man as Thomas Edison, Jr. made serious scientific efforts to photograph human thought and the human soul.³⁸ It remained an open question precisely which "inner" human characteristics could be exposed by the camera. The inability to distinguish reality from fantasy left a lurking sense of discomfort and uncertainty that was partially caused by, and in turn directed at photography and photographers.

Another factor at work in this complex scenario was the contemporary

notion that the face was the window of sincere sentiment. Bourgeois New Yorkers were obsessed with ritualistic behavior designed to display feelings deemed appropriate. They were particularly threatened when they were photographed at times when they were not on their guard, because the revelation of sincere feeling in their unguarded faces would then be preserved. Karen Halttunen notes that in contemporary estimation, "the face was the most transparent part of the body."³⁹ The ritualization and consequent hypocrisy of "sincerity" forced late Victorian New Yorkers constantly to be on guard to avoid exhibiting the wrong feelings. This was as true with respect to men as it was with respect to women:

A woman's feelings were revealed in her smile, in her complexion, and especially in her eyes: "There is the timid glance of modesty, the bold stare of insolence, the warm glow of passion, the glassy look of indifference, the light of intellect and genius, the leaden gaze of stupidity, the calm serenity of innocence, the open frankness of candor, the furtive look of hypocrisy."⁴⁰

As sincerity became subject to conscious manipulation, it became possible to compile what was little more than a catalog correlating feeling with facial expression. Feeling and personality could thus be packaged deliberately, but only with the greatest care and self-consciousness. As a result, a photograph of a person's facial expression, taken while that person was unaware and consequently not self-conscious, was thought to be the surest way of capturing the subject's "real" feelings, character, and personality.

As one photography journal noted, "[t]he interest [in a photograph] lies solely in the subject—in the character, and feeling depicted."⁴¹ This interest was enhanced when circumstance provided guarantees that the feeling was sincere. Photographs of prominent people taken without their knowledge were always in demand with newspapers, "which pa[id] fully twice as much for them as for the conventional photographs made in a studio." Another journal noted that "[t]he beauty of the invention [a concealed camera] is that the victim is thoroughly unsuspecting. He does not know that his picture is being 'took,' consequently the character is all preserved."⁴²

The display of another's unguarded feelings was both profoundly interesting and profoundly disturbing. Bourgeois New Yorkers understood that they were responsible for the visible evidence of their feelings at every moment. If they were caught betraying an inappropriate or

indelicate feeling, there was no escape from embarrassment, and if that moment were captured in a photograph, embarrassment could be perpetual.

Under these cultural conditions, it is not remarkable that conflict would emerge between amateur photographers and their unwilling subjects. The most extreme among the photographers claimed the right to photograph anyone, and to do as they wished with the photographs, which they regarded as their personal property.⁴³ On the other hand, many people felt a profound sense of exposure and violation upon being photographed, or upon finding their photographs displayed and sold in photo shops, or used in advertisements, without their consent.

This profound sense of exposure was exacerbated by the enormous size of the market in photographs of all sorts, taken by amateur and professional photographers alike, in this period. Photographs were sold in a variety of locations, from the attractive shops of successful professional photographers to general junk shops. They were dispensed from vending machines, and even given away free in cigarette packs. Many amateurs apparently made substantial profits selling their work for such uses.

Photographs of celebrities, particularly political figures, actors, and actresses, were the most popular items in the photograph shops. However, the market was not limited to pictures of those who sought notoriety and consented to the broad dissemination of their pictures. Even members of the working class served as grist for the photographers. The *New York Tribune's* "Casual Observer" reported that small junk shops peddled "the second hand stock of the cheapest East Side photograph parlors . . . pictures of bridal couples in full regalia, stiff and unhappy-looking family groups, and the usual number of portraits of young men and women whose toughness is somehow apparent in spite of their mild expressions and best clothes."⁴⁴

The feelings, personalities, and even the class status of the people pictured were obvious to the "Casual Observer," and the equally obvious effort to ape bourgeois manners seemed embarrassingly out of place in these photographs. Yet "[c]ollectors, cranks, dudes, and theatrical people" would buy scores, even hundreds of such photographs, sometimes for a penny each, for uses limited only by the purchaser's imagination. The *Photographic Times and American Photographer*, a New York photography journal, noted that "[t]here are any number of rooms in this city that are completely papered with photographs."⁴⁵

The uses of such photographs sometimes came to the attention of the person pictured. In 1902 the *New York Times* noted that a photograph used in a corset advertisement, to the chagrin of the woman pictured therein, was purchased by the advertiser in an ordinary shop.⁴⁶

All of this exposure provoked strong reactions in many of the amateur's unwilling subjects. The *Times* published a story of a hotel proprietor in rural New York "who prided himself on never allowing his picture to be taken." When an amateur photographer set an ambush for the old gentleman and took his picture, he provoked a violent reaction. According to the *Times*: "The next scene, which was unfortunately not secured on a plate, included the proprietor with uplifted cane chasing the wily young man. The elusive photographer managed to escape."⁴⁷

There were many other instances in which individuals, famous and otherwise, suffered annoyance at the hands of amateur photographers. Lord Tennyson was so harassed and besieged that the *New York Tribune* suggested, tongue-in-cheek, that the decline of His Lordship's poetry could be "traced to amateur photographers."⁴⁸ These aggravations found expression even in the photographic journals. One anonymous correspondent wrote to the editor of the *Photographic Times and American Photographer* to complain, on behalf "of a much photographed and annoyed public" that the "demoralizing and degrading habits of some of the amateur photographers" at Coney Island ought to be dealt with by Anthony Comstock and his officers. This correspondent complained that "during the bathing hours, a half-dozen cameras may be seen at almost any time, pointed at the half-nude and innocent bathers, at a time when they are not in a position to be perpetuated by the camera."⁴⁹

There were some early hints that the photographers' activities might be regulated by law. Amateur photographers were banned from the White House grounds during the first Cleveland administration because, according to the Superintendent of Public Buildings and Grounds: "[I]f we took no steps to prevent it there would be a double file of amateur photographers encircling the White House from morning until night, every one of them ready to take a snap shot at Mrs. Cleveland should she venture to show her head. We can't really allow it, you know."⁵⁰

In 1887, when Mrs. Cleveland's picture was used in an advertisement for a patent medicine, official Washington took notice and almost took action. A bill was introduced in the House that would ban the public

exhibit of any photograph or likeness of any woman without her consent. The bill was referred to the Judiciary Committee, where it apparently died a quiet death.⁵¹ In New York, in early 1890, a judge ordered a photographer to refrain from selling or distributing a picture of the dancer Marion Manola, taken surreptitiously and against her strongly stated wishes, as she appeared in tights on the stage of the Broadway Theatre. The case was not officially reported, however, and consequently provided no legal precedent.⁵²

Reporters and editors in New York in the late 1880s and early 1890s recognized that many people were disturbed by the amateur photographers' activities. However, just as the Congress was unwilling to exercise legal authority, the newspaper editors were unwilling to exercise moral authority on behalf of the unconsenting subjects of amateur photography. Despite the rhetoric of threat and danger so common in the first years of the boom in amateur photography, newspaper editors did not condemn the amateurs' crude intrusions. Instead, they wrote about them almost as if they were little more than boyhood pranks. The *New York Tribune* dismissed the photographers' antagonists as "peculiar people" suffering from a "species of vanity."⁵³ The *New York Times* declared that "a great deal that is said of the art as a nuisance is owing to misplaced judgment."⁵⁴

The remarkably callous attitude toward the concerns of the amateur photographers' unwilling subjects was particularly evident when those subjects were women. The operative metaphor in such cases was that of the medieval hunt. Amateur photographers were "knights of the camera," and their "natural prey" were "pretty girls." The consent of the subject was customarily sought in a *pro forma* fashion, but there is reason to suspect that it was often a matter of indifference to the amateur photographer: "If the young lady refuses [to be photographed] the [male] photographer will perhaps strive to get her picture when she is not on guard just out of spite, and herein lies the danger of the little detective." Yet, according to the *Times*, "the girls ha[d] no right to be down on the photographers" for these annoyances.⁵⁵

Perhaps the views of these editors were influenced by their knowledge that many people, including many young women, actively sought notoriety and pursued their goals by allowing photographers to take and disseminate their pictures. It was common for such people to engage photographers, paying them a reduced "professional" rate. The photographer's compensation was derived primarily from the sale of the

subject's photograph on the open market.⁵⁶ It was quite common for such people to demand that the photographer retouch the photograph to make it more flattering. As one contemporary noted, "[a] photographer these days has to be a barber, surgeon and dentist."⁵⁷

Such retouching or manipulation of the photograph was not always sought by the subject, however, and was not always flattering in effect. In 1888, LeGrange Brown, an amateur photographer from Brooklyn, was arrested by Anthony Comstock and his agents for selling nude pictures of "the most fashionable ladies in the city." Brown had taken pictures of hundreds of fairly prominent young women, apparently with their consent. He had then taken the heads from the negatives and developed them together with nude female bodies from other negatives, "and so obtained a picture which would ruin the reputation of any respectable young girl."⁵⁸ He peddled the photos in a Brooklyn saloon for twenty-five cents apiece.⁵⁹ Brown's manipulations threatened each subject's character, and consequently, her future ability to engage in the most important social and economic relation available to most women at the time, marriage.⁶⁰ But the case was a matter for the police, who responded readily on the basis of a tip from an informant.⁶¹ There is no indication that a formal complaint or any allegation of emotional injury was made on behalf of any of the victims.⁶²

In December 1890, the Warren-Brandeis article was published. While it had no immediate effect, it clearly expressed the feelings of many of the most frequent subjects of photographers, scandal sheet reporters, and gossip-mongers. Warren and Brandeis used the case of Marion Manola as an example in their discussion, arguing that it directly implicated the right of privacy. Their sense of the egregiousness of the case, and of others like it, led them to conclude that the existence of the right of privacy was of such moment that it must soon be decided by the state supreme courts.⁶³

Despite that prediction, the issue languished in the inferior courts without the guidance that higher courts might have provided. In 1893 a New York trial court issued an injunction forbidding *Der Wachter*, a popular local magazine, from publishing the portrait of an actor against his stated wishes. The picture had been published in connection with a popularity contest that the magazine staged between Marks, who was the plaintiff, and another actor. The court forbade further publication, citing both the Warren-Brandeis and the Godkin articles, and one case, and concluded its brief opinion with the remarkable

statement that "[t]he right of the plaintiff to relief seems too clear, both upon principle and authority, to require further discussion."⁶⁴ Despite the court's statement, the right of privacy, understood as protection for feelings and personality, was not yet clearly established by any legal authority in New York.

In the very next year, the New York Common Pleas Court denied a request for an injunction and damages for the unauthorized publication of the portrait of a young girl. Judge Henry Bischoff's opinion raised a number of technical infirmities in the pleadings, but also addressed the substantive merits of the claim. He did not cite the *Marks* case, nor did he make reference to the Warren-Brandeis article. He stated flatly that "the law does not take cognizance of and will not afford compensation for sentimental injury." He did not disparage the importance of feelings, nor did he discount the seriousness of sentimental injury. But he reduced the duty to protect feelings to "a purely moral duty," stating "[p]erhaps the feelings find as full protection as it is possible to give in moral law and responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."⁶⁵

The conflicting opinions of these lower courts stood for years. Finally, in late 1899 the Franklin Mills Company, a Rochester concern, began using a new trademark in its advertising. The trademark included the picture of Abigail Roberson, an exceptionally attractive Rochester teenager. The picture, in itself, was not pornographic or embarrassing. It would not have threatened her character in any substantial way, nor would it have aroused the wrath of the Comstockers. It is not clear whether the photograph was taken with or without her consent, or whether it was taken by a professional or an amateur, although language in the dissenting opinion in the Court of Appeals suggests that it may have been taken surreptitiously. The fact that no photographer was named as a defendant in her suit suggests that the photographer, if he or she were even known, was an amateur, as most professionals who maintained portrait shops or studios could be found and sued rather easily.

The photograph was incorporated in the trademark with the slogan "Flour of the Family" printed above it, and the product name, "Franklin Mills Flour" printed below it. In the lower corner the name "Rochester Folding Box Company" appeared. This trademark was distributed on flyers, approximately twenty-five thousand of which were placed in

stores, warehouses, and saloons throughout the Rochester area. When the young woman was informed of the use of her picture in such a manner she "suffered a severe nervous shock and was confined to her bed and compelled to employ a physician."⁶⁶

Abigail Roberson's bout with severe neurasthenia was a spark that set off an explosion of activity within the New York legal system, which ultimately led to the recognition of the right of privacy. She brought suit in county court in Rochester, claiming that her right of privacy had been violated, and demanding damages in the amount of fifteen thousand dollars. She did not claim that she had been libelled. The basis of her claim was not injury to her character or reputation, as her failure to allege libel demonstrates. She claimed an injury to her feelings, rather than injury to her community standing.

The defendants, the box company and the flour company, admitted that the alleged facts were true, but argued that the law simply did not provide a remedy for the plaintiff's injuries. Judge John M. Davy paraphrased their argument as follows: "[t]he substance of [defendants'] contention is that the feelings of the plaintiff may be outraged with impunity by any person who may desire to circulate her likeness as an advertising scheme, and there is no power in the courts to protect her."⁶⁷ In an opinion which obviously drew heavily upon the Warren-Brandeis article, he ruled that the defendants had no such right, and that their actions had violated her right of privacy. Perhaps in an effort to ground his decision in better established law, he ruled that her right to control the dissemination of her likeness was a right of property as well as a right of personality.

The defendants appealed to the Appellate Division, the intermediate appellate court in the state court system. There, in an opinion which was also strongly influenced by the Warren-Brandeis article, a panel of four judges ruled unanimously that the defendants had violated Roberson's "right of personal immunity, [her] right not to be interfered with to [her] damage or danger or discomfort."⁶⁸ This court, while recognizing plaintiff's cause of action for sentimental injury, also sought to link her claim to better established rules of law. It held that, in addition to her right of personal immunity, Roberson also had a right of property in her own body, and that either of these rights provided sufficient grounds to allow her to maintain her action against these defendants.

On 27 June 1902, the New York Court of Appeals, the state's highest

court, reversed the two lower courts. In an opinion that stands as a model of misguided judicial restraint, four of the court's seven judges rejected Roberson's claim. They ruled that the principle of "inviolable personality" was not protected by existing legal principles, Warren and Brandeis notwithstanding; that such a rule of law was too far removed from established legal principles to be derived by analogy or by parity of reasoning from those principles; that the rule contended for would lead to an explosion of litigation of the most trivial sort; and that it was the proper function of the legislature to fashion a narrow and practicable remedy for whatever injury the plaintiff had suffered. The crucial point in the court's opinion was its rejection of the idea that the law should protect the constellation of inner feelings that were thought to define personality. "There is no right, capable of enforcement by process of law, to possess or maintain, without disturbance, any particular condition of feeling."⁶⁹ The court gave the plaintiff twenty days to file an amended complaint, implying that she should include a count for libel. This suggested that the court would protect Roberson's traditional property right to her reputation, but would not change the law to protect her from injury to her feelings.

The court's ruling that the right of privacy did not exist at common law brought on a storm of severe criticism. One week after the decision was announced, the *New York Times* lamented that "the affirmation on such high authority that no right of privacy exists is liable to be abused and liberties taken under it which will represent the anomaly of injury without legal remedy."⁷⁰ A month later, the *Times* responded even more harshly, characterizing the court's opinion as "amazing," and arguing that the only appropriate remedy left to the aggrieved, in light of the court's outrageous opinion, was "personal chastisement," — violence administered by the victim himself or herself. Clearly, according to the *Times*, some legal remedy was required. "There is something very irritating in chronic exposure," the editors complained. "Mr. J. Pierpont Morgan, we read, was [recently] so beset by 'kodakers' lying in wait to catch his emergence from his office . . . that he was actually held prisoner for some time." But the *Times* editors' most insightful comment were as follows:

[I]n this series of events we can see political evolution at work. We can see the effect of public opinion upon law and institutions in the making. For all these things appeal to the decent and unsophisticated human mind as outrages. . . . If there be, as Judge Parker says there is, no law now to cover these

savage and horrible practices . . . then the decent people will say that it is high time that there were such a law.⁷¹

There is a perceptible difference between this characterization of photographers' activities as "savage and horrible practices," and the earlier, more tolerant characterization of similar activities as if they were little more than boyhood pranks. The same newspaper that had previously insisted that photographers' victims had "no right" to object was clearly calling for legislation to provide a remedy for such intrusions.

The editors' harsh opinion of the court's action in the *Roberson* case was so deeply felt by the judges that one of them took the extraordinary step of responding to it directly. In an article published in the November 1902 issue of the *Columbia Law Review*,⁷² Judge Denis O'Brien accused the newspaper of misrepresenting the court's disposition of the *Roberson* case. He denied that the court had ruled that the right of privacy did not exist. The narrow holding in the case, according to the judge, was that the right of privacy was not enforceable by the courts.

The editors at the *Times* would not be so easily mollified. Shortly after the publication of O'Brien's essay, they stated the obvious rebuttal of the judge's narrow legalisms. "To say that an assumed right is not enforceable by the courts is surely tantamount to denying that it is a legal right at all."⁷³ The call for legislation on the subject was soon heeded. On 6 April 1903, in its very first session after *Roberson* was handed down, the Legislature adopted "An act to prevent the unauthorized use of the name or picture of any person for the purposes of trade."⁷⁴

The first section of the statute made the unauthorized use of the name or picture of any living person for the purposes of trade or advertising, without written authorization, a misdemeanor. The second section created a civil cause of action, and allowed a plaintiff to sue for compensatory and punitive damages, and an injunction barring further use of the picture or name. Suit was to be brought in a court of equity, where it would be heard by a judge without a jury.

The protection afforded was limited, however.⁷⁵ The act did not restrict the use of photographs of deceased persons. More importantly, its sanction extended only to the use of photographs or names for the purpose of "trade." Trade was defined very broadly by the Appellate Division in Brooklyn to include even the sale of the photograph itself, and was not limited to advertising.⁷⁶ Even limited, as it was, to

regulation of the dissemination of photographs, the legislation was understood to have established, as a general proposition, that the right of privacy existed, and was worthy of some protection from the law in New York.

The state courts showed no reluctance to enforce the act. The First and Second Departments of the Appellate Division, sitting, respectively, in Manhattan and Brooklyn, declared the act to be constitutional.⁷⁷ The Court of Appeals also validated the act in a unanimous opinion in *Rhodes v. Sperry & Hutchinson Co.* Judge Willard Bartlett's opinion for the Court briefly described the process which led to the act's adoption:

[The act] is a recognition by the lawmaking power of the very general sentiment which prevailed throughout the community against permitting advertisers to promote the sale of their wares by this method, regardless of the wishes of the persons thereby affected. There was a natural and widespread feeling that such use of their names and portraits, in the absence of consent, was indefensible in morals, and ought to be prevented by law. Hence the enactment of this statute.⁷⁸

The decision of the New York Court was later affirmed by the United States Supreme Court, in a brief opinion by Mr. Justice Holmes.⁷⁹

The right of privacy arose in New York at a time when the sense of cultural anxiety resulting from technological advance, economic interdependence, urbanization, and secularization caused a change in notions of selfhood held by middle- and upper-class Americans. In this evolving "culture of personality" the importance of feeling, emotion, or sentiment as aspects of the self was more widely recognized. At the same time, technological change and marketing strategy led to the vast expansion of the photographic industry. As a tool for the packaging of personality, the camera both authenticated and invaded the realm of private feeling. As a result, photography was "loaded" with meaning in late Victorian culture and provoked both intense fascination and intense discomfort. Initially, the judiciary in New York was divided, and debated the wisdom of providing legal protection for feelings, absent a coincident invasion of some recognized property right. Privacy was recognized only as a social right, a matter of bourgeois propriety and morals, but did not constitute a distinct legal interest. However, as the problem of exposure was exacerbated by the seemingly unlimited advances in photographic technology, by the broad

market in photographs, and by the widespread use of photographs in advertisements, those suffering under the outrages committed by amateur photographers increasingly demanded relief from the courts. When the New York Court of Appeals announced that there was no legal right to privacy, popular reaction led quickly to legislation designed to confirm the existence of the right and afford it limited protection.

NOTES

1. See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965), announcing that the First, Third, Fourth, Fifth and Ninth Amendments "have penumbras, formed by emanations from those guarantees," which include the right of privacy.

2. Some scholars have argued that the right of privacy existed in the United States as early as the colonial era. See David H. Flaherty, *Privacy in Colonial New England* (Charlottesville, 1972). For a convincing refutation of Flaherty's argument, see Richard C. Gossweiler, "The Right of Privacy: Misuse of History" (Ph.D. diss., Ohio State University, 1978). One scholar has argued that privacy is a biological need which must be protected in all societies, albeit in ways which may be inscrutable to modern sensibilities. See Alan F. Westin, *Privacy and Freedom* (New York, 1967). See generally, Philip J. Greven, Jr., *The Protestant Temperament: Patterns of Child-Rearing, Religious Experience and the Self in Early America* (New York, 1977); and John C. Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (New York, 1970).

3. See, for example, Harry Kalven, Jr., "Privacy in Tort Law—Were Warren and Brandeis Wrong?" *Law and Contemporary Problems* 31 (Spring 1966): 326; Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," *New York University Law Review* 39 (Dec. 1964): 962; William L. Prosser, "Privacy," *California Law Review* 48 (Aug. 1960): 383; Roscoe Pound, "Interests of Personality," *Harvard Law Review* 28 (Feb. 1915): 343; Samuel H. Hofstadter, *The Development of the Right of Privacy in New York* (New York, 1954); Flaherty, *Privacy in Colonial New England* (Charlottesville, 1972); Westin, *Privacy and Freedom* (New York, 1967); Adam C. Breckenridge, *The Right to Privacy* (Lincoln, 1970); Arthur R. Miller, *The Assault on Privacy* (Ann Arbor, 1971); Don R. Pember, *Privacy and the Press* (Seattle, 1972); John Curtis Raines, *Attack on Privacy* (Valley Forge, 1974); John A. Rohr, "Privacy: Law and Values," *Thought* 49 (Dec. 1974): 353; Note, "The Right to Privacy in Nineteenth Century America," *Harvard Law Review* 94 (June 1981): 1892; Noel C. Stevenson, "Names and the Right of Privacy," *Names* 32 (June 1984): 170.

4. See, for example, Bloustein, "Privacy As An Aspect of Human Dignity,"; Prosser, "Privacy,"; Pound, "Interests of Personality."

5. See, for example, Note, "The Right to Privacy in Nineteenth Century America," and sources cited therein.

6. An amateur photographer was defined at the time as one "who [did] not advertise,

invite custom, or rely upon the art as a livelihood." It was understood that a photographer who accepted some payment for his or her work did not necessarily lose the status of an amateur. A professional photographer was "[a]nyone who gets his living by the practice of photography; not necessarily anyone who accepts remuneration for photographic work." Bernard E. Jones, ed., *Encyclopedia of Photography* (London, 1911), republished as *The Encyclopedia of Early Photography* (London, 1981), 22, 442. See also Grace Sieberling, *Amateurs, Photography, and the Mid-Victorian Imagination* (Chicago, 1986), 113; William Innes Homer, *Alfred Stieglitz and the Photo-Secession* (Boston, 1983), 31; and *Amateur Photographer*, 13 Mar. 1885, 358; *ibid.*, 20 Mar. 1885, 379.

7. Up to this time, legal authorities had paid only the most ordinary attention to photography. Photographs had been admissible in evidence for various purposes since at least 1866. *Archer v. New York, N.H. & H.R. Co.*, 106 N.Y. 589, 13 N.E. 318 (1887); *Cozzens v. Higgins*, 42 N.Y. 206 (1866). They were copyrightable under federal law, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Contracts concerning the production and sale of photographs were generally enforceable at common law. *Cortiss v. E. W. Walker Co.*, 57 Fed 434 (C.C.D.Mass. 1893); *Moore v. Rugg*, 44 Minn. 28, 46 N.W. 141 (1890).

8. William L. Prosser, *Law of Torts*, 4th ed. (Minneapolis, 1971), 804-14.

9. Modern legal doctrine holds that a person's right of privacy may be invaded in four distinct ways: (1) by appropriation of the plaintiff's picture or name for defendant's commercial advantage; (2) by intrusion into the plaintiff's seclusion or affairs; (3) by publication of facts in a manner which places the plaintiff in a false light; and (4) by publication of private facts about the plaintiff. American Law Institute, *Restatement of the Law (2d), Torts*, (adopted 19 May 1977 St. Paul, 1979), sec. 652A through 652I; Prosser, *Law of Torts*, 804-14; Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts*, 2d ed. (Boston, 1986), 633-35; G. Edward White, *Tort Law in America: An Intellectual History* (New York, 1985), 173-76.

10. T. J. Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880-1920* (New York, 1983), chap. 1; Karen Halttunen, *Confidence Men and Painted Women: A Study of Middle-class Culture in America, 1830-1870* (New Haven, 1982), especially chaps. 2 and 6.

11. Warren I. Susman, "'Personality' and Twentieth Century Culture," in *Culture as History: The Transformation of American Society in the Twentieth Century* (New York, 1984), 271-85.

12. *Ibid.*, 281. See Susman, "Culture Heroes: Ford, Barton, Ruth," in *Culture as History*, 122-49, noting that celebrities in the early twentieth century were possessed of "that indescribable asset known as color, personality, crowd appeal, or whatever you may care to call it," 142, quoting the sportswriter Grantland Rice.

13. E. L. Godkin, "The Rights of the Citizen: To His Own Reputation," *Scribner's Magazine* 8 (July 1890): 65.

14. *Ibid.*, 65, n. 8.

15. *Ibid.*, 65, 67.

16. Henry P. Willis, *Etiquette and the Usages of Society* (New York, 1863), 40; see Halttunen, *Confidence Men and Painted Women*, chap. 4.

17. See, for example, *Chase v. Western Union Telegraph Co.*, 44 Fed. 554 (C.C.N.D.Ga. 1890); *Wilcox v. Richmond & D. R. Co.*, 52 Fed. 264 (C.C.D.C. 1892); *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 57 N.W. 973 (1894); *Chicago R.I. & T. Railway Co. v. Hitt*, 31 S.W. 1084 (Tex. Civ. App. 1895); *Chapman v. Western Union Tel. Co.*, 88 Ga. 763 (1892).

18. Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law*

Review 4 (Dec. 1890): 193. Godkin reiterated his position in response to this article, in a piece entitled "The Right to Privacy," *The Nation* 51 (25 Dec. 1890): 496-97.

19. "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual . . ." Warren and Brandeis, "The Right to Privacy," 196. See Richard Sennett, *The Fall of Public Man* (New York, 1974).

20. Warren and Brandeis, "The Right to Privacy," 195.

21. Quoted in Frank Luther Mott, *American Journalism, A History: 1690-1960*, 3d ed. (New York, 1962), 441, 442. Mott notes an increase of 222 percent in aggregate circulation of daily newspapers between 1870 and 1890, a period in which the national population increased only 63 percent. In this same period, however, prepaid subscriptions declined, indicating that, while many more people were reading newspapers, they were, for the most part, buying them on the street. Publishers were consequently forced to depend upon the immediate content appeal of the day's leading stories, and the immediate visual appeal of the particular edition, in order to ensure sales. See Mott, 508. See also Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York, 1978).

22. On the history of photography, see generally Robert Taft, *Photography and the American Scene: A Social History, 1839-1889* (New York, 1938); Josef Maria Eder, *History of Photography*, 4th ed., trans. Edward Epstean (New York, 1945); Beaumont Newhall, *The History of Photography from 1839 to the Present* (Boston, 1982); Brian Coe and Paul Gates, *The Snapshot Photograph: The Rise of Popular Photography, 1888-1939* (London, 1977); Reese V. Jenkins, "Technology and the Market: George Eastman and the Origins of Mass Amateur Photography," *Technology and Culture* 16 (Jan. 1975): 1-19.

23. Quoted in Jenkins, "Technology and the Market," 5.

24. Eastman invented the word "kodak" in 1888. The word had no meaning prior to its association with Eastman's camera. Eastman liked the word because it was "[t]erse, abrupt to the point of rudeness, literally bitten off by firm and unyielding consonants at both ends, it snaps like a camera shutter in your face. What more could one ask?" Quoted in Newhall, *The History of Photography*, 489.

25. See Jenkins, "Technology and the Market."

26. *New York Tribune*, 5 Sept. 1889, 6.

27. *New York Times*, 25 Feb. 1889, 8; 14 May 1889, 9; 20 May 1889, 5; 5 Aug. 1889, 2.

28. *Photographic Mosaics: An Annual Record of Photographic Progress* (Philadelphia, 1885), 115; *New York Times*, 3 Feb. 1890, 6; *New York Tribune*, 3 July 1892, 15.

29. *New York Tribune*, 3 July 1892, 15.

30. *Photographic Mosaics* (1884): 117.

31. *New York Times*, 15 July 1889, 8; 16 Sept. 1889, 2; 12 Aug. 1889, 8; 17 Feb. 1890, 3; *New York Tribune*, 5 Sept. 1889, 6; Coe and Gates, *The Snapshot Photograph*, 18; *Photographic Mosaics* (1891): 131; *Photographic Times and American Photographer* 18 (3 Aug. 1888): 370, describing subjects of the photographers' art as "victims of the deadly camera"; "The Deadly Kodak Girl," *Photographic Times* 21 (16 Oct. 1891): 518. The term "detective camera" was used to describe any camera which could be concealed on one's person and used surreptitiously to take photographs of the unwilling or unknowing. It does not properly refer to any particular brand or type of camera. *New York Tribune*, 6 July 1890, 14.

32. See, for example, *Photographic Mosaics* (1885): 136; *Photographic Mosaics* (1884): 109. There are scores of other examples in the photography journals of the era.

33. *New York Tribune*, 28 Nov. 1897, Supplement, 4.

34. See Peter Hales, *Silver Cities: The Photography of America Urbanization, 1839-1915* (Philadelphia, 1984), chap. 4, esp. 234.

35. For a discussion of "unreality" and "weightlessness" as metaphors for middle-class cultural anxiety in the period between 1880 and 1920, see T. J. Jackson Lears, "From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880-1930," in *The Culture of Consumption*, ed. Gary Fox and T. J. Jackson Lears (New York, 1983), 1-38. See also Lears, *No Place of Grace*. For a discussion of contemporary ideas about the passage of time, see Stephen Kern, *The Culture of Time and Space, 1880-1918* (Cambridge, Mass., 1983).

36. *New York Times*, 22 May 1897, Saturday Supplement, 4.

37. *Anthony's Photographic Bulletin* 23 (24 Dec. 1892): 739.

38. *New York Tribune*, 7 June 1896, 6; 21 Dec. 1897, 6; *The Photographic Times* 28 (Mar. 1896): 148.

39. Haltunen, *Confidence Men and Painted Women*, 83.

40. Haltunen, 83, quoting *Godey's Lady's Book* 62 (May 1861): 460-61.

41. *Photographic Mosaics* (1885): 66.

42. *Library of American Photography*, vol. 4, 1911 ed., 404; *Photographic Times and American Photographer* 18 (10 Feb. 1888): 70.

43. See *Wyatt v. Wanamaker*, 58 Misc. 429, 110 N.Y.S. 900 (Special Term, N.Y. County, 1908); *Wyatt v. McCreery*, 126 App. Div. 650, 111 N.Y.S. 86 (App. Div. 1st Dept. 1908).

44. *New York Tribune*, 18 Dec. 1898, Illustrated Supplement, 7. See *Photographic Times and American Photographer* 18 (6 July 1888): 321, quoting an "uptown dealer" as saying that "[t]he photograph trade has assumed immense proportions." *New York Times*, 16 Sept. 1889, 2; 3 Aug. 1889, 3; *Photographic Times and American Photographer* 18 (27 Apr. 1888): 199; 18 (23 Nov. 1888): 560; *Photographic Times* 28 (Jan. 1896): 54; *New York Times*, 5 Aug. 1889, 2; see also 12 Aug. 1889, 8; and 26 Aug. 1889, 8.

45. *Photographic Times and American Photographer* 18 (23 Nov. 1888): 560.

46. *New York Times*, 3 July 1902, 8.

47. *Ibid.*, 20 May 1889, 5.

48. *New York Tribune*, 5 Sept. 1889, 6; see *New York Times*, 27 Jan. 1889, 2.

49. *Photographic Times and American Photographer* 18 (24 Aug. 1888): 403.

50. *Photographic Times and American Photographer* 18 (20 Jan. 1888): 34.

51. H.R. 8151, 50th Congress, 1st Session, 1888.

52. *Manola v. Myers* (not officially reported), *New York Times*, 15 June 1890, 2; 18 June 1890, 3; 21 June 1890, 2.

53. *New York Tribune*, 25 Jan. 1891, 16.

54. *New York Times*, 15 July 1889, 8.

55. *Ibid.*

56. *New York Tribune*, 22 Aug. 1897, Illustrated Supplement, 5; *Wyatt v. McCreery; Wyatt v. Wanamaker*.

57. *Anthony's Photographic Bulletin* 21 (13 Dec. 1890): 754; 21 (9 Aug. 1890): 466.

58. *New York Times*, 26 Sept. 1888, 8.

59. *Brooklyn Daily Eagle*, 21 Sept. 1888, 6.

60. See, for example, Laws of New York, 1871, chap. 219, p. 448, which allowed a woman to sue anyone who imputed unchastity to her. This statute did not require any proof that the plaintiff had sustained pecuniary harm, nor did it require proof of harm to her feelings (cited in *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097, 1098 [1908]).

61. *Brooklyn Daily Eagle*, 21 Sept. 1888, 6.

62. The public authorities were not alone in their swift response. The fathers and brothers of many of the victims, as the custodians of female virtue in Victorian New York, descended in droves upon the precinct house and demanded, unsuccessfully, to see the pictures. The threat of violence against Brown was apparently quite serious. Shortly after his arrest, Brown jumped bail and presumably fled the state to avoid trial, imprisonment and, perhaps, harsher sanctions. *New York Times*, 25 Oct. 1888, 3; *Brooklyn Daily Eagle*, 24 Oct. 1888, 6.

63. *Harvard Law Review* 4 (Dec. 1890): 193, 195-6.

64. *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (N.Y. City Superior Court, Special Term, 1893).

65. *Murray v. The East Lithographic & Engraving Co.*, 8 Misc. 36 (N.Y. Common Pleas 1894), quoting with approval *Chapman v. Western Union Tel. Co.*

66. *Roberson v. Rochester Folding Box Co.*, 32 Misc. 344, 345 (Special Term, Monroe County, 1900).

67. *Ibid.*, 346.

68. 64 App. Div. 30, 33 (App. Div. 4th Dept. 1901).

69. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442, 446 (1902), quoting with approval from *Chapman v. Western Union Telegraph Co.* The three dissenting judges adopted, in essence, the argument in the Warren-Brandeis article, holding that established precedent did protect privacy and personality, and, in any event, that it was the proper function of the courts to tailor the law to fit a changing world.

70. *New York Times*, 3 July 1902, 8. The *New York Herald* also noted the Roberson decision with disapproval, but without extended analysis. "Why Your Face Is Not Your Own, as Told by a Court of Appeals Judge," *New York Herald*, 2 July 1902, 4.

71. *New York Times*, 23 Aug. 1902, 8.

72. Denis O'Brien, "The Right of Privacy," *Columbia Law Review* 2 (Nov. 1902): 437-48.

73. *New York Times*, 16 Nov. 1902, 6.

74. Laws of 1903, chap. 132, codified as sections 51 and 52 of the New York Civil Rights Law.

75. It is not at all remarkable that the right of privacy was limited, particularly in its earliest expressions, as all rights are limited in common law jurisprudence. However, the significance of the particular limitations found in this legislation is beyond the scope of the present discussion.

76. *Kunz v. Bosselman*, 131 App. Div. 288 (App. Div. 2d Dept. 1909).

77. *Wyatt v. McCreery*; *Rhodes v. Sperry & Hutchinson Co.*, 114 App. Div. 920, 100 N.Y.S. 1140 (App. Div. 2d Dept. 1906). For additional brief discussions of the act, see *Binns v. The Vitagraph Company of America*, 210 N.Y. 51 (1913); *Riddle v. McFadden*, 116 App. Div. 353 (App. Div. 1st Dept. 1906); 201 N.Y. 215 (1911).

78. *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908).

79. 220 U.S. 502, 55 L. Ed. 561 (1911).