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# Defamation and the Right of Privacy

JOHN W. WADE\*

*In this article Dean Wade discusses the scope of the tort of unwarranted invasion of the right of privacy, comparing and contrasting it with the tort of defamation. He observes that the action for invasion of the right of privacy may come to supplant the action for defamation and that this development should be welcomed by the courts and writers. Finally, he concludes that the whole law of privacy may someday become a part of the larger, more comprehensive tort of intentional infliction of mental suffering.*

## I. INTRODUCTION

The history of the two torts of defamation and unwarranted invasion of the right of privacy has been greatly different. Defamation developed over a period of many centuries, with the twin torts of libel and slander having completely separate origins and historical growth. Professor Street summarizes this history by declaring that there was "a perversion of evolutionary processes," with the result that there was produced "a rather heterogeneous pile which should normally have gone to form a consistent body of legal doctrine, but which on the contrary, comprises many disconnected fragments moving in a confused way under the impulse of different principles." He concludes that the verdict which must be reached regarding "this branch of the law" is that it was "marred in the making."<sup>1</sup> Efforts at judicial and legislative reform have not proved very successful.<sup>2</sup>

The right of privacy, on the other hand, is of quite recent development. Its origin is the remarkable law review article of Messrs. Warren and Brandeis, published in 1890,<sup>3</sup> and the first decision of a court of last resort recognizing the right was in the current century.<sup>4</sup> At the start the judicial

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1. I STREET, FOUNDATIONS OF LEGAL LIABILITY 273 (1960). For treatment of the history of defamation see Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Green, *Slander and Libel* 6 AM. L. REV. 593 (1872); Lovell, *The "Reception" of Defamation by the Common Law*, p. 1051 *supra*; Veeder, *History and Theory of the Law of Defamation* I, 3 COLUM. L. REV. 546 (1903); Veeder, *History and Theory of the Law of Defamation* II, 4 COLUM. L. REV. 33 (1904).

2. The most ambitious attempt at legislative reform is the English Defamation Act, 1952, 15 & 16 GEO. 6 & 1 ELIZ. 2, c. 66. See REPORT OF THE COMMITTEE ON THE LAW OF DEFAMATION, Cmd. 7536 (1948).

3. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Slightly earlier, Judge Cooley had spoken of the "right to be let alone." COOLEY, TORTS 29 (2d ed. 1888).

4. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

reception to the idea was mixed, and even the courts which espoused the theory felt compelled to write a long "apologia" for adopting it.<sup>5</sup> But the doctrine has been well established in the United States<sup>6</sup> for a number of years now, and the attributes and characteristics of the tort are taking clear shape.<sup>7</sup>

The difference between the two torts is now well known. As the Massachusetts court put it, "The fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation."<sup>8</sup> But there have been overlappings from the beginning. In the first place, though defamation seeks to protect reputation and though mental distress cannot supply the requirement of special damages where it is required in order to impose liability,<sup>9</sup> it has consistently been held that when an action lies for defamation, the plaintiff can recover for emotional distress and resulting bodily harm.<sup>10</sup> In the second place, the law of defamation has been expanded to include certain situations where there was no real injury to the plaintiff's reputation but he was held up to ridicule or otherwise subjected to mental disturbance.<sup>11</sup>

5. "In recent years the courts which have recognized the right to privacy for the first time have not felt obliged to indulge in lengthy apologia. This is the final stage in the acceptance of any new doctrine." Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 536 (1941). Note that this was written almost a dozen years ago, and there have been substantial developments since that time.

6. Great Britain has never given legal recognition to the right of privacy. For conflicting views, see Goodhart, *The Law of Defamation and Freedom of Speech*, 13 CURRENT LEGAL PROBLEMS 135, 145-46 (1960); Winfield, *Privacy*, 47 L.Q. REV. 23 (1931). See also Neill, *The Protection of Privacy*, 25 MODERN L. REV. 393 (1962). As to the continent, see Gutteridge & Walton, *The Comparative Law of the Right of Privacy*, 47 L.Q. REV. 203 (1931).

7. There is no need to cite all of the articles which have discussed the tort. The best single treatment is Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); see also PROSSER, TORTS ch. 20 (2d ed. 1955). Among other leading treatments are Dickler, *The Right of Privacy, A Proposed Redefinition*, 70 U.S.L. REV. 435 (1936); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1948); Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW. 499 (1952). The most recent treatment is Reed, *Privacy: A Brief Commentary*, 1962 INS. L.J. 618. See ERNST & SCHWARTZ, *PRIVACY: THE RIGHT TO BE LET ALONE* (1962) for a new book popularizing the subject and written for a lay audience.

8. *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753, 755 (1940).

9. The leading case is *Terwilliger v. Wands*, 17 N.Y. 54 (1858); see also *Scott v. Harrison*, 215 N.C. 427, 2 S.E.2d 1 (1939); *Allsop v. Allsop*, 5 H. & N. 534, 157 Eng. Rep. 1292 (Ex. 1860).

10. See, *Adams v. Smith*, 58 Ill. 417 (1871); GATLEY, *LIBEL AND SLANDER* § 1148 (5th ed. 1960); NEWELL, *SLANDER AND LIBEL* § 725 (4th ed. 1924).

11. Several of these cases are collected in a quotation from *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753, 754 (1940): "Modern cases have made it possible to reach certain indecent violations of privacy by means of the law of libel, on the theory that any writing is a libel that discredits the plaintiff in the minds

From the other side, there has been a group of cases in which recovery has been permitted for invasion of the right of privacy where the defendant's statements gave a false impression concerning the plaintiff, and where his reputation may well have been injured by the communication.<sup>12</sup> The number of these cases has increased so greatly in recent years that they have come to be classified as one of the separate torts in the "complex of four" which constitute the law of privacy,<sup>13</sup> and the suggestion has been made that the law of privacy may be "capable of swallowing up and engulfing the whole law of public defamation."<sup>14</sup>

of any considerable and respectable class in the community though no wrongdoing or bad character is imputed to him. *Ingalls v. Hastings & Sons Publishing Co.*, [304] Mass. [31], 22 N.E.2d 657 [1939]. Accordingly, it may be found libelous to publish a photograph which represents the plaintiff as being ridiculously though unbelievably malformed (*Burton v. Crowell Publishing Co.*, 2 Cir., 82 F.2d 154 [1936]); to exhibit a wax figure representing the plaintiff, who had been acquitted of murder by shooting, with a gun near him (*Monson v. Tussauds, Ltd.* [1894] 1 Q.B. 671; to publish of a woman that she had been ravished (*Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* 50 T.L.R. 581 [C.A. 1934]); to publish of a man that his sister had been arrested for larceny (*Merrill v. Post Publishing Co.*, 197 Mass. 185, 190, 83 N.E. 419 [1908]); to impute to a woman the publishing of the details of her love affair (*Karjavaineau v. MacFadden Publications, Inc.*, [305] Mass. [573], 26 N.E.2d 538 [1940]); to impute to a dramatic actress an appearance in burlesque in scanty costume (*Louka v. Park Entertainments, Inc.*, 294 Mass. 268, 1 N.E.2d 41 [1936]); to impute to a woman the giving of a testimonial for a brand of whiskey (*Peck v. Tribune Co.*, 214 U.S. 185; 29 S. Ct. 554; 53 L. Ed. 960, 16 Ann. Cas. 1075 [1909]); to impute to a prominent man the giving of a testimonial for a patent medicine. (*Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364, 34 L.R.A., N.S., 1137, 135 Am. St. Rep. 417 [1909]); or to impute to an amateur athlete consent to the use of his name and likeness in advertising chocolate. *Tolley v. J.S. Fry & Sons, Ltd.* [1931] A.C. 333." Other cases which might be added are *Zbyszko v. New York American*, 228 App. Div. 277, 239 N.Y. Supp. 411 (1930) (putting wrestler's picture next to that of a gorilla in article on evolution); *Dall v. Time, Inc.*, 252 App. Div. 636, 300 N.Y. Supp. 680 (1937) (fictional statement perfectly apparent if whole item was read). See GREEN, MALONE, PEDRICK & RAHL, *CASES ON INJURIES TO RELATIONS* 373-76 (1959).

Reference may be made also to two unpublished English cases described in DEAN, *HATRED, RIDICULE OR CONTEMPT* ch. 14 (1953): *Plumb v. Jeyes Sanitary Compound Co.* (1937) (policeman's picture used to advertise deodorizing "fluid foot-bath"); *Honeysett v. News Chronicle, Ltd.* (1935) ("doctored" composite picture of plaintiff on bicycle used in article on "Unchaperoned Holidays").

In most, if not all, of these cases, action for invasion of the right of privacy would have more accurately met the injury to the plaintiff and produced less distortion to existing rules of law.

12. These cases are collected and discussed in the next section of this article.

13. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Dean Prosser describes these four torts as follows: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Several courts have already quoted this classification. See, e.g., *Norris v. Moskin Stores, Inc.*, 277 Ala. 174, 132 So. 2d 321 (1961); *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (Dist. Ct. App. 1961); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla. 1961); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961); *Yoder v. Smith*, 112 N.W. 2d 862 (Iowa 1962).

14. Prosser, *supra* note 13, at 401.

A careful study of the relationship between the two torts is thus clearly warranted.<sup>15</sup> This article is an attempt to present such a study, with particular emphasis upon the privacy cases in order to permit conclusions about developments in the future.

## II. PRIVACY CASES INVOLVING FALSE STATEMENTS

The first privacy case giving express legal recognition to the right of privacy belongs in the classification of privacy cases involving the creation of a false impression regarding the plaintiff as much as in the category involving appropriation of the plaintiff's name for commercial purposes. In *Pavesich v. New England Life Insurance Co.*,<sup>16</sup> defendant published a newspaper advertisement carrying two pictures with the legends, "Do it now. The man who did," and "Do it while you can. The man who didn't." The picture above the first legend was that of the plaintiff, an artist who had no insurance policy with the defendant and had not given consent to the use of his picture. The Georgia court held that this was both an unwarranted invasion of the right of privacy and a libel. Its reasoning as to libel: plaintiff had alleged that his friends knew that he had no insurance with defendant; when they saw him claim in the ad that he had they would assume that he was lying, either gratuitously or for money, and in either event he would be discredited and held in contempt.

The overlap is made somewhat more vivid by a Kentucky case four years later. In *Foster-Milburn Co. v. Chinn*,<sup>17</sup> defendant company, which produced Doan's Kidney Pills, published a "Directory" containing a picture of plaintiff, a state senator, with an endorsement of the pills and a statement that they had eliminated his trouble. Apparently a practical joker had sent the letter and picture to the defendant, and it had published them without checking. Plaintiff brought a libel action, but the court discussed the right of privacy at length and cited and quoted the *Pavesich* case on the subject. The court held that it was proper for plaintiff to show that

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15. Aside from Dean Prosser's treatment, the relationship between the two torts has been considered in the following: Powsner, *Libel in Limbo: Another Conquest for the Right of Privacy?*, 30 L.A. BAR BULL. 365 (1955); Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 So. CAL. L. REV. 280 (1957); Comment, 50 CALIF. L. REV. 357 (1962). See also Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 KY. L.J. [No. 8] 3 (1916).

Even as the right of privacy was first beginning to develop some treatment was given the relationship between the two torts. See Adams, *The Right of Privacy, and Its Relation to the Law of Libel*, 39 AM. L. REV. 37 (1905). And see 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 319 (1906): "It is supposed that if such a right [of privacy] is to be born it must come in some way from the law of libel. Those who contend for a right of personal security broad enough to include a general right 'to be let alone' would not perhaps admit this, but unquestionably the law of libel furnishes a nearer approach to the indicated goal than any other branch of tort."

16. 122 Ga. 190, 50 S.E. 68 (1905).

17. 134 Ky. 424, 120 S.W. 364 (1909).

he had been ridiculed and laughed at by his friends and that there was a scale of prices for endorsements of this nature, in order to demonstrate the implication that he had sold his endorsement. The case is treated as the one establishing the legal right of privacy in Kentucky, and is cited by later Kentucky cases as the origin of the doctrine.

There have been a number of other right-of-privacy cases where recovery was permitted for a wrongful use of plaintiff's alleged endorsement to advertise a product. In *Flake v. Greensboro News Co.*,<sup>18</sup> for example, a young lady whose picture was placed in an ad by mistake was identified as "Mlle. Sally Payne, exotic red haired Venus" from the "Folies de Paree," endorsing certain bread; the court allowed an action for invasion of the right of privacy though holding that a count for libel would not lie. Again, in *Fairfield v. American Photocopy Equipment Co.*,<sup>19</sup> plaintiff was identified in an advertisement as one of many "leading law firms" who were satisfied users of a copying machine, when he had found it unsatisfactory and returned it; the court held that an action for invasion of the right of privacy was appropriate, explaining that the "injury is mental and subjective" and that plaintiff should be allowed to testify as to calls from other lawyers and the mental anguish they caused. And again, in *Munden v. Harris*<sup>20</sup> an advertisement carried a picture of plaintiff, a 5-year-old boy, and had him saying, "Papa is going to buy Mama an Elgin watch for a present and some one (I mustn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money if you get it from Harris-Goar Co." The court held that counts might lie for invasion of the right of privacy and for libel. It explained that the statement had plaintiff speaking publicly about private affairs of his parents and his sister and would subject him to the "vexation and humiliation of ridicule" through the teasing of his playmates.<sup>21</sup>

Somewhat similar is a group of cases where defendant has utilized plaintiff's name in a fashion where it might be treated as an appropriation but where the major injury lies in the false implication regarding the plaintiff which is derived from the use. Perhaps the earliest of these cases is that of *Lord Byron v. Johnston*,<sup>22</sup> in which Lord Byron was able to enjoin

18. 212 N.C. 780, 195 S.E. 55 (1938).

19. 138 Cal. App. 2d 82, 291 P.2d 194 (Dist. Ct. App. 1955).

20. 153 Mo. App. 652, 134 S.W. 1076 (1911).

21. See also *Manger v. Kree Institute of Electrolysis, Inc.*, 233 F.2d 5 (2d Cir. 1956) (contest essay changed to make it appear to be an endorsement). In *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 18 N.Y. Supp. 240 (Sup. Ct. 1891), plaintiff, a prominent British physician, was granted an injunction against the use of false letters from him endorsing and recommending "Soden Mineral Pastilles" for sore throat, catarrh, etc. Relief was denied under similar conditions in *Dockrell v. Dougall*, 78 L.T. 840 (Q.B. 1898), when the jury found the purported statement was not libelous.

22. 2 Mer. 29, 35 Eng. Rep. 851 (Ch. 1816).

defendant from publishing spurious poems under his name. Similar is *D'Altomonte v. New York Herald Co.*,<sup>23</sup> where a ridiculous story on "stopping a Congo cannibal feast," written in the first person and highly self-praising, was attributed to a reputable explorer.<sup>24</sup> Plaintiff's name was wrongfully signed to a telegram to the governor asking him to veto a bill controlling optical practice in *Hinish v. Meier & Frank Co.*<sup>25</sup> In holding that this constituted an unwarranted invasion of the right of privacy the court called attention to the fact that as a federal employee he was under the restrictions of the Hatch Act. In *Marks v. Jaffa*<sup>26</sup> defendant placed the name of plaintiff, a well-known actor (also a law student) in a popularity contest with another prominent actor; an injunction was granted.<sup>27</sup>

A false attribution of belief was involved in *Goldberg v. Ideal Publishing Corp.*<sup>28</sup> A "romance" magazine published an article in which a minister, a priest, and a rabbi were asked certain sex questions and had their answers published. Plaintiff, the rabbi, brought action alleging that he had had no such interview and that the sex views imputed to him were not his. A motion to dismiss the count based on the New York right-of-privacy statute was denied.<sup>29</sup>

In certain other cases, the use of the name is less significant than false statements which were made in connection with the use of the name and which created a false impression which was embarrassing and offensive. Thus, in *Goodyear Tire & Rubber Co. v. Vandergriff*,<sup>30</sup> defendant tire company had an employee call four other tire companies, falsely pretending to be the plaintiff, asking for confidential prices on tires. Another employee compared the prices with defendant's, and told one of the tire companies that he did not see how it could sell at that price. When it asked how he obtained the price, he said that defendant had given it to them. A demurrer to the complaint was held properly overruled.<sup>31</sup> In *Hamilton*

23. 154 App. Div. 453, 139 N.Y. Supp. 200 (1913).

24. The decision that action would lie both for libel and for violation of the New York Civil Rights Statute was reversed as to the statute by a memorandum decision in 208 N.Y. 596, 102 N.E. 1101 (1913). Cf. *Martin v. The Picayune*, 115 La. 979, 40 So. 376 (1906), where it was held to be libelous to publish a purportedly self-narrated account of a marvelous cure by plaintiff physician.

25. 166 Ore. 482, 113 P.2d 438 (1941).

26. 6 Misc. 290, 26 N.Y. Supp. 908 (N.Y. City Ct. 1893).

27. Like the case of *Mackenzie v. Soden Mineral Springs Co.*, *supra* note 21, this case was decided prior to the New York Right of Privacy Act, and also prior to *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), which denied the existence of a common law right of privacy in New York.

28. 210 N.Y.S.2d 928 (Sup. Ct. 1960). Cf. *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924) (candidate for national office entitled to relief against state "party" using his name, when it was not in accord with his views).

29. The decision in this case was anticipated by 44 years in an article by Dean Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 Ky. L.J. [No. 8] 3 (1916).

30. 52 Ga. App. 662, 184 S.E. 452 (1936).

31. "[P]lacing the plaintiff in the position of having procured confidential prices on

*v. Lumbermen's Mutual Casualty Co.*<sup>32</sup> plaintiff, an engaged man living in Baton Rouge, was seriously hurt in an accident and unable to give an account of it. Defendant, his insurance company, without his knowledge, put an ad in the paper with his name and a New Orleans address and telephone number, asking witnesses to the accident to get in touch with him. When persons called the listed number, a woman employee of defendant answered and claimed to be the plaintiff's wife. A jury verdict for \$12,500 was reduced to \$3,000.

Even more difficult to explain on the appropriation theory is *Kerby v. Hal Roach Studios, Inc.*<sup>33</sup> As a publicity stunt, advertising one of the "Topper" movies, defendant sent to 1000 men a tinted perfumed letter reading:

Dearest: Don't breathe it to a soul, but I'm back in Los Angeles and more curious than ever to see you. Remember how I cut up about a year ago? Well, I'm raring to go again, and believe me I'm in the mood for fun. Let's renew our acquaintanceship and I promise you an evening you won't forget. Meet me in front of Warner's Downtown Theatre at 7th and Hill on Thursday. Just look for a girl with a gleam in her eye, a smile on her lips, and mischief on her mind! Fondly, your ectoplasmic playmate, Marion Kerby.

Plaintiff had the same name, as could have been discovered from the telephone directory. She was held to have an action for the mental suffering resulting from invasion of her right of privacy.

A similar use of the mail to create a false implication of sexual misconduct was involved in *Freeman v. Busch Jewelry Co.*,<sup>34</sup> where the store, seeking to collect a debt, sent plaintiff a postcard reading: "Dear Milford, I'll be in La Grange next week. Call me at 9693. Love, Mary." Plaintiff's wife saw it and marital difficulties resulted. The court held that a tort was committed and it was not necessary to label it "as one arising from violation of the right of privacy, as plaintiff contends . . . or, as seems more likely, to this court, as arising from publication of a libel."<sup>35</sup>

There is a group of about a dozen cases in which the plaintiff was allowed to recover for an invasion of his right of privacy when the defendant carried his picture with a published item—usually an article—which gave a false impression of the plaintiff's character. An example is

tires, and then betraying the confidence imposed in him by giving the quoted prices to competitors, had a 'tendency to bring the plaintiff into contempt or ridicule' and 'entitles him to recover, without proof of special damage.' 184 S.E. at 454.

32. 82 So. 2d 61 (La. App. 1955).

33. 53 Cal. App. 2d 207, 127 P.2d 577 (Dist. Ct. App. 1942).

34. 98 F. Supp. 963 (N.D. Ga. 1951).

35. *Id.* at 966. Cf. *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961) (phone calls to similar effect—recovery); *Magouirk v. Western Union Tel. Co.*, 79 Miss. 632, 31 So. 206 (1902) (false telegram purporting to come from plaintiff to a man—recovery). *But cf.* *Perry v. Moskin Stores, Inc.*, 249 S.W.2d 812 (Ky. 1952) (postcard, "Please call WAbash 1492 and ask for Carolyn" held to be acceptable means of advertising). See comment on the last case in 1953 U.C.L.A. INTRA. L. REV. 75.



*Peay v. Curtis Publishing Co.*<sup>36</sup> The *Saturday Evening Post* contained an article on Washington taxi drivers entitled "Never Give a Passenger a Break." It was a "caustic, merciless diatribe," depicting them as "ill-mannered, brazen, and contemptuous of their patrons . . . dishonest and cheating their customers when opportunity arises." As merely one of the "defamed" group, plaintiff would not have been able to maintain an action, but her picture was used, and this was held to identify her sufficiently, though her name was not used. She was permitted to recover for both libel and invasion of the right of privacy. An article about waiters, with plaintiff's picture, produced the same result in *Valerni v. Hearst Magazines, Inc.*<sup>37</sup> So also with an article in *Front Page Detective* entitled "Gang Boy,"<sup>38</sup> and an article in *Tan* entitled "Man Hungry."<sup>39</sup> The first carried a picture of several boys talking in front of a building, and the second a picture of a professional model; neither had any connection with the article.

Two similar cases make clear that it is not the publication of the picture, but the false implication from its use with the article which gives rise to the cause of action. In *Leverton v. Curtis Publishing Co.*,<sup>40</sup> plaintiff, as a 10-year-old child, had been involved in a street accident in Birmingham. A photographer took a very dramatic action picture of her being lifted to her feet by a bystander, and the picture was widely used in newspapers over the country. Twenty months later, the defendant published in the *Saturday Evening Post* an article, "They Ask to Be Killed," about children and traffic hazards. The picture was included, next to a box saying, "Do you invite massacre by your own carelessness? Here's how thousands have committed suicide by scorning laws that were passed to keep them alive." Recovery was allowed.<sup>41</sup> In *Gill v. Curtis Publishing Co.*,<sup>42</sup> plaintiff's picture was used in an article entitled "Love" in the

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36. 78 F. Supp. 305 (D.D.C. 1948).

37. 99 N.Y.S.2d 866 (Sup. Ct. 1949) (New York statute).

38. *Metzger v. Dell Publishing Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955).

39. *Martin v. Johnson Publishing Co.*, 157 N.Y.S.2d 409 (Sup. Ct. 1956).

40. 192 F.2d 974 (3d Cir. 1951).

41. The court explained that while the accident was newsworthy, this use of the picture had nothing to do with the accident. "It related to the general subject of traffic accidents and pedestrian carelessness. Yet the facts, so far as we know them in this case, show that the little girl, herself, was at the time of her accident not careless and the motorist was. The picture is used in connection with several headings tending to say that this plaintiff narrowly escaped death because she was careless of her own safety. That is not libelous; a count for defamation was dropped out in the course of the trial. But we are not talking now about liability for defamation. We are talking about the privilege to invade her interest in being left alone . . . . The sum total of all this is that this particular plaintiff, the legitimate subject for publicity for one particular accident, now becomes a pictorial, frightful example of pedestrian carelessness. This, we think, exceed the bounds of privilege." *Id.* at 978.

42. 38 Cal. 2d 273, 239 P.2d 630 (1952).

*Ladies Home Journal*. Plaintiffs, husband and wife, were seated on stools at the Farmer's Market in San Francisco, with the husband having his arm around his wife and their cheeks touching. The court held in a different case that there was no invasion of privacy in taking and publishing this picture, since the plaintiff's took this voluntary pose in public and there was nothing uncomplimentary or discreditable in the photograph itself.<sup>43</sup> But underneath the picture in the *Journal* article on "Love" was the caption, "Publicized as glamorous, desirable, 'love at first sight' is a bad risk." This kind of love was classified as "100% sex attraction" and the "wrong" kind. The court found that the implication given by the article was that the plaintiffs were "persons whose only interest in each other is sex, a characterization that may be said to impinge seriously upon their sensibilities."<sup>44</sup>

In two cases, pictures were "doctored" or tampered with for advertisement purposes. In *Sinclair v. Postal Telegraph & Cable Co.*,<sup>45</sup> the composite picture showed a professional actor in the act of notifying his "enthusiastic admirers" by telegraph on a telegram of defendant company that a motion picture of his was to be shown at a certain theater. The court agreed that this presented him in an "undignified light." In *Russell v. Marboro Books*<sup>46</sup> the picture of plaintiff, a professional model, was made into a bawdy composite picture advertising bedsheets. The court held that action might lie both for violation of the New York statute and for libel.<sup>47</sup>

In several cases it is indicated that a plaintiff's right of privacy is violated when his photograph is kept in a police rogue's gallery when he has been found not guilty of any criminal act.<sup>48</sup>

It is now well established that a newspaper does not commit an unwarranted invasion of a person's right of privacy when it reports in a straightforward fashion a newsworthy story; and the same is true of articles of educational or informational value and of articles dealing with

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43. *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953) (Carter, J., dissenting).

44. 239 P.2d at 634.

45. 72 N.Y.S.2d 841 (Sup. Ct. 1935).

46. 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959).

47. Two other "picture cases" are appropriately cited here, though there is nothing unusual in regard to them. Both involved stories in true detective magazines. *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958); *Thompson v. Close-up, Inc.*, 277 App. Div. 848, 98 N.Y.S.2d 300 (1950). See also *Semler v. Ultem Publications, Inc.*, 170 Misc. 551, 9 N.Y.S.2d 319 (City Ct. N.Y. 1938) (picture of infant model, clad in negligee, put in magazine, *Silk Stocking Stories*).

48. *Izkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905). See also *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946); *Downs v. Swann*, 111 Md. 53, 73 Atl. 653 (1909); *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947).

public affairs of "public figures."<sup>49</sup> A substantial number of cases have indicated, however, that a cause of action does arise when the story is dressed up in a sensational fashion and is "fictionalized"—in other words, when a false impression is created regarding the plaintiff. Thus in *Garner v. Triangle Publications, Inc.*<sup>50</sup> where plaintiffs were initially convicted of murder of the husband of one of the plaintiffs and the conviction was later reversed, defendants' magazines carried numerous stories about it. In denying defendants' motion for a summary judgment, the court said that there would be no liability for giving of news or information but that if defendants

enlarged upon the facts so as to go beyond the bounds of propriety and decency, they should not be cloaked with and shielded by the public interest in dissemination of "information." . . . It is no answer to say, as defendants do, that such interests, if they exist, can be adequately compensated for under the libel laws. If the articles violate rights of privacy, plaintiffs may bring their action under the privacy laws also.<sup>51</sup>

In addition to detective magazines,<sup>52</sup> this approach has been applied to newspaper Sunday magazines,<sup>53</sup> films,<sup>54</sup> and television programs.<sup>55</sup> The extent to which there must be a variation from the true facts in order to give rise to a cause of action is not clear. A mere allegation that a story was fictionalized without setting out the parts which were false has been held subject to demurrer.<sup>56</sup> Minor variations of fact were held not to be significant or the basis for a cause of action when they appeared in a biography,<sup>57</sup> a movie magazine,<sup>58</sup> a comic book,<sup>59</sup> a newspaper column,<sup>60</sup>

49. The cases are very numerous. See generally Prosser, *Privacy*, 48 CALIF. L. REV. 383, 410-15 (1960).

50. 97 F. Supp. 546 (S.D.N.Y. 1951).

51. *Id.* at 550.

52. See *Hazlitt v. Fawcett Publication, Inc.*, 116 F. Supp. 538 (D. Conn. 1953) (murder trial); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945).

53. *Sutton v. Hearst*, 277 App. Div. 155, 98 N.Y.S.2d 233 (1950), *motion for leave to appeal denied*, 277 App. Div. 873, 98 N.Y.S.2d 589 (1950) ("sensationalized version of facts embellished with matters drawn from the author's imagination"—deceased turret gunner's bequest of "one perfect rose" a week to plaintiff); *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959) ("Marriage for spite"—"though the facts of the article were admittedly true, the author embellished and fictionalized them").

54. *Binns v. Vitagraph Co. of America*, 210 N.Y. 51, 103 N.E. 1108 (1913) (film of wireless operator in wreck at sea); see *Blumenthal v. Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y. Supp. 800 (1932), *aff'd mem.*, 261 N.Y. 504, 185 N.E. 713 (1933), as explained in *Sarat Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y. Supp. 382, 388 (Sup. Ct. 1937).

55. *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958) (emergency plane landing at sea).

56. *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (Dist. Ct. App. 1951) (Marine Corps Medal of Honor winner, portrayed in the movie, "The Sands of Iwo Jima").

57. *Koussevitzky v. Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779

and a regular newspaper item.<sup>61</sup> On the other hand, in *Strickler v. National Broadcasting Co.*,<sup>62</sup> involving a television film showing the part of a naval commander in an emergency commercial plane landing at sea, where the variations from truth were minor,<sup>63</sup> the court denied a motion to dismiss, holding that the question of whether the false items would be offensive to a person of ordinary sensibilities was a question of fact for the jury.<sup>64</sup>

Another group of cases holds that plaintiff's right of privacy may be invaded by false statements even though they are oral and therefore to be likened to slander rather than libel. In their original article Warren and Brandeis had suggested that oral remarks should not be treated as in-

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(Sup. Ct. 1947), *aff'd*, 272 App. Div. 759, 69 N.Y.S.2d 432 (1947) (biography of symphony conductor "not fictional" and not repugnant to a reasonable sense of decency).

58. *Carlisle v. Fawcett Publications, Inc.*, 20 Cal. Rptr. 405 (Dist. Ct. App. 1962) (story about Janet Leigh; her first marriage to plaintiff set a year earlier to make her 14 instead of 15—no revelations of "intimate details which would tend to outrage public decency").

59. *Molony v. Boy Comics Publishers, Inc.*, 277 App. Div. 166, 98 N.Y.S.2d 119 (1950) (plaintiff's part in aiding the victims of the Empire State Building airplane disaster—"minor discrepancies").

60. *Middleton v. News Syndicate Co.*, 162 Misc. 516, 295 N.Y. Supp. 120 (Sup. Ct. 1937) (column, "The Inquiring Reporter," identified an unemployed model as a hotel cigarette girl). See also *Callas v. Whisper, Inc.*, 198 Misc. 829, 101 N.Y.S.2d 532 (Sup. Ct. 1950), *aff'd mem.*, 278 App. Div. 974, 105 N.Y.S.2d 1001 (1951), *aff'd mem.*, 303 N.Y. 759, 103 N.E.2d 543 (1952) (picture of 19-year-old girl in night club). And see *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208, 213 Dist. Ct. App. 1961).

61. *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929). While plaintiff and her husband were walking down the street, two men assaulted and killed her husband. The newspaper item quoted her as saying she fought with the men and tried to kill them and that she would have revenge. Said the court: "We do not regard the language attributed to Mrs. Jones as sufficient to add anything to her cause of action. There was no intention to reflect on her. The account was intended to be complimentary. The language attributed to her was such as might have been used by any wife whose husband had been killed before her eyes. It would be going too far afield to hold her up to contempt, hatred, scorn, or ridicule by her friends and acquaintances, or the public in general." 18 S.W.2d at 973. Many of the other courts would disagree with the result in this case, which reflects the Kentucky court's often indicated reluctance to grant relief in this field.

See also *Reardon v. News-Journal Co.*, 169 A.2d 263 (Del. 1960), involving a newspaper item on the meeting of a Youth Services Commission where there was a minor error. The court distinguishes a "legitimate news article" from one where "the facts were so distorted and fictionalized that they did not constitute in the truest sense a newspaper article at all but rather a fictionalized article . . ." *Id.* at 267.

62. 167 F. Supp. 68 (S.D. Cal. 1958).

63. The film showed him out of uniform wearing a Hawaiian shirt, showed him smoking a pipe and cigarettes, failed to show the assistance he received and showed him in the act of praying.

64. In *Donahue v. Warner Bros. Pictures Distrib. Co.*, 2 Utah 2d 256, 272 P.2d 177 (1954), the Utah statute was construed not to apply to a fictional portrayal of a character in a biographical movie. Earlier, the federal court had construed it to apply. *Donahue v. Warner Bros. Pictures, Inc.*, 194 F.2d 6 (10th Cir. 1952).

vasion.<sup>65</sup> There have been several dicta to this effect, but with the exception of Kentucky cases,<sup>66</sup> the actual decisions have been otherwise.

In *Bennett v. Norban*,<sup>67</sup> the assistant manager of defendant self-service store, caught plaintiff, a customer, about twenty feet from the entrance as she was leaving the store, and in an angry fashion ordered her to take off her coat. When she did, he said, "What about your pockets?" and reached into the pockets of her dress. Finding nothing, he seized her purse, took everything out, looked in it, handed it back to her, mumbled something and ran back into the store. All this was in the presence of other persons. The court held that the trial court was wrong in sustaining preliminary objections to counts of slander and invasion of the right of privacy. It said that defendant's actions were "transitory gestures," so that slander was appropriate, rather than libel. And it added:

[T]he privacy of a presumably innocent woman is invaded by a character on the public highway that destroys her seclusion and subjects her to humiliation by suggesting that she is a felon . . . . She had every right to prefer the presumption of her innocence to its hostile demonstration.<sup>68</sup>

In *Linehan v. Linehan*,<sup>69</sup> jury verdicts for plaintiff on counts of slander and privacy were affirmed when the defendant, who had divorced her husband, made repeated statements that she was his only lawful wife and that plaintiff, his second wife, was cohabiting with him in sin.<sup>70</sup> In *Norris v. Moskin Stores, Inc.*,<sup>71</sup> defendant sought to collect an alleged debt by ar-

65. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890): "The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage . . . . The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether."

66. The leading case is *Pangallo v. Murphy*, 243 S.W.2d 496 (Ky. 1951). Plaintiff and her family had been renting two furnished rooms from defendant. While plaintiff was in the hospital, defendant removed all their personal belongings to a shed, went to the hospital and in the presence of others, told her he had removed them, saying: "You and your family are not fit persons to live in the house; you are filthy and dirty and the rooms were filthy and dirty and I didn't want you and your family in the house." Despite physical consequences, the court held there could be no recovery for slander or invasion of the right of privacy. "[T]here can be no grant of redress for the invasion of the right of privacy by oral publications." See also *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943). And see *McKown v. Great Atl. & Pac. Tea Co.*, 99 Ga. App. 120, 107 S.E.2d 883 (1959).

67. 396 Pa. 94, 151 A.2d 476 (1959).

68. 151 A.2d at 479. Cf. *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959).

69. 134 Cal. App. 2d 250, 285 P.2d 326 (Dist. Ct. App. 1955).

70. The court declared that there were no questions of law involved, only one of evidence. See also *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962), where defendants were charged with telling plaintiff's employer that he had been discharged from a previous employment for molesting children and drunkenness, when he had been exonerated of the charges.

71. 272 Ala. 174, 132 So. 2d 321 (1961).

ranging for a woman calling herself Doris to telephone (1) plaintiff's wife, speaking of her dates with plaintiff in Indiana and her need to speak with him privately, and (2) plaintiff's sister-in-law, to say that she was "in trouble" and didn't know plaintiff was married when she dealt with him. The court expressly held that a privacy action would lie for oral statements and that these fell "beyond the realm of reasonable action and into the area of wrongful and actionable intrusion."<sup>72</sup>

A final case also involved an attempt to collect a debt. In *Biederman's of Springfield, Inc. v. Wright*,<sup>73</sup> defendant's agent appeared in a restaurant where plaintiff was a waitress and said loudly, "I think you're deadbeats—I don't think you intended to pay for the furniture when you got it." The court held that action for invasion of the right of privacy might be maintained and indicated that it made no difference whether the charge made in the oral statement was true or false.

From a cumulative standpoint, this group of cases presents an impressive total. For the contrary position the authority is comparatively slight. The only case which is expressly contrary is *Gregory v. Bryan-Hunt Co.*<sup>74</sup> Defendant made an oral charge that certain cigarettes in plaintiff's store were stolen; the court sustained a demurrer to an action for invasion of the right of privacy, saying that such an action "is restricted to matters peculiarly personal, private, seclusive, as distinguished from such wrongs as libel, slander, trespass or injury to property, assault, etc., for which there are other remedies."<sup>75</sup> But Kentucky has taken a very restricted view of the right of privacy. The court has held that oral statements are not the basis for a cause of action,<sup>76</sup> and, indeed, so held in the *Gregory* case; thus,

72. 132 So. 2d at 325. Cf. *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P. 2d 571 (Dist. Ct. App. 1950), where phone calls for collection purposes were held to constitute an intentional infliction of mental suffering and probably also an invasion of the right of privacy. See Smith & Straske, *Collection Procedures and Right of Privacy*, 36 FLA. B.J. 1085 (1962).

73. 322 S.W.2d 892 (Mo. 1959).

74. 295 Ky. 345, 174 S.W.2d 510 (1943).

75. 174 S.W.2d at 512. The court continued: "While it may be true that a right of action for violation of privacy may incidentally include some of the elements included in the other class of actions mentioned above, yet there is a line of distinction, though close in some instances, which must be kept in mind. . . . In no event . . . was such right ever intended as a substitute or alternative remedy for the invasion or violation of rights for which other known and established remedies are available."

76. There was a dictum to this effect in *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 987 (1927). It was so held in the instant case, and also later in *Pangallo v. Murphy*, 243 S.W.2d 496 (Ky. 1951), a case which it seems would have been particularly appropriate for a privacy action. For facts, see note 66 *supra*. Other unusually restrictive Kentucky decisions are *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929) and *Perry v. Moskins Stores, Inc.*, 249 S.W.2d 812 (Ky. 1952); cf. *Walker v. Tucker*, 220 Ky. 363, 295 S.W. 138 (1927) (slander).

It is noteworthy that Kentucky has had so many privacy decisions despite its restrictive view. Sometimes such a view produces more appellate cases because of efforts to modify the law, while a broader view permits the cases to be determined at the trial level.

the quoted statement may be regarded as a dictum.

Another case which might be cited as contrary is the Seventh Circuit decision of *Estill v. Hearst Publishing Co.*,<sup>77</sup> but the court gave no real attention to the possible application of a privacy action to misstatements of fact.<sup>78</sup> Reference may also be made to a statement in a Georgia intermediate court,<sup>79</sup> and cases in two jurisdictions before the right of privacy had there been given clear recognition.<sup>80</sup>

On balance the weight of authority is therefore clearly to the effect that an action for invasion of the right of privacy can be maintained for false statements about the plaintiff.

On the merits this is as it should be. As the Missouri Supreme Court seems to suggest in a recent case,<sup>81</sup> when the action is for invasion of the right of privacy the court should not find it necessary to inquire into the truth or falsity of the statement.<sup>82</sup> To force a plaintiff to prove that the

77. 186 F.2d 1017 (7th Cir. 1951).

78. The *Chicago Herald-American* ran a series of articles on John Dillinger many years after his death. One of them had a picture of plaintiff with his arm around Dillinger. Dillinger had been captured and placed in jail in a county where plaintiff was prosecuting attorney; later Dillinger escaped. The story called plaintiff a victim of the "Dillinger curse" and said falsely that he had been laughed out of office and died a broken man. The court held that a libel count was good against a demurrer but not one for invasion of the right of privacy. On the latter it declared that plaintiff was a public figure and the story did not give an unwarranted publicity to his "private affairs and activities." No reference of any kind was made to the misstatements of fact in this connection.

79. *McKown v. Great Atl. & Pac. Tea Co.*, 99 Ga. App. 120, 107 S.E.2d 883, 886-87 (1959): "[S]ince all slander cases necessarily involve the right of privacy against slander the right of privacy is involved but the gist of the action is still slander in such cases and not invasion of privacy." Cf. *Freeman v. Busch Jewelry Co.*, 98 F. Supp. 963 (N.D. Ga. 1951) (not necessary to decide whether cause of action is for libel or invasion of the right of privacy). But cf. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga. App. 662, 184 S.E. 452 (1936).

80. In *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933), plaintiff sued her husband for divorce and he sued his chauffeur for alienation of affections. Defendant paper took a picture of several people, cut out those of the plaintiff and the chauffeur and carried the picture of the two, with the words, "Principals in local divorce scandal." The court held that an action for libel would lie but one for invasion of the right of privacy would not. The discussion on privacy was confined to the use of the picture and the right to be let alone. See the later recognition of the right in *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940).

In *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (C.P. 1938), defendant burlesque theater displayed the picture of plaintiff, an actress "of high reputation," on the front of the theater between "nude and lewd" pictures of burlesque actresses. The court held that a count in libel could stand, but not one for invasion of the right of privacy. Discussion on the latter was that plaintiff, as a "public character . . . cannot complain that any right of privacy is trespassed upon by the mere unauthorized publication of a photograph." See the later recognition of the right in *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

See also *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134 (S.D.N.Y. 1953).

81. *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892, 898 (Mo. 1959).

82. Compare the statement by Warren and Brandeis: "Obviously this branch of the

offensive statement about him was true in order to maintain an action is to create an anomaly of the worst sort; and to put him in a position where he must choose in advance an action in privacy or one in defamation depending on whether he guesses the court will find the statement true or false is to resort to the rigid pleading of the early days of the forms of action. Suppose that the offensive statement is an exaggeration of a true occurrence or a complex of true and false assertions; should the plaintiff be required to bring separate actions?<sup>83</sup> As one commentator puts it, "The gist of the wrong is public disclosure. Inasmuch as factually true incidents and those which are falsely attributed to an individual are both communicated to the public as genuine occurrences, they should be treated in the same way."<sup>84</sup>

To the argument that this will produce a duplication of actions and of damages the answer should be apparent. The available damages should be complete, but not duplicative. They should compensate for both the mental distress and the injury to reputation. Whether this is done by fact pleading for a single action, by separate counts in a single complaint, or by completely separate action depends upon the rules of pleading in the particular jurisdiction. In no event should damages be awarded twice for the mental suffering. It is true that the legal right of privacy was evolved by the common law to fill in certain gaps previously existing. But in the development of the logical scope of the principle involved it should not be limited to pre-existing gaps.

The conclusion is therefore justified by both precedent and reason that a right of privacy action may be maintained in the so-called "false light" cases. The question still remains as to the particular attributes of this group of cases and their relationship to the other privacy cases. What kind of false statement will be actionable? Need it be defamatory? The cases indicate that the answer to this is no. It may be defamatory but need not

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law should have no concern with the truth of [*sic*] falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890).

83. *Cf.*, *Hazlitt v. Fawcett Publications, Inc.*, 116 F. Supp. 538 (D. Conn. 1953), where action was brought for a fictionalized story of a murder trial in a detective magazine. The court held that the statute of limitations had run on the defamatory statements but not on the ones which merely involved the right of privacy.

84. Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 SO. CAL. L. REV. 280, 291 (1957). Other parts of the same comment: "Truth obviously is not a defense. By the same token, falsity should not be a defense. A publication which exaggerates the incidents depicted may well aggravate the offense to sensibilities. Falsely attributed conduct of a private nature can be equally offensive. . . . Both [true and false statements] may cause humiliation and embarrassment, impinge upon dignity and self-respect, offend the ordinary sensibilities of ordinary people."



be.<sup>85</sup> Should it be one which would be actionable even if true? There has been no discussion of the problem from this angle. The *Restatement of Torts* at present speaks of one who "unreasonably and seriously interferes with another's interest."<sup>86</sup> The cases have spoken of matter which would be offensive to a person of ordinary sensibilities.<sup>87</sup> Either formula adequately takes care of this question, without more. The truth or falsity of the statement is simply one of the factors to be weighed in applying the formula.

But there is one area where the falsity of the statement may make a substantial difference. It is generally agreed that a "public figure" or a person having connection with a newsworthy event which is in the public interest, cannot claim that his right of privacy has been unreasonably invaded when publicity is given by a true description of the matters of public interest.<sup>88</sup> But suppose there are false statements. The question thus posed was stated in a recent California case

as being whether a person who has theretofore acquired the status of a public personage may claim an invasion of his right of privacy when a newspaper publishes an article about him, the subject matter of which is written within the general scope of what is understood to be within the public domain, if such article contains false or misleading statements which cause him emotional distress but no special damages.<sup>89</sup>

The answer indicated by the decided cases is that the "privilege" of publishing matters of public interest does not extend to false statements, so that even a public personage or a person connected with a newsworthy event can maintain an action if the false statement is one which would offend a person of ordinary sensibilities.<sup>90</sup>

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85. Thus, it was held to be defamatory in *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Linehan v. Linehan*, 134 Cal. App. 2d 250, 285 P.2d 326 (Dist. Ct. App. 1955); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959). It was held not to be defamatory in *Leverton v. Curtis Publishing Co.*, 192 F.2d 974 (3d Cir. 1951); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

86. RESTATEMENT, TORTS § 867 (1939).

87. See, e.g., *Leverton v. Curtis Publishing Co.*, 192 F.2d 974 (3d Cir. 1951); *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958); *Carlisle v. Fawcett Publications, Inc.*, 20 Cal. Rptr. 405 (Dist. Ct. App. 1962) ("restricted to 'ordinary sensibilities' and not to supersensitivities or agoraphobia"); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 396 (1960).

88. See, e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), cert. denied, 311 U.S. 711 (1940); *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953); *Jacova v. Southern Radio & Tel. Co.*, 83 So. 2d 34 (Fla. 1955); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 410-15 (1960).

89. *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208, 213 (Dist. Ct. App. 1961), 50 CALIF. L. REV. 357 (1962). The court held the retraction statute to be applicable, so that failure to comply with it disposed of the cause of action; and it therefore did not attempt to answer the question.

90. See the cases cited in notes 50-64 *supra* and the accompanying text.

## III. APPLICATION OF DEFAMATION RESTRICTIONS TO PRIVACY ACTIONS

During the lengthy course of its development, the law of defamation has produced many restrictions, limitations, and defenses. Some of them are historical relics serving little useful purpose today, and have been the object of severe criticism. Some are recent developments, either judicial or statutory. Some developed through an attempt to keep control of juries in the hands of the trial judge. Others came about in an effort to prevent the bringing of trivial actions. Still others are the outcome of the desire to protect freedom of speech and of the press. Often a particular restriction is the result of several of these reasons. Which restrictions should be treated as applicable to privacy actions—particularly the false-statement cases? A detailed consideration seems to be indicated.

The first difference to be noted is so obvious that it is listed out of its logical order. Truth is a defense to an action for libel or slander.<sup>91</sup> It is not a defense to an action for invasion of the right of privacy.<sup>92</sup>

There is little difference in the two torts in the requirement of publication. It has been urged that, at least so far as disclosure of embarrassing private facts is concerned, publicity or public disclosure to more than one person or a small group is required for a privacy action.<sup>93</sup> The cases cited for the contention are all explained on other grounds, however,<sup>94</sup> and the requirement, if it is held to exist, will probably have less basis in the false-statement cases. There seem to be no privacy cases specifically discussing the matter of repetition or secondary publication.<sup>95</sup> Defamation holdings seem properly analogous. At least one case holds that the recently developed single-publication rule in defamation<sup>96</sup> should be applied to

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91. The cases are many. See GATLEY, LIBEL AND SLANDER § 254 (5th ed. 1960); NEWELL, SLANDER AND LIBEL § 696 (4th ed. 1924); Harnett & Thornton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425 (1949); Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43 (1931).

92. Again, the cases are numerous. Indeed, the law of privacy developed to fill this gap in the law of defamation. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890). For representative cases, see *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

93. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 393 (1960).

94. The single-person cases are all ones where a creditor communicated with a debtor's employer in an effort to collect a debt. The conduct was therefore not an unreasonable invasion of privacy. See note 122 *infra*. The small-group case was the Kentucky case of *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943). It involved oral statements which Kentucky has held not to be actionable in a privacy action, and the court based its holdings on the ground that the right of privacy cannot be used to duplicate other remedies. See note 74 *supra* and corresponding text.

95. See *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), where the news magazine was held liable for picking up a newspaper story, erroneously assuming that consent had been given to publish it. In *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945), a news agent was held liable for selling a magazine containing an article held to invade plaintiff's right of privacy.

96. See *Gregoire v. G. P. Putnam's Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948);

privacy.<sup>97</sup> It is significant that the Uniform Single Publications Statute refers both to defamation and the right of privacy.<sup>98</sup>

Defamation is normally an intentional tort, but there has developed a peculiar sort of strict liability which will hold the defendant without regard to intent or negligence.<sup>99</sup> The extent to which this strict liability is imported into the law of privacy is not clear. Several cases holding the defendant liable when he thought he had consent are not truly indicative.<sup>100</sup> Even in the intentional tort of battery, a mistake as to consent or privilege is no defense.<sup>101</sup> Two California cases declare that "inadvertance or mistake is no defense where the publication does in fact refer to the plaintiff in such a manner as to violate his right of privacy."<sup>102</sup> These cases and this statement may be the basis for applying the strict liability of defamation, though they are clearly distinguishable. In both, the defendant was so grossly negligent that it amounted to reckless conduct.<sup>103</sup> On

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PROSSER, TORTS § 94, at 599 (2d ed. 1955); Leflar, *The Single Publication Rule*, 25 ROCKY MT. L. REV. 263 (1953).

97. *Fouts v. Fawcett Publication, Inc.*, 116 F. Supp. 535, 537 (D. Conn. 1953): "The only reasonable conclusion is that any state which adopts the single publication rule for purposes of the tort of libel, would also adopt it and apply it, with the same test as to the date of accrual, in cases of wrongful violations of the right of privacy. I so hold." See also, *Hazlitt v. Fawcett Publications, Inc.*, 116 F. Supp. 538 (D. Conn. 1953). The problem is recognized by the court but not decided in *Leverton v. Curtis Publishing Co.*, 192 F.2d 974 (3d Cir. 1951).

98. UNIFORM SINGLE PUBLICATIONS ACT (1952). Section one provides: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance. . . ." See *Hull v. Curtis Publishing Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956).

99. See 1 HARPER & JAMES, TORTS § 5.5 (1956); PROSSER, TORTS § 94 (2d ed. 1955).

100. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909) (indorsement of medicine believed to have come from plaintiff—mitigation of damages if defendant acted in good faith); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (defendant took embarrassing story from newspaper, assuming consent—liability, but no punitive damages); *Myers v. U.S. Camera Publishing Corp.*, 9 Misc. 2d 765, 167 N.Y.S.2d 771 (N.Y. City Ct. 1957) (defendant thought agent obtained consent—"grossly negligent and reckless to publish a full body photograph of a nude woman revealing her identity without her written consent"); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). In *Harlow v. Buno Co.*, 36 Pa. D. & C. 101 (1939), the court held for the defendant when it published a picture, misled by a forged consent, saying "the invasion must be intentional and . . . the defendant must knowingly publish the photograph of plaintiff without authority."

101. PROSSER, TORTS § 17 (2d ed. 1955); see Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335 (1902).

102. *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 195, 197 (Dist. Ct. App. 1955); *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 127 P.2d 577, 581 (Dist. Ct. App. 1942). See also *Thompson v. Close-up, Inc.*, 277 App. Div. 848, 98 N.Y.S.2d 300 (1950); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) (nominal damages granted when photograph used by mistake).

103. In *Fairfield* defendant listed plaintiff in an advertisement as being a satisfied user of its machine, without consent, and despite the fact that plaintiff had returned the machine as being unsatisfactory. In *Kerby*, defendant had used plaintiff's name

principle, it would appear that protection of the right of privacy need not extend beyond negligent acts, and that the tort might well be regarded as an intentional one. The concept of technical malice which has plagued the law of defamation has fortunately not made its appearance in the privacy cases. Similarly, an allegation of express malice does not create liability when the statement is not otherwise actionable.<sup>104</sup>

When it comes to the actionable character of the statement or communication, the standard is expressed somewhat differently for defamation and privacy. To be defamatory a statement must expose the plaintiff to hatred, ridicule, or contempt of other people. The *Restatement* declares that the expression must tend so to harm his "reputation as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>105</sup> The standard for invasion of the right of privacy is phrased in terms of the effect of the statement on the plaintiff, himself, and indicates that it must be offensive to him. But the standard is still not subjective; the courts speak of the requirement that it be offensive to a person of ordinary sensibilities.<sup>106</sup> Despite the different way of stating the two tests, in the case of a false statement they seem quite likely to reach the same result. Certainly it would appear that a statement which holds him up to hatred, ridicule, or contempt would offend the sensibilities of an ordinary, reasonable person.

The distinction between oral and written statements in the law of defamation has no counterpart in the law of privacy. Following Warren and Brandeis,<sup>107</sup> a few courts have held or suggested that an action for invasion of the right of privacy will not lie for oral statements,<sup>108</sup> but the great

(Marion Kerby) on a purportedly salacious private letter sent as an advertising scheme to many persons, when it could have discovered plaintiff's name in the telephone directory.

In the new draft of the *Restatement* liability for intentional infliction of mental suffering is held to apply to intentional or reckless conduct. See RESTATEMENT (SECOND), TORTS § 46 (Tent. Draft No. 1, 1957).

104. See, e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956).

105. RESTATEMENT, TORTS § 559 (1938). Comment *e* explains that the statement need not prejudice him in the eyes of all the community or even a majority of it. "It is enough that the communication tend to prejudice him in the eyes of a substantial and respectable minority of them . . ."

106. See, e.g., *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954); *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd mem.*, 232 F.2d 369 (D.C. Cir. 1956); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla. App. 1961); *Davis v. General Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950). In *Perry v. Moskins Stores, Inc.*, 249 S.W.2d 812 (Ky. 1952) the standard is said to be that of a reasonable man.

107. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890).

108. E.g., *Pangallo v. Murphy*, 243 S.W.2d 496 (Ky. 1951); see *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944).

majority have held otherwise.<sup>109</sup> There has been no inclination to import into privacy the distinction between slander per se and slander which requires proof of special damage. If a communication invades the right of privacy at all, it offends the plaintiff's sensibilities and causes him mental distress—the injury for which compensation is given.<sup>110</sup> This is, therefore, one of the defamation restrictions which can be avoided by bringing an action for invasion of the right of privacy.<sup>111</sup>

As for the measure of damages in general, it would appear that there is little difference in the two torts. In defamation the prime basis of the cause of action is damage to reputation, but if the action can be maintained the plaintiff can recover for resulting emotional distress.<sup>112</sup> In a privacy action the plaintiff recovers primarily for the emotional distress, but also for the harm to his interest in privacy, and this would appear to include damage to his reputation.<sup>113</sup> There is no difference between the two torts as to punitive damages.

It is on the subject of privileges that the most difficult single decision regarding the right of privacy must be made. In the law of defamation, the plaintiff makes a prima facie case when he establishes the defendant's publication to a third person of a statement defamatory of the plaintiff. The defendant may then present as a matter of defense that the occasion was privileged because the ends to be gained by permitting the statement outweigh the harm which may be done to the plaintiff.<sup>114</sup> The privilege may be "absolute" or it may be "conditional," in which case it may be exceeded or abused and the defendant still be liable. The intricate mixture

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109. *E.g.*, *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961); *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (Dist. Ct. App. 1950); *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959); *Bennett v. Norban*, 398 Pa. 94, 151 A.2d 476 (1959).

110. Numerous cases indicate that special damages are not necessary in order to maintain an action for violation of the right of privacy. See, *e.g.*, *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961); *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (Dist. Ct. App. 1955); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

111. Thus, in *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961), the plaintiff, a man, was permitted to recover for invasion of the right of privacy, when the defendant, seeking to collect a debt, made telephone calls to his wife and sister-in-law implying sexual misconduct. But the same court had previously held in *Marion v. Davis*, 217 Ala. 16, 114 So. 357 (1927) that an action of slander would not lie for imputing unchastity to a man, in the absence of proof of special damages.

112. RESTATEMENT, TORTS § 623 (1938).

113. Special damages can be shown. See, *e.g.*, *Freeman v. Busch Jewelry Co.*, 98 F. Supp. 963 (N.D. Ga. 1951); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E. 2d 306 (1949); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909). On damages for invasion of the right of privacy in general see Prosser, *Privacy*, 48 CALIF. L. REV. 383, 409 (1960).

114. RESTATEMENT, TORTS, Introductory Note ch. 25, Title B, at 223-25 (1938). See PROSSER, TORTS § 95, at 606-07 (2d ed. 1955).

of rules on privilege to defame is very confusing and involved, but it generally affords a means for judge or jury to balance properly the conflicting interests involved. In the law of negligence on the other hand, there is no talk of privilege at all. The plaintiff must show that the defendant's conduct created an unreasonable risk which caused injury to him—that the defendant's conduct was not that of a reasonable, prudent man. The same opportunity to balance conflicting social interests is presented, and it is done in a much simpler, cleaner fashion. Do the authorities indicate the adoption of either of these approaches? Which of the two approaches is better for handling the right-of-privacy cases?

A first reaction would be that privacy law is nearer defamation law since it involves language and that the privilege approach should be used. Indeed, in their famous article, Warren and Brandeis list this as one of the attributes of the tort.<sup>115</sup> There are cases which quote or repeat this statement.<sup>116</sup> It is generally agreed that a cause of action for violation of the right of privacy will not lie for publication of legitimate news or matter of public interest. Frequently, this is called a privilege,<sup>117</sup> and it is sometimes expressly likened to the qualified privilege in defamation.<sup>118</sup>

But there is substantial authority the other way. In *Themo v. New England Newspaper Publishing Co.*,<sup>119</sup> a newspaper published a picture of plaintiff talking with the captain of police. The court held that a demurrer was properly sustained to the declaration since the occasion might have been one in which the readers had a legitimate public interest. This was not negated in the declaration, which "stated no case unless the plaintiffs under all conceivable circumstances had an absolute legal right to exclude from a newspaper any photograph of them taken without their permission."<sup>120</sup> In the first case expressly recognizing the right of privacy, the

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115. "The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 216 (1890).

116. See, e.g., *Hubbard v. Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (1962) (court record); *Johnson v. Scripps Publishing Co.*, 18 Ohio Op. 372, 32 Ohio L. Abs. 423 (C.P. 1940) (public nomination petition).

117. E.g., *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958); *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954); *Jacova v. Southern Radio & Tel. Co.*, 83 So. 2d 34 (Fla. 1955).

118. See *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291, 295 (1942) ("The determination of what is a matter of public concern is similar in principle to qualified privilege in libel"). See also Prosser, *Privacy*, 48 CALIF. L. REV. 383, 410-15, 421 (1960).

119. 306 Mass. 54, 27 N.E.2d 753 (1940).

120. 306 Mass. at 58, 27 N.E.2d at 755. A similar attitude seems to be indicated in *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (Dist. Ct. App. 1951). Compare *Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 287 S.W.2d 32 (1956), where a college newspaper set forth a declaration in an action brought against a college "humor magazine." Action was brought for libel and invasion of the right of privacy. The court held there was a conditional privilege in the libel action to

court said that the right "can not be said to have been invaded by one who speaks or writes or prints, provided the reference to such person and the manner in which he is referred to is reasonably and legitimately proper in an expression of opinion on the subject that is under investigation."<sup>121</sup> Several courts have held that the test as to whether a creditor is liable in a privacy action for disclosing the debt is whether he took reasonable action under the circumstances,<sup>122</sup> and another court has used the same test in connection with advertising.<sup>123</sup> Several courts point out that the recovery is not for invasion of the right of privacy, but for an "unreasonable" or "unwarranted" invasion of the right of privacy;<sup>124</sup> the implication is that the plaintiff must show that the invasion is unreasonable or unwarranted.

On balance, support must be given to the "negligence approach" and the position taken that the plaintiff in a privacy action must allege and establish facts to show that there was an unwarranted invasion of his right of privacy. Defamation cases on privilege would be relevant and persua-

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publish the pleading, and sent the case back for a trial on abuse of the privilege because of malice or partial report. As to the privacy count, however, it held outright that there was no invasion in publishing a matter of public record. No reference was made to privilege or abuse of privilege.

121. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 204, 50 S.E. 68, 73, 74 (1905). Compare the test applied under the actionable words statute in Mississippi in *Cooper v. Davidson*, 172 Miss. 74, 157 So. 418, 419 (1935) ("if the occasion is such as to render it necessary or proper for the use of the words, they are not actionable, if used in good faith and without any intention to insult").

122. Not liable: *Cunningham v. Securities Inv. Co.*, 278 F.2d 600, 604 (5th Cir. 1960), *rehearing denied*, 281 F.2d 439 (5th Cir. 1960) ("right to take reasonable, that is non-oppressive, action to pursue his debtor and persuade payment, although the steps taken may result in actual but not actionable invasion of the debtor's privacy"); *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957) (letter to debtor's employer held ordinary and reasonable step). Liable: *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961) ("What constitutes 'reasonable' action must depend largely on the facts of the particular case"—conduct here "cannot be justified as reasonably related to a legitimate effort to collect the debt"); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (creditor has right to take reasonable steps, but action here unreasonable).

In *Yoder v. Smith*, 112 N.W.2d 862 (Iowa 1962), defendant collection agency was held not liable for writing a letter to plaintiff's employer seeking collection of a debt. The majority opinion indicated that this was not an invasion of the plaintiff's right of privacy because the employer had a "natural and proper interest in the debts of his employees" and defendant had taken "reasonable action." A specially concurring opinion spoke of a "limitation" on the right of privacy but found it unnecessary to decide whether it was "a qualified privilege, a qualified exception or a restricted right." It subsequently called it a qualified privilege.

123. *Perry v. Moskins Stores, Inc.*, 249 S.W.2d 812, 814 (Ky. 1952), 1953 U.C.L.A. INTRA. L. REV. 75: "Modern day advertising techniques have come to be acceptable and are in effect a limitation on the individual's right of privacy. Such methods are not actionable so long as they are not unreasonable."

124. See, e.g., *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957); *Voneye v. Turner*, 240 S.W.2d 588, 590 (Ky. 1951).

sive in determining whether or not there was an unwarranted invasion,<sup>124a</sup> but they would not be controlling.<sup>125</sup> Accepting this viewpoint would provide a reform, eliminating some of the unnecessarily complicated ramifications of the law of defamation, and at the same time would appear to pose in a clearer and more intelligible fashion the need of balancing the conflicting social interests involved. It would also eliminate the complexities in the law of defamation about the burden of proof,<sup>126</sup> and in accordance with the *Themo* case<sup>127</sup> would place the burden on the plaintiff on all matters except the affirmative defenses like consent and the statute of limitations.

This approach would also leave in a simple form the rules about relative functions of judge and jury in the privacy cases.<sup>128</sup> At present the courts appear to be well in agreement that in privacy cases the question of whether the communications would be offensive to a person of ordinary

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124a. Obviously the policy on which a privilege in defamation is based may be so important that it will apply also in a privacy action. This is particularly true of the absolute privileges or immunities. Thus, in *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962), the court held that the executive privilege of executive officers applies also to an action for invasion of the right of privacy and to an action for conspiracy to terminate plaintiff's employment. The policy behind the immunity was "that the benefit to the public of having its governmental agents free to act as the duties of their offices required without fear of harassment or responsibility for damages at the suit of a citizen outweighed the protection of the individual against damage caused by oppression or malicious action of a federal official." *Id.* at 844. The court relied on *Barr v. Matteo*, 360 U.S. 564, 569 (1959), where the Supreme Court declared that the privilege applied to "civil damage suits for defamation and kindred torts," and cited other cases where it applied to such actions as false arrest, malicious prosecution and conspiracy.

Compare the similar problem regarding the defamation privilege given to a witness in a judicial proceeding. Courts have held that the policy behind it is sufficiently strong to make the privilege still applicable when the plaintiff seeks to avoid it by bringing an action for conspiracy to defame, *Marrinan v. Vibert*, [1962] 3 Weekly L.R. 912 (C.A.); *Cabassi v. Vila*, 64 Commw. L.R. 130 (1940); an action in the nature of malicious prosecution, see *Brett, M.R.*, in *Munster v. Lamb*, 11 Q.B.D. 588, 601-02 (1883); or an action for violation of an insulting-words statute, *Verner v. Verner*, 64 Miss. 321, 1 So. 479 (1886). Unquestionably, the policy would be broad enough to prevent a successful action for invasion of the right of privacy.

125. As Professor Winfield expressed it, "any attempt to import wholesale into the law of privacy principles of the law of defamation is likely to confuse both topics. . . . Fair comment and privilege, as known in the law of defamation, should be applied only sparingly and, at most, by way of analogy." Winfield, *Privacy*, 47 L.Q. REV. 23, 42 (1931). On the similar question as to whether the defamation privileges are directly applicable or are to be treated as analogous in an action under a statute creating liability for abusive and insulting language, see *Malone, Insult in Retaliation—the Huckabee Case*, 11 Miss. L.J. 333, 336 (1939).

126. See RESTATEMENT, TORTS § 613 (1938).

127. *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940); see note 119 *supra*.

128. On function of judge and jury in defamation, see RESTATEMENT, TORTS §§ 614-19 (1938).



sensibilities is one for the jury to decide<sup>129</sup>—unless of course, as with other jury questions, it is so clear that the jury could reach only one reasonable result.<sup>130</sup> The courts have just as consistently, however, decided themselves, as a matter of law whether the communications involved a matter of legitimate public interest.<sup>131</sup> There is practically no discussion of why this is treated as a matter of law, but it is obvious that the reason is that there are here involved important matters of freedom of speech and of the press; and the courts are not ready to delegate the delicate weighing process here to the jury.

There is no reason to believe that the very technical rules of pleading in defamation<sup>132</sup> will be imported into the law of privacy. None of the privacy cases give any indication of a requirement of an inducement, an innuendo, or a colloquium. The question of reference to the plaintiff has been raised in several cases, but has been solved without resort to technical rules of pleading. Thus it is held that reference by name<sup>133</sup>—even the first name<sup>134</sup>—or by picture<sup>135</sup> may be sufficient. But when the defendant dramatizes a newsworthy episode in which the plaintiff played a part, without naming or pointing to the plaintiff in any significant way, several cases have held that there was not sufficient reference to the plaintiff to amount to an unwarranted invasion of his right of privacy.<sup>136</sup> Use of a fictitious name in

129. *E.g.*, *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla. Dist. Ct. App. 1961); *cf.* *Leverton v. Curtis Publishing Co.*, 192 F.2d 974 (3d Cir. 1951).

130. Compare for example, the conflicting opinions in *Sutton v. Hearst Corp.*, 277 App. Div. 155, 98 N.Y.S.2d 233 (1950).

131. See, *e.g.*, *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3d Cir. 1958); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953); *Buzinski v. Doall Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961); *Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942); *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956). In *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd on opinion below*, 232 F.2d 369 (D.C. Cir. 1956), the court draws a distinction between the question of whether the communication would cause "mental suffering, shame, or humiliation to a person of ordinary sensibilities," and the question of whether the publication was "unwarranted . . . that is, absence of any waiver or privilege authorizing it." It characterizes the first as a "fact question for the jury" and the second as "a mixed question of fact and law." 129 F. Supp. at 831. *But cf.* *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959).

132. See *Wyse, The Complaint in Libel and Slander: A Dilemma For Plaintiff*, 33 CHI.-KENT L. REV. 313 (1955); *NEWELL, SLANDER AND LIBEL* ch. 18 (4th ed. 1924).

133. *E.g.*, *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939) (dramatization of holdup in radio program); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931) (movie, "The Red Kimono"); *cf.* *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 127 P.2d 577 (Dist. Ct. App. 1942) (plaintiff's name used by error in suggestive advertising letter).

134. *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944) (book *Cross Creek* contained portrayal of "Zelma").

135. *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948); *Valerni v. Hearst Magazines, Inc.*, 99 N.Y.S.2d 866 (Sup. Ct. 1949).

136. *E.g.*, *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955),

a novel has been held not actionable merely because some of the events were similar to those of a living person.<sup>137</sup> There appear to be no privacy cases leaning toward the discredited defamation doctrine that language will always be interpreted *in mitiore sensu*.<sup>138</sup>

As to limitation of actions, the reported cases are in accord that the statute of limitations for libel and slander does not apply to an action for an invasion of the right of privacy.<sup>139</sup> The decision, of course, depends upon the language of the statute and the court's interpretation of it. In *Hazlitt v. Fawcett Publications, Inc.*,<sup>140</sup> the court held that where there was a different statute of limitations for the two actions so that a libel count was barred, while a privacy count was not, all libelous statements had to be eliminated from the privacy count since the libel statute had run on them. The case involved a magazine account of a trial for murder, and the true statements would probably not be actionable since they involved matters of public interest. This holding, therefore, left an action for the fictionalized parts of the account which were not libelous in nature. Other

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*aff'd on opinion below*, 232 F.2d 369 (D.C. Cir. 1956) (television program "The Big Story"—murder trial); *Miller v. National Broadcasting Co.*, 157 F. Supp. 240 (D. Del. 1957) ("The Big Story"—bank robbery); *Smith v. National Broadcasting Co.*, 138 Cal. App. 2d 807, 292 P.2d 600 (Dist. Ct. App. 1956) ("Dragnet"—false report of escape of black panther). In the *Bernstein* case, *supra*, Judge Keech gave careful consideration to the matter and distinguished *Melvin v. Reid*, *supra* note 133 because the plaintiff was there identified. "Public identification of the present person with past facts, however, would constitute a new disclosure and, if unwarranted, would infringe upon an existing privacy. Thus, it would appear that protection which time may bring to a formerly public figure is not against repetition of the facts which are already public property, but against unreasonable public identification of him in his present setting with the earlier incident." 129 F. Supp. at 828. In *Hill v. Hayes*, 27 Misc. 2d 863, 207 N.Y.S.2d 901 (Sup. Ct. 1960), *aff'd mem.*, 13 App. Div. 2d 954, 216 N.Y.S.2d 497 (1961), an experience of a family in being held hostage by escaping convicts for a day was used as the basis of the novel, *The Desperados*, and a subsequent play and movie. *Life* magazine then came out with a picture story indicating that plaintiffs were the "true life" family of the book, with pictures in parallel columns. In an action under the New York statute it was held error to grant a summary judgment for defendants.

With the privacy cases contrast such libel decisions as *Yousouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581 (C.A. 1934) (plaintiff claimed she was portrayed as a character in the movie "Rasputin"); and *American Broadcasting-Paramount Theatres, Inc. v. Simpson*, 126 S.E.2d 873 (Ga. App. 1962) (plaintiff claimed that he was portrayed as a prison guard in an episode from "The Untouchables").

137. *Toscani v. Hersey*, 271 App. Div. 445, 65 N.Y.S.2d 814 (1946) ("Major Victor Joppolo," the Sicilian senior civil affairs officer in John Hersey's *A Bell For Adano*).

138. For history of the doctrine in defamation, see BOWER, ACTIONABLE DEFAMATION 302-05 (2d ed. 1923); *cf.* Spiegel, *Defamation By Implication—In the Confidential Manner*, 29 So. CAL. L. REV. 306, 312 (1956).

139. *Hazlitt v. Fawcett Publications, Inc.*, 116 F. Supp. 538 (D. Conn. 1953); *Anneriuo v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958); *Hull v. Curtis Publishing Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956). See also *Fouts v. Fawcett Publications, Inc.*, 116 F. Supp. 535 (D. Conn. 1953); *cf.* *Frith v. Associated Press*, 176 F. Supp. 671 (E.D.S.C. 1959).

140. 116 F. Supp. 538 (D. Conn. 1953).

cases, though they also involved fictionalized parts; have not drawn a distinction between the libelous parts and the other false parts in the account,<sup>141</sup> and it seems quite anomalous to draw it. If the action is for invasion of the right of privacy and the language used constituted an invasion, the fact that a different action might, but need not, have been successfully brought for part of the language, if it had been brought earlier, would seem to be irrelevant. After all, there are other places in the law where particular conduct may give rise to separate kinds of action with different statutes of limitation, and the plaintiff has a choice as to the kind of action he will bring.<sup>142</sup>

On survival of the cause of action, the only significant decision is that of *Reed v. Real Detective Publishing Co.*<sup>143</sup> The Arizona statute provided for survival of "an action to recover damages for injuries to the person." Actions for libel and for invasion of the right of privacy were brought for a magazine story of a crime. One of the defendants had died, and the court held that the libel action did not come within the statutory provision but that the privacy action did, so that it survived.<sup>144</sup> Again, the problem is one of statutory language and statutory interpretation, but it is apparent

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141. In *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958), a story, "If You Love Me, Slip Me A Gun," in the magazine *Inside Detective*, carried a picture of plaintiff, wife of a police detective shot by a criminal following an escape. Said the court: "the complaint sufficiently alleges an unwarranted invasion of plaintiff's right of privacy. It follows, therefore, that defendants' contention that the complaint states a cause of action for defamation by libel, barred by the statute of limitations, is equally without merit." *Id.* at 211, 149 N.E.2d at 763-64. In *Hull v. Curtis Publishing Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956), also involving a picture in a magazine article, the privacy action was held barred by the statute of limitations, but it was a different, longer statute than the one for libel. *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945) likewise involved a magazine story of a crime, allegedly containing false and defamatory statements. The court indicated that a privacy action came within the two-year statute for "injuries to the person" rather than the one-year period for "injuries done to the character or reputation of another by libel or slander."

142. Thus, one who converts a chattel may be subjected to an action of trover with a short statute of limitations for tort actions, an action of replevin with a longer statute of limitations for property actions, or an action of quasi-contract (waiver of tort) with a still longer statute of limitations for contract actions. For cases allowing the longer limitations period in waiver of tort, see *Dentists' Supply Co. v. Cornelius*, 281 App. Div. 306, 119 N.Y.S.2d 570, *aff'd mem.*, 306 N.Y. 624, 116 N.E.2d 238 (1953); *Kirkman v. Phillip's Heirs*, 54 Tenn. 222 (1872); *Jacobs v. City of Seattle*, 100 Wash. 524, 171 Pac. 662 (1918); see York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A.L. Rev. 499, 545-46 (1957).

143. 63 Ariz. 294, 162 P.2d 133 (1945).

144. In rendering the decision that libel was not an "injury to the person" the court was influenced by the fact that there was a one-year statute of limitations for "injuries done to the character or reputation of another by libel or slander" and a two-year statutory period for "injuries done to the person." 162 P.2d at 137. It declared that invasion of the right of privacy "must be considered as a direct rather than an indirect injury and one that is wholly personal in character . . . . An injury . . . which affects the sensibilities is equally an injury to the person as an injury to the body would be . . . ." *Id.* at 139.

that a different rule may be applied to an action for defamation and to a privacy action for defamatory language.

The suggestion has been made that there is greater likelihood of obtaining injunctive relief if the action is for invasion of privacy rather than for defamation.<sup>145</sup> But the suggestion seems dubious, particularly regarding a privacy action for false statements about the plaintiff.<sup>146</sup> Policy reasons for declining to issue a prior restraint are equally valid in both types of action.<sup>147</sup>

The question of the application of special defamation statutes to privacy actions is raised in a few cases. Thus in *Werner v. Times-Mirror Co.*,<sup>148</sup> there was involved the California newspaper retraction statute.<sup>149</sup> The action involved a newspaper item about the second marriage of a man who had been a prominent political figure thirty years earlier. The article called up old details and added others alleged to be false and probably libelous. Plaintiff had not complied with the retraction statute and alleged no special damages, claiming that his action for invasion of privacy was not affected by the statute. The court held that a general demurrer to the complaint was properly sustained. The retraction statute was held to be the "declared . . . public policy of the state." As to statements "libelous in nature," the court said,

to permit him to recover general damage in this case under the theory of the invasion of his right of privacy is to sanction an evasion of the provision of section 48a of the Civil Code. If such recovery cannot be had in the case of libelous statements, no greater relief could be reasonably expected for statements in the challenged publication which are of a nonlibelous character.<sup>150</sup>

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145. Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 So. CAL. L. REV. 280, 293-95 (1957).

146. The only case cited for this is *Douglas v. Disney Prods.*, decided by a trial court in Los Angeles and reported only in the Los Angeles Daily Journal, Dec. 31, 1956, p. 27, col. 3.

Different rules may be applied so that an injunction may be granted in cases involving property interests such as appropriation of a name or in cases involving invasions of the plaintiff's seclusion or solitude. These are the first and fourth of Dean Prosser's list of the "four torts" involved in the right of privacy. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

147. See Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

148. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (Dist. Ct. App. 1961); 50 CALIF. L. REV. 357 (1962).

149. "In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. . . . 'General damages' are damages for loss of reputation, shame, mortification and hurt feelings . . ." CAL. CIV. CODE § 48a (Deering 1961).

150. 14 Cal. Rptr. 208, at 215. The court calls attention to the fact that "general damages" include shame, mortification and hurt feelings."

The decision that the policy of the retraction statute is broad enough to include false statements which are made the basis of a privacy action is a very reasonable one. Once again it is a question of interpretation of the language of the statute and the purpose behind it.

In the *Werner* case, a motion to dismiss had also been made because the plaintiff had failed to file a bond for costs as required in libel actions under section 830 of the Code of Civil Procedure. The trial court dismissed this motion, thus indicating its belief that the statute was not applicable to the privacy suit, and the court of appeals made no comment on this action. In an earlier case the court had indicated that the statute was not applicable to a privacy action,<sup>151</sup> Thus, the policy behind this statute appears to be not so broad in its coverage.

The conflict of laws as to defamation cases is in a state of complete confusion, with ten or twelve different rules being offered for determining the governing law.<sup>152</sup> There is some indication that the same confusion may arise regarding the right of privacy,<sup>153</sup> but some of the recent cases have indicated that since the nature of the injury here is the impact of the publication upon the plaintiff and his sensibilities, the law which should govern is that of his domicile, especially if the invasion first came to his attention there.<sup>154</sup>

#### IV. CONCLUSION

Privacy is now fully established as a legally protected right in the United States. Of the four recognized types of invasion of the right of privacy, the two which are most closely analogous to the right of reputation, as protected by the law of defamation, are "public disclosure of embarrassing private facts about the plaintiff" and "publicity which places the plaintiff in a false light in the public eye."<sup>155</sup> These two differ only in that the first involves a true statement and the other a false statement. The hurt to the plaintiff's feelings, the damage to his sensibilities, is essentially the same in both cases. If the true statement is actionable in privacy, the false statement should be actionable too. A plaintiff's action for invasion

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151. *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 127 P.2d 577, 581-82 (Dist. Ct. App. 1942).

152. For detailed discussion and collection of cases see Leflar, *Choice of Law: Torts: Current Trends*, 6 VAND. L. REV. 447, 453-58 (1953); Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953), also in PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 70 (1953); Warner, *Multistate Publication in Radio and Television*, 23 LAW & CONTEMP. PROB. 14 (1958).

153. See Ludwig, "Peace of Mind" in 48 Pieces versus Uniform Right of Privacy, 32 MINN. L. REV. 734 (1948).

154. See *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd on opinion below*, 232 F.2d 369 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 945 (1956); *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958). See also Note, 19 U. PITT. L. REV. 98 (1957).

155. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

of the right of privacy should not be subject to the defense that the communication is true or false, if it is one which could be offensive to a person of ordinary sensibilities.<sup>156</sup> And if a non-defamatory false statement is actionable because it invades the plaintiff's right of privacy, a defamatory statement should be actionable for the same reason.<sup>157</sup>

It is true that this produces an overlap with the law of defamation. It is also true that the great majority of defamation actions can now be brought for invasion of the right of privacy and that many of the restrictions and limitations of libel and slander can be avoided. As lawyers come to realize this, the action for invasion of the right of privacy may come to supplant the action for defamation. This supplanting of one action by another has happened before in legal history,<sup>158</sup> and it can happen again. For this reason one experienced and astute writer in the field has sounded a note of caution, and suggested that we exercise "concern over where privacy may be going." Dean Prosser continues by saying:

The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?<sup>159</sup>

Over the years, judges and legal writers have joined in condemning the "anomalies and absurdities" of the law of defamation.<sup>160</sup> Efforts at legal

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156. A communication of newsworthy or educational matter is of course not an unwarranted invasion of the right of privacy. In this regard truth of the statement may therefore be relevant to liability.

157. "It is no answer to say, as defendants do, that such untruths, if they exist, can be adequately compensated for under the libel laws. If the articles violate rights of privacy, plaintiffs may bring their action under the privacy laws also." *Garner v. Triangle Publications, Inc.*, 97 F. Supp. 546, 550 (S.D.N.Y. 1951). "Although the interest ostensibly protected in privacy cases is the plaintiff's hurt feelings, his reputation is also injured in the defamatory 'false light' cases. To deny a recovery in privacy in these cases, while allowing recovery when defamation is not involved, would seem to put an unjustified premium on hurt feelings." 50 CALIF. L. REV. 342, 363 n.57 (1962).

158. For example in the supplanting of debt by indebitatus or general assumpsit, and of detinue by trover. It usually happens when the new action is simpler and less ponderous and burdened by arbitrary restrictions than the older one.

159. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401 (1960). See also *id.* at 422-23; and see Comment, 50 CALIF. L. REV. 357 (1962), urging that the right of privacy should not be extended to the "false light cases" except when there is an appropriation of plaintiff's name or likeness.

160. As Justice Kenison says in *Blanchard v. Claremont Eagle*, 95 N.H. 375, 63 A.2d 791, 792 (1949), "for the most part any thoughtful consideration of the present state of the law of libel either begins or ends with a combined apology and lament."

reform have proved quite unsuccessful. The customary common law growth through gradual judicial modification has been hampered and restricted by the numerous detailed rules, which have resisted synthesis into broad principles or standards. Similarly, legislative reform has been generally ineffective because a complete revision of the whole system was required and no one has been willing to undertake a statutory code covering the whole subject. The penetration of the law of privacy into this field affords a splendid opportunity for reform of the traditional law regarding the actionability of language which harms an individual's peace of mind or his reputation. This reform can take the customary common law method of gradual judicial development, case by case, of the principles involved. The opportunity should be welcomed by courts and writers, and there is reason to believe that it will be as it becomes more readily apparent and therefore more easily recognized.<sup>161</sup>

Of course, the courts should proceed carefully. Of course, the courts should be careful, doubly careful, to preserve the interests in freedom of speech and of the press, which are to some extent safeguarded by some of the rigid rules of the law of defamation, which developed in the early days of the common law, long before there was any clear concept of freedom of speech and of the press. As a matter of fact, there is much more consideration given to the public interests of freedom of speech in the recent right-of-privacy cases than in most of the defamation cases.<sup>162</sup> The simple standard that the plaintiff must prove that the defendant committed an unreasonable or unwarranted invasion of his right of privacy permits the conflicting policies and interests to be brought out into the open and

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Slander of course, is worse. Dean Prosser uses his customary vivid language: "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has a kind word, and it is a curious compound of strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm. The explanation is in part one of historical accident and survival, in part one of conflict of opposing ideas of policy . . ." PROSSER, TORTS 572 (2d ed. 1955). "No branch of the law has been more fertile of litigation than this . . . nor has any been more perplexed with minute and barren distinction." POLLOCK, TORTS 177 (15th ed. 1951). Other quotations might be multiplied indefinitely.

161. By accepting the opportunity, the courts will be able to meet Sir Frederiek Pollock's challenge that "the law [of defamation] went wrong from the beginning in making the damage and not the insult the cause of action; and this seems the stranger when we have seen that with regard to assault a sounder principle is well established." POLLOCK, TORTS 181 (15th ed. 1951).

162. For representative privacy cases involving a good discussion of the conflicting interests, see *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3rd Cir. 1958); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953); *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942); *Sarat Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937).

essentially directs the court to give due weight to them.<sup>162a</sup> The myriad rules of defamation and their artificial and conflicting natures conceal and confuse the actual policies involved, so that a jury cannot appreciate them, and even a judge, unless he is unusually wise and perceptive, is misled into attempting to interpret the exact language of rules set out many years ago, rather than to give due consideration to what should be the underlying policies. As for the function of the rules of defamation in discouraging "trivial and extortionate claims," contrast the effect of such rules as *metior sensus* or pleading requirements of inducement, colloquium, and innuendo with the objective standard in the law of privacy that the communication must be offensive to the person of ordinary sensibilities. Perhaps a few courts have sometimes been a little too ready to allow this last issue to go to the jury, but this is easily remedied by tightening the application rather than by setting up a special rule of law that knocks out many legitimate claims in order to eliminate some others that are not so worthy.

As a matter of fact, the major problem today is not trivial claims but excessive damages.<sup>163</sup> Here the courts need to exercise more care than they are now using. Since the very first privacy case,<sup>164</sup> it has often been held that an action can be maintained successfully for both defamation and invasion of the right of privacy, usually by separate counts in one

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162a. The standard of what a reasonable man would do under the same or similar circumstances in the law of negligence has been broken down by legal writers to a formula of balancing the magnitude of the risk against the utility of the risk, with a listing of the various factors involved. See Terry, *Negligence*, 29 HARV. L. REV. 40 (1915); RESTATEMENT, TORTS §§ 291-93 (1934). Is a similar break-down to a formula feasible for determining when there has been an unreasonable invasion of the right of privacy? We might speak of balancing the seriousness of the injury to plaintiff against the importance of the social interests advanced by the statement. Factors involved in the first would include the measure of offensive character of the statement, its truth or falsity, and the nature and extent of dissemination. Factors included in the second would involve the extent to which the statement promotes the dissemination of newsworthy, cultural, or educational information, ideas, or opinions; the satisfaction of public curiosity in accordance with recognized mores; the protection of consequential private interests of defendant or other parties; and the preservation of public interests in the proper administration or governmental functions. This, of course, is only a rough beginning and an indication of what a refined formula might provide. For similar formulas in the field of constitutional law, see L. Hand, J., in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) ("In each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"); Harlan, J., in *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown").

163. In earlier days the court trials provided entertainment for the people and many trivial defamation actions were brought to make the plaintiff the center of community attention. Today, this motive is minimized. But the motive of obtaining a monetary windfall has become much stronger.

164. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).



civil action.<sup>165</sup> The cases do not indicate how much attention is given to the prevention of duplication of damages. If the action in defamation can be maintained, plaintiff is entitled to damages for mental distress,<sup>166</sup> and, if the privacy action can be maintained for being publicly placed in a false position, it could appear that plaintiff can recover damages for the harm to his reputation from the position in which he is so placed. A better position is taken by the New York cases which indicate that there is only a single action for the one transaction with complete damages being given for it.<sup>167</sup>

The courts have been wise to treat the weight to be given to public interest in freedom of speech and press as an issue of law and thus to retain it for themselves and not to submit it to the jury. They will also be wise to follow the position requiring the plaintiff to show that the defendant's action amounted to an unwarranted invasion of his right of privacy rather than to adopt the defamation system of *prima facie* case, rebutted by privilege and rebutted in turn by abuse of privilege. Decisions in defamation privilege cases, particularly those dealing with fair comment, may prove helpful by analogy in privacy cases. So also may cases drawing a distinction between statements of fact and statements of opinion. The strict liability of defamation law has no place in privacy law. Pleading restrictions should not be imported from one to the other. Application of statutes such as limitation of actions, retractions, etc., depends on the language of the statute and the breadth of the policy behind it.

Subject to careful consideration of adjustments such as these in the relationship of the two torts, the courts should not hesitate to proceed in a cautious fashion toward the further development of the law of privacy. If the law of privacy then absorbs the law of defamation, it will merely afford a complete "unfolding" of the idea or principle behind that law. Indeed, there is real reason to conclude that the principle behind the law of privacy is much broader than the idea of privacy itself, and that the

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165. See, *e.g.*, *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948); *Linehan v. Linehan*, 134 Cal. App. 2d 250, 285 P.2d 326 (Dist. Ct. App. 1955); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959). But compare the viewpoint expressed in *Binns v. Vitagraph Co.*, 210 N.Y. 51, 103 N.E. 1108, 1111 (1913): "It would be difficult to avoid a double recovery if the jury were to be permitted in one action to give damages under the [New York privacy] statute for a violation of rights protected thereby, and in another action for the libel based on the same acts."

166. RESTATEMENT, TORTS § 623 (1938).

167. *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959); *Metzger v. Dell Publishing Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955); *cf. D'Altomonte v. New York Herald Co.*, 154 App. Div. 453, 139 N.Y. Supp. 200 (1913), *modified*, 208 N.Y. 596, 102 N.E. 1101 (1913). See also *Freeman v. Busch Jewelry Co.*, 98 F. Supp. 963 (N.D. Ga. 1951), explaining that under Georgia law the court has only to find that a tort has been committed and assess damages. "It is not necessary for this court to label plaintiff's action as one arising from violation of the right of privacy as plaintiff contends . . . or, as seems more likely to this court, as arising from publication of a libel." *Id.* at 966.

whole law of privacy will become a part of the larger tort of intentional infliction of mental suffering. That tort would then absorb established torts like assault and defamation and invasion of the right of privacy and join them together with other innominate torts to constitute a single, integrated system of protecting plaintiff's peace of mind against acts of the defendant intended to disturb it. This development is clearly discernable to the perceptive eye and has been the subject of comment by a number of writers.<sup>168</sup>

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168. See generally, Davis, *What Do We Mean By "Right to Privacy?"*, 4 S.D.L. REV. 1 (1959); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Harper & McNeely, *A Reexamination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222 (1939); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

