Chapter 15
Invasion of Privacy

Introduction

The "right to privacy" is a subject of much current debate. In its constitutional form, it serves as a means of declaring invalid laws that interfere with abortion, homosexuality, and other controversial activities. However, privacy as a tort doctrine is older than the claims for the constitutional status of a "right to privacy." As the following article illustrates, it was a concern nearly a century ago.

In analyzing the right to privacy, you must distinguish the forms that are recognized as a common law (or even statutory) right (like the interest in one's reputation) from the constitutional claim that requires protection of some individual's privacy. Even if there is no constitutional right protecting, e.g., abortion on demand, the state (through the court system or through the legislature) may choose to recognize the right to be let alone.

The right to privacy is broken down into distinct interests, some of which protect the right to be let alone, and others which protect the property interest in one's likeness or name. But in general, the interest in privacy protects against certain kinds of exploitation of private individuals by society.

Warren & Brandeis, The Right to Privacy
4 Harv. L. Rev. 193, 193-197 (1890)

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, —the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession —intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally the law halted, —as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the
action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art; goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

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

Of the desirability —indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of

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1 Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages." CASSODAY, J., in *Lavery v. Crooke*, 52 Wis. 612, 623 (1881). First the fiction of constructive service was invented;... Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage;... The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, *e.g.*, the suffering of the parent in case of physical injury to the child;...

2 Copyright appears to have been first recognized as a species of private property in England in 1558. **Drone on Copyright**, 54, 61.

3 **Cooley on Torts**, 2d ed., p. 29.

Warren & Brandeis, *The Right to Privacy*

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5 *Marion Manola v. Stevens & Myers*, N.Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theatre, in a rôle which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken....
commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and pervers. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can be properly invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.

Questions and Notes

1. If you had been assigned to write an updated version of this article for a 1990 centennial edition, are there any substantive changes you would need to make? Do you think Warren & Brandeis would be surprised at any of the developments between 1890 and 1990?

2. Are Warren & Brandeis identifying a single interest that is deserving of protection, or a cluster of interests?

FROELICH v. ADAIR
213 Kan. 357, 516 P.2d 993 (1973)

OWSLEY, Justice

Plaintiff William Froelich appeals from judgment of the trial court denying him recovery for his mental suffering due to an alleged invasion of his privacy by defendant Burneta Adair.

Plaintiff’s cause of action for invasion of privacy by intrusion arose sometime in October, 1969, while he was a patient at St. Francis Hospital in Wichita. Burneta Adair’s former husband, Tom Hamilton, had previously sued her seeking to recover a million dollars for defamation because she had stated he was homosexual and William Froelich was his lover. Truth is a defense to an action for defamation and Mrs. Adair was interested in obtaining evidence from William Froelich as to the truth of her statements. Syd Werbin, deputy sheriff and a friend of Mrs. Adair, informed her that Froelich had become ill and was at St. Francis Hospital. Mrs. Adair then became alarmed that he might not be able to testify in the defamation action. She had previously obtained hair from her former husband’s bed and underclothing and had it analyzed, and she suggested in her conversation with Werbin it would be a good idea to get samples of Froelich’s hair for analysis and comparison. Werbin paid a hospital orderly who obtained combings from Froelich’s hairbrush and a discarded adhesive bandage to which Froelich’s hair was attached. Werbin passed these on to Mrs. Adair and she had them analyzed. There was conflicting testimony as to whether she asked Werbin to obtain the hair samples or whether he did so of his own volition after their discussion. During a deposition session with Hamilton’s attorneys, she let it be known she had the samples of Froelich’s hair obtained from his hospital room. Although he had not been aware of the taking of his hair samples at the time they were taken, when he later learned of the intrusion he claimed he was emotionally upset over the alleged invasion of his privacy and brought suit against both Mrs. Adair and Syd Werbin (Froelich v. Werbin, 212 Kan. 119, 509 P.2d 1118) in separate actions.

We have recognized invasion of the right of privacy as a tort upon which a cause of action may be based. (Kunz v. Allen, 102 Kan. 883, 172 P. 532; Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P.2d 808; Munsell v. Ideal Food Stores, 208 Kan. 909, 494 P.2d 1063.) Discussion of the right of privacy is found in PROSSER, LAW OF TORTS, 4th Ed., PRIVACY, § 117, p. 802; 62 AM. JUR. 2D, PRIVACY, § 26, p. 718; AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW SECOND, TORTS, Tentative Draft No. 13, § 652. These authorities point out invasion of the right of privacy comprises four distinct kinds of tort.
Prosser points out they are tied together by a common name, but otherwise have almost nothing in common except each protects against interference with the right to be let alone. They are listed in the Restatement as:

§ 652B. Intrusion Upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man. (p. 103.)

§ 652C. Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy. (p. 108.)

§ 652D. Publicity Given to Private Life

One who gives publicity to matters concerning the private life of another, of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy. (p. 113.)

§ 652E. Publicity Placing Person in False Light

One who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy. (p. 120.)

We are concerned here with an action for invasion of privacy by intrusion upon seclusion. The foregoing authorities recognize such an action and each lists numerous citations of supporting cases. Although Kansas has recognized other actions for invasion of privacy, an action for intrusion upon seclusion is one of first impression in this state. We are impressed by the reasoning of the cases which sanction such a right. Our research discloses the weight of authority is in favor of such a right. We conclude invasion of privacy by intrusion upon seclusion should be recognized in this state.

The rules of civil procedure require that in all actions tried without a jury the judge shall find and, either orally or in writing, state the controlling facts. (K.S.A. 60-252(a); Duffin v. Patrick, 212 Kan. 772, 512 P.2d 442.) The law relative to intrusion upon seclusion cannot be applied when the trial court fails to make findings of fact necessary to a determination of the issues. In view of this we must return the case to the trial court for a new trial. We do not believe it advisable to return the case for findings of fact based on the existing record since the judge who heard the case is no longer an active trial judge.

In announcing its judgment, the trial court remarked on the law applicable to this action. Although unnecessary to our ruling herein, we believe it important to review the trial court's conclusions of law in order to avoid initiating a new field of law in this state on questionable foundation. The trial court first stated:

... Gathering evidence to defend one's self from a charge of slander in a substantial action has been excused and has been excepted from the privilege of privacy...." We construe this statement to mean if a matter is privileged there is no cause of action based on the manner in which the privileged matter was obtained. Conclusions of law based upon the immunities of privileged communications are not relevant to charges of invasion of privacy by intrusion since intrusion does not require publication to be actionable. In Dietemann v. Time, Inc., 449 F.2d 245 (9 Cir. 1971), the First Amendment privilege of news reporters was raised as a defense in an action for intrusion and the court said:

As we previously observed, publication is not an essential element of plaintiff's cause of action. Moreover, it is not the foundation for the invocation of a privilege. Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication...." (pp. 249, 250.)

Invasion of privacy and defamation are separate and distinct torts even though they share some of the same elements and often arise out of
the same acts. The first is a cause of action based upon injury to plaintiff’s emotions and his mental suffering; the second is a remedy for injury to plaintiff’s reputation. Invasion of privacy torts which require publication and defamation torts share the common defense of privileged communications which grant immunity to otherwise actionable publication. Judicial proceedings are absolutely privileged communications, and statements in the course of litigation otherwise constituting an action for slander, libel, or one of the invasion of privacy torts involving publication, are immune from such actions. They are privileged communications because of the overriding public interest in a free and independent court system. This absolute privilege extends immunity to parties to private litigation and to anything published in relation to a matter at issue in court, whether said in pleadings, affidavits, depositions or open court. (Weil v. Lynds, 105 Kan. 440, 185 P. 51.)

Since plaintiff’s action is not based upon publication, the court’s conclusion of excusable conduct based upon gathering privileged communications in connection with a judicial proceeding is not a defense to intrusion in this action.

In its remarks the trial court also stated the evidence did not show any malicious conduct on the part of the defendant toward the plaintiff. This implies that malice is a necessary element of this action. The precise motives for invasion of privacy are unimportant. Defendant’s action, rather than precise motives accompanying the act or conduct, is the criterion of liability. (62 Am. Jur. 2d, Privacy, § 15, p. 698; 14 A.L.R.2d 758.) Malice may become material on the issue of damages. (62 Am. Jur. 2d, Privacy, § 47, p. 752.) In both instances, we conclude the trial court’s statements as to the law applicable to an action for intrusion upon seclusion were erroneous. In Kunz, supra, and Johnson, supra, we recognized a cause of action for appropriation without consent of a person’s name and likeness for another person’s benefit. Since each of the cases involved publication of the material appropriated they cannot be considered as authority for an action for intrusion which requires no publication. It cannot be argued from the language of these cases that a cause of action such as brought in this case is in any way prohibited. In Munsell, supra, we stated the right of privacy does not prohibit communication of a matter of a private nature when the publication is made under circumstances which would render it a privileged communication according to the law of libel and slander. We have no criticism of this statement when confined to actions which require publication; but we hasten to point out that the rule in Munsell is not applicable to an action when publication is not required as in the action prosecuted in this proceeding. As we have previously stated, in an action for intrusion appropriation of privileged matter is not a defense.

We are reversing this case and granting a new trial on the failure of the trial court to make findings of fact. Whether a cause of action under the law applicable to intrusion upon seclusion has been proven must await the determination of these facts. Our treatment of the law relative to this subject is confined to correcting the trial court’s statements.

Reversed and remanded for a new trial.

FROM ME, Justice (dissenting)

The majority after recognizing and properly limiting an action for intrusion of seclusion fails to consider the limitation inherent in the action. The opinion goes off on a tangent to hold the trial court erred in two statements of law which justify a new trial. In my view the trial court merely held the plaintiff failed to establish his cause of action. The admitted facts of this case giving rise to the claim of intrusion of seclusion bring the case within the recognized limitation that no action exists unless the wrongful intrusion is such as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. In ¶ 2 of the syllabus the court holds:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man. (Emphasis added.)

The last phrase of this syllabus delimits such an action. Invasion of seclusion to be actionable must be highly offensive to a reasonable man. The common link uniting all of the cases which recognize the cause of action is the unwarranted, obtrusive and objectionable intrusion into the

FROELICH v. ADAIR
privacy of another. In this case the appellant admits (appellant's brief page 10) it is not the embarrassment potential of the information obtained, it is the intrusion itself which the court should analyze to see if one's seclusion has been intruded upon. The character of the intrusion should determine liability or non-liability. The degree of the mental anguish does not determine liability, only the amount of damages.

No court has said that every invasion of itself into another person's private quarters constitutes an actionable invasion of privacy. It is only when the invasion is so outrageous that the traditional remedies of trespass, nuisance, intentional infliction of mental distress, etc., will not adequately compensate a plaintiff for the insult to his individual dignity that an invasion of privacy action will lie. The intrusion itself must be patently offensive before an invasion of privacy action will lie. The totality of the intruder's conduct must be extreme, intentional and outrageous; the conduct must be so offensive that it would cause mental harm or anguish in a person of ordinary sensibilities. An invasion of privacy action should not be utilized to avoid the more stringent requirements of other torts designated to compensate an individual for physical or mental injury.

Before analyzing the facts of this case in light of the above law, we will first investigate one case relied upon by the appellant to support his position. In *Ford Motor Co. v. Williams*, 108 Ga. App. 21, 132 S.E.2d 206, the court found that the breaking into plaintiff's house by the defendant's agents constituted an intrusion of seclusion even though plaintiff was not present when such intrusion occurred. However, the court was not recognizing an intrusion of seclusion solely, because of the break-in; it merely acknowledged that defendant's use of three marked police cars and a paddy wagon in front of plaintiff's friends and neighbors was so patently outrageous, that it constituted an affront to the plaintiff's dignity. The intrusion there was under such aggravating circumstances that it would constitute an intrusion of seclusion to any man of ordinary sensibilities.

Appellant himself asked the question in his brief, "what kind of intrusion will outrage a man of ordinary sensibilities?" Although appellant correctly notes that malice is not an essential element of an action founded upon intrusion of seclusion, he still premises his cause of action upon appellee's alleged malicious intent to prove his alleged homosexual tendencies. Appellant has misconstrued the issue before this court. It is not whether the appellee's alleged motive is so reprehensible that it brands her actions an intrusion of seclusion; that rather it is whether the act itself (the removal of the hair from the brush and the tape) is so outrageous, regardless of appellee's motives, that it would cause emotional harm to a person of ordinary sensibilities. Every theft of personal property may be upsetting or annoying; but it does not automatically give rise to an invasion of privacy action.

The alleged invasion of the appellant's seclusion was not so callous or indifferent that it would outrage a reasonable man. Actually, the removal of the hair was performed in a very unobtrusive manner. The appellee's activities herein lack the callous and objectionable characteristics which were present in every other case cited by the parties herein which is concerned with an intrusion of seclusion.

Whether or not the appellant may have an action in trespass, defamation, intentional infliction of mental harm, or some other remedy is not the question here. It is the appellant's burden to prove all necessary elements of the theory before he will be granted recovery thereon. The admitted facts herein simply do not support appellant's theory of recovery.

In the present case what was it that was highly offensive to appellant? In appellant's brief the acts are characterized as follows:

It later became clear how the hair was obtained from Mr. Froelich. It seems that Werbin [a friend of appellee] had tipped the orderly $5.00 to retrieve some hair from a hairbrush which was in the plaintiff's hospital room, and from a bandaid which had apparently held an I.V. secure to his arm and which had ripped out a few hairs upon removal.

Considering the evidence in the light most favorable to the appellant the evidence is insufficient to establish a cause of action for intrusion of seclusion. The evidence was insufficient to establish that such acts were extreme, outrageous or highly offensive to a reasonable person. Accordingly the case should be
affirmed.

SCHROEDER, J., joins in the foregoing dissent.

GALELLA v. ONASSIS
487 F.2d 986 (2d Cir. 1973)

Before SMITH, HAYS and TIMBERS, Circuit Judges

J. JOSEPH SMITH, Circuit Judge:

Donald Galella, a free-lance photographer, appeals from a summary judgment dismissing his complaint against three Secret Service agents for false arrest, malicious prosecution and interference with trade (S.D. N.Y., Edward C. McLEAN, Judge), the dismissal after trial of his identical complaint against Jacqueline Onassis and the grant of injunctive relief to defendant Onassis on her counterclaim and to the intervenor, the United States, on its intervening complaint and a third judgment retaxing transcript costs to plaintiff (S.D. N.Y., Irving Ben COOPER, Judge), 353 F. Supp. 196 (1972). In addition to numerous alleged procedural errors, Galella raises the First Amendment as an absolute shield against liability to any sanctions. The judgments dismissing the complaints are affirmed; the grant of injunctive relief is affirmed as herein modified. Taxation of costs against the plaintiff is affirmed in part, reversed in part.

Galella is a free-lance photographer specializing in the making and sale of photographs of well-known persons. Defendant Onassis is the widow of the late President, John F. Kennedy, mother of the two Kennedy children, John and Caroline, and is the wife of Aristotle Onassis, widely known shipping figure and reputed multimillionaire. John Walsh, James Kalafatis and John Connelly are U.S. Secret Service agents assigned to the duty of protecting the Kennedy children under 18 U.S.C. § 3056, which provides for protection of the children of deceased presidents up to the age of 16.

Galella fancies himself as a "paparazzo" (literally a kind of annoying insect, perhaps roughly equivalent to the English "gadfly.") Paparazzi make themselves as visible to the public and obnoxious to their photographic subjects as possible to aid in the advertisement and wide sale of their works.¹

Some examples of Galella's conduct brought out at trial are illustrative. Galella took pictures of John Kennedy riding his bicycle in Central Park across the way from his home. He jumped out into the boy's path, causing the agents concern for John's safety. The agents' reaction and interrogation of Galella led to Galella's arrest and his action against the agents; Galella on other occasions interrupted Caroline at tennis, and invaded the children's private schools. At one time he came uncomfortably close in a power boat to Mrs. Onassis swimming. He often jumped and postured around while taking pictures of her party notably at a theater opening but also on numerous other occasions. He followed a practice of bribing apartment house, restaurant and nightclub doormen as well as romancing a family servant to keep him advised of the movements of the family.

After detention and arrest following complaint by the Secret Service agents protecting Mrs. Onassis' son and his acquittal in the state court, Galella filed suit in state court against the agents and Mrs. Onassis. Galella claimed that under orders from Mrs. Onassis, the three agents had falsely arrested and maliciously prosecuted him, and that this incident in addition to several others described in the complaint constituted an unlawful interference with his trade.

Mrs. Onassis answered denying any role in the arrest or any part in the claimed interference with his attempts to photograph her, and counterclaimed for damages² and injunctive relief, charging that Galella had invaded her privacy, assaulted and battered her, intentionally inflicted emotional distress and engaged in a campaign of harassment.

The action was removed under 28 U.S.C. § 1442(a) to the United States District Court. On a motion for summary judgment, Galella's claim against the Secret Service agents was dismissed, the court finding that the agents were acting within the scope of their authority and thus were immune from prosecution. At the same time, the government intervened requesting injunctive relief

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¹ The newspapers report a recent incident in which one Marlon Brando, annoyed by Galella, punched Galella, breaking Galella's jaw and infecting Brando's hand.

² The damage claim was later dropped and a claim for violation of New York Civil Rights Act §§ 50, 51 (McKinney's Consol. Laws, c. 6 1948) added.
from the activities of Galella which obstructed the Secret Service's ability to protect Mrs. Onassis' children. Galella's motion to remand the case to state court, just prior to trial, was denied.

Certain incidents of photographic coverage by Galella, subsequent to an agreement among the parties for Galella not to so engage, resulted in the issuance of a temporary restraining order to prevent further harassment of Mrs. Onassis and the children. Galella was enjoined from "harassing, alarming, startling, tormenting, touching the person of the defendant ... or her children ... and from blocking their movements in the public places and thoroughfares, invading their immediate zone of privacy by means of physical movements, gestures or with photographic equipment and from performing any act reasonably calculated to place the lives and safety of the defendant ... and her children in jeopardy." Within two months, Galella was charged with violation of the temporary restraining order; a new order was signed which required that the photographer keep 100 yards from the Onassis apartment and 50 yards from the person of the defendant and her children. Surveillance was also prohibited.

Upon notice of consolidation of the preliminary injunction hearing and trial for permanent injunction, plaintiff moved for a jury trial—nine months after answer was served, and to remand to state court. The first motion was denied as untimely, the second on grounds of judicial economy. Just prior to trial Galella deposed Mrs. Onassis. Under protective order of this court, the defendant was allowed to testify at the office of the U.S. Attorney and outside the presence of Galella.

After a six-week trial the court dismissed Galella's claim and granted relief to both the defendant and the intervenor. Galella was enjoined from (1) keeping the defendant and her children under surveillance or following any of them; (2) approaching within 100 yards of the home of defendant or her children, or within 100 yards of either child's school or within 75 yards of either child or 50 yards of defendant; (3) using the name, portrait or picture of defendant or her children for advertising; (4) attempting to communicate with defendant or her children except through her attorney.

We conclude that grant of summary judgment and dismissal of Galella's claim against the Secret Service agents was proper. Federal agents when charged with duties which require the exercise of discretion are immune from liability for actions within the scope of their authority. Ordinarily enforcement agents charged with the duty of arrest are not so immune. Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 456 F.2d 1339 (2d Cir. 1972). The protective duties assigned the agents under this statute, however, require the instant exercise of judgment which should be protected. The agents saw Galella jump into the path of John Kennedy who was forced to swerve his bike dangerously as he left Central Park and was about to enter Fifth Avenue, whereupon the agents gave chase to the photographer. Galella indicated that he was a press photographer listed with the New York City Police; he and the agents went to the police station to check on the story, where one of the agents made the complaint on which the state court charges were based. Certainly it was reasonable that the agents "check out" an individual who has endangered their charge, and seek prosecution for apparent violation of state law which interferes with them in the discharge of their duties.

If an officer is acting within his role as a government officer his conduct is at least within the outer perimeter of his authority. Bivens, supra, 456 F.2d at 1345. The Secret Service agents were charged under 18 U.S.C. § 3056 with "guarding against and preventing any activity by any individual which could create a risk to the safety

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3 The Secret Service is responsible for protecting the children of former presidents until the age of 16. 18 U.S.C. § 3056.

4 Even where an absolute privilege has been denied police officers charged with false arrest, good faith and reasonable belief in the validity of the arrest is an affirmative defense. See Pierson v. Ray, 386 U.S. 547, 555-557, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) (§ 1983 action); Bivens, supra, 456 F.2d at 1341, 1348; Boyd v. Huffman, 342 F. Supp. 787, 789 (N.D. Ohio, W.D. 1972).

5 Bivens suggests that so long as the officer is acting in his role as a government agent he is acting within the "outer perimeter of his line of duty." Bivens, supra, 456 F.2d at 1348. Compare Spalding v. Vilas, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780 (1896); Gregoire v. Biddle, 177 F.2d 579, 580-581 (2d Cir. 1949), cert. denied, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950); Barr v. Matteo, 360 U.S. 564, 572-573, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959).
and well being of the ... children or result in their physical injury." It was undisputed that the agents were on duty at the time, and there was evidence that they believed John Kennedy to be endangered by Galella’s actions. Unquestionably the agents were acting within the scope of their authority.6

To be sure, even where acting within their authority, not all federal agents are immune from liability. Immunity is accorded officials whose decisions involve an element of discretion so that the decisions may be made without fear or threat of vexatious or fictitious suits and alleged personal liability. Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), cert. denied, 374 U.S. 827, 83 S. Ct. 1862, 10 L. Ed. 2d 1050 (1963). The issue in each case is whether the public interest in a particular official's unfettered judgments outweighs the private rights that may be violated.7 See Bivens, supra, 456 F.2d at 1346. The protective duties of the agents on assignments similar to this warrant this protection.8

6 The failure to label the complaint as one made by an officer does not alter the fact that the incident occurred while the agents were unquestionably carrying out their duties of protection of John's person.

7 Persons to whom immunity has been provided include: the Attorney General of the United States, Directors of the Enemy Alien Control Unit of the Department of Justice and the District Director of Immigration who wrongfully arrested a plaintiff as a German enemy alien and kept him in custody after establishment of his French citizenship, Gregoire, supra; a Director of Rent Stabilization who issued a press release defamatory to several employees who had given out incorrect information concerning the compensation methods of employees of the department, information which caused considerable Congressional criticism of the agency, Barr, supra; government officials who through false reports of plaintiff's failure to perform adequately on his contract caused the contract to be canceled, Ove Gustavsson Contracting, supra; Secret Service agents assigned to protect the President who kept under close personal surveillance a firearms dealer who possessed a large number of weapons near the President's temporary residence when he refused to leave the area while the President was in residence, Scherer, supra. See also Krause v. Rhodes, 471 F.2d 430, 445-446 (6th Cir. 1972) (O'SULLIVAN, J., concurring); Reese v. Nixon, 347 F. Supp. 314, 317-318 (D.C. Cal. 1972). See, generally, Second Circuit Review, 39 Brooklyn L. Rev. 907, 943 (1973).


Discrediting all of Galella's testimony the court found the photographer guilty of harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of defendant's personality, and invasion of privacy. Fully crediting defendant's testimony, the court found no liability on Galella's claim. Evidence offered by the defense showed that Galella had on occasion intentionally physically touched Mrs. Onassis and her daughter, caused fear of physical contact in his frenzied attempts to get their pictures, followed defendant and her children too closely in an automobile, endangered the safety of the children while they were swimming, water skiing and horseback riding. Galella cannot successfully challenge the court's finding of tortious conduct.10

Finding that Galella had "insinuated himself into the very fabric of Mrs. Onassis' life" the court framed its relief in part of the need to prevent further invasion of the defendant's privacy. Whether or not this accords with present New

8(continued)

9 The court's findings on credibility are indeed broad, but they are supported in the record. Galella demonstrated a gallling lack of respect for the truth and gave no indication of any consciousness of the meaning of the oath he had taken. Not only did he admit blatantly lying in his testimony, he admitted attempting to have other witnesses lie for him.

10 Harassment is a criminal violation under New York Penal Law § 240.25 (McKinney's Consol. Laws, c. 40, 1967) when with intent to harass a person follows another in a public place, inflict physical contact or engages in any annoying conduct without legitimate cause. Galella was found to have engaged in this proscribed conduct. Conduct sufficient to invoke criminal liability for harassment may be the basis for private action. Cf. Long v. Beneficial Finance Co. of New York, 39 A.D.2d 11, 330 N.Y.S.2d 664 (1972).
York law, there is no doubt that it is sustainable under New York's proscription of harassment.\footnote{See n.11, supra.}

Although the New York courts have not yet recognized a common law right of privacy, if we were required to reach the question, we would be inclined to agree with the court below that when again faced with the issue the Court of Appeals may well modify or distinguish its 1902 holding in \textit{Roberson v. Rochester Folding-Box Co.}, 171 N.Y. 538, 64 N.E. 442 (1902), that "The so-called right of privacy has not as yet found an abiding place in our jurisprudence." There is substantive support today for the proposition that privacy is a "basic right" entitled to legal protection. \textit{Time v. Hill}, 385 U.S. 374, 415, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) (\textit{FORTAS, J.}, dissenting), nor can the "power of a State to control and remedy such intrusion (even for news gathering purposes) ... be denied." \textit{Id.} at 404, 87 S. Ct. at 550 (\textit{HARLAN, J.}, concurring and dissenting). Privacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights. \textit{See Katz v. United States}, 389 U.S. 347, 350 n.5, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); \textit{Tehan v. U.S. ex rel. Shott}, 382 U.S. 406, 416, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966) (Fifth Amendment); \textit{Stanley v. Georgia}, 394 U.S. 557, 564-566, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (First and Fourteenth Amendments). \textit{See also Time v. Hill, supra}, 385 U.S. at 412-415, 87 S. Ct. 534; \textit{Bloustein, Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser}, 39 N.Y.U. L. Rev. 962, 971 (1964); Fried, \textit{Privacy}, 77 Yale L.J. 475, 482ff (1968). There is an emerging recognition of privacy as a distinct, constitutionally protected right. \textit{Roe v. Ingraham}, 480 F.2d 102 (2d Cir., 1973), (\textit{FRIENDLY, J.})

While the Constitution provides protection for specific manifestations of privacy "the protection of a person's general right to privacy—his right to be let alone by other people is like the protection of his property and his very life left largely to the law of the individual states...." \textit{Katz, supra}, 389 U.S. at 350-351, 88 S. Ct. at 511, citing \textit{Warren & Brandeis, Right to Privacy}, 4 Harv. L. Rev. 193 (1890).

The vast majority of states have now recognized and protect a right to privacy. \textit{Restatement of Torts} 2d § 652(a), comment a (Tent. Draft No. 13, 1967). Statutory protection has been afforded the right in New York through imposition of criminal sanctions for invasion of privacy through the use of mechanical devices for wiretap and eavesdropping and for tampering with certain private communications. \textit{New York Penal Code} §§ 250.00-250.35 (McKinney, 1967).


Of course legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. However the interference allowed may be no greater than that necessary to protect the overriding public interest. Mrs. Onassis was properly found to be a public figure and thus subject to news coverage. \textit{See Sidis v. F.R. Publishing Corp.}, 113 F.2d 806 (2d Cir.), \textit{cert. denied}, 311 U.S. 711, 61 S. Ct. 393, 85 L. Ed. 462 (1940). Nonetheless, Galella's action went far beyond the reasonable bounds of news gathering. When weighed against the de minimis public importance of the daily activities of the defendant, Galella's constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable. If there were any doubt in our minds, Galella's inexcusable conduct toward defendant's minor children would resolve it.

Galella does not seriously dispute the court's finding of tortious conduct. Rather, he sets up the First Amendment as a wall of immunity protecting newsmen from any liability for their conduct while gathering news. There is no such scope to the First Amendment right. Crimes and torts committed in news gathering are not protected. \textit{See Branzburg v. Hayes}, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); \textit{Rosenbloom v. Metromedia}, 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971); \textit{Dietemann v. Time, Inc.}, 449 F.2d 245, 249-250 (9th Cir. 1971). \textit{See Restatement of Torts} 2d § 652(f), comment k (Tent. Draft No. 13, 1967). There is no threat to a free press in requiring its agents to act within the law.

\* \* \*

Injunctive relief is appropriate. Galella has stated his intention to continue his coverage of defendant so long as she is newsworthy, and his continued harassment even while the temporary restraining orders were in effect indicate that no voluntary change in his technique can be expected. New York courts have found similar conduct sufficient to support a claim for injunctive relief. \textit{Flamm v. Van Nierop}, 56 Misc. 2d 1059, 291

\footnote{(1962), \textit{aff'd mem.} 20 A.D.2d 628, 245 N.Y.S.2d 1003 (1963).}
The injunction, however, is broader than is required to protect the defendant. Relief must be tailored to protect Mrs. Onassis from the "paparazzo" attack which distinguishes Galella's behavior from that of other photographers; it should not unnecessarily infringe on reasonable efforts to "cover" defendant. Therefore, we modify the court's order to prohibit only (1) any approach within twenty-five (25) feet of defendant or any touching of the person of the defendant Jacqueline Onassis; (2) any blocking of her movement in public places and thoroughfares; (3) any act foreseeably or reasonably calculated to place the life and safety of defendant in jeopardy; and (4) any conduct which would reasonably be foreseen to harass, alarm or frighten the defendant.


Likewise, we affirm the grant of injunctive relief to the government modified to prohibit any action interfering with Secret Service agents' protective duties. Galella thus may be enjoined from (a) entering the children's schools or play areas; (b) engaging in action calculated or reasonably foreseen to place the children's safety or well being in jeopardy, or which would threaten or create physical injury; (c) taking any action which could reasonably be foreseen to harass, alarm, or frighten the children; and (d) from approaching within thirty (30) feet of the children.

** * * **

12 The defendant in Flamm was sued for intentional infliction of emotional distress. He was charged with having dashed at the plaintiff in a threatening manner in various public places with threatening gestures, grimaces, leers, distorted faces and malign looks, accompanied by ridiculous utterances and laughs, driven his automobile behind that of the plaintiff at a dangerously close distance; walked behind or beside or in front of the plaintiff on the public streets; and consistently telephoned the plaintiff at home and place of business and hung up or remained on the line in silence.

Affirmed in part, reversed in part and remanded for modification of the judgment in accordance with this opinion. Costs on appeal to be taxed in favor of appellees.

TIMBERS, Circuit Judge (concurring in part and dissenting in part):

With one exception, I concur in the judgment of the Court and in the able majority opinion of Judge Smith. With the utmost deference to and respect for my colleagues, however, I am constrained to dissent from the judgment of the Court and the majority opinion to the extent that they modify the injunctive relief found necessary by the district court to protect Jacqueline Onassis and her children, Caroline B. and John F. Kennedy, Jr., from the continued predatory conduct of the self-proclaimed paparazzo Galella.

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SIDIS v. F-R PUBLISHING CORPORATION
113 F.2d 806 (CA 2, 1940)

CLARK, Circuit Judge

William James Sidis was the unwilling subject of a brief biographical sketch and cartoon printed in THE NEW YORKER weekly magazine for August 14, 1937. Further references were made to him in the issue of December 25, 1937, and in a newspaper advertisement announcing the August 14 issue. He brought an action in the district court against the publisher, F-R Publishing Corporation. His complaint stated three "causes of action": The first alleged violation of his right of privacy as that right is recognized in California, Georgia, Kansas, Kentucky, and Missouri; the second charged infringement of the rights afforded him under Secs. 50 and 51 of the N.Y. Civil Rights Law (Consol. Laws, c. 6); the third claimed malicious libel under the laws of Delaware, Florida, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, Pennsylvania, and Rhode Island. Defendant's motion to dismiss the first two "causes of action" was granted, and plaintiff has filed an appeal from the order of dismissal. Since a majority of this court believe that order appealable, for reasons referred to below, we may consider the merits of the case.

William James Sidis was a famous child
prodigy in 1910. His name and prowess were well known to newspaper readers of the period. At the age of eleven, he lectured to distinguished mathematicians on the subject of Four-Dimensional Bodies. When he was sixteen, he was graduated from Harvard College, amid considerable public attention. Since then, his name has appeared in the press only sporadically, and he has sought to live as unobtrusively as possible. Until the articles objected to appeared in The New Yorker, he had apparently succeeded in his endeavor to avoid the public gaze.

Among The New Yorker’s features are brief biographical sketches of current and past personalities. In the latter department, which appears haphazardly under the title of "Where Are They Now," the article on Sidis was printed with a subtitle "April Fool." The author describes his subject’s early accomplishments in mathematics and the wide-spread attention he received, then recounts his general breakdown and the revulsion which Sidis thereafter felt for his former life of fame and study. The unfortunate prodigy is traced over the years that followed, through his attempts to conceal his identity, through his chosen career as an insignificant clerk who would not need to employ unusual mathematical talents, and through the bizarre ways in which his genius flowered, as in his enthusiasm for collecting streetcar transfers and in his proficiency with an adding machine. The article closes with an account of an interview with Sidis at his present lodgings, "a hall bedroom of Boston’s shabby south end." The untidiness of his room, his curious laugh, his manner of speech, and other personal habits are commented upon at length, as is his present interest in the lore of the Okamakammessett Indians. The subtitle is explained by the closing sentence, quoting Sidis as saying "with a grin" that it was strange, "but, you know, I was born on April Fool’s Day." Accompanying the biography is a small cartoon showing the genius of eleven years lecturing to a group of astounded professors.

It is not contended that any of the matter printed is untrue. Nor is the manner described as having "a certain childlike charm." But the article is merciless in its dissection of intimate details of its subject’s personal life, and this in company with elaborate accounts of Sidis’ passion for privacy and the pitiable lengths to which he has gone in order to avoid public scrutiny. The work possesses great reader interest, for it is both amusing and instructive; but it may be fairly described as a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life.


The complaint contains a general allegation, repeated for all the claims, of publication by the defendant of The New Yorker, "a weekly magazine of wide circulation throughout the United States." Then each separate "cause" contains an allegation that the defendant publicly circulated the articles or caused them to be circulated in the particular states upon whose law that cause is assumed to be founded. Circulation of the New York World-Telegram advertisement is, however, alleged only with respect to the second "cause," for asserted violation of New York law.

I. Under the first "cause of action:" we are asked to declare that this exposure transgresses upon plaintiff’s right of privacy, as recognized in California, Georgia, Kansas, Kentucky, and Missouri. Each of these states except California grants to the individual a common law right, and California a constitutional right, to be let alone to a certain extent. The decisions have been carefully analyzed by the court below, and we need not examine them further. None of the cited rulings goes so far as to prevent a newspaper or magazine from publishing the truth about a person, however intimate, revealing, or harmful the truth may be. Nor are there any decided cases that confer such a privilege upon the press. Under the mandate of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, we face the unenviable duty of determining the law of five states on a broad and vital public issue which the courts of those states have not even discussed.

All comment upon the right of privacy must stem from the famous article by Warren and Brandeis on The Right of Privacy in 4 Harv. L. Rev. 193. The learned authors of that paper were convinced that some limits ought to be imposed
upon the privilege of newspapers to publish truthful items of a personal nature. "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." Warren and Brandeis, supra at page 196.

Warren and Brandeis realized that the interest of the individual in privacy must inevitably conflict with the interest of the public in news. Certain public figures, they conceded, such as holders of public office, must sacrifice their privacy and expose at least part of their lives to public scrutiny as the price of the powers they attain. But even public figures were not to be stripped bare. "In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and legitimate connection with his fitness for a public office.... Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation." Warren and Brandeis, supra at page 216.

It must be conceded that under the strict standards suggested by these authors plaintiff's right of privacy has been invaded. Sidis today is neither politician, public administrator, nor statesman. Even if he were, some of the personal details revealed were of the sort that Warren and Brandeis believed "all men alike are entitled to keep from popular curiosity."

But despite eminent opinion to the contrary, we are not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press. Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. Warren and Brandeis were willing to lift the veil somewhat in the case of public officers. We would go further, though we are not yet prepared to say how far. At least we would permit limited scrutiny of the "private" life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a "public figure." See Restatement, Torts, Sec. 867, comments c and d; Corliss v. E. W. Walker Co., C.C. Mass., 57 F. 434, 31 L.R.A. 283; Id., C.C., 64 F. 280, 31 L.R.A. 283, Jeffries v. New York Evening Journal Pub. Co., 67 Misc. 570, 124 N.Y.S. 780; Jones v. Herald Post Co., supra; Meter v. Los Angeles Examiner, supra; cf. Hillman v. Star Pub. Co., 64 Wash. 691, 117 P. 594, 35 L.R.A.N.S. 595, criticized in 10 Mich. L. Rev. 335.

William James Sidis was once a public figure. As a child prodigy, he excited both admiration and curiosity. Of him great deeds were expected. In 1910, he was a person about whom the newspapers might display a legitimate intellectual interest, in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity. But the precise motives of the press we regard as unimportant. And even if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then Sidis has cloaked himself in obscurity, but his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern. The article in The New Yorker sketched the life of an unusual personality, and it possessed considerable popular news interest.

We express no comment on whether or not the news worthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

SIDIS v. F-R PUBLISHING CORPORATION
Plaintiff in his first "cause of action" charged actual malice in the publication, and now claims that an order of dismissal was improper in the face of such an allegation. We cannot agree. If plaintiff's right of privacy was not invaded by the article, the existence of actual malice in its publication would not change that result. Unless made so by statute, a truthful and therefore non-libelous statement will not become libelous when uttered maliciously. Restatement, Torts, Sec. 582, comment a; George, The Count Joannes v. Jennings, 4 Hun, N.Y., 66, 6 Thomp. & C. 138; Basket v. Crossfield, 190 Ky. 751, 228 S.W. 673; Cook v. Pulitzer Pub. Co., 241 Mo. 326, 145 S.W. 480, 490. A similar rule should prevail on invasions of the right of privacy. "Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property." Warren and Brandeis, supra at page 218. Nor does the malice give rise to an independent wrong based on an intentional invasion of the plaintiff's interest in mental and emotional tranquility. This interest, however real, is one not yet protected by the law. Restatement, Torts, Sec. 46, comment c.

If the article appearing in the issue of August 14, 1937, does not furnish grounds for action, then it is clear that the brief and incidental reference to it contained in the article of December 25, 1937, is not actionable.

2. The second "cause of action" charged invasion of the rights conferred on plaintiff by Secs. 50 and 51 of the N.Y. Civil Rights Law. Section 50 states that "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." Section 51 gives the injured person the right to an injunction and to damages.

Before passage of this statute, it had been held that no common law right of privacy existed in New York. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478, 89 Am. St. Rep. 828. Any liability imposed upon defendant must therefore be derived solely from the statute, and not from general considerations as to the right of the individual to prevent publication of the intimate details of his private life. The statute forbids the use of a name or picture only when employed "for advertising purposes, or for the purposes of trade." In this context, it is clear that "for the purposes of trade" does not contemplate the publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public. Though a publisher sells a commodity, and expects to profit from the sale of his product, he is immune from the interdict of Secs. 50 and 51 so long as he confines himself to the unembroidered dissemination of facts. Publishers and motion picture producers have occasionally been held to transgress the statute in New York, but in each case the factual presentation was embellished by some degree of fictionalization. See, for example, Blumenthal v. Picture Classics, Inc., 235 App. Div. 570, 257 N.Y.S. 800, affirmed without opinion 261 N.Y. 504, 185 N.E. 713. The cases are collected and the distinction between fact and fiction explained as vital in Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y.S. 382. See also Neyland v. Home Pattern Co., 2 Cir., 65 F.2d 363; Sweenek v. Pathe News, Inc., D.C. E.D. N.Y., 16 F. Supp. 746. The New Yorker articles limit themselves to the unvarnished, unfictionalized truth.

The case as to the newspaper advertisement announcing the August 14 article is somewhat different, for it was undoubtedly inserted in the World-Telegram "for advertising purposes." But since it was to advertise the article on Sidis, and the article itself was unobjectionable, the advertisement shares the privilege enjoyed by the article. Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 476, 178 N.Y.S. 752. Besides, the advertisement quoted above, did not use the "name, portrait or picture" of the plaintiff.

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Affirmed.

BRISCOE v. READER'S DIGEST ASSOCIATION
483 P.2d 34 (Calif. 1971)

PETERS, Justice

Plaintiff Marvin Briscoe filed suit against defendant Reader's Digest Association, alleging that defendant had willfully and maliciously invaded his privacy by publishing an article which
disclosed truthful but embarrassing private facts about plaintiff's past life. A demurrer was sustained without leave to amend, and plaintiff has appealed from the ensuing judgment. Thus, we are presented simply with a pleading problem — does the complaint state a cause of action?

The allegations of the complaint may be summarized as follows: On December 15, 1956, plaintiff and another man hijacked a truck in Danville, Kentucky. "[I]mediately subsequent to said incident, plaintiff abandoned his life of shame and became entirely rehabilitated and has thereafter at all times lived an exemplary, virtuous and honorable life ... he has assumed a place in respectable society and made many friends who were not aware of the incident in his earlier life."

"The Big Business of Hijacking," published by defendant 11 years after the hijacking incident, commences with a picture whose caption reads, "Today's highwaymen are looting trucks at a rate of more than $100 million a year. But the truckers have now declared all-out war." The article describes various truck thefts and the efforts being made to stop such thefts. Dates ranging from 1965 to the time of publication are mentioned throughout the article, but none of the described thefts is itself dated.

One sentence in the article refers to plaintiff: "Typical of many beginners, Marvin Briscoe and [another man] stole a "valuable-looking" truck in [Danville, Ky.,] and then fought a gun battle with the local police, only to learn that they had hijacked four bowling-pin spotters." There is nothing in the article to indicate that the hijacking occurred in 1956.

As the result of defendant's publication, plaintiff's 11-year-old daughter, as well as his friends, for the first time learned of this incident. They thereafter scorned and abandoned him.

Conceding the truth of the facts published in defendant's article, plaintiff claims that the public disclosure of these private facts has humiliated him and exposed him to contempt and ridicule. Conceding that the subject of the article may have been "newsworthy," he contends that the use of his name was not, and that the defendant has thus invaded his right to privacy.

The concept of a legal right to privacy was first developed by Warren and Brandeis in their landmark law review article, The Right to Privacy (1890) 4 Harv. L. Rev. 193. Warren and Brandeis characterized the right to privacy as the individual's "right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." (Id., at p. 198; see also A. Westin, Privacy and Freedom (1967) p. 7; Gross, The Concept of Privacy (1967) 42 N.Y.U. L. Rev. 34, 35-36.)

Try as they might, Warren and Brandeis had a difficult time tracing a right of privacy to the common law. In many respects a person had less privacy in the small community of the 18th century than he did in the urbanizing late 19th century or he does today in the modern metropolis. Extended family networks, primary group relationships, and rigid communal mores served to expose an individual's every deviation from the norm and to straitjacket him in a vise of backyard gossip. Yet Warren and Brandeis perceived that it was mass exposure to public gaze, as opposed to backyard gossip, which threatened to deprive men of the right of "scratching wherever one itches." (Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's (1966) 66 Colum. L. Rev. 1003, 1025.)

Acceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze.

In a society in which multiple, often conflicting role performances are demanded of each individual, the original etymological meaning of

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1 The article was a condensed version of an article which originally appeared in the December 10, 1967, issue of Chicago's American Magazine, published by the Chicago American Publishing Company. It is not alleged that this first publication injured plaintiff. Defendant concedes that this first publication does not absolve it from responsibility.

2 Although other ways in which the word "privacy" is used — to indicate an interest in mental repose, physical solitude, or autonomy — are weaker senses of the word (Gross, supra, at pp. 36-39), the "right of privacy" has also served as a general rallying point for those concerned about "deep intrusions on human dignity by those in possession of economic or governmental power." (Havighurst, Foreword (1966) 31 Law & Contemp. Prob. 251, 252.)
the word "person" — mask — has taken on new meaning. Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to define one's circle of intimacy — to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in literal loss of self-identity (Westin, supra, at p. 1023; cf. Fried, Privacy (1968) 77 YALE L.J. 475), and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.


The right to keep information private was bound to clash with the right to disseminate information to the public. We early noted the potential conflict between freedom of the press and the right of privacy (Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 277-278, 239 P.2d 630; Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 228, 253 P.2d 441), as did Warren and Brandeis themselves, who suggested that the right should not apply to matters of "public or general interest." (Warren and Brandeis, supra, 4 Harv. L. Rev. 193, 214.)

The instant case, pitting a rehabilitated felon's right to anonymity against a magazine's right to identify him, compels us to consider the character of these competing interests.

The central purpose of the First Amendment "is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal...." (A. Meiklejohn, Political Freedom: The Constitutional Powers of the People (1960) p. 75.) Nor is freedom of the press confined to comment upon public affairs and those persons who have voluntarily sought the public spotlight. "Freedom of discussion... must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period...." (Thorhill v. Alabama (1940) 310 U.S. 88, 102, 60 S. Ct. 736, 744, 84 L. Ed. 1093; see Time, Inc. v. Hill (1967) 385 U.S. 374, 388, 87 S. Ct. 534, 17 L. Ed. 2d 456.) The scope of the privilege thus extends to almost all reporting of recent events, even though it involves the publication of a purely private individual's name or likeness. (See, e.g., Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491; Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876.)

4 (...continued)

Applied to Libel and Misapplied to Privacy (1968) 56 Cal. L. Rev. 935.)

5 Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged. By volunteering his services for public office the official (as opposed to the ordinary employee) waives much of his right to privacy. Other individuals who voluntarily seek the public eye are also subject to fair comment and criticism. (Prosper, Law of Torts, supra, at p. 844.) Because discussion of such figures is not so vital to the maintenance of our self-governing democracy as is discussion of public officials and public affairs, such figures may have greater protection from media exposure or untruths. (See Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 155, 87 S. Ct. 1975, 18 L. Ed. 2d 1094.)

6 The publisher need not intend to educate the public. "The line between... informing and... entertaining is too elusive.... Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine...." (Winters v. New York (1948) 333 U.S. 507, 510, 68 S. Ct. 665, 667,

(continued...)

Briscoe v. Reader's Digest Association
Particularly deserving of First Amendment protection are reports of "hot news," items of possible immediate public concern or interest. The need for constitutional protection is much greater under these circumstances, where deadlines must be met and quick decisions made, than in cases where more considered editorial judgments are possible. (Rosenbloom v. Metromedia, Inc. (3d Cir. 1969) 415 F.2d 892, 895-896.) Most factual reporting concerns current events. For example, in Time, Inc. v. Hill, supra, 385 U.S. 374, 383-384, fn. 7, 87 S. Ct. 534, 17 L. Ed. 2d 715 [phone number of party]; 1969) 415 F. 2d 240, plaintiff was presently incarcerated, and would not be heard to complain of a dramatic reenactment of his crime four years later. Of the 22 cases cited, only Barbieri v. News-Journal Company (Del. 1963) 189 A.2d 773, which explicitly rejects our landmark decision of Melvin v. Reid, supra, 112 Cal. App. 285, 297 P. 91, and Smith v. Doss (1948) 251 Ala. 250, 37 So. 2d 118, is the recall of past events involving nonpublic figures at issue. In the latter case the spectacular disappearance of plaintiff's father, who was thought murdered, the accusation of an innocent man, and the discovery 25 years later of the facts (the father had deserted his family) was said to be so imprinted on the community's collective history that publication was privileged.

There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims — these are vital bits of information for people coping with the exigencies of modern life. Reports of these events may also promote the values served by the constitutional guarantee of a public trial. Although a case is not to be "tried in the papers," reports regarding a crime or criminal proceedings may encourage unknown witnesses to come forward with useful testimony and friends or relatives to come to the aid of the victim.

It is also generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eye witnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest.

In general, therefore, truthful reports of Recent crimes and the names of suspects or offenders will...
be deemed protected by the First Amendment.\footnote{We do not mean to imply that the First Amendment gives the media the unmitigated right to publish the identity of suspected offenders or victims. In some jurisdictions, for example, the Legislature has decided that the rehabilitative goals of the juvenile law are so important as to override the right of the press to identify juvenile defendants. (See, e.g., Virgin Islands Code, title 5, § 2511; Fla. Stat. § 801.14, F.S.A. (sex offenses only).) In many other states the rights of the press to report juvenile proceedings are limited. In In re Gaul (1967) 387 U.S. 1, 25, 87 S. Ct. 1428, 18 L. Ed. 2d 527, the United States Supreme Court gave implicit approval to such restrictions on First Amendment rights. (See also Government of Virgin Islands v. Brodhurst (D.C. 1968) 285 F. Supp. 831, holding the Virgin Islands statute prohibiting the naming of juvenile defendants constitutional as against a First Amendment challenge; Geis, Publication of the Names of Juvenile Felons (1962) 23 Mont. L. Rev. 141.) Similarly, some states have prohibited the naming of rape victims in news reports. (Fla. Stat. § 794.03, F.S.A.; Ga. Code Ann. § 26-2105; S.C. Code Ann. § 16-81; Wis. Stats. Ann. § 942.02.) The Wisconsin statute has been held constitutional. (State v. Evjue (1948) 253 Wis. 146, 33 N.W.2d 305 (holding that the minimum social value of publication is outweighed by the encouragement given to victims to complain to the police once their privacy is guaranteed.)) In Nappier v. Jefferson Standard Life Insurance Company (4th Cir. 1963) 322 F.2d 502, the South Carolina statute was not only upheld, following the reasoning of Evjue, but also was extended to apply to any identification of the victims (in this case televising a picture of their well-known business truck at a report that it belonged to the victims). We of course express no opinion on these matters.}

The instant case, however, compels us to consider whether reports of the facts of past crimes and the identification of past offenders serve these same public-interest functions.

We have no doubt that reports of the facts of past crimes are newsworthy. Media publication of the circumstances under which crimes were committed in the past may prove educational in the same way that reports of current crimes do. The public has a strong interest in enforcing the law, and this interest is served by accumulating and disseminating data cataloguing the reasons men commit crimes, the methods they use, and the ways in which they are apprehended. Thus in an article on truck hijackings, Reader's Digest certainly had the right to report the facts of plaintiff's criminal act.

However, identification of the act\textsuperscript{or} in reports of long past crimes usually serves little independent public purpose. Once legal proceedings have terminated, and a suspect or offender has been released, identification of the individual will not usually aid the administration of justice. Identification will no longer serve to bring forth witnesses or obtain succor for victims. Unless the individual has retracted the public eye to himself in some independent fashion, the only public "interest" that would usually be served is that of curiosity.

There may be times, of course, when an event involving private citizens may be so unique as to capture the imagination of all. In such cases — e.g., the behavior of the passengers on the sinking Titanic, the heroism of Nathan Hale, the horror of the Saint Valentine's Day Massacre — purely private individuals may by an accident of history lose their privacy regarding that incident for all time. There need be no "reattraction" of the public eye because the public interest never wavered. An individual whose name is fixed in the public's memory, such as that of the political assassin, never becomes an anonymous member of the community again. But in each case it is for the trier of fact to determine whether the individual's infamy is such that he has never left the public arena; we cannot do so as a matter of law.

The Restatement of Torts some time ago balanced the considerations relevant here, concluding that criminals "are the objects of legitimate public interest during a period of time after their conduct ... has brought them to the public attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." (§ 867, com. c.) Where a man has reverted to that "lawful and unexciting life" led by others, the Restatement implies that he no longer need "satisfy the curiosity of the public."

Another factor mitigating in favor of protecting the individual's privacy here is the state's interest in the integrity of the rehabilitative process. Our courts recognized this issue four decades ago in Melvin v. Reid, supra, 112 Cal. App. 285, 297 P. 91. There, plaintiff had been a prostitute. She was charged with murder and acquitted after a long and very public trial. She thereafter abandoned her life of shame, married, and assumed a place in respectable society, making many friends who were not aware of the incidents of her earlier life.

Seven years after the trial defendants made a
ICNSION OF PRIVACY

We are realistic enough to recognize that men are curious about the inner sanctums of their neighbors — that the public will create its heroes and villains. We must also be realistic enough to realize that full disclosure of one’s inner thoughts, intimate personal characteristics, and past life is neither the rule nor the norm in these United States. We have developed a variegated panoply of professional listeners to whom we confidentially "reveal all"; otherwise we keep our own counsel. The masks we wear may be stripped away upon the occurrence of some event of public interest. But just as the risk of exposure is a concomitant of urban life, so too is the expectation of anonymity regained. It would be a crass legal fiction to assert that a matter once public never becomes private again. 13 Human forgetfulness over time puts today’s "hot" news in tomorrow’s dusty archives. In a nation of 200 million people there is ample opportunity for all but the most infamous to begin a new life.

Plaintiff is a man whose last offense took place 11 years before, who has paid his debt to society, who has friends and an 11-year-old daughter who were unaware of his early life — a man who assumed a position in "respectable" society. Ideally, his neighbors should recognize his present

movie based entirely on Mrs. Melvin’s early life. They used only facts found in the public record, and did not falsify or create false innuendoes regarding that period of her life. Defendants used Mrs. Melvin’s true maiden name in the film.

The Court of Appeal, in a decision cited ceaselessly since, held that the subject of the film was protected. No cause of action accrues from the use of "incidents of a life ... so public as to be spread upon a public record," the court reasoned, since these matters "cease to be private." 11 (112 Cal. App. at pp. 290-291, 297 P. at p. 93.) The court took a different view of defendants’ use of Mrs. Melvin’s name. Although that, too, had been spread upon a public record, the court held that defendants’ use of plaintiff’s name was improper. The lapse of time between the incidents in issue and the making of the film was a relevant, but not conclusive, factor to the court. 11 Rather, the Court of Appeal emphasized that “[o]ne of the major objectives of society ... and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal.... Where a person has ... rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony." (112 Cal. App. at p. 292, 297 P. at p. 93.) The plaintiff was held to have stated a cause of action for invasion of privacy.

One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. In return for becoming a "new man," he is allowed to melt into the shadows of obscurity. 12


12 The purpose of the indeterminate sentence law in California (PEN. CODE, § 1168), for example, is "to put before the prisoner great incentive to well-doing...." (In re Lee, 177 Cal. 690, 692, 171 P. 958, 959; Grasso v. McDonough Power Equipment, Inc., 264 Cal. App. 2d 597, 600, 70 Cal. Rptr. 458, 460.) The indeterminate sentence law in theory "affords a person convicted of crime the opportunity to minimize the term of imprisonment by rehabilitating himself in such manner (continued...)

13 "A public figure ... can be so far removed from his former position in the public eye, that the publisher will no longer enjoy the prophylactic treatment accorded him when he deals with those persons who truly are public officials or public figures...." (Johnston v. Time, Inc. (M.D. N.C. 1970) 321 F. Supp. 837 (former professional basketball player no longer a public figure, had regained right to privacy.)] [It is erroneous ... to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected...." (Spahn v. Julian Messner, Inc. (1966) 18 N.Y. 2d 324, 328, 274 N.Y. S. 2d 877, 879, 221 N.E. 2d 543, 545; accord, Leverton v. Curtis Pub. Co. (3d Cir. 1951) 192 F. 2d 974; Mau v. Rio Grande Oil, Inc. (N.D. Cal. 1939) 28 F. Supp. 845; see Note, supra, 30 U. CHI. L. REV. 722, 726-727,) In Time, Inc. v. Hill, supra, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456, plaintiffs had been held hostage in their own home by escaped criminals three years prior to publication of the article in LIFE magazine. Their plight had been fully reported at the time. The court did not even question whether that previously publicly reported event remained public; the Hills were assumed to have a right to privacy concerning the event.

BRISCOE v. READER’S DIGEST ASSOCIATION
worth and forget his past life of shame. But men are not so divine as to forgive the past trespasses of others, and plaintiff therefore endeavored to reveal as little as possible of his past life. Yet, as if in some bizarre canyon of echoes, petitioner’s past life pursues him through the pages of Reader’s Digest, now published in 13 languages and distributed in 100 nations, with a circulation in California alone of almost 2,000,000 copies.

In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published. But the great general interest in an unfettered press may at times be outweighed by other great societal interests. As a people we have come to recognize that one of these societal interests in that of protecting an individual’s right to privacy. The right to know and the right to have others Not know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.

In Time, Inc. v. Hill, supra, 385 U.S. 374, 383, 87 S. Ct. 534, 17 L. Ed. 2d 456, the United States Supreme Court considered some of these same balancing problems with regard to a different form of invasion of privacy, that of placing the individual in a false light in the public eye. The New York statute construed in Time did not create a right of action for the truthful report of newsworthy people or events. The Supreme Court stated, however, that "[t]his limitation to newsworthy persons and events does not of course foreclose an interpretation … to allow damages where ‘Revelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency,’ …" (385 U.S. at p. 383, fn. 7, 87 S. Ct. at p. 539.) Thus a truthful publication is constitutionally protected if (1) it is newsworthy and (2) it does not reveal facts so offensive as to shock the community’s notions of decency.

We have previously set forth criteria for determining whether an incident is newsworthy. We consider "(1) the social value of the facts published, (2) the depth of the article’s intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety. (Citations.)" (Kapellas v. Kofman, 1 Cal. 3d 20, 36, 81 Cal. Rptr. 360, 370, 459 P.2d 912, 922.)

On the assumed set of facts before us we are convinced that a jury could reasonably find that plaintiff’s identity as a former hijacker was not newsworthy. First, as discussed above, a jury could find that publication of plaintiff’s identity in connection with incidents of his past life was in this case of minimal social value. There was no independent reason whatsoever for focusing public attention on Mr. Briscoe as an individual at this time. A jury could certainly find that Mr. Briscoe had once again become an anonymous member of the community. Once legal proceedings have

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14 Judicial attempts at defining what constitutes "news" are fraught with oversimplification. Thus news has been defined as the "report of recent occurrences" (Jenkins v. News Syndicate Co., Inc. (N. Y. Sup. Ct. 1926) 128 Misc. 284, 285, 219 N. Y. S. 196) or as all factual reports with "that indefinable quality of interest, which attracts public attention." (Associated Press v. International News Service (2d Cir. 1917) 245 F. 244, 248, affirmed, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211.)

15 The notion of balancing competing interests is not foreign to First Amendment controversies. The extent to which government may prescribe advocacy of the use of force or violation of law has long occupied the attention of the judiciary. (See, e.g., Schenck v. United States (1919) 249 U.S. 52, 39 S. Ct. 247, 63 L. Ed. 470 (Holmes’ adumbration of the "clear and present danger" test); Whitney v. California (1927) 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095; Dennis v. United States (1951) 341 U.S. 494, 507, 71 S. Ct. 857, 95 L. Ed. 1137.) In Brandenburg v. Ohio (1969) 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430, the United States Supreme Court held that such proscription would be allowed only where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Roth v. United States (1957) 354 U.S. 476, 485, 77 S. Ct. 1304, 1309, 1 L. Ed. 2d 1498, the court held that obscene utterances "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (See also cases cited supra, Ins. 7 and 10; Wright, Defamation, Privacy, and the Public’s Right to Know: A National Problem and a New Approach (1968) 46 Tex. L. Rev. 630, 633.)

16 New York does not recognize a common law right to privacy. Its statutory right to privacy provides no relief for the publication of truthful but embarrassing private facts so long as the reports concern newsworthy persons or events. (Spahn v. Julian Messner, Inc., supra, 18 N.Y.2d 324, 328, 274 N.Y.S.2d 877, 221 N.E.2d 543, vacated on other grounds, 387 U.S. 239, 87 S. Ct. 1706, 18 L. Ed. 2d 744, judgment affirmed 21 N.Y.2d 124, 286 N.Y.S.2d 832, 233 N.E.2d 840, appeal dismissed (1968) 393 U.S. 1046, 89 S. Ct. 676, 21 L. Ed. 2d 600.)
concluded, and particularly once the individual has reverted to the lawful and unexciting life led by the rest of the community, the public's interest in knowing is less compelling.

Second, a jury might find that revealing one's criminal past for all to see is grossly offensive to most people in America. Certainly a criminal background is kept even more hidden from others than a humiliating disease (Barber v. Time, Inc., supra, 348 Mo. 1199, 159 S.W.2d 291) or the existence of business debts (Trammell v. Citizens News Co., Inc., supra, 285 Ky. 529, 148 S.W.2d 708; Tollefson v. Price, supra, 247 Or. 398, 430 P.2d 990). The consequences of revelation in this case — ostracism, isolation, and the alienation of one's family — make all too clear just how deeply offensive to most persons a prior crime is and thus how hidden the former offender must keep the knowledge of his prior indiscretion.

Third, in no way can plaintiff be said to have voluntarily consented to the publicity accorded him here. He committed a crime. He was punished. He was rehabilitated. And he became, for 11 years, an obscure and law-abiding citizen. His every effort was to forget and have others forget that he had once hijacked a truck.

Finally, the interests at stake here are not merely those of publication and privacy alone, for the state has a compelling interest in the efficacy of penal systems in rehabilitating criminals and returning them as productive and law-abiding citizens to the society whence they came. A jury might well find that a continuing threat that the rehabilitated offender's old identity will be resurrected by the media is counter-productive to the goals of this correctional process. Mindful that "the balance is always weighted in favor of free expression" (Liberty Lobby, Inc. v. Pearson (1968) 129 U.S. App. D.C. 74, 390 F.2d 489, 491), and that we must not chill First Amendment freedoms through uncertainty, we find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive.

We do not hold today that plaintiff must prevail in his action. It is for the trier of fact to determine (1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed. We hold today only that, as pleaded, plaintiff has stated a valid cause of action, sustaining the demurrer to plaintiff's complaint was improper, and that the ensuing judgment must therefore be reversed.

Plaintiff also claims that defendant's article placed him in a false light in the public eye by implying that his criminal activity was of recent vintage. He refers to the words "today" and "now" in the opening caption to the article, and the numerous recent dates mentioned, and contends that these imply to the reasonable man that the incident described took place recently. We have previously stated that a "false light" cause of action

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17 The instant case must be contrasted with the situation in Time, Inc. v. Hill, supra, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456; most people would not consider their former momentary status as a hostage of escaped criminals to be so offensive or discreditable as to render the disclosure of this fact outrageous. (Cf. Melvin v. Reid, supra, 112 Cal. App. 285, 297 P. 91; Mau v. Rio Grande Oil, Inc., supra, D.C., 28 F. Supp. 845, 846; Binns v. Vitagraph Co. (1913) 210 N.Y. 51, 103 N.E. 1108.) Compare Commonwealth v. Wiseman, supra, 356 Mass. 251, 249 N.E.2d 610, limiting public access to defendant's film on Bridgewater Hospital (Titicut Follies) because the film invaded the inmates' right to privacy by showing scenes of forced feeding, masturbation, etc.

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18 Because the categories with which we deal — private and public, newsworthy and nonnewsworthy — have no clear profile, there is a temptation to balance interests in ad hoc fashion in each case. Yet history teaches us that such a process leads too often to discounting society's stake in First Amendment rights. (See Nimmer, supra, 56 CAL. L. REV. 935, 939-941.) We therefore strive for as much predictability as possible within our system of case-by-case adjudication, lest we unwittingly chill First Amendment freedoms. "One steers clear of a barbed wire fence ... he stays even farther away if he is not sure exactly where the fence is..." (Wright, supra, 46 TEX. L. REV. 630, 634.) However, there is little uncertainty here. A publisher does have every reason to know, before publication. That identification of a man as a former criminal will be highly offensive to the individual involved. It does not require close reading of "Les Miserables" or "The Scarlet Letter" to know that men are haunted by the fear of disclosure of their past and destroyed by the exposure itself.

In alleging malice and willfulness in his complaint, plaintiff has complied with this initial requirement.

BRISCOE v. READER'S DIGEST ASSOCIATION
"is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice (cf. Time, Inc. v. Hill (1967) 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456) and fulfillment of the requirements of section 48a (of the Civil Code). (See Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 122-123, 14 Cal. Rptr. 208.)" (Kapellas v. Kofman, supra, 1 Cal. 3d 20, 35, fn. 16, 81 Cal. Rptr. 360, 459 P.2d 912.)

Plaintiff here alleged malice, but at no time complied with the requirements of section 48a. It would therefore be possible for him to amend his complaint to state a cause of action based on a "false light" theory only if he alleged special damages.

Defendant demurred specially as well as generally to plaintiff's complaint. The trial court sustained defendant's demurrer without leave to amend in general terms, contrary to Code of Civil Procedure, section 472d. Under such circumstances we must assume that the court ruled only on the general demurrer and not on the special demurrer. (Weinstock v. Eissler, 224 Cal. App. 2d 212, 237, 36 Cal. Rptr. 537; Stowe v. Fritzie Hotels, Inc., 44 Cal. 2d 416, 425, 282 P.2d 890.)

The judgment is reversed and the cause is remanded to the trial court with directions to overrule the general demurrer and to rule upon the points presented by the special demurrer. Appellant shall recover costs on appeal.

WRIGHT, C.J., and McCOMB, TOBRINER, MOSK, BURKE and SULLIVAN, JJ., concur.

MEMPHIS DEVELOPMENT, ETC. v. FACTORS ETC., INC.
616 F.2d 956 (CA 6, 1980)

MERRITT, Circuit Judge

This appeal raises the interesting question: Who is the heir of fame? The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality. We are called upon in this diversity case to determine whether, under Tennessee law, the exclusive right to publicity survives a celebrity's death. We hold that the right is not inheritable. After death the opportunity for gain shifts to the public domain, where it is equally open to all.

I

Elvis Presley died in Memphis on August 16, 1977. To honor him, the Memphis Development Foundation, a Tennessee non-profit corporation, laid plans to erect a large bronze statue of Presley in downtown Memphis. The Foundation solicited public contributions to pay for the sculpture. Donors of $25 or more received an eight-inch pewter replica of the proposed statue from the Foundation.

The District Court held that the heirs and assigns of Presley retained his exclusive right of publicity after his death. It held that the exclusive right to exploit Elvis Presley's name and likeness currently belongs to Factors Etc., Inc., the assignee of Elvis Presley's "right of publicity." The District Court thus enjoined further distribution of the replicas by the Foundation.

Prior to his death, Presley had conveyed the exclusive right to exploit the commercial value of his name and likeness to Boxcar Enterprises in exchange for royalties. Colonel Tom Parker, Presley's manager, was the majority shareholder of Boxcar. Parker owned 56% of the shares; Presley and Tom Dishkin, President of Boxcar, each owned 22%. Two days after Presley's death, Boxcar sold a license to use its rights to Factors for $150,000. Presley's father agreed to the sale on behalf of Elvis' estate.

The Foundation instituted this action seeking a declaratory judgment that Factors' license does not preclude distribution by the Foundation of the pewter replicas and that the Foundation has the right to erect the Presley statue.

Factors in turn by counterclaim seeks damages and an injunction against further distribution of the replicas by the Foundation. Factors claims that the Foundation is selling the statuettes for $25 apiece, and thus appropriating Factors' exclusive right to reap commercial value from the name and likeness of Elvis Presley.
The District Court issued an injunction against the Foundation. The injunction allows the Foundation to build the Presley memorial but prohibits it from manufacturing, selling or distributing any statuette bearing the image or likeness of Elvis Presley, or utilizing commercially in any manner or form the name, image, photograph or likeness of Elvis Presley.

II

At common law, there is a right of action for the appropriation or unauthorized commercial use of the name or likeness of another. An individual is entitled to control the commercial use of these personal attributes during life. But the common law has not heretofore widely recognized this right to control commercial publicity as a property right which may be inherited. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804, 815 (4th ed. 1971).

Recently, a few cases have characterized the right of publicity as property which may be passed on to heirs or assigns. In addition, a recent law journal article advocates recognition of such a right after death where a person has exploited his fame during life by assigning it to an agent or otherwise entering into a contract for its use. The theory is that the law should recognize that "the possibility of providing for one's heirs may have a motivational effect during one's life." Assignment during life is the touchstone because "if no contract has been created, the identification of ... harm is ... difficult" and evidently "such concerns were not a substantial motivation." The article thus distinguishes between "the unrealized potential ability of a person to profit from his attributes," an interest insufficient to establish an inheritable right, and the conscious exploitation of the right during life, the continuation of which after death fulfills "the social policy of encouraging individual creativity." Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 YALE L.J. 1577, 1618-19 (1979).

Tennessee courts have not addressed this issue directly or indirectly, and we have no way to assess their predisposition. Since the case is one of first impression, we are left to review the question in the light of practical and policy considerations, the treatment of other similar rights in our legal system, the relative weight of the conflicting interests of the parties, and certain moral presuppositions concerning death, privacy, inheritability and economic opportunity. These considerations lead us to conclude that the right of publicity should not be given the status of a degradable right, even where as here a person exploits the right by contract during life.

III

Recognition of a post-mortem right of publicity would vindicate two possible interests: the encouragement of effort and creativity, and the hopes and expectations of the decedent and those with whom he contracts that they are creating a valuable capital asset. Although fame and stardom may be ends in themselves, they are normally by-products of one's activities and personal attributes, as well as luck and promotion. The basic motivations are the desire to achieve success or excellence in a chosen field, the desire to contribute to the happiness or improvement of one's fellows and the desire to receive the psychic and financial rewards of achievement. As John Rawls has written, such needs come from the deep psychological fact that the individuals want the respect and good will of other persons and "enjoy the exercise of their realized capacities [their innate or trained abilities], and this enjoyment increases the more the capacity is realized, or the greater its complexity." (Footnote omitted.) According to Rawls:

MEMPHIS DEVELOPMENT, ETC. v. FACTORS ETC., INC.
Such activities are more enjoyable because they satisfy the desire for variety and novelty of experience, and leave room for feats of ingenuity and invention. They also evoke the pleasures of anticipation and surprise, and often the overall form of the activity, its structural development, is fascinating and beautiful. A Theory of Justice 426-27 (1971).

Fame is an incident of the strong motivations that Rawls describes. The desire to exploit fame for the commercial advantage of one's heirs is by contrast a weak principle of motivation. It seems apparent that making the right of publicity inheritable would not significantly inspire the creative endeavors of individuals in our society.

IV

On the other hand, there are strong reasons for declining to recognize the inheritability of the right. A whole set of practical problems of judicial line-drawing would arise should the courts recognize such an inheritable right. How long would the "property" interest last? In perpetuity? For a term of years? Is the right of publicity taxable? At what point does the right collide with the right of free expression guaranteed by the first amendment? Does the right apply to elected officials and military heroes whose fame was gained on the public payroll, as well as to movie stars, singers and athletes? Does the right cover posters or engraved likenesses of, for example, Farah Fawcett Majors or Mahatma Gandhi, kitchen utensils ("Revere Ware"), insurance ("John Hancock"), electric utilities ("Edison"), a football stadium ("RFK"), a pastry ("Napoleon"), or the innumerable urban subdivisions and apartment complexes named after famous people? Our legal system normally does not pass on to heirs other similar personal attributes even though the attributes may be shared during life by others or have some commercial value. Titles, offices and reputation are not inheritable. Neither are trust or distrust and friendship or enmity descendable. An employment contract during life does not create the right for heirs to take over the job. Fame falls in the same category as reputation; it is an attribute from which others may benefit but may not own.

The law of defamation, designed to protect against the destruction of reputation including the loss of earning capacity associated with it, provides an analogy. There is no right of action for defamation after death. See Restatement (Second) of Torts § 560 (rev. ed. 1977). The two interests that support the inheritability of the right of publicity, namely, the "effort and creativity" and the "hopes and expectations" of the decedent, would also support an action for libel or slander for destruction of name and reputation after death. Neither of these reasons, however, is sufficient to overcome the common law policy terminating the action for defamation upon death.

Fame often is fortuitous and fleeting. It always depends on the participation of the public in the creation of an image. It usually depends on the communication of information about the famous person by the media. The intangible and shifting nature of fame and celebrity status, the presence of widespread public and press participation in its creation, the unusual psychic rewards and income that often flow from it during life and the fact that it may be created by bad as well as good conduct combine to create serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public. Heretofore, the law has always thought that leaving a good name to one's children is sufficient reward in itself for the individual, whether famous or not. Commercialization of this virtue after death in the hands of heirs is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture.

There is no indication that changing the traditional common law rule against allowing heirs the exclusive control of the commercial use of their ancestor's name will increase the efficiency or productivity of our economic system. It does not seem reasonable to expect that such a change would enlarge the stock or quality of the goods, services, artistic creativity, information, invention or entertainment available. Nor will it enhance the fairness of our political and economic system. It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few. An equal distribution of the opportunity to use the name of the dead seems preferable. The memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system.

These same considerations also apply to the
Presley assigns' more narrow argument based on the fact that Presley entered into contracts during his life for the commercial use of his image. It is true that the assignment of the right of publicity during life shows that Presley was aware of the value of the asset and intended to use it. The assignment also suggests that he intended to convert a mere opportunity or potential for profit into a tangible possession and consciously worked to create the asset with, perhaps, the hope of devising it.

The question is whether the specific identification and use of the opportunity during life is sufficient to convert it into an inheritable property right after death. We do not think that whatever minimal benefit to society may result from the added motivation and extra creativity supposedly encouraged by allowing a person to pass on his fame for the commercial use of his heirs or assigns outweighs the considerations discussed above.

Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with the principles announced above.