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# The Developing Methodology for Analyzing Privacy Torts\*

By DUNCAN M. DAVIDSON\*\*  
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The amorphous right of privacy was conceived by Samuel D. Warren and Louis D. Brandeis to protect a person's ability to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others."<sup>1</sup> They failed, however, to define it adequately.<sup>2</sup> The confusion that ensued regarding the legal basis for this tort remains with us today.<sup>3</sup> As societal patterns for privacy narrow and technology for its invasion grows more sophisticated each day, it becomes increasingly important to have a clear focus on the limits of this tort.

The present state of case law reflects the legacy of William L. Prosser, who classified the cases using the privacy rubric into four categories: (1) intrusion into one's solitude or private affairs ("intrusion"); (2) appropriation of a name or likeness for commercial purposes ("appropriation"); (3) publicity which places one in a false light ("false light"); and (4) public disclo-

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1. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

2. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 237 (1977).

3. In 1956 one federal judge evaluated the state of privacy case law as the equivalent of a "haystack in a hurricane". *Ettore v. Philco Television Broadcasting Co.*, 229 F.2d 481, 485 (3d Cir. 1956) (Biggs, C.J.).

sure of private facts ("public disclosure").<sup>4</sup> Prosser's analysis has been embodied in the Restatement (Second) of Torts.<sup>5</sup> Prosser's classification has been criticized for departing from the Warren and Brandeis formulation, that is, for failing to unify and ennoble the rights into one central right to dignity or right to be left alone,<sup>6</sup> or into one right of peace of mind.<sup>7</sup> Prosser's analysis can also be criticized for lack of definition. Certain privacy situations are well-defined.<sup>8</sup> Most privacy situations under Prosser's definitions, however, have no well-defined analogues. Instead, a jury is left to decide whether the defendant's conduct was so "offensive" as to offend a reasonable person's sense of what privacy should be protectable.<sup>9</sup> In some instances, Prosser's torts fail to provide any basis for relief.<sup>10</sup>

What is needed is a common method of analyzing the privacy situations, one which can be applied to the disparate privacy torts and to circumstances not covered by them, and which can provide better guidance and definition for practitioners, juries and courts. This article presents the development and application of such a method, and demonstrates how it can unify, broaden and strengthen the present schema of privacy torts.

## I

### The Developing Methodology

The developing method of analyzing privacy situations is applicable to situations in which private information is obtained

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

5. RESTATEMENT (SECOND) OF TORTS, §§ 652A-I (1976). The Restatement has not been adopted in all states, however, at least in whole. *E.g.*, *Davis v. First National Bank of Arizona*, 124 Ariz. 458, 462, 605 P.2d 37, 41 (1979); *Kapellas v. Kaufman*, 1 Cal. 3d 20, 35 n.16, 459 P.2d 912, 921 n.16, 81 Cal. Rptr. 360, 369 n.16 (1969); *Hollander v. Lubow*, 277 Md. 47, 53-60; 351 A.2d 421, 424-27 (1976); *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App. 1976).

6. *See, e.g.*, Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964). *See generally* Nizer, *The Right of Privacy—A Half Century's Developments*, 39 MICH. L. REV. 526 (1941).

7. *See, e.g.*, Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

8. *E.g.*, intrusion cases are analogous to search and seizure cases, *see infra* note 30.

9. *See* RESTATEMENT (SECOND) OF TORTS, §§ 652B, D and E (1976).

10. *E.g.*, *Tureen v. Equifax*, 571 F.2d 411 (8th Cir. 1978); *see infra* text accompanying notes 37-39.

or disclosed. Instead of analyzing such a privacy situation as one involving "offensive" conduct by the defendant, the developing method analyzes the privacy situation as one in which the defendant has exceeded the extent to which the plaintiff has expressly or impliedly consented to the gathering or disclosure of the private information in question.

This approach to analyzing a privacy situation grants better guidance to practitioners, juries, and judges. It is based upon the concept of consent, which has well-defined legal precedent.<sup>11</sup> Additional guidance is supplied, by analogy, to several well-established areas of the law. Cases involving the gathering of information without the consent of the plaintiff can be analogized to search and seizure decisions under the fourth amendment of the United States Constitution. To this extent, the cases under Prosser's intrusion tort already have been analyzed under this scope of consent approach.<sup>12</sup> Intrusion, however, protects one from some but not all intrusions into areas not dedicated to the public.<sup>13</sup> Under Prosser's construction, the tort may not cover the situation in which a person exposes private details for limited purposes only to another, who uses the information for other purposes.<sup>14</sup> Under the construction given intrusion by the concept of the scope of consent, that misuse could be tortious. Plaintiffs, in such contexts, would have a powerful means to protect many privacy interests heretofore unprotected by the intrusion tort and by the other privacy torts as well.

Cases involving the disclosure of private information which was rightfully gathered, albeit for limited purposes, could be analogized to trade secret and breach of confidence cases. Trade secrets have many similarities to personal secrets. To be protected, a trade secret must be deserving of protection. Its owner must have taken steps to ensure its secrecy.<sup>15</sup> Trade secrets, however, often are valuable only if they can be licensed or disclosed for limited purposes.<sup>16</sup> In recent years, a considerable body of law has developed regarding the extent to

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11. Prosser, *supra* note 4, at 417-18. See also, *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976).

12. See *infra* text accompanying notes 113-17.

13. Prosser, *supra* note 4, at 392-98.

14. *Id.* A strict analogy to fourth amendment cases also would tend to bring about this result. See *Smith v. Maryland*, 442 U.S. 735 (1979), *infra* note 108.

15. R. MILGRIM, *TRADE SECRETS* § 2.03 (1982).

16. *Id.* at § 1.02.

which licensees, employees, contractors and others having such limited access can be prevented from using or disclosing the trade secrets without the consent of the trade secret owner.<sup>17</sup> Similarly, there is a considerable body of law respecting breaches of confidence.<sup>18</sup> Typically, a confidential relationship is created by contract or is implied by law because of the relationship between the parties involved,<sup>19</sup> and if the party entrusted in confidence with the sensitive information uses or discloses it in violation of the express or implied confidentiality relationship, an action will lie preventing the disclosure or permitting recovery of damages because of it.<sup>20</sup> Thus, privacy actions could arise in the context of existing relationships, such as employer/employee, debtor/creditor or doctor/patient, even if no action currently could be pursued under Prosser's privacy torts. These analogies have the added advantage of being the method recognized by Warren and Brandeis for analyzing privacy situations. They compared their right of privacy to trade secret law, common law copyright (which covered the improper appropriation of private papers), and breach of confidence principles.<sup>21</sup>

The breach of the scope of consent method of analysis has been recognized and applied in several recent decisions. It is best illustrated by *Dietemann v. Time, Inc.*,<sup>22</sup> in which reporters investigating an alleged "quack" doctor entered his home (and office) with permission, but had hidden on their persons microphones and cameras. The court held this to be an invasion of privacy because

[while] [o]ne who invites another to his home or office takes a risk . . . that the visitor may repeat all he hears and observes to others . . . he does not and should not be required to take the risk that what is heard and seen will be transmitted by pho-

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17. *Id.* at § 7.08(1).

18. *E.g.*, *Dietemann v. Time*, 449 F.2d 245 (9th Cir. 1971).

19. *Id.*

20. *Id.*

21. Warren and Brandeis, *supra* note 1, at 212-14. Common law copyright, until the 1976 Copyright Act, gave one the right to keep letters, writings and statements unpublished, and to get back or enjoin publication of any of the above which is lost or stolen to others. *Id.* at 119-207. Breach of confidence or implied contract allowed parties to make limited disclosures without losing the information to the public as a whole. *Id.* at 207-12. Trade secret law allowed companies to bind employees to secrecy and to enjoin those other companies who get the information surreptitiously, through spying, burglary or bribery. *Id.* at 212-14.

22. 449 F.2d 245 (9th Cir. 1971).

tograph or recording . . . to the public at large or to any segment of it that the visitor may select.<sup>23</sup>

In this one statement, the court applied the scope of consent method of analysis. The gathering of information in the plaintiff's home had been permitted by express consent. The repeating of what was seen and heard to others was also permitted, by implied consent. This implied consent did not extend, however, to the electronic recording and photographing of the plaintiff. The appropriate analysis for a juror presented with a similar factual circumstance would not be whether the electronic recording and transmitting were "offensive", but whether the plaintiff had a reasonable expectation of privacy with respect to actions a visitor might take when invited to the plaintiff's home or office.<sup>24</sup> Common sense would inform the juror that a person must expect a visitor to repeat what is seen and heard but ordinarily would not expect the repetition to be by electronic recording and broadcasting transmittal.

#### A. Intrusion of the Home

Following *Dietemann v. Time*, a series of decisions have incorporated similar reasoning, although often without recognizing the connections between their analyses and the analysis by the Ninth Circuit in that case. Some of the clearest and easiest issues to handle arose, like the issue in *Dietemann v. Time*, in the context of the gathering of information at the plaintiff's home. When the invasion of privacy and the gathering of information occur in a context in which consent could not reasonably be implied, the courts should have little difficulty under Prosser's analysis in determining that an invasion of privacy has occurred. In other circumstances, however, the courts have applied the developing method of analysis.

Difficult cases have arisen when the invasion into the home was under a limited implied or express consent. In *Florida*

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23. *Id.* at 249. Warren and Brandeis presaged this concept when they constructed their right of privacy in analogy to breach of confidentiality, *inter alia*. See *supra* note 21.

24. The "reasonable expectation of privacy" test has been applied in search and seizure cases under the fourth amendment of the United States Constitution and is appropriate here. See *Katz v. U.S.*, 389 U.S. 347 (1967); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977). See generally *infra* text accompanying note 101.

*Publishing Co. v. Fletcher*,<sup>25</sup> a newspaper had published a picture of a silhouette of the plaintiff's daughter, who had died in a fire at her home. The court found that there was implied consent by custom that, when a fire had occurred, a photographer could enter with the fire marshall who was investigating the cause of the fire to photograph pertinent details. In this case, the photograph was taken for the official investigation by a newspaper photographer, and was later published in his newspaper. In a close decision, which reversed an equally close decision of the appellate court, the Florida Supreme Court held that, because of the implied consent, the "trespass" was not actionable.<sup>26</sup> In *Rafferty v. Hartford Courant Co.*,<sup>27</sup> defendant's news photographers and one of its reporters, none of whom were invited, attended a mock "unwedding" ceremony at a private location where plaintiffs were celebrating their recent divorces. The court held that the public's "right to find out" about private acts of individuals is not absolute, and, in the absence of consent, the publication of these private events could be tortious.<sup>28</sup>

#### B. Privacy Arising from Existing Relationships

Often the investigations of persons at their homes occur in connection with some relationship between the plaintiff and defendant, where the defendant is in the position to argue that, because of the relationship, there was implied, or even express, consent for the investigation. Courts have faced this argument when considering the issue of the extent to which a person claiming a disability or injury in a workers' compensation or personal injury case has consented to an investigation. Generally, seeking benefits has been sufficient to provide consent to the use of movies or videotapes, even with telephoto lenses, showing the movements of the plaintiff.<sup>29</sup> In contrast, telephone companies have been found liable for invasions of privacy if their employees enter customers' homes, even

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25. 340 So. 2d 914 (Fla. 1976).

26. The court did not reach the issue of whether the scope of implied consent extended to the publication. If the photograph had been part of the public record perhaps no invasion of privacy action could have been asserted.

27. 36 Conn. Supp. 239, 416 A.2d 1215 (1980).

28. *Id.* at 241, 416 A.2d at 1216.

29. *E.g.*, *American Electric Co-Operative, Inc. v. Partridge*, 284 Ala. 442, 225 So. 2d 848 (1969); *McLain v. Boise Cascade Corp.*, 271 Or. 549, 533 P.2d 343 (1975); and *Jeffers v. City of Seattle*, 23 Wash. App. 301, 597 P.2d 899 (1979).

though empty at the time, to repossess telephones used by customers who are delinquent in paying their bills,<sup>30</sup> and despite any claim of right, in the form of a tariff, by the local telephone regulatory body approving such action.<sup>31</sup> Landlords have also asserted the right to enter premises to impound possessions in order to enforce the delinquent payment of rent. In *Lucas v. Ludwig*,<sup>32</sup> after the landlord had impounded the tenant's possessions, the tenant accompanied by police officers entered the landlord's home to try to repossess his property on charges of theft. The presence of the police did not make the intrusion any more legitimate. The court held that the tenant, by causing the unwarranted police visit and involvement, seriously interfered with the plaintiff's interest in not having her affairs known to others, including the police, and went beyond any privilege or implied consent the tenant may have had to enter the premises.<sup>33</sup>

It is fairly clear how the developing methodology works in the case of an intrusion of the home, with or without any relationship between the intruder and the homeowner. The difficult problems arise when the invasion of privacy violates interests in other contexts, such as those arising in connection with a relationship between the parties. Prosser's analysis fails to provide an adequate balance of the competing interests. Under Prosser's analysis, the basis for distinguishing between information disclosed for limited purposes and information dedicated to the public is in the concept of "publication."<sup>34</sup> This concept is fraught with difficulties, particularly because it is a concept originally designed for copyright or defamation situations and not for privacy cases. The scope of consent analysis of *Dietemann v. Time*,<sup>35</sup> on the other hand, provides much broader and more satisfactory results in many of these privacy situations.

### C. Information Data Banks and Reporting

#### Analyzing privacy cases using the scope of consent concept

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30. *Gonzales v. Southwestern Bell Telephone Co.*, 555 S.W.2d 219 (Tex. 1977).

31. *Engman v. Southwestern Bell Telephone Co.*, 591 S.W.2d 78 (Mo. App. 1979).

32. 313 So. 2d 12 (La. App. 1975).

33. *Id.* at 15.

34. Prosser, *supra* note 4, at 393-94. See, e.g., *Tureen v. Equifax, Inc.*, 571 F.2d 411 (8th Cir. 1978); *Beaumont v. Brown*, 401 Mich. 80, 257 N.W.2d 522 (1977); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

35. *Dietemann*, *supra* note 22.

could have a tremendous impact on problems related to the retention and reporting of information, particularly in connection with computer data banks, which have the greatest opportunity for pervasive privacy invasion today. A consequence of our technologically complex society is that computer data banks often hold extremely private details of one's personal history. From salary to marital status, financial net worth to personal references, too much information is available to those who can simply punch in the proper code, with little restraint on how this information may be used. Using the developing methodology could give one the right to limit the dissemination of information. For example, information obtained for the purpose of evaluating credit could be restricted to that specific purpose. Because the consent is limited, the creditor could not disclose the information to another, sell names for a mailing list, or otherwise compromise the scope of this consent. In the same sense, if a person tells a reporter that the conversation is "off the record," that person would now have the means to ensure that result.<sup>36</sup> Thus, to use private information in an alternate manner, one must either obtain consent for each specific use or a blanket waiver of consent. Of course, there will be situations where little choice exists regarding consent because of unequal bargaining power. In such cases, the better approach is to look to the legislature to shape protective policy. For the majority of cases, however, one need not go so far; this principle will be sufficient.

The deficiencies of Prosser's approach in analyzing the limits of a data-reporting company's right to disseminate is illustrated by *Tureen v. Equifax, Inc.*<sup>37</sup> The Eighth Circuit held that investigations by a health insurance company following a claim of disability by the plaintiff were not actionable, in part because the plaintiff had specifically checked a box for a "special health" investigation when making his claim. The plaintiff made an additional argument that, even if the conducting of

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36. A person discussing issues with the press, however, assumes the risk that the resulting story will not comport with the person's wishes. See, e.g., *Goldman v. Time, Inc.*, 336 F. Supp. 133 (N.D. Cal. 1971), discussed *infra* at note 65. Enforcing confidentiality of private information requires protection in varying degrees. However, this protection "must be able to withstand many forceful arguments of constitutional principles and policy available not only to a free press, but also to a free people." Gerety, *supra* note 2 at 283. The balancing of these interests gives us the final test for the constitutionality of this concept of privacy. *Id.*

37. 571 F.2d 411 (8th Cir. 1978).

the initial investigation was within his consent, the retention of the resulting report was not.<sup>38</sup> The court held that the defendant had a privilege to retain the information because of a legitimate business need for retention of such reports to minimize the risk of extending valuable benefits and credit to persons submitting fraudulent claims and credit applications. On these two issues the court applied a scope of consent analysis.

The plaintiff also argued that the later disclosure of this information to other parties was an invasion of his privacy. The court, apparently hampered by the limitations of Prosser's classifications, found that such disclosure was neither covered by the intrusion tort nor involved a "publication" which would bring it under the public disclosure tort.<sup>39</sup> The dissent disagreed as to this latter holding,<sup>40</sup> noting that basing the decision upon the narrow, artificial question of whether a publication had occurred would not adequately consider the plaintiff's privacy interest; the plaintiff could be losing control over the dissemination of information about himself regardless of the occurrence of a "publication."<sup>41</sup>

Similarly, the limitations of Prosser's four privacy torts "handcuffed" the Ohio courts in *Shibley v. Time, Inc.*<sup>42</sup> The plaintiff brought a class action for subscribers to publications and holders of credit cards, claiming that the practice of publishers and credit card companies of disclosing the names, addresses and other information of their subscribers and credit card holders was an invasion of privacy. The court held that such an invasion of privacy claim was not maintainable because it did not fit under any of the four privacy torts of Prosser. The court found that no intrusion had occurred despite some dissemination of this information.<sup>43</sup> On appeal, the court held that an actionable invasion of privacy would require the unwarranted appropriation or exploitation of plaintiff's personality and that because no endorsement of any products or services had occurred in the dissemination of names, there had been no tortious appropriation.<sup>44</sup> While there may be implied

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38. *Id.* at 416.

39. *Id.* at 419.

40. *Id.* at 420.

41. *Id.* at 422.

42. 40 Ohio Misc. 51, 55, 321 N.E.2d 791, 794 (1974), *aff'd* 45 Ohio App. 2d 69, 72, 341 N.E.2d 337, 339 (1975).

43. *Id.* at 57, 321 N.E.2d at 795.

44. 45 Ohio App. 2d at 72, 341 N.E.2d at 339.

consent by custom in this circumstance, because of the widespread knowledge that such customer lists are sometimes assigned to third parties, the present schema of Prosser's torts does not allow serious consideration of this issue in a tort context.<sup>45</sup>

In contrast is the reasoning of the court in *Fadjo v. Coon*,<sup>46</sup> involving an investigation of a beneficiary of life insurance policies. An action for violation of a constitutional right of privacy was held to be proper when information the plaintiff had given an investigator for the state, under a pledge of confidentiality, was released by the state to a private insurance investigator.<sup>47</sup> The court, not hampered by Prosser's torts, rather than phrasing the issue as one of publication, phrased the issue in terms of breach of a confidentiality agreement and balanced the plaintiff's privacy interest against any legitimate state interest.<sup>48</sup>

#### D. The Press

The press<sup>49</sup> is another major institution in society wielding great power over privacy. The press (as it did in *Dietemann v. Time*) can raise a constitutional objection to this developing method of analyzing privacy torts: the gathering of information is as essential to a free press as the publishing of that information; by granting an injunction for publication of material gathered by modern technological methods, the court infringes upon the first amendment of the United States Constitution. This argument, however, is unpersuasive for several reasons. First, allowing the press full freedom to "snoop" in the home or in files dedicated for limited purposes could greatly reduce the most important areas of privacy of individuals. Since the constitutional dimension of the right to privacy has long been recognized,<sup>50</sup> the competing interests here must be balanced. Second, this argument assumes that under the first amend-

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45. The giving of names alone may not be an invasion of privacy as there must be an objectionable public disclosure of private facts. See *Hollander v. Lubow*, 277 Md. 47, 55, 351 A.2d 421, 425 (1976).

46. 633 F.2d 1172 (5th Cir. 1981).

47. *Id.* at 1175.

48. *Id.* at 1176.

49. This article will use the term "the press" to refer to major organized news gathering and disseminating institutions.

50. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

ment, the press has greater rights in gathering information than individuals. The Supreme Court, however, has rejected granting the press, as an institution, such greater rights.<sup>51</sup> Although the text of the amendment refers both to freedom of speech and to freedom of the press, the founders' probable intention was to distinguish between speaking and writing, similar to the distinction made between slander and libel, and not to distinguish between the institutional press and informal or non-commercial publishers.<sup>52</sup> Certainly the difficulty of determining when publishers or broadcasters have become part of the press seems insurmountable.<sup>53</sup>

*Barber v. Time, Inc.*<sup>54</sup> provides a good example of how the developing methodology establishes limits on invasions of privacy by the press. In this case, the plaintiff suffered from a medical disorder which gave her an insatiable appetite, yet left her malnourished. Two photographers took pictures of her in her hospital bed, despite her protests, and subsequently used them to illustrate their news article. Their unauthorized action was held to be tortious.<sup>55</sup> Under the scope of consent analysis, the plaintiff had a reasonable expectation of freedom from photographers while a patient in the hospital; her claim, therefore, was properly upheld. Of course, if the pictures were taken as the plaintiff entered the hospital, the result might have been different. She would have had less of a claim against the press because in public her expectation of privacy would have been less. In a similar vein, because of obligations arising from the relationship between a physician and a patient, a hospital probably would not be able to divulge to the press the name and the illness of a patient without the patient's consent.<sup>56</sup>

In circumstances such as these, the press often argues that the plaintiff loses her right of privacy because her illness is newsworthy.<sup>57</sup> The freedom of the press to print her name and

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51. *Houchins v. KQED*, 438 U.S. 1, 16 (1978); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Saxbe v. Washington Post*, 417 U.S. 843, 850 (1974) (giving a reporter no more right of access to prisons or inmates than is given an ordinary citizen).

52. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 57-58 (1976-1977).

53. *Id.* at 58.

54. 348 Mo. 1199, 159 S.W.2d 291 (1942).

55. *Id.* at 295. See also *Estate of Berthiaume v. Pratt*, 365 A.2d 792 (Me. 1976) (intrusion by taking unauthorized picture of dying man).

56. The disclosure of a patient's name alone is not a violation of a patient's rights. See *Geisberger v. Willuhn*, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979).

57. *E.g.*, *Rafferty v. Hartford Courant Co.*, 36 Conn. Supp. 239, 416 A.2d 1215 (1980).

4. the personal details of her life, rather than simply to discuss the illness of an anonymous person, turns on this question. By applying the scope of consent analysis, one need never tread upon the "slippery slope" of newsworthiness. If the reporters have to approach her for the information, and she refuses to give it or to have her picture taken in the privacy of the hospital, or if she gives it with the limitation that her name and background not be mentioned, the reporters are limited accordingly. If they gather the information properly, without violating an area in which she has a reasonable expectation of privacy, they are not restricted. In effect, if "newsworthiness" is defined as the boundary between properly and improperly gathered information, the courts need never restrict the content of news according to its subject matter; they need look only at the manner of discovery, the extent to which the plaintiff has dedicated the information to the public domain, and whether she had a reasonable expectation of privacy as to its discovery.

Similarly, this analysis would have better resolved the issues in *United States v. Progressive, Inc.*,<sup>58</sup> another case involving the press. *The Progressive* attempted to print an article on the inconsistencies in the government's classification of secrets; the article revealed the "secret" of thermonuclear devices (hydrogen bombs). The U.S. Government argued that to reveal the contents of the article would breach national security and its publication should therefore be enjoined. The magazine asserted that the article only included information obtained from the public domain, and that its consolidation into one article was protected under the first amendment. The government disputed this contention, asserting that the article contained a core of information which the government had never dedicated to the public domain. Under the scope of consent analysis, this factual determination would have been dispositive; if the court had followed that analysis, no "prior restraint"<sup>59</sup> would have occurred, as the court could have answered the factual issue without looking into the content of the article.<sup>60</sup>

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58. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

59. See *Near v. Minnesota*, 283 U.S. 697, 715-16 (1931); see also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976).

60. A determination may have to be made as to whether the information was the sort which could be private, but the determination could be made under protective order and would not be the basis for an injunction. In a trade secret case, the informa-

The press still has a broad privilege under the analysis used. If a publisher or broadcaster receives the information without instigating or encouraging the invasion of privacy, it is free to publish.<sup>61</sup> Although this distinction somewhat limits the scope of the tort, it seems a sensible balance. The press has a fairly clear guideline with which to work.<sup>62</sup> In those cases where an embarrassing private fact is surreptitiously gained and released to the unsuspecting reporter, one suspects it would not be published absent some newsworthy aspect. As a public policy, the public may be willing to suffer some gossip to avoid another Watergate. Arguably, in the realm of government information, inadvertent disclosures are not protectable under the privacy tort. The right of privacy belongs to individuals or private associations.<sup>63</sup> Congress has thoroughly preempted the field with various federal privacy acts.<sup>64</sup> Thus, the press can still fairly freely perform its function of being a check on government. Of course, a public official would still have a cause of action when the publication involved information improperly obtained from his home or elsewhere about those few aspects of his life not dedicated to the public.<sup>65</sup>

The privilege of the press would also extend to situations where the plaintiff consents to a disclosure or an investigation for certain purposes and the resulting article or news broadcast characterizes the discovered information in a manner different from that expected. Targets of investigations could control what is revealed, not how it is characterized or integrated with other rightfully obtained facts. In *Goldman v.*

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tion must be determined to be a trade secret, but the basis of any remedy is the wrongful act of the defendant. MILGRIM, *supra* note 15, at § 7.08[2] n.45.

61. *Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

62. *Cf.* R. MILGRIM, *supra* note 15, at § 5.04[2] (right of person who acquires knowledge of a trade secret without any reason to believe it is secret, to use it).

63. *Socialist Workers Party v. United States*, 463 F. Supp. 515, 525 (S.D.N.Y. 1978).

64. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (1982) (requires that an individual be given access to government records concerning the individual and prevents these records from being made public without his or her consent); Right to Financial Privacy Act of 1978 § 1101-22, 12 U.S.C. §§ 3401-22 (1982) (prohibits governmental access to customer records prepared by financial institutions, except in certain limited situations); 20 U.S.C. §§ 1232f-32i (1982) (withholding funds from educational institutions that deny parents and students access to student records or that release such records without the consent of the students' parents).

65. In *Shewmaker v. Minchew*, 504 F. Supp. 156, 163-64 (D.D.C. 1980), the court noted that a public official has no reasonable expectation of privacy as to his conduct while in the employment of the government.

*Time, Inc.*,<sup>66</sup> for example, the plaintiffs, young Americans living in caves in a village on the island of Crete, sued *Time* for invasion of privacy because of an article written by a reporter who had investigated the plaintiffs with their consent. The plaintiffs contended that they cooperated with and consented to photographs and questioning under the impression that the article was to be in the form of a travelogue. Instead, the article's theme was disenchanted American youth, and the plaintiffs were portrayed as aimless wanderers seeking refuge from America. The court held, in analogy to the privilege granted the press for publication of defamatory information, that *Time* was privileged in publishing this article because "a great deal of latitude must necessarily be afforded the media in its selection and presentation of news."<sup>67</sup>

The press would still be limited, however, in how far it could go in characterizing or using the information it obtains. This is so, even in circumstances where the person is otherwise exposed to public scrutiny. For example, close surveillance of a person in a public place, such as a bank, does not violate his right of privacy as long as his actions reveal to any casual observer the later-reported information, such as the amount of money withdrawn.<sup>68</sup> If consent cannot be implied from his actions, however, close surveillance can become actionable as an overzealous intrusion.<sup>69</sup> But while an embarrassing photograph may be taken in a public place because consent to be seen is implied, mere public presence may not itself constitute consent for the subsequent publication of such a photograph, for the consent to be seen did not extend that far.<sup>70</sup> On the other hand, when filmmaking is done from a public place, and the subject of the investigation is involved in a newsworthy event, it can be expected that broad protection will be given to the press.<sup>71</sup>

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66. 336 F. Supp. 133 (N.D. Cal. 1971).

67. *Id.* at 138.

68. *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 567, 570, 307 N.Y.S.2d 647, 653, 655, 255 N.E.2d 765, 769, 771 (1970).

69. *Id.* at 570, 307 N.Y.S.2d at 655, 255 N.E.2d at 771.

70. *See Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964) (a woman whose dress was blown upward in a fun house has an actionable claim for intrusion where a photograph thereof is published); *but see, Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976) (where plaintiff was in a group at football game that encouraged and persuaded him to pose for photographer, publication of his picture with his pants zipper open is not actionable in privacy).

71. *Mark v. King Broadcasting Co.*, 27 Wash. App. 344, 618 P.2d 512 (1980) (no inva-

### E. Disclosures of Intimate Personal Attributes

The scope of consent concept is also useful in analyzing situations of limited disclosure of highly intimate matters, both physical and mental, in the context of a relationship between the plaintiff and defendant (lawyer, doctor, clergyman, banker, etc.). As almost every aspect of life increasingly demands exposure of one's private affairs, it seems not merely a useful, but a necessary, standard for balancing these interests properly.

Many cases fall within some general medical context. In *De May v. Roberts*,<sup>72</sup> a layman accompanied the doctor into a room where Mrs. Roberts was in labor and about to give birth to a child. The court held that the layman entered the room under false pretenses. The fraud was imputed to Dr. De May because he failed to tell Mr. and Mrs. Roberts that Scattergood, the layman, was not medically trained. The Roberts' tacit consent was based on their false assumption of Scattergood's medical status, and therefore was inoperative. The court termed childbirth as a "most sacred" occasion, during which Mrs. Roberts had a "legal right to" . . . "privacy."<sup>73</sup> Another case, *York v. Story*,<sup>74</sup> presents an analogous situation involving intimate physical exposure. In *York*, a policeman told a young woman, the victim of a recent crime, that, despite her objection, he was required to photograph her bruises in order to preserve evidence of the crime. She ultimately consented because of his misrepresentations. The nude photographs were later reproduced and widely distributed throughout the police department.<sup>75</sup>

It is the characterization of these two cases as invasions of privacy that presents the focal issue. The scope of consent analysis allows a court the opportunity to balance the issues involved and better assess the extent of damages. For instance, when a newspaper publishes a picture of a deformed

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sion of privacy when television crew took photograph, in conjunction with a legitimate news story, through the open front window of plaintiff's office).

72. 46 Mich. 160, 9 N.W. 146 (1881). See also, *Knight v. Penobscot Bay Medical Center*, 420 A.2d 915 (Me. 1980) (no liability due to lack of scienter where nurse's husband, who consented to viewing of one birth, unintentionally was shown a different birth).

73. *Id.* at 165, 9 N.W. at 149.

74. 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

75. While this case was brought under the constitutional right of privacy through the 1871 Civil Rights Act, it provides useful precedent by analogy.

newborn child,<sup>76</sup> the child's parents are not disturbed about possible reputation loss as much they are chagrined that the world is an intimate bystander to their private tragedy.<sup>77</sup> The developing analysis is better designed to measure damages for turning such a private moment into a public event, by concentrating on the manner in which the photograph became available to the newspaper and the extent to which the plaintiffs tried to preserve their privacy, rather than considering the offensiveness of the publication.

The privacy right encompasses exposure not only of physical characteristics, but also of mental characteristics. In *Doe v. Roe*,<sup>78</sup> a psychiatrist's former patient sued to enjoin publication of a medical book containing a detailed case history and verbatim disclosures from therapy. Although the court did not recognize a common law right of privacy in New York, it upheld the claim based on the implied contract of confidentiality in a professional relationship and on statutory medical regulations.<sup>79</sup> The court specifically did not reach the issue of the psychiatrist's right to publish case histories where identities are fully concealed.<sup>80</sup> Both the privacy interests of the patient and the public interest in medical research and discovery can be served by disguising the identity of the patient. Even if a technical breach of contract were present, there would be no liability because causation of injury could not be shown. Thus, the breach of confidentiality analysis in the context of these types of privacy interests is well-suited for evaluating broader policy questions.<sup>81</sup>

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76. *E.g.*, *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930).

77. Bloustein, *supra* note 6, at 979.

78. 93 Misc. 2d 201, 400 N.Y.S.2d 668 (1977).

79. *Id.* at 212-13, 400 N.Y.S.2d at 676.

80. *Id.* at 214, 400 N.Y.S.2d at 677.

81. The more difficult extension of these invasions of privacy is presented by *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970), which involved a film of inmates of a state correctional institution. The film was described as a

stark portrayal of patient-routine and treatment of the inmates [which] is at once a scathing indictment of the inhumane conditions that prevailed at the time of the film and an undeniable infringement of the privacy of the inmates filmed, who are shown nude and engaged in acts that would unquestionably embarrass an individual of normal sensitivity.

398 U.S. at 960 (Harlan, J., dissenting). The State of Massachusetts sued to enjoin any showing of this film on the ground that proper releases were not obtained from all persons identifiable in the film. The defendants argued that the film was invaluable not merely for education, but also for its bearing on the important public issue of mental health care. The court, sensitive both to the privacy and public policy interests,

## F. Debtor/Creditor

Another common situation in which privacy interests can be invaded occurs when plaintiff and defendant are debtor and creditor. Many states have faced the issue of the extent to which a creditor can attempt to enforce a debt. Often the measures taken do not involve the communication of information or the gathering of information, and thus are not appropriately analyzed by the developing method of analysis. When the creditor is simply attempting to harass the debtor, the proper tort for relief and for balancing the conflicting issues involved is the tort of intentional infliction of emotional distress.<sup>82</sup> Many creditor cases, however, are well-analyzed by the developing methodology. Some creditor cases involve investigations of the debtor as a first step in deciding whether to take further action against him.<sup>83</sup> These cases involve issues similar to those raised by investigations prompted by personal injury or disability claims.<sup>84</sup> Similarly, other creditor cases involve the dissemination of information and credit histories of delinquent debtors. These cases could be analyzed in the same manner as the investigation cases. In entering a debtor/creditor relation, the debtor has dedicated certain private information to the creditor's use. The limits of the creditor's use of the information depend on the legitimate business needs of the creditor, which should be analyzed in the context of the debtor/creditor relationship. The developing method of analysis would work well in this context. The public policy expressed by the legitimate business needs of the creditor circumscribes both implied consent and the debtor's reasonable expectations of privacy.

The most common issue arising in these cases stems from the creditor's publication or display of the name or likeness of a debtor and the fact of the debtor's delinquency. The courts have generally attempted to handle this issue under the public disclosure tort, since neither defamation nor false light are ap-

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allowed the presentation of the film only to appropriate audiences for its legal or medical value. The significance of this case to the developing method of analysis lies both in the novel relief granted and in the breach of consent analysis used by the court to find liability.

82. See *infra* text accompanying notes 109-112. See *Munley v. ISC Financial House, Inc.*, 584 P.2d 1336 (Okla. 1978).

83. See *Vogel v. W. T. Grant Co.*, 458 Pa. 124, 327 A.2d 133 (1974) (good analysis of creditor cases).

84. See *supra* text accompanying note 36.

propriate if the creditor was astute enough to avoid the implication of falsehood.<sup>85</sup> Generally, the issue is framed as whether the disclosure was a "publication," that is, whether the disclosure was made to the public at large or to so many persons that it can be inferred that the information would soon become public knowledge.<sup>86</sup> Viewed in the context of the developing method of analysis, this may not provide satisfactory results in the long run. The creditor's self-help rights should not be judged in the context of an artificial standard such as "publication," or a vague standard such as "offensiveness," but should instead be judged by a standard which balances the respective interests involved with the extent to which the debtor has, by entering into the debt, consented to certain self-help remedies.<sup>87</sup>

### G. Employer/Employee

Privacy issues also arise in the context of employment. Based on the developing method of analysis, the privacy interest of the employee would be protected depending on the duties and obligations of the employer with respect to information about the employee. Currently, none of the privacy torts suggested by Prosser adequately balances these issues. In *Beaumont v. Brown*,<sup>88</sup> the employer, the Department of Labor, wrote a lengthy letter to the Army Reserve requesting confirmation of the plaintiff's military schedule as well as information concerning military procedures for reservists. The plaintiff had apparently left his job for a month without approval or notification to his supervisor in order to attend a reserve training session. The court held that there was sufficient evidence to present an invasion of privacy action to a jury because the letter went too far in describing the plaintiff's bad

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85. *Vogel v. W. T. Grant Co.*, 458 Pa. 124, 327 A.2d 133 (1974); RESTATEMENT (SECOND) OF TORTS, § 652D Comment d (1977).

86. RESTATEMENT (SECOND) OF TORTS, § 652D, Comment d (1977).

87. In this context, cases applying the developing method of analysis may agree with cases which hold that publication of loan delinquency to the public at large in an attempt to embarrass or cajole the debtor into payment is, on balance, not sufficient to outweigh the debtor's reputation and privacy interests, especially since creditors have alternate means of self-help and access to legal means of redress. *Cf. Norris v. King*, 355 So. 2d 21 (La. 1978) (erecting a billboard with plaintiff's photographs and captions indicating he was a convicted thief in an effort to coerce repayment held to be an invasion of privacy, although truthful, because defendant could have pursued legal means of redress).

88. 401 Mich. 80, 257 N.W.2d 522 (1977).

employment record to the Army Reserve.<sup>89</sup> Under the developing method of analysis, the issues in that case would have been characterized as duties of the employer to retain the confidentiality of information regarding an employee. The court, however, disavowed any breach of confidence theory in analyzing the issues and instead attempted to evaluate a summary judgment motion on the issue of publication. The court went to some length to determine that more people than simply the addressee of the letter would read the letter (that is, that it would circulate throughout the Army's bureaucracy) and that therefore a "publication" had occurred.

The court further concluded that "publication" would depend on the significance of the communication and that disclosure to a small number of people might be deemed publication, depending on the importance of the matter disclosed to the persons made aware of it.<sup>90</sup> The court attempted to introduce normative concepts of an employee's reasonable expectation of privacy into the disparate concept of "publication." A more appropriate analysis would be to remove the issue of "publication" and analyze the issue in terms of an employer's duties, an employee's expectations, and society's legitimate concerns.<sup>91</sup>

#### H. Educational Records

Privacy issues also arise with respect to information regarding a student's financial information and grades. In *Porten v. University of San Francisco*,<sup>92</sup> a student claimed misconduct by the University in disclosing grades the student had earned at another school. The student maintained that he had sought and received assurances from the university that his prior grades would be used only for evaluating his application for admission. On appeal of a demurrer, the California court held that there was no "publication" because the grades had only been communicated to the California Scholarship and Loan Commission and not to the general public. However, the court went on to recognize that, because of a privacy provision added

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89. *Id.* at 96, 257 N.W.2d at 528.

90. *Id.* at 105, 257 N.W.2d at 530-31.

91. See *Rogers v. I.B.M. Corp.*, 500 F. Supp. 867, 870 (W.D. Pa. 1980) (company's investigation of employee's job performance does not violate his right to privacy when limited to discussions with and disclosures to company employees and to inspection of company records).

92. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

to the California Constitution in 1972,<sup>93</sup> the plaintiff may have stated a cause of action for breach of a confidential relation in a context outside of Prosser's classification of privacy torts. This is precisely the manner in which the developing method of analysis would be applied—whether and to what extent a limitation on the use of grades in the context of a student/university relationship is understood or agreed to. This case indicates, even in the absence of the California constitutional privacy right, that relief is possible outside of Prosser's classifications by analyzing a dispute with reference to the relationship between the parties, and by pursuing a cause of action based on breach of implied or express obligations arising in such a relationship. The fact that privacy interests are being protected should not obscure the source of relief and should not “strait-jacket” practitioners and courts into applying the four torts of Prosser.

## II

### Application of the Developing Method to Prosser's Four Privacy Torts

As has been demonstrated, the developing method of analysis can be applied to fact patterns now falling within Prosser's four privacy torts, as well as to those in which the four privacy torts do not apply to the issues involved. In addition, many of the doctrinal problems with the privacy torts can be obviated by use of this method. Prosser's four privacy torts each suffer certain doctrinal and theoretical inconsistencies. The intrusion tort is an amalgam of two concepts: prying for information and disturbing solitude.<sup>94</sup> The appropriation tort has been recognized as primarily benefitting celebrities and indeed appears to be developing into a “right of publicity.”<sup>95</sup> The false light tort has been viewed as similar to defamation<sup>96</sup> and therefore has not been recognized as a separate tort in some jurisdictions.<sup>97</sup> The public disclosure tort restricts publication of true

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93. CAL. CONST. art. I, § 1 provides: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

94. See *infra* text accompanying note 103.

95. See *infra* text accompanying note 122.

96. See *infra* text accompanying note 188.

97. See *infra* notes 192-3.

facts, and may be unconstitutional.<sup>98</sup> By properly applying the developing method of analysis, however, many of the interests which these torts are designed to address can be adequately covered without some of the problems found in the present definitions of these torts.

### A. Intrusion

Prosser describes this tort as any "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs."<sup>99</sup> Of the four torts, this is the one most deserving of the term "privacy"; in the others, an action will lie simply for the use of information gathered (or created) in the public domain.<sup>100</sup> This intrusion tort most directly protects the right to be left alone.<sup>101</sup> It is further distinguished from the other torts because it does not require publication. The tort is well-defined, with the gravamen of an intrusion being the entering of physical space where the plaintiff had a reasonable expectation of privacy,<sup>102</sup> and from which the plaintiff could reasonably expect to exclude intruders.<sup>103</sup>

Under Prosser's definition, the intrusion tort serves two distinct interests: protection from disturbances of solitude as well as from prying. Thus, it would cover both harrassing a homeowner with telephone calls and "bugging" a home with telephone taps. This dual coverage may be a reflection of the tort's doctrinal background, derived from both nuisance and trespass law.<sup>104</sup> The harassment or non-information-gathering aspect of intrusion, however, is not as well-defined as the prying aspect. Also, other torts have developed to meet these particular problems. For example, offensive intrusions such as late night phone calls may be covered by the tort of intentional in-

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98. See *infra* text accompanying note 253.

99. Prosser, *supra* note 4, at 389.

100. See generally Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272, 279 (1966).

101. In Cooley's treatise on torts, the right to be left alone preceded the right of privacy, even though Warren and Brandeis receive the credit. COOLEY, TORTS 29 (2d ed. 1888).

102. This test is borrowed from the fourth amendment, *Katz v. U.S.*, 389 U.S. 347 (1967). See, e.g., *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969) (applying the *Katz* standard to an intrusion action).

103. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

104. EZER, INTRUSION ON SOLITUDE: HEREIN OF CIVIL RIGHTS AND CIVIL WRONGS, LAW IN TRANSITION 21, 63 (1961).

fiction of mental distress.<sup>105</sup> Other intrusions of the home, which are not meant to offend but nevertheless do, fall under nuisance law or even trespass law.<sup>106</sup> The earlier torts already provide sufficient remedies for these issues and are better designed to handle them. Disturbances which happen to intrude are often incidental to another person's enjoyment of land. Nuisance law gives better protection to all interests than does intrusion for these incidental disturbances at home; it frames the issues in terms of balancing the equities between competing land users,<sup>107</sup> permits recovery for negligence, and allows equitable remedies.<sup>108</sup> Intrusion, however, frames the issue as "offensiveness," is primarily an intentional tort, and looks to damages as its basic relief.<sup>109</sup> By looking only at "offensiveness," and not at the competing uses, intrusion would tend to help undeserving plaintiffs, and by covering only intentional disturbances, would tend to ignore deserving plaintiffs.

Disturbances of solitude may be intentional, as in the case of harassment. Although the mental distress tort gives one less protection from harassment than does intrusion, this result may be desirable. By its careful restriction of protection, the mental distress tort balances the normative and individual values of privacy; it has been narrowly defined precisely to avoid trivialization of the right of privacy.<sup>110</sup> Privacy, like other rights, is not absolute.<sup>111</sup> Outside the home, especially, it loses

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105. When Prosser presented his original analysis, it was only in Ohio, which recognizes no mental distress tort, that these cases had been lumped together as intrusion cases. Prosser, *supra* note 4, at 390. The leading case is *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956). See *Kelly v. Franco*, 72 Ill. App. 3d 642, 28 Ill. Dec. 855, 391 N.E.2d 54 (1979) (held no intrusion) for a more recent analysis.

106. Compare *Pritchett v. Board of Comm'rs*, 42 Ind. App. 3, 85 N.E. 32 (1908) (an intrusion where plaintiff was assailed by noise and profanity from a neighboring jail); *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 104 N.E. 371 (1914) (nuisance where a nearby quarry's machinery emitted loud, penetrating noises). Consider also a creditor harassment case which was held to be a nuisance. *Wiggins v. Moskins Credit Clothing Store*, 137 F. Supp. 764 (E.D.S.C. 1956).

107. W.L. PROSSER, TORTS, § 89 at 591 (4th ed. 1971).

108. *Id.* at 575, 577.

109. Prosser, *supra* note 4, at 389ff, 409.

110. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966). Consider also the types of cases reported at Prosser, *supra* note 4, at 390-91 which have not been brought successfully as intrusion cases: noises that disturb church services, bad manners, harsh names, insulting gestures in public, a landlord who stops by for rent on Sunday morning. The mental distress cases have considered the problems in extending protection to trivial intrusions and are designed to obviate those problems. W.L. PROSSER, TORTS, § 12 at 52.

111. Gerety, *supra* note 2, at 238.

much of its value.<sup>112</sup> These restrictions simply reflect the specific focus of the mental distress tort on harassment.<sup>113</sup> Substituting the vague and unfocused "offensiveness" standard of Prosser may upset the balance reached by the mental distress tort. Further, such a standard could be manipulated politically to attack unkempt appearances or different lifestyles.

The other interest being protected by the intrusion tort, freedom from prying, is not fraught with these difficulties. Although it is said to be based on trespass,<sup>114</sup> it is better thought of as a counterpart to the fourth amendment.<sup>115</sup> Consequently, its legal profile is already well-defined by fourth amendment cases. Thus, although it is said that the tort occurs only if information is gathered,<sup>116</sup> it is better to view the attempt to gather information as sufficient for a violation of privacy, just as an illegal search can occur if the police enter the wrong apartment but gather no evidence.<sup>117</sup> Further, it is the ability to gather information of a private nature which is the feared offense; a prying has occurred, for example, where a store has its employees observe customers in the dressing rooms, even if the stated purpose is the prevention of shoplifting. The tort, in a sense then, is not a specific intent tort; it is sufficient that private information be seen or heard, after one has intentionally placed oneself in a position to be privy to the details. As noted above, this aspect of intrusion can be analyzed by the

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112. See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (court very cautious in granting an injunction against a photographer to prevent him from harassing Jackie Onassis and her children in public); see also Prosser, *supra* note 4, at 391. But cf. *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964) (Not all actions occurring in a public place may be characterized as open to the public; a woman whose dress was blown upward in a "fun house" has an actionable claim for intrusion when a photograph thereof is published).

113. The tort is said not to be sufficiently expansive, for it requires intentional, calculated distress and has stringent proof-of-injury rules. This objection, however, is not well taken, for in most jurisdictions it is sufficient to show that the defendant was reckless as to resulting distress. W.L. PROSSER, TORTS § 12 at 60. The special damage rules only apply if the plaintiff is suing in negligence and asking for damages for mental distress accompanying physical injury. *Id.* § 54. Courts have been hesitant to push the tort beyond recklessness.

114. Ezer, *supra* note 103, at 64; Prosser, *supra* note 4, at 389-90.

115. Ezer, *supra* note 103, at 66-7; *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969).

116. *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765, 769 (1970).

117. E.g., *Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322 (1977) (sheriff who entered the wrong apartment, in which plaintiff was sleeping, liable for invasion of privacy unless justified by warrant or privilege).

developing methodology.<sup>118</sup>

## B. Appropriation

Prosser describes this tort as "appropriation, for the defendant's . . . advantage, of the plaintiff's name or likeness."<sup>119</sup> Appropriation was the earliest of the four categories to be recognized,<sup>120</sup> and, accordingly, its profile is fairly well-defined.<sup>121</sup> No constitutional problems arise as long as the tort is confined to the direct commercial exploitation of the name or likeness in the sense of using it in an advertisement. For example, the profitmaking motive of newspapers does not taint their use of a person's name or likeness for non-advertising purposes.<sup>122</sup>

Appropriation is concerned with whether the plaintiff is a public personality. As Prosser defines it, appropriation best protects public plaintiffs, and the tort falls under the auspices of a right of publicity<sup>123</sup> more than a right of privacy.<sup>124</sup> The

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118. See *supra* text accompanying notes 24-33. It would be necessary to analyze intrusion under a scope of consent analysis if the tort is to become more than simply an analogue to the fourth amendment. In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court held that installation of a "pen register," a device that records the numbers dialed from a particular telephone, is not an impermissible search based on the fact that the plaintiff understood that the phone company would maintain a record of all phone numbers called for billing purposes. But it does not follow that the plaintiff would consent to the use of these records for other purposes. See *id.* at 748 (Marshall, J., dissenting). The intrusion tort would allow the release of information for limited purposes without losing all control over its use, even though the fourth amendment would not.

119. Prosser, *supra* note 4, at 401.

120. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). See also *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902), in which the tort was not recognized. The New York legislature responded by passing a statute which provides a cause of action when an individual's name or likeness is commercially appropriated and which provides the basis for most of New York's privacy litigation. N.Y. Crv. RIGHTS LAW §§ 50, 51 (McKinney 1976). Commentators differ strongly on the question of whether the statute incorporates a right of publicity and whether a common law right of privacy exists independently of the statute. See Gerety, *supra* note 2, at 248 n.55; Zurofsky, *Constitutional Law—Privacy Torts—First Amendment Does Not Privilege Violation of Right of Publicity—Zacchini v. Scripps-Howard Broadcasting Co.*, 31 RUTGERS L. REV. 269, 274 n.57 (1978); Note, *First Amendment Theory Applied To The Right of Publicity*, 19 B.C.L. REV. 277, 278 n.11 (1978).

121. See Kalven, *supra* note 109, at 331.

122. Prosser, *supra* note 4, at 405; see also *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (broadcast of a football half-time show was not an appropriation because not associated with the intervening commercial).

123. The right of publicity was first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868-69 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Since that case, several other jurisdictions have followed its lead in distinguishing between

type of plaintiffs most likely to utilize Prosser's tort are public persons or celebrities whose names or likenesses have commercial value in selling products. Public plaintiffs or celebrities have "waived" to some extent their privacy interests by seeking publicity or by acquiescing to it.<sup>125</sup> While perhaps they still retain some private aspects of their lives,<sup>126</sup> they certainly have transformed their names or likenesses into public aspects of their lives. It would remove any meaning from "privacy" to say that what the defendant publicizes can be kept from the public eye because it is "private."<sup>127</sup> Further, as Prosser admits, the appropriation tort protects a right in the nature of a property right, not a personal right.<sup>128</sup> This is not an unimportant question of labeling;<sup>129</sup> the classification will determine vastly different substantive results. A privacy right is personal, and neither assignable, nor inheritable.<sup>130</sup> Thus, to construe appropriation as a privacy right could compromise the inherent value of the tort in protecting the value of a name or likeness. For example, if that name or likeness is not assignable for exclusive use in advertisement, it will not be worth as much.<sup>131</sup> Finally, the other three privacy torts of Prosser re-

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the right of publicity and the right of privacy. See, e.g., *Memphis Dev. Found. v. Factors, Inc.*, 441 F. Supp. 1323, 1330 (W.D. Tenn. 1977); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122 (1968) *aff'd*, 301 N.Y.S.2d 948 (1969).

124. Many of the following arguments are from Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

125. Prosser, *supra* note 4, at 411; cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

126. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 301-02 n.4 (1964) (Goldberg, J., concurring).

127. See *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941).

128. Prosser, *supra* note 4, at 406. See also Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1305 n.461 (1976). But see Bloustein, *supra* note 6, at 968 (suggesting that the tort does not involve a proprietary interest).

129. See Prosser, *supra* note 4, at 406; Bloustein, *supra* note 6, at 968.

130. See Prosser, *supra* note 4, at 408 and cases cited *supra* note 122.

131. In *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979), the California Supreme Court held that the heirs of Bela Lugosi had no property interest in his name and likeness. This is contrary to the concept that the right of publicity or the right created by appropriation is his property right, not a personal right, and therefore can be inherited. The rationale of the California Supreme Court, however, was that the right was a personal right and did not survive his death; after death the name is in the public domain. But see *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (assignees of a likeness of Elvis Presley could enjoin its exploitation after his death); *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981) (right to publicity must have matured during the owner's lifetime through exploitation).

quire the tortious act to be "offensive".<sup>132</sup> This requirement is not found explicitly in the appropriation tort. To add it, as in the argument that the very commercialization of the plaintiff's identity is offensive,<sup>133</sup> would withhold the protection of the tort from those who need it most. Public figures or celebrities, especially those who have endorsed products in the past, would be hard pressed to claim that commercialization is offensive *per se*. The "offensiveness" of the appropriation is somewhat irrelevant to the damage that public figures or celebrities claim, the injury being the lack of remuneration for the use of their endorsements and the damage to future goodwill.<sup>134</sup> The tort of appropriation, in the sense of a right to publicity, concerns the right to develop, keep, and market a value in one's name or likeness, and is not a privacy right.

Where one does not seek publicity, but wishes to keep one's name or likeness out of publications, a right of publicity realistically offers little relief beyond an injunction.<sup>135</sup> Private plaintiffs, after all, are not worried about the goodwill in their image, nor the fees they could command, for they have little, if any, claim to either.<sup>136</sup> An injunction may be the proper remedy in many cases, but it can be expected that private plaintiffs would also wish to recover damages for the commercialization and the resultant mental distress.<sup>137</sup>

An analysis of the types of appropriation cases which apply to private plaintiffs demonstrates that the relevant damage interests can often be adequately protected by defamation law, by the intrusion tort, and by the mental distress tort. In addition, the developing method of analysis can be applied to give relief in circumstances not covered by these three torts, or by the "right of publicity" cases.<sup>138</sup>

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132. Prosser, *supra* note 4, at 390-91, 397, 400 ("offensive" or not tolerable to community morals). *cf.* Treece, *Commercial Exploitation of Names, Licenses and Personal Histories*, 51 TEX. L. REV. 637, 640 (1973) (that the nature of the injury to self-esteem by appropriation is "elusive").

133. Bloustein, *supra* note 6, at 987-88.

134. *See generally* Nimmer, *supra* note 123.

135. An injunction can be awarded when appropriate. *E.g.*, *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

136. If companies had to pay private plaintiffs, they probably would look elsewhere for advertising material.

137. Bloustein, *supra* note 6, at 986-88; Treece, *supra* note 131, at 640. The first two appropriations cases are illustrative. *See supra* note 119.

138. *E.g.*, *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (original consent to publication of picture may be inoperative where picture changed in context).

One type of appropriation case involves an endorsement, where the plaintiff's name or likeness is associated with the selling of a good or service.<sup>139</sup> This is the core area of the right of publicity.<sup>140</sup> It is also the core area of the private plaintiff's appropriation claim, for it is in being used in an advertisement and through the commercialization of a person's identity that one is injured.<sup>141</sup> Ordinarily, a plaintiff's only remedy for appropriation is injunctive relief.<sup>142</sup> In those cases where more has been lost than privacy—for instance, if the plaintiff's reputation is damaged by being associated with the particular product<sup>143</sup> or if the advertisement is done in a particularly offensive way<sup>144</sup>—an action for defamation may lie.<sup>145</sup>

139. Prosser, *supra* note 4, at 401-2 nn.156-9. See also, Treece, *supra* note 131, at 641-48.

140. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). "[I]t is common knowledge that many prominent persons . . . far from having their feelings bruised . . . would feel sorely deprived if they no longer received money for authorizing advertisements, . . . . This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant . . . ."

141. Treece, *supra* note 131, at 640. "Individuals of average sensibility do not suffer when their names appear in a favorable light in a news item or when a magazine displays their likenesses in a flattering context. The peculiar nature of advertising, rather than the mere fact of publicity, must cause whatever injury occurs." See Bloustein, *supra* note 6, at 988.

142. Generally, mere commercialization alone is not enough to give more than nominal damages unless special damages are proven. See *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *Miller v. Madison Square Garden Corp.*, 176 Misc. 714, 28 N.Y.S.2d 811 (1941); *Almind v. Sea Beach Ry. Co.*, 157 A.D. 230, 141 N.Y.S. 842 (1912). It has been suggested that mere commercial exploitation engenders sufficient harm to justify damages under the appropriation tort beyond injunctive relief. Bloustein, *supra* note 6, at 988. The problem is how to measure these damages. In the other privacy torts there is at least a threshold level of "offensiveness" which must be met before an action will lie. In defamation law, loss of reputation is calculated objectively by the archaic *per se-per quod* distinction and by the usual requirement of pecuniary loss as a prerequisite for any recovery for a *per quod* violation. W.L. PROSSER, TORTS § 112 at 763-64 (4th ed. 1971). A loss due to mere commercialization does not have these standards, and may be incalculable. See Kalven, *supra* note 109, at 334. Given these difficulties, it is unlikely that the position that mere commercialization gives rise to more than nominal damages will be widely accepted. In any event, it is likely that all incidents in which a plaintiff has truly been offended will be covered by defamation; as a policy matter, anything not so covered probably should not be.

143. See *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1942). In *Peck v. Tribune Co.*, 214 U.S. 185 (1909) (Holmes, J.), defamation was found when a temperate nurse was shown endorsing whisky.

144. See, e.g., *Burton v. Crowell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936) where due to an optical illusion the plaintiff was shown in a sexually humiliating light as he held a saddle in a cigarette ad. The court reversed an award of a summary judgment for the defendant based on defamation.

145. In many appropriation cases, defamation has also been found. E.g., *Pavesich v.*

A second type of appropriation case occurs when the plaintiff's image is shown or sold, either accompanying a product<sup>146</sup> or for other business reasons.<sup>147</sup> These, too, are right of publicity cases. Although there is no attribution of direct endorsement, there is an indirect effect: the goodwill and notoriety of the plaintiff's reputation is used to bring attention to the product. Leading examples of this type of appropriation include the use of an actress's picture in lockets,<sup>148</sup> the use of baseball players' pictures in popcorn and chewing gum packets,<sup>149</sup> and even the use of an actress's picture in a photography booklet put out by a camera manufacturer.<sup>150</sup> The link can be very attenuated, and yet an action will lie.<sup>151</sup> Private plaintiffs may avail themselves of the right of publicity action despite their previous failure to develop or exploit goodwill in their image, on the presumption that such appropriation denotes some marketability in their image. To that extent, then, they become celebrities. Since the commercialization is indirect, there appears to be little, if any, basis for a commercialization action alone; indeed, very few cases of this type have been reported.<sup>152</sup>

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New England Life Ins., 122 Ga. 190, 50 S.E. 68 (1905). An alternative is to frame the case as a false light case, but appropriation may be a more powerful means of protection. In *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), a college football star was held not to have a false light claim for having his picture used on a calendar put out by a beer company despite the fact that the imputation of being intemperate was defamatory among his peers (he was active in a group denouncing the use of alcohol by teenagers). As the dissent pointed out, because he was a publicized personality, he would have had a greater likelihood of success if he had framed the issue as a loss of a right to publicity. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938), is often considered a false light case, but this appears to be incorrect since the innocent mistake was later corrected; the *mens rea* for false light is at least negligence. See *infra* note 254.

146. Prosser, *supra* note 4, at 402 n.159.

147. *Id.* at n.161.

148. *Lane v. F.W. Woolworth Co.*, 171 Misc. 66, 11 N.Y.S.2d 199 (Sup. Ct. 1939), *aff'd*, 256 A.D. 1065, 12 N.Y.S.2d 352 (1939).

149. *Jansen v. Hilo Packing Co., Inc.*, 202 Misc. 900, 118 N.Y.S.2d 162 (Sup. Ct.), *aff'd*, 282 A.D. 935, 125 N.Y.S.2d 648 (1952).

150. *Selsman v. Universal Photo Books, Inc.*, 18 A.D.2d 151, 238 N.Y.S.2d 686 (1963).

151. In *Miller v. Madison Square Garden Corp.*, 176 Misc. 714, 28 N.Y.S.2d 811 (1941), an aging Pony Express rider who had tried to capitalize on an 1887 race between himself on a bicycle and a horseless carriage collected 6 cents for the use of a picture from that race in a program at the Garden.

152. Perhaps the closest case is *Almind v. Sea Beach Ry. Co.*, 157 A.D. 230, 141 N.Y.S. 842 (1912), *rev'd*, 78 Misc. 445, 139 N.Y.S. 559 (1912), where in a 3-2 decision, the court found a "technical" violation of the N.Y. appropriation statute in the use of a film showing the plaintiff who had consented orally, but the law requires written consent. The court brought the action under the law by finding "advertising" in the use of her

A related use of an image must be distinguished. Where the image or name is not used to sell a collateral product, but is used in connection with a news story, the press is privileged to print it without consent.<sup>153</sup> A right of publicity still exists, but is subject to the constraints of the first amendment.<sup>154</sup> The press's privilege is not absolute, however. In the leading case, *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>155</sup> the United States Supreme Court upheld the right of publicity (under Ohio law) against a news broadcast of the plaintiff's human cannonball act. The station showed the 15-second act, in full, on its nighttime news program. In analyzing the policy interests underlying the right of publicity, the Court recognized that absent the ability to charge admission to see the act, the plaintiff would, in all likelihood, never have created it. The free broadcast had satiated a part of the paying public. By analogizing to copyright laws, which provide economic incentives for the creation of copyrightable materials, the Court held that a strong public policy to foster creativity was embodied in the first amendment and that the press's rights must be limited accordingly.<sup>156</sup> In effect, the Court interpreted the first amendment as optimizing freedom of speech (variety), not merely speech (quantity). The courts, by limiting the press's right to broadcast,<sup>157</sup> and the copyright laws, through economic incentives, have provided the public with many creative forms of ex-

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pictures to "sell" a cause, that is, the safe way to enter cars. The case really stands for the proposition that there is an advertising value to companies in developing their goodwill through "public service" ads.

153. This was firmly announced under the New York appropriation statute in *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 267 N.E.2d 256 (1971) (picture of plaintiff in Irish garb, taken while he was watching a St. Patrick's Day parade, allowed to illustrate cover of magazine with a story on Irish immigrants).

154. Comparable first amendment problems may also subsist in "commercial speech" use of names or images, and may, in the future, be found to restrict the appropriation tort. *But see* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (first amendment protects commercial speech, but to a lesser extent than other protected expression). Justice Stewart, in his concurring opinion in *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 424 U.S. 589 (1976) noted that while commercial product advertising was protected by the first amendment, it could be regulated to a greater degree—at least respecting false or deceptive claims—than could ideological speech. He noted that an advertiser has the ability to verify its claims scientifically, and thus would not be chilled by stringent regulation. This principle appears consistent with a plaintiff's rights in appropriation cases, *i.e.*, preventing a false or deceptive endorsement.

155. 433 U.S. 562 (1977).

156. *Id.* at 576-77.

157. The press is not totally prohibited from covering such an act in its news broadcast. For example, it could properly present its analysis of the act and show part of it.

pression which otherwise might never have existed.<sup>158</sup> Private plaintiffs would not benefit from this *Zacchini* rationale, however, when privacy, in the sense of neither developing nor marketing an image or act, is involved.

An individual's privacy may need protection when, because of involvement in a newsworthy event, a private person's name or likeness and the event are used commercially. If the use is for advertising purposes, as by a "good Samaritan" company which aided the plaintiff and then distributed reprints of a news article about the aid, an appropriation action is proper.<sup>159</sup> If the use is to sell the story itself, as in a dramatization or fictionalization, an appropriation action is also proper, but within first amendment constraints. The leading case is *Binns v. Vitagraph Co. of America*,<sup>160</sup> in which the court developed the principle that when the presentation is not "factual," the work is only "entertainment" and, therefore, not protected as news.<sup>161</sup> A series of movies were created chronicling Binns' story: Binns was the first to use radio in a sea rescue and Binns was held to have a cause of action for the exploitation of his likeness. But the *Binns* court was walking on a tightrope. On the one side, news is protected, and as the United States Supreme Court has recently recognized in defamation<sup>162</sup> and privacy<sup>163</sup> cases, reporters are to be given liberal scope for making mistakes in the facts. On the other side, fiction is pro-

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The press could freely comment on the act, even if their opinion would economically ruin it, but they could not reveal any trick parts or clever twists.

158. An interesting case in this vein is *Paulsen v. Personality Posters, Inc.*, 59 Misc. 444, 299 N.Y.S.2d 501 (1968), in which the comedian Pat Paulsen, who had developed a political satire act including a "Paulsen for President" campaign, sued to enjoin a poster manufacturer from selling "Paulsen for President" posters without a license. In what would probably be an incorrect decision after *Zacchini*, the New York court denied the injunction, thinking the poster a form of political speech. Perhaps the court was concerned that politicians could then enjoin posters satirizing them. But in *Paulsen*, the plaintiff, unlike a politician, had actively created and exploited an act which was stolen by the poster manufacturer. Another case in this line is *Redmond v. Columbia Pictures Corp.*, 277 N.Y. 707, 14 N.E.2d 636, *aff'd*, 253 A.D. 708, 1 N.Y.S.2d 643 (1938), where a professional "trick" golfer recovered for the use of pictures of his act in a movie on golf.

159. *E.g.*, *Canessa v. J. I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967) (real estate company which helped plaintiff find and finance a house disbursed reprints of a news article on this help).

160. 210 N.Y. 51, 103 N.E. 1108 (1913).

161. See Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1300 (1976).

162. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

163. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

tected by the first amendment,<sup>164</sup> even in films.<sup>165</sup> As a result, many exceptions to the *Binns* principle have been recognized: untrue statements alone do not transfer a work into the class of fiction (where privacy statutes apply),<sup>166</sup> and *de minimus* references to the plaintiff in novels are allowable;<sup>167</sup> fiction can be based on real people,<sup>168</sup> even closely or thinly based;<sup>169</sup> drawings depicting an event are treated more liberally than pictures.<sup>170</sup> It was soon said that as long as the work was fictional it could not be the subject of an appropriation.<sup>171</sup>

This framework, however, can be criticized for failing to provide a clear standard of when a minor error becomes too fictional or when fiction becomes too factual.<sup>172</sup> It also removes protection from satire; in light of its obvious basis on real people, satire could be the subject of an appropriation action, and because it is "entertainment," there is no persuasive argument which can provide it with a news status.<sup>173</sup> Further, this framework fails to provide a clear standard for dealing with the "new fiction," in other words, fiction written as if fact and based on fact.<sup>174</sup> Finally, the privacy interest itself is not very compelling. Where the fictionalization is not defamatory or offensive, one is still entitled to have the record "set straight" which, if the record is innocuous or even flattering in its falsity, is a high

164. The pornography cases make this clear. *See e.g.*, *Roth v. United States*, 354 U.S. 476 (1957).

165. *See, e.g.*, *Kingsley Internat'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (film of *LADY CHATTERLY'S LOVER*).

166. *Koussevitzky v. Alen, Towne, & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779, *aff'd*, 272 A.D. 759, 69 N.Y.S.2d 432 (1947).

167. *Damron v. Doubleday, Doran & Co., Inc.*, 133 Misc. 302, 231 N.Y.S. 444 (1928), *aff'd*, 226 A.D. 796, 234 N.Y.S. 773 (1929).

168. W.L. PROSSER, *TORTS* § 117 at 806 n.40; *see also* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1208, 1305 (1954).

169. *Donahue v. Warner Bros. Picture Distributing Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954) (movie based on a vaudeville star allowed); *Stryker v. Republic Pictures Corporation*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951) (no right of privacy for a real life Sergeant Stryker for the John Wayne film "Sands of Iwo Jima" in absence of any reference to the plaintiff beyond similarity in names or allegation that the fictionalized portions were inaccurate, discrediting or unwarranted).

170. *Molony v. Boys Comics Publishers, Inc.*, 277 A.D. 166, 98 N.Y.S.2d 119 (1950) (comic magazine drawings). *See also* *Colyer v. Richard K. Fox Publishing Co.*, 162 A.D. 297, 146 N.Y.S. 999 (1914).

171. Recent Decisions, *Torts-Statutory Right of Privacy*, 51 MICH. L. REV. 762 (1953).

172. *See* *Donahue v. Warner Bros. Picture Distributing Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954) for a good discussion of this problem.

173. Hill suggests that satirists like Art Buchwald or Aristophanes would not be protected. *See* Hill, *supra* note 160 at 1304-05.

174. *E.g.* "Roots", "Blind Ambition", and other literature and television programs.

price to pay for chilling uncertainty.<sup>175</sup> Indeed, classifying an action protecting this privacy interest as "appropriation" is peculiar, for the interest here is far from the original proprietary underpinnings of that tort; a public figure does not own the public facts and news of his biography.<sup>176</sup>

These problems can be avoided and the privacy and publicity interests preserved if it is made clear that there is no commercialization or fictionalization tort aside from the "right of publicity" tort.<sup>177</sup> This may not prove to be a very satisfying result to many people; indeed, it was the printing of scurrilous gossip in newspapers which lead Warren and Brandeis to write their oft-quoted article.<sup>178</sup> It is difficult, however, to resolve the complicated balancing of interests in a fictionalization case in the context of a privacy action. In *Aquino v. Bulletin Company*,<sup>179</sup> the court, on appeal, was faced with a fact pattern involving a fictionalized story of a secretly married young girl whose marriage was promptly annulled. The groom admitted to entering into the marriage not for love of her, but to spite the girl's parents. The basic facts of the story were based on truth but were strongly embellished by the author. Oddly enough, the jury had found against the putative bride on her cause of action for invasion of privacy, but in favor of the parents for theirs.<sup>180</sup> It would not appear that the interest of any of the

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175. See e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967) (although the plaintiff was painted in a heroic light, the Court applied the *New York Times v. Sullivan* defamation standard in order to avoid chilling free expression in cases where one is not absolutely certain of the facts).

176. See e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (1968), *aff'd without opinion*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (1969).

177. Basically, if the fiction is presented as news and understood as such, or if news is presented as fiction but understood as really portraying truth, and the fiction is defamatory, an action will lie, as long as constitutional standards of breathing space, already delineated to allow some fiction in news, are met. See *Time v. Hill*, 385 U.S. 374 (1967), which involved fiction presented as a reenactment, and *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), which involved fiction presented as news; the Court applied the *New York Times v. Sullivan* privilege to allow breathing space. The hard case would be the implication of truth in a work of fiction, but the principles to distinguish defamation from fiction have been developed, e.g., *Kelly v. Loew's, Inc.*, 76 F. Supp. 473 (D. Mass. 1948) (movie held defamatory which thinly disguised its portrayal of a naval officer as headstrong and lacking in discipline), and are analogous to standards for distinguishing protected opinions from defamatory opinions which imply false facts. These standards, however, are still disputed and evolving. See Christie, *supra* note 50.

178. See *supra* note 1.

179. 190 Pa. Super. 528, 154 A.2d 422 (1959).

180. *Id.*

parties was fully balanced and considered in such a decision; the spurned and embarrassed bride was accorded no relief, despite the characterization of her as disloyal to her parents and fooled by her spiteful groom. Her parents, who recovered, were portrayed as insightful and caring. It would appear that the most suitable balancing of interests in such a context would be through a libel action.<sup>181</sup> Otherwise it is difficult to ascertain what interests are being protected, or to be assured that the standards now guiding juries in such cases would protect whatever interests one may wish to have protected.

One final type of appropriation case arises when the defendant impersonates the plaintiff for some advantage.<sup>182</sup> Some of these cases have been improperly classed as false light cases.<sup>183</sup> Certainly, if the impersonation injured the plaintiff's reputation, a defamation action would lie.<sup>184</sup> In other circumstances, other torts would lie. If the defendant used the ruse to gain access to private or confidential information, an intrusion has occurred.<sup>185</sup> If the impersonator passes himself off as a celebrity, an unfair competition action will lie.<sup>186</sup> Otherwise, if no harm occurs, no action should be available.<sup>187</sup>

### C. False Light

Prosser described this tort as "publicity which places the plaintiff in a false light in the public eye."<sup>188</sup> It seems very much like defamation; indeed, Prosser himself admitted:

There has been a good deal of overlapping of defamation in the

181. Other tort claims may be available such as intrusion or right of publicity actions. See *supra* text accompanying notes 154-58.

182. Prosser, *supra* note 4, at 403 nn.166-68.

183. Wade, *supra* note 7, at 1097-98.

184. See *infra* notes 206-07. See, e.g., Prosser, *supra* note 4, at 403 n.168, involving naming the wrong person as the father on a birth certificate. Cf. Wade, *supra* note 7, at 1098.

185. See *Corcoran v. Southwestern Bell Tel. Co.*, 572 S.W.2d 212 (Mo. 1978) (former daughter-in-law in pretending to still be married to plaintiff and having the telephone company send plaintiff's bills to her committed an intrusion when she opened them). See Prosser, *supra* note 4, at 403 n.166.

186. Although not quite on point, *Edgar Rice Burroughs, Inc. v. Charlton Publications, Inc.*, 243 F. Supp. 731 (S.D.N.Y. 1965) indicates that the famous character Tarzan is protected from others using the name and personality in unauthorized works. In the "Aunt Jemima" case, *Gardella v. Log Cabin Products Co.*, 89 F.2d 891 (2d Cir. 1937), the court noted that if there was confusion or deception, an imitator of the Aunt Jemima actress could be liable for unfair competition.

187. See Prosser, *supra* note 4, at 403, discussing that anyone could change their name to "Rockefeller" if they wished, without falsely impersonating the real one.

188. See Prosser, *supra* note 4, at 389.

false-light cases . . . The privacy cases do go considerably beyond the narrow limits of defamation . . . The question may well be raised . . . whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; . . . . If that . . . be the case . . . 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?<sup>189</sup>

Subsequently, it was argued that defamation should be consolidated within the false light tort.<sup>190</sup> To some extent, this would be welcomed, at least among those who condemn the "anomalies and absurdities of the law of defamation."<sup>191</sup> As a tactical matter, consolidation makes sense, for there has been much resistance to directly modifying defamation law.<sup>192</sup> This resistance may be well-based, however, for the false light tort is demonstrably unnecessary and a poor substitute for defamation.

The tort is unnecessary because its cases could have been covered by other, more established torts. It has often been recognized that many false light cases were also defamation cases,<sup>193</sup> and, consequently, in many factual situations courts will not recognize a false light action distinct from that of defamation.<sup>194</sup> Most of the cases which Prosser cited as establishing the false light tort were defamation cases, in the form of imputing misrepresentations in advertisements,<sup>195</sup> professional incompetence,<sup>196</sup> unchastity in a woman<sup>197</sup> and criminal

189. *Id.* at 400-01.

190. *See* Wade, *supra* note 7.

191. *Id.* at 1121. *See generally*, Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976).

192. *See, e.g.*, Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621 (1977).

193. *See, e.g.*, Prosser, *supra* note 4, at 400 n.146; *see generally*, 16 CLEV.-MAR. L. REV. 540.

194. *E.g.*, *Kapellas v. Kofman*, 1 Cal. 3d 20, 35 n.16, 81 Cal. Rptr. 360, 459 P.2d 912 (1969); *Rawlins v. The Hutchinson Publ. Co.*, 218 Kan. 295, 543 P.2d 988 (1975).

195. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Foster-Millburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911). These cases involved fictitious testimonials used in advertising.

196. *D'Altomonte v. New York Herald Co.*, 154 A.D. 453, 139 N.Y.S. 200 (1913), *modified to a defamation case*, 208 N.Y. 596, 102 N.E. 1101 (1913) (attributed a ridiculous cannibal story to a respected anthropologist); *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948) (cheating taxi driver); *Valerni v. Hearst Magazines, Inc.*, 99 N.Y.S.2d 866 (1949) (waiter).

197. *Martin v. Johnson Publishing Co.*, 157 N.Y.S.2d 409 (1956) ("man hungry" woman); *Semler v. Ultem Publications*, 170 Misc. 551, 9 N.Y.S.2d 319 (1938) (picture in a

or delinquent behavior.<sup>198</sup> Other cases cited by Prosser were actually appropriation (right of publicity),<sup>199</sup> intrusion,<sup>200</sup> or mental distress cases.<sup>201</sup> In the remaining cases, the courts felt satisfied to rest on privacy grounds, but the facts seemed quite analogous to these other tort cases and especially to defamation. Two cases involve the implication of sexual misconduct, in the context of advertising<sup>202</sup> and debt collection.<sup>203</sup> Several cases imputed criminal conduct, such as peddling drugs<sup>204</sup> or violating the Hatch Act.<sup>205</sup> In this vein is a series of "rogues' gallery" cases in which plaintiff's name and picture is posted among a group of criminals either before any conviction or after an acquittal.<sup>206</sup> Two interesting impersonation cases also seem to be based in defamation. In one, plaintiff's insurance company, in seeking witnesses for an accident involving the plaintiff, had a woman employee pose as his wife.<sup>207</sup> Since he was engaged to be married, this suggests sexual misconduct, criminal misconduct (bigamy) and general disrepute (liar,

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sex magazine); *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (1959) (bawdy bed sheet ad).

198. *Garner v. Triangle Publications, Inc.*, 97 F. Supp. 546 (S.D.N.Y. 1951) (murder); *Metzger v. Dell Publishing Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (1955) (juvenile delinquent); *Linehan v. Linehan*, 134 Cal. App. 2d 250, 285 P.2d 326 (1955) (bigamy).

199. *Lord Byron v. Johnston*, 2 Mer. 29, 35 Eng. Rep. 851 (1816) (spurious and inferior poem); *Hogan v. A. S. Barnes & Co.*, 114 U.S.P.Q. (BNA) 314 (Pa. C.P. 1957) (book on gold purports to include advice by the plaintiff); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) (mistaken advertisement) (*see also supra* note 144).

200. *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (while a false light tort was alleged due to imputation of shoplifting, this was really an intrusion case because the shopkeeper looked in the plaintiff's purse, pockets, and bags without consent).

201. *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961) (overzealous creditor who hounded the plaintiffs in public, telling the world of the debts).

202. *Krby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942) ("ectoplasmic playmate").

203. *Freeman v. Busch Jewelry Co.*, 98 F. Supp. 963 (N.D. Ga. 1951) (the court did not label the action, although it felt it was "more likely" a libel action than a privacy action).

204. *Thompson v. Close-up, Inc.*, 277 A.D. 848, 98 N.Y.S.2d 300 (1950).

205. *Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941).

206. *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *State v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946). These two cases are based on *Downs v. Swann*, 111 Md. 53, 73 Atl. 653 (1909), which never mentioned libel but noted that the listing "would be a permanent proof of dishonesty." Today, the plaintiff would probably sue under § 1983 or the *Bivens* doctrine for violation of a constitutional right. *See, e.g.*, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). *But see* *Paul v. Davis*, 424 U.S. 693 (1976) (Rehnquist, J.) (limiting this action and saying the best recourse is defamation). *See generally* *Christie, supra* note 50.

207. *Hamilton v. Lumbermen's Mutual Casualty Co.*, 82 So. 2d 61 (La. App.), *appeal transferred*, 226 La. 644, 76 So. 2d 916 (1955).

cheat and fraud upon a decent woman). In the other case, a tire company employee posed as the plaintiff to elicit confidential tire prices from another company; in the process the imposter revealed the "confidential" prices of the plaintiff's tire company.<sup>208</sup> Since the imposter's actions reflect on the plaintiff and suggest that the plaintiff cannot be trusted in business dealings, they could injure the plaintiff's relationship with these companies, and slander *per se* has occurred. Finally, two cases cited as false light cases involved tort problems discussed above, including fictionalization<sup>209</sup> and mental distress caused by debt collectors.<sup>210</sup>

There are several remaining cases which represent three basic themes; one is the use of the plaintiff's picture to illustrate a story with which the plaintiff has no reasonable connection. Most of the cases involve a defamatory implied connection.<sup>211</sup> Only two of the cases appear to fall in a pure false light area. In one, a couple's picture was used to illustrate an article on the "wrong type of love" (love that is based upon sex and not affection), although the couple were happily married.<sup>212</sup> In the other, a well-publicized picture of a child who had been in an accident was used twenty months later to illustrate a story on the carelessness of children, even though this child had not been careless.<sup>213</sup> A libel count was dropped and the decision rested on privacy grounds. Even assuming *arguendo* that these decisions are correct, other torts besides false light might have given relief here. In a companion case to the "wrong type of love" incident, the same picture was published without any defamatory legend, and yet the court found a loss of privacy on the basis of intrusion (a breach of the scope of consent).<sup>214</sup> The picture was taken as the couple innocently sat inside their diner. The court felt that "[t]hey may be unthinking of the stares of those in the vicinity and thus unaffected by them, but that is far from consenting to the photographing of their like-

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208. Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936).

209. Strickler v. N.B.C., 167 F. Supp. 68 (S.D. Cal. 1958) (movie thinly disguised an account of plaintiff in the war).

210. Biederman's of Springfield v. Wright, 322 S.W.2d 892 (Mo. 1959) (citing Housh v. Peth, which is a privacy case only because Ohio has no mental distress tort; see *supra* note 104).

211. See, e.g., Prosser, *supra* note 4, at 399 nn.137-42.

212. Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952).

213. Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951).

214. Gill v. Hearst Publishing Co., 239 P.2d 636 (Cal. 1952).

ness and publishing it in a magazine.”<sup>215</sup> In the child-carelessness case, this intrusion argument is obviated by the fact that the picture was taken and publicized as news in the first place.<sup>216</sup> The decision of this court in *Leverton*, however, has not been followed in other jurisdictions<sup>217</sup> and may be considered the type of spurious decision which the false light tort’s vague definition of “offensiveness” would be likely to produce.

The second false light theme can be illustrated by cases in which professionals sue for incidents that would not be defamatory to anonymous people; examples include an actor said to have entered an embarrassing popularity contest,<sup>218</sup> another actor put in an undignified light in a “doctored” advertisement,<sup>219</sup> a lawyer advertising a paper-copier which he, in fact, had returned as unsatisfactory,<sup>220</sup> a rabbi whose name was attributed to a fictitious interview on sex found in a romance magazine,<sup>221</sup> and a candidate for national office whose name was attributed to a party not representing his views.<sup>222</sup> While some of these cases, particularly the ones involving actors, could be brought as right of publicity cases, they all have in common an injury which damages professional reputation. Defamation has long protected professional or business standing,<sup>223</sup> and these types of cases could, therefore, be treated as ordinary defamation cases.

The cases upon which Prosser based his false light tort could, except for the child-carelessness case, have been characterized as defamation, appropriation, intrusion or mental

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215. *Id.* at 638.

216. Arguably, it was not an intrusion in the first instance only because of the implied consent of people caught in a newsworthy public situation to have their picture taken and their story told; in the second publication of the picture, the paper had gone too far and violated the scope of this implied consent. Alternatively, since the later article had no reasonable connection with the picture, arguably the article is a “collateral product” using the innate goodwill of the picture to bring attention to it. Thus, the child’s right of publicity in that picture has been appropriated. *See supra* text accompanying notes 145-51; *cf.* the right of publicity of an “innately” attractive woman.

217. *E.g.*, *Nelson v. Times*, 373 A.2d 1221 (Me. 1977) (not invasion of privacy to publish in connection with a book review or picture of a child which had previously been published in a news article).

218. *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (1893).

219. *Sinclair v. Postal Tel. and Cable Co.*, 72 N.Y.S.2d 841 (1935).

220. *Fairfield v. American Photocopying Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

221. *Goldberg v. Ideal Publishing Co.*, 210 N.Y.S.2d 928 (1960).

222. *State v. Hinkle*, 131 Wash. 86, 229 P. 317 (1924).

223. It is a *per se* violation to impugn professional reputation. W.L. PROSSER, TORTS § 112 (4th ed. 1971).

distress cases. Such alternate characterizations would, perhaps, have been preferable given vague standards for false light liability.

A third theme in the false light area has developed since Prosser published his classification scheme and suggests a stronger basis for this tort. The theme is fictionalization of news or biography presented as truth, but in a manner which is more laudatory than defamatory, for the purpose of enhancing sales. Typical cases include: *Time, Inc. v. Hill*,<sup>224</sup> in which the plaintiff and his family, held hostage in their suburban home, were portrayed in an article as reacting heroically to alleged violence; *Cantrell v. Forest City Publishing Co.*,<sup>225</sup> a case involving the story of a widow and her family after her husband's tragic death, which embellished her courage; and *Spahn v. Julian Messner, Inc.*,<sup>226</sup> in which a biography of a baseball star was glorified to appeal to a juvenile audience. This theme fits with difficulty under the other established torts, but some suggestions of alternate classifications can be made. First, although the stories were not defamatory on their face due to their laudatory light, they are defamatory among the plaintiff's peers who know the truth, for it appears that the plaintiff has lied.<sup>227</sup> Second, an appropriation (violation of a right of publicity) may have occurred. Although the use of plaintiff's name or image is related to the story, one can also argue that the fiction itself is being used to sell a collateral product, the truth. The distinction between appropriating a name or image to sell a collateral product and doing so to sell the truth as news was made in the context of the right of publicity.<sup>228</sup> In either case,

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224. 385 U.S. 374 (1967) (while the publication was an account of a play, it was presented as reporting on a reenactment of the event).

225. 419 U.S. 245 (1974).

226. 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966) (although this case arose under the N.Y. appropriation law, it presents the same issue as in *Hill* and *Cantrell*; see 385 U.S. at 386).

227. Wade, *supra* note 7, at 1096 explains the decision in *Pavesich*—which came down both in libel and privacy—as based on the idea that those friends of the plaintiff who knew he did not own the insurance he is reported to have said he owned would think he lied for money.

228. See *supra* text accompanying note 152. A constitutional privilege probably does not exist under this suggestion, as a calculated decision to sell truth with fiction would be "actual malice" under *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967); *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 127-28, 233 N.E.2d 840, 843-44, 286 N.Y.S.2d 832, 834-35 (1967). The "new journalism", which presents events realistically by creating characters who are an amalgam of actual people, would be protected, since it is the implication of truth and not realism which is objectionable. Even if the story appeared to be

there is no need for a separate false light tort.

#### D. Public Disclosure

This is the tort about which Warren and Brandeis were concerned.<sup>229</sup> Ironically, it has the most tenuous claim of credibility today: it has the least definite legal profile,<sup>230</sup> and may be unconstitutional.<sup>231</sup> Prosser described it as "public disclosure of embarrassing private facts about the plaintiff."<sup>232</sup> Although to Warren and Brandeis the interest protected is "privacy,"<sup>233</sup> to Prosser the interest is reputation, and Prosser characterizes the tort as defamation without the defense of truth.<sup>234</sup> This difference is more than semantic, for it changes the focus from whether the press is "warranted" in publishing, that is, whether the information should be left private,<sup>235</sup> to whether the plaintiff is entitled to relief, that is, whether the publication is "offensive" or injures reputation. The former formula would eliminate from the press inoffensive gossip which is not important, yet would keep in the news "offensive" acts which are important to the public; the latter would tend to do the opposite. Consequently, Prosser's tort does not protect either the privacy or the first amendment interests very well. This is illustrated by two cases involving attempts to escape past notoriety. In one, the plaintiff had been a prostitute involved in a sensational murder trial, but had since married and lived a respectable life.<sup>236</sup> In the other case, the plaintiff had been a child mathematics prodigy, but had since led an obscure life with eccentric hobbies and with a passion for privacy.<sup>237</sup> The respectable spouse won while the eccentric *enfant* lost. The

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presented as truth, the references to real people may be too tenuous upon which to base a claim.

229. Prosser, *supra* note 4, at 392; Bloustein, *supra* note 6, at 967; Kalven, *supra* note 109, at 330.

230. Kalven, *supra* note 109, at 327.

231. See *infra* text accompanying note 249.

232. Prosser, *supra* note 4, at 392.

233. See Bloustein, *supra* note 6, at 966-69.

234. Prosser, *supra* note 4, at 398.

235. Warren and Brandeis, *supra* note 1, at 219; See also Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Facts*, 16 STAN. L. REV. 107, 111 (1963).

236. *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931). See also *Briscoe v. Readers Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (upholding the privacy claim of a reformed convict whose story was mentioned 11 years later in a hijacking article read by the classmates of his young daughter).

237. *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940).

results are explained on the basis of community mores of what is offensive to publish.<sup>238</sup> The privacy interest of both, however, seems the same. Certainly, both were offended; indeed, perhaps the prodigy was even more so, for the article exposing him is said to have contributed to his early death.<sup>239</sup> What is evident is that a community mores standard protects the privacy of people the community deems respectable more than it does that of eccentrics, which seems contrary to the principles underlying a right of privacy. Further, the first amendment interest of the defendant newspaper in *Briscoe* was greater than the interest of the defendant in *Sidis*, for the play which exposed the former prostitute was based on public records of a very newsworthy past event, while the article which traced the life of the prodigy went beyond past records and dug into his present private life.

The public disclosure cases fall into certain categories. Some involve revelation of intimate personal details, including photographs of the human anatomy,<sup>240</sup> bizarre habits,<sup>241</sup> and masculine characteristics of a woman.<sup>242</sup> Others involve surreptitious photographs, stolen photographs, bribery or other breaches of trust to gain the material.<sup>243</sup> These types of cases can usually be based either on the intrusion tort, because they entail "snooping" analogous to illegal police practices, or—by using the developing method of analysis—on a breach of the scope of consent.<sup>244</sup> A third category involves cases where the defendant has exceeded permissible bounds. For instance, reports of an individual shirking payment of debts are not actionable if given to an employer or if revealed to an individual or

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238. Prosser, *supra* note 4, at 397. Another explanation is the public policy in California of encouraging rehabilitation of former convicts. *Briscoe v. Readers Digest*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). This policy may no longer be sufficient to restrain publication of true facts about felons. See *Rawlings v. The Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988 (1975), citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (upholding accurate broadcasting of information found in the public record).

239. Prosser, *supra* note 4, at 397.

240. Prosser, *supra* note 4, at 393 n.88, 397 n.120.

241. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (body surfer who allegedly ate spiders, extinguished cigarettes in his mouth, and dove headfirst down flight of stairs).

242. Prosser, *supra* note 4, at 393 n.89.

243. Prosser, *supra* note 4, at 395 nn.109-11.

244. See *supra* note 239. Cases on pictures of nudity or anatomy generally involve a breach of confidence, usually by a doctor. In *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), the plaintiff had originally consented to a series of interviews but later withdrew that consent.

small group, but can be actionable if publicized at large.<sup>245</sup> It has been suggested that singling the plaintiff out of the crowd is actionable,<sup>246</sup> and that if the plaintiff's name can be left out of the story, it should be.<sup>247</sup> In general, if the publication is not extensive, no action will lie.<sup>248</sup> These suggestions parallel the developing scope of consent analysis. The use of that analysis would obviate the need for reaching "offensiveness" or "publication" issues under the public disclosure tort.

Another problem with the public disclosure tort is that the standard which is developing to draw the line between tortious and privileged disclosures—community mores of offensiveness—is not a good one.<sup>249</sup> The community standard of offensiveness test is less protective of the plaintiff's reputational interest than is defamation law. It is the lesson of history that a loss to reputation is hard to prove.<sup>250</sup> It is also a lesson of the past that a plaintiff has a difficult time disproving a falsehood. As a result, the plaintiff need not disprove the falsehood to establish defamation; instead, the burden is shifted to the defendant by making truth a defense. However, falsity may be important to show the negligence or "offensiveness" of the publication (for instance, that a story was embellished) or to show the lack of public value; therefore, these burdens will still fall on the plaintiff.<sup>251</sup> At the same time, the vagueness of the standard could encourage many nuisance suits and trivial claims, as well as exploitation of the publicity surrounding such suits, simply because of the difficulty of achieving sum-

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245. Prosser, *supra* note 4, at 393-94.

246. Prosser, *supra* note 4, at 395; *see also* Bloustein, *supra* note 6, at 979 n.107.

247. Franklin, *supra* note 234, at 128-131; Prosser, *supra* note 4, at 396. *See* Byron, Harless, Schaffer, Reid and Assocs, Inc. v. State, 360 So. 2d 83, 98 (Fla. App. 1978). *Cf.* Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

248. Prosser, *supra* note 4, at 393-94; Bloustein, *supra* note 6, at 980-81.

249. Unfortunately, the standard has some impressive constitutional analogues. In recent obscenity cases, the Supreme Court has relied upon a jury applying contemporary community standards to determine when the material is unprotected. *See, e.g.,* Miller v. California, 413 U.S. 15 (1973). The analogy to the obscenity cases is misleading, however. Pornography is farther from the core of the first amendment than is news. A community standards test is less chilling on core values, and is perhaps more tolerable when applied to pornography than when applied to news. In addition, the obscenity decisions include a "serious (social) value" test, which is not solely a question of fact. *See* KAMISAR, LAFAYE AND SCOTT, CONSTITUTIONAL LAW 1030, (West, 4th ed. 1975). There appears to be no corresponding "public issue" requirement in the developing public disclosure cases.

250. This is the reason for presumed damages in defamation actions. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 n.30 (1974) (White, J., dissenting).

251. *Cf. Keeton, supra* note 191 at 1235; *see also* Wade, *supra* note 7, at 1112.

mary judgment.<sup>252</sup> Thus, both deserving plaintiffs and defendants may lose. Also, the community standard of "offensiveness" does not do justice to the first amendment interest. It does not protect truth. As a defense, it is not as clear as the standard of truth or other conceivable privacy standards,<sup>253</sup> and hence, has a greater chilling effect and is more likely to be applied for non-privacy reasons. In cases involving national publications or broadcasts, local community standards result not in local standards, but in one national standard based on the most restrictive locality. The damages due to that one violation may make the costs for presentation of the information too high. This problem may be mitigated somewhat if states define their public disclosure tort to place less restriction on speech, but any restriction on speech will be acutely felt because core values are involved and because the "offensiveness" standard is open to manipulation for non-privacy reasons.

The basic problem with the public disclosure tort, however, is not that it is unnecessary or improperly defined, but that it may be unconstitutional because it does not allow truth to be a defense.<sup>254</sup> If the first amendment protects all ideas, a fundamental element of most theories on free speech,<sup>255</sup> arguably true facts must be protected, for they are essential to the formation of ideas and opinions. False facts are not essential to this end, and are therefore not protected, except to the extent that the "robust" nature of free speech allows errors or exaggeration.<sup>256</sup> The argument for protecting private facts is that the privacy interest is strong and the speech interest (in expressing and forming ideas based on these facts) is attenuated—being far from the political arena—and on balance, the

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252. Kalven, *supra* note 109, at 338-39.

253. *E.g.*, That the disclosure is "unwarranted", Warren and Brandeis, *supra* note 1, at 218-19; that the disclosure affects reputation, discussed *infra* note 260; an intrusion standard, *supra* notes 238-47; and a standard analogous to the constitutional right of privacy, suggested *infra* notes 263-69.

254. *E.g.*, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). The Court struck down a state statute which imposed criminal penalties for the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper as violative of the paper's first amendment interests. See Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 817 (1964).

255. See A. MEIKELJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

256. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

privacy right should be respected.<sup>257</sup> This argument presumes that some ideas are not valuable to public debate, without letting the "marketplace of ideas" make that determination.<sup>258</sup> This is dangerous for a variety of reasons. First, the presumption is based on the fallacy that when the facts are private and not of public interest, the free speech interest is the same, regardless of the truth. It has, in fact, been suggested that in some situations the false light and public disclosure causes of action could be brought without any need to determine which is technically applicable.<sup>259</sup> The privacy interest is considered

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257. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

258. Franklin, *supra* note 254, at 812-13.

259. Wade, *supra* note 7, at 1120-1. Arguably, the Supreme Court has been heading toward this result in recent defamation cases. Beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court had been moving in the same direction, to a standard that in areas of public interest, the press has a privilege of printing even false facts as long as there is no reckless or intentional disregard for the truth.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), however, the Court limited this privilege to stories on public officials or public figures and applied a negligence standard to the defamation of private persons. Although the Court appears to hold that both tiers of speech—that concerning private persons as well as public figures—are protected by the first amendment, the result from applying the two tests is the same if the negligence standard is viewed not as a lesser privilege, but rather, as marking the boundary between protected and unprotected speech. The Court is drawing the same lines between privilege and privacy as the false light tort does between liability and non-liability—negligence as to the falsity of the speech. Wade, *supra* note 7, at 1112-13. The result is that while a privilege exists if the defendant is not negligent, regardless of the privilege, there is no liability for the tort. If the defendant is negligent, there is no privilege and liability does attach. The privilege thus adds nothing to the result.

The extension of this negligence standard to a community standards test as the first amendment threshold has already been suggested. Christie, *supra* note 51, at 64. As has been noted, if a fact is truly private, under Prosser's schema it will be actionable regardless of truth under either the false light or public disclosure label, absent some privilege. But if the *Gertz* privilege is made to depend upon whether the community standard for privacy has been violated, instead of negligence as to its falsity, a clever synthesis has occurred. Two areas of the law have been joined, for public disclosure of a private fact (true or false) generates liability and no privilege, while public disclosure of a non-private fact generates no liability and privilege. Thus, where there is no *Gertz* privilege, there would be liability under the combined false light/public disclosure tort, and where there would be privilege, no liability would attach.

This schema would help explain some interesting problems involving *Gertz*. First, the *Gertz* standard was not simply negligence, but at least negligence (no "liability without fault"). This standard meshes nicely with definitions of the standard found in false light or public disclosure cases—ranging from negligence to offensive and intentional disclosures—which always require at least negligence and sometimes more to give the first amendment greater deference. Wade, *supra* note 7, at 1112-16; Prosser, *supra* note 4, at 397, 400. Second, *Gertz* added that in defamation actions by private plaintiffs, no damages could be presumed. In defamation actions by public plaintiffs, the traditional rule would still apply: proof of damages could be presumed. In privacy actions, proof of actual damages has always been required. Wade, *supra* note 7, at 1112-16; Prosser, *supra* note 4, at 409. These changes in effect rewrote defamation of

the same. The first amendment interest, however, is quite different. An idea based on truth is worth more than one based on falsity. Second, this presumption that ideas based on private facts are not valuable to public debate is also unrealistic. In practice, to determine that a fact or idea is private and not of general value *a priori* is not possible. What appears to be an isolated, private fact may be the piece in a puzzle that leads to significant public facts.<sup>260</sup> Suppression may also be harmful in itself, regardless of its place in any puzzle, because of the stigma that information is being withheld. Third, this presumption invites use contrary to the public interest. It permits those who wish to suppress these ostensibly private facts to refrain from disclosing information which would aid in the in-

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private persons into a false light tort, except for some spurious results which derive from using an "offensiveness" instead of a loss-of-reputation standard. See *supra* text accompanying note 216; cf. Nimmer's idea *infra* note 260. Similarly, except for the same spurious results, the false light tort for public figures is the same as defamation. Thus, the troublesome false light tort has been neatly divided into a defamation tort and a public disclosure tort of true or false facts.

Third, this schema would explain certain decisions subsequent to *Gertz*. *Gertz* suggested that the recklessness standard would apply to any public figure, defined to be one who attempts to influence the resolution of a public issue and who can command channels of communication to rebut false charges. The public nature of the issue would be important only to determine if the plaintiff has entered the public arena; certainly it was reasonable to expect that one who actively sought publicity had so entered the arena. But this is not necessarily so. In a subsequent case involving the divorce of a society woman, the Court held that she was not a public figure even though she sought publicity and held news conferences (in order to rebut falsehoods). *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). This decision appears highly unprincipled. *Id.* (Marshall, J., dissenting); see Christie, *supra* note 51, at 54; but see *infra* text accompanying notes 271-73. In another case, three obscure employees in a labor dispute were held to be subject to the recklessness standard merely because they were involved in a labor dispute. *Old Dominion v. Austin*, 418 U.S. 264 (1974); see Christie, *supra* note 51, at 50-51. Evidently, although the *Gertz* Court said it applies the two standards based on whether the plaintiff is a public or private figure and that the nature of the issue is not determinative, it actually applied the two standards based upon whether the issue is public or private. See *Gertz*, 418 U.S. at 346. Facts in a labor dispute, such as whether the employees were crossing union lines, are not private; facts in a divorce, unlike those in public proceedings such as rape, (See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where the Supreme Court held that the accurate publication of the publicly recorded name of a crime victim or, implicitly, of an accused or convicted criminal cannot be actionable under any circumstances), are private when they involve intimate details of the personal relations of the married couple. (The key fact in *Firestone* was an allegation of adultery.) In other words, the cases could be said to parallel the results in a public disclosure action. As has been noted, one theme in the public disclosure cases is that the defendant has simply gone too far. In *Firestone*, the court intimated that if the same facts had not been published nationally but only in the Palm Beach community where all of this was of concern, the report might have been privileged. 424 U.S. at 453.

260. Franklin, *supra* note 253 at 822-23.

vestigation of corruption or moral failing of the powerful but private people in our society.

These constitutional problems could be obviated under several theories. Arguably, disclosure of private facts, like pornography, commercial speech or false facts, does not merit first amendment protection.<sup>261</sup> Alternatively, restrictions on speech are appropriate if they can be characterized as reasonable time, place, and manner restrictions and if the underlying ideas can be freely expressed.<sup>262</sup> The first amendment does not protect "speech", but "freedom of speech"; this means that everything worth saying should be said, not that everyone should speak.<sup>263</sup> Perhaps this test can be used to resurrect the public disclosure tort within the first amendment. Certainly, many public disclosure cases do not restrict the publication of facts and ideas, but only a particular manner of publication; however, other cases do involve absolute censure. Another approach is suggested by a recent trend in Supreme Court cases: the first amendment can be limited when it competes with another fundamental right. In *Nebraska Press Association v. Stuart*,<sup>264</sup> the court disallowed restrictions on pre-trial disclosure but suggested that in extreme circumstances, where necessary to lessen the prejudicial impact, certain restraints may be allowed.<sup>265</sup> In *Gannett v. DePasquale*,<sup>266</sup> the Court found such circumstances and limited the right of access of the press to a pretrial judicial hearing. Other recent decisions indicate that there is a fundamental, constitutional right of privacy to make certain "private" decisions, such as whether to use contracep-

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261. See Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968). Nimmer suggests that a private fact is one which, though known to the immediate participants, is unknown to any number of casual observers . . . . *Id.* at 960 n.86. Nimmer's theory, as he indicates by the following hypothetical, posits that even when truthful, disclosure of a private fact may be injurious. The publication of a picture of a nude woman, taken surreptitiously, with no defamatory imputation of complicity or consent, clearly would be actionable as an intrusion. Now what if the woman's face were appended to a picture of a nude body and published? This is not an intrusion, and while her distress due to the public's reaction (snickering?) is the same, this event is not as harmful; she is still free in her own home from intrusions. But she might as well not be free, for the public effect is the same. Arguably, however, it may be that such a publication would be defamatory because of the imputation of consent. *Id.* at 963.

262. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

263. A. MEIKELJOHN, *supra* note 255.

264. 427 U.S. 539 (1976).

265. *Id.* at 617 (Stevens, J., concurring).

266. 443 U.S. 368 (1979).

tives<sup>267</sup> or to have an abortion,<sup>268</sup> free from government interference. Arguably, where public disclosure of certain facts would chill the exercise of these decisions, a private cause of action is appropriate and allowable under state law. The advantage of this approach is that it would cover only the core areas of privacy and, accordingly, would have a less chilling effect on other speech.<sup>269</sup> One disadvantage of this approach is illustrated in the following hypothetical: can an anti-abortion group publish the names of people who have abortions, in an effort to chill the exercise of that right? The type of speech used here is not only in the core area of privacy, it is political speech of the sort protected by the first amendment. It is quite analogous to government regulations which require teenagers to notify their parents before undergoing an abortion.<sup>270</sup> This demonstrates the problem with not allowing truthful speech to be protected. But perhaps the anti-abortionists' point could be made in a less offensive manner. This is, of course, what Warren and Brandeis suggested.<sup>271</sup> Since the very matters about which they were worried—gossip on intimate affairs, marriage and sex—are those in the core area of the constitutional right of privacy, this approach to their tort may satisfy both the privacy and first amendment interests.

The best approach, however, is to change the focus of the public disclosure tort from the nature of the facts disclosed to the manner of discovery—that is, the developing methodology should be incorporated within the public disclosure tort. The crucial question would be to ascertain the scope of consent for the use of the facts by determining whether the plaintiff has acted so as to thrust these private facts into the public arena. Recent defamation cases have conformed to this developing method of analysis and point the direction in which the common law should proceed to determine what is protectable privacy. In *Wolston v. Reader's Digest Association*,<sup>272</sup> the plaintiff

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267. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

268. *Roe v. Wade*, 410 U.S. 113 (1973).

269. *Cf.* the intrusion analysis *infra* note 274. Since the constitutional right of privacy lacks textual delineation, the privacy analogy should be narrowly construed.

270. Of course, state laws requiring all unmarried minors to seek parental consent for an abortion, with no provision allowing "mature minors" to go directly to the court for permission without first consulting or notifying parents, are unconstitutional. *Belotti v. Baird*, 428 U.S. 132 (1976).

271. Warren & Brandeis, *supra* note 1 at 214-10.

272. 443 U.S. 157 (1979).

was once accused of espionage, but sixteen years later was not found to be a public figure because he had never voluntarily thrust himself into the forefront of the particular public controversy, and indeed had led a thoroughly private existence before and after the original controversy. In *Hutchinson v. Proxmire*,<sup>273</sup> a research scientist whose funding by various federal agencies on a particular project was publicized as an example of egregious waste was similarly found not to be a public figure because he "did not thrust himself or his views into public controversy to influence others."<sup>274</sup> The Court is focusing not on the newsworthiness or public nature of the alleged defamation, but on what the plaintiff has done to protect or relinquish his privacy. Similarly, in the related context of disclosure of private facts, the focus should be on the extent to which the plaintiff has dedicated the disclosed facts to the public; in other words, the focus should be the same as that of the developing method of analysis.

### III Conclusion

This analysis of Prosser's right of privacy indicates that a revision is in order. Appropriation does not protect privacy, but publicity. False light protects the same interest as defamation, and perhaps not as well. Public disclosure in its present form poorly serves both the privacy and first amendment interests it balances and may be unconstitutional in any form. Intrusion should be narrowed to cover only the seeing, hearing, and gathering of information from private areas. Most of all, regardless of which of the four torts a privacy situation falls into, if any, the analysis of the situation should proceed by the scope of consent standard, and protection should not be afforded those uses of information which go beyond the purposes for which they were dedicated to the public. By using this analysis, especially in the context of the consensual relationship between the plaintiff and defendant, many of the other interests, especially public disclosure interests, could be protected. This analysis fully protects privacy and provides clear standards for use by the press. Using the concept of a scope of consent to cover disclosure of private facts for limited purposes could be a

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273. 443 U.S. 111, 135 (1979).

274. *Id.*

powerful tool to protect privacy. It focuses on the key harm to privacy—the revelation of hidden information—instead of peripheral injuries, such as harm to reputation. To the extent this analysis suffers from lack of precedent and indefinite standards, definition can be supplied by analogy, as with fourth amendment, trade secret and breach of confidence cases.<sup>275</sup> In addition, the privacy interests of the parties can be analyzed in the context of the parties' relationship, using the present body of law regarding duties arising from that relationship. This tort would have the advantage, with respect to first amendment interests, of being based on the manner of discovery of the information, not on the nature of the fact. This concept of intrusion restores the "dignity" that Warren and Brandeis attributed to the right of privacy: it protects not reputation, mental distress or property, but rather privacy, pure and simple, and the control over that privacy.

In conclusion, this analysis provides a bright light to end the privacy confusion. Its clear conceptual limits give the courts the necessary framework to guide the law of privacy wisely in the future, especially as society and its norms of privacy become increasingly complex.

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275. See Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977).