Philosophical Dimensions of Privacy: An Anthology

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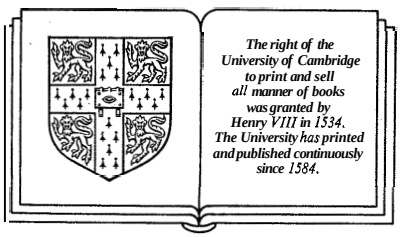

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Privacy
[A legal analysis]

WILLIAM L. PROSSER

In the year 1890 Mrs. Samuel D. Warren, a young matron of Boston, which is a large city in Massachusetts, held at her home a series of social entertainments on an elaborate scale. She was the daughter of Senator Bayard of Delaware, and her husband was a wealthy young paper manufacturer, who only the year before had given up the practice of law to devote himself to an inherited business. Socially Mrs. Warren was among the élite; and the newspapers of Boston, and in particular the *Saturday Evening Gazette,* which specialized in "blue blood" items, covered her parties in highly personal and embarrassing detail. It was the era of "yellowjournalism," when the press had begun to resort to excesses in the way of prying that have become more or less commonplace today;' and Boston was perhaps, of all of the cities in the country, the one in which a lady and a gentleman kept their names and their personal affairs out of the papers. The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed.[2] It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years.

Mr. Warren turned to his recent law partner, Louis D. Brandeis, who was destined not to be unknown to history. The result was a noted article, *The Right to Privacy,*[3] in the *Harvard Law Review,* upon which the two men collaborated. It has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law. In the Harvard Law School class of 1877 the two authors had stood respectively second and first, and both of them were gifted with scholarship, imagination, and ability. Internal evidences of style, and the probabilities of the situation, suggest that the writing, and perhaps most of the research, was done by Brandeis; but

it was undoubtedly ajoint effort, to which both men contributed their ideas.

Piecing together old decisions in which relief had been afforded on the basis of defamation, or the invasion of some property right,[4] or a breach of confidence or an implied contract,[5] the article concluded that such cases were in reality based upon a broader principle which was entitled to separate recognition. This principle they called the right to privacy; and they contended that the growing abuses of the press made a remedy upon such a distinct ground essential to the protection of private individuals against the outrageous and unjustifiable infliction of mental distress. This was the first of a long line of law review discussions of the right of privacy,[6] of which this is to be yet one more. With very few exceptions,' the writers have agreed, expressly or tacitly, with Warren and Brandeis.

The article had little immediate effect upon the law. The first case to allow recovery upon the independent basis of the right of privacy was an unreported decision[8] of a New York trialjudge, when an actress very scandalously, for those days, appeared upon the stage in tights, and the defendant snapped her picture from a box, and was enjoined from publishing it. This was followed by three reported cases in New York,[9] and one in a federal court in Massachusetts,[10] in which the courts appeared to be quite ready to accept the principle. Progress was brought to an abrupt halt, however, when the Michigan court flatly rejected the whole idea, in a case[11] where a brand of cigars was named after a deceased public figure. In 1902 the question reached the Court of Appeals of New York, in the case of *Roberson v. Rochester Folding Box* Co.[12] in which the defendant made use of the picture of a pulchritudinous young lady without her consent to advertise flour, along with the legend, "The Flour of the Family." One might think that the feebleness of the pun might have been enough in itself to predispose the court in favor of recovery; but in a four-to-three decision, over a most vigorous dissent, it rejected Warren and Brandeis and declared that the right of privacy did not exist, and that the plaintiff was entitled to no protection whatever against such conduct. The reasons offered were the lack of precedent, the purely mental character of the injury, the "vast amount of litigation" that might be expected to ensue, the difficulty of drawing any line between public and private figures, and the fear of undue restriction of the freedom of the press.

The immediate result of the *Roberson* case was a storm of public disapproval, which led one of the concurring judges to take the un-

precedented step of publishing a law review article in defense of the decision.[13] In consequence the next New York Legislature enacted a statute[14] making it both a misdemeanor and a tort to make use of the name, portrait or picture of any person for "advertising purposes or for the purposes of trade" without his written consent. This act remains the law of New York, where there have been upwards of a hundred decisions dealing with it. Except as the statute itself limits the extent of the right, the New York decisions are quite consistent with the common law as it has been worked out in other states, and they are customarily cited in privacy cases throughout the country.

Three years later the supreme court of Georgia had much the same question presented in *Pavesich v. New England Life Insurance Co.*,[15] when the defendant's insurance advertising made use of the plaintiff's name and picture, as well as a spurious testimonial from him. With the example of New York before it, the Georgia court in turn rejected the *Roberson* case, accepted the views of Warren and Brandeis, and recognized the existence of a distinct right of privacy. This became the leading case.

For the next thirty years there was a continued dispute as to whether the right of privacy existed at all, as the courts elected to follow the *Roberson* or the *Pavesich* case. Along in the thirties, with the benediction of the *Restatement of Torts*,[16] the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled. At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts. It is recognized in Alabama,[17] Alaska,[18] Arizona,[19] California,[20] Connecticut,[21] thé District of Columbia,[22] Florida,[23] Georgia,[24] Illinois,[25] Indiana,[26] Iowa,[27] Kansas,[28] Kentucky,[29] Louisiana,[30] Michigan,[31] Mississippi,[32] Missouri,[33] Montana,[34] Nevada,[35] New Jersey,[36] North Carolina,[37] Ohio,[38] Oregon,[39] Pennsylvania,[40] South Carolina,[41] Tennessee,[42] and West Virginia.[43] It will in all probability be recognized in Delaware[44] and Maryland,[45] where a federal and a lower court have accepted it; and also in Arkansas,[46] Colorado,[47] Massachusetts,[48] Minnesota,[49] and Washington,[50] where the courts at least have refrained from holding that it does not exist, but the decisions have gone off on other grounds. It is recognized in a limited form by the New York' statute,[51] and by similar acts adopted in Oklahoma,[52] Utah,[53] and Virginia.[54]

At the time of writing the right of privacy stands rejected only by a 1909 decision in Rhode Island,[55] and by more recent ones in Nebraska,[56] Texas,[57] and Wisconsin,[58] which have said that any change in the old common law must be for the legislature, and which have not gone without criticism.

In nearly every jurisdiction the first decisions were understandably preoccupied with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did. It is only in recent years, and largely through the legal writers, that there has been any attempt to inquire what interests are we protecting, and against what conduct. Today, with something over three hundred cases in the books, the holes in the jigsaw puzzle have been largely filled in, and some rather definite conclusions are possible.

What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley,[59] "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

It should be obvious at once that these four types of invasion may be subject, in some respects at least, to different rules; and that when what is said as to any one of them is carried over to another, it may not be at all applicable, and confusion may follow.

The four may be considered in detail, in order.

I. Intrusion

Warren and Brandeis, who were concerned with the evils of publication, do not appear to have had in mind any such thing as intrusion upon the plaintiff's seclusion or solitude. Nine years before their article was published there had been a ,Michigan case[60] in which a young man had intruded upon a woman in childbirth, and the court,

invalidating her consent because of fraud, had allowed recovery without specifying the ground, which may have been trespass or battery. In retrospect, at least, this was a privacy case. Others have followed, in which the defendant has been held liable for intruding into the plaintiff's home,[61] his hotel room,[62] and a woman's stateroom on a steamboat,[63] and for an illegal search of her shopping bag in a store.[64] The privacy action which has been allowed in such cases will evidently overlap, to a considerable extent at least, the action for trespass to land or chattels.

The principle was, however, soon carried beyond such physical intrusion. It was extended to eavesdropping upon private conversations by means of wire tapping[65] and microphones;[66] and there are three decisions,[67] the last of them aided by a Louisiana criminal statute, which have applied the same principle to peering into the windows of a home. The supreme court of Ohio, which seems to be virtually alone among our courts in refusing to recognize the independent tort of the intentional infliction of mental distress by outrageous conduct,[68] has accomplished the same result[69] under the name of privacy, in a case where a creditor hounded the debtor for a considerable length of time with telephone calls at his home and his place of employment.[70] The tort has been found in the case of unauthorized prying into the plaintiff's bank account,[71] and the same principle has been used to invalidate a blanket subpoena duces tecum requiring the production of all of his books and documents,[72] and an illegal compulsory blood test.[73]

It is clear, however, that there must be something in the nature of prying or intrusion, and mere noises which disturb a church congregation,[74] or bad manners, harsh names and insulting gestures in public,[75] have been held not to be enough. It is also clear that the intrusion must be something which would be offensive or objectionable to a reasonable man, and that there is no tort when the landlord stops by on Sunday morning to ask for the rent.[76]

It is clear also that the thing into which there is prying or intrusion must be, and be entitled to be, private. The plaintiff has no right to complain when his pre-trial testimony is recorded,[77] or when the police, acting within their powers, take his photograph, fingerprints or measurements,[78] or when there is inspection and public disclosure of corporate records which he is required by law to keep and make available.[79] On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about.[80] Neither is it such an invasion to take his photograph in such a place,[81] since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see. On the other hand, when he is confined to a hospital bed,[82] and in all probability when he is merely in the seclusion of his home, the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain.

It appears obvious that the interest protected by this branch of the tort is primarily a mental one. It has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.

II. Public disclosure of private facts

Because of its background of personal annoyance from the press, the article of Warren and Brandeis was primarily concerned with the second form of the tort, which consists of public disclosure of embarrassing private facts about the plaintiff. Actually this was rather slow to appear in the decisions. Although there were earlier instance in which other elements were involved, its first real separate application was in a Kentucky case[84] in 1927, in which the defendant put up a notice in the window of his garage announcing to the world that the defendant owed him money and would not pay it. But the decision which has become the leading case, largely because of its spectacular facts, is *Melvin v. Reid*,[85] in California in 1931. The plaintiff, whose original name was Gabrielle Darley, had been a prostitute, and the defendant in a sensational murder trial. After her acquittal she had abandoned her life of shame, become rehabilitated, married a man named Melvin, and in a manner reminiscent of the plays of Arthur Wing Pinero, had led a life of rectitude in respectable society, among friends and associates who were unaware of her earlier career. Seven years afterward the defendant made and exhibited a motion picture, called "The Red Kimono," which enacted the true story, used the name of Gabrielle Darley, and ruined her new life by revealing her past to the world and her friends. Relying in part upon a vague constitutional provision that all men have the inalienable right of "pursuing and obtaining happiness,'' which has since disappeared from the California cases, the court held that this was an actionable invasion of her right of privacy.

Other decisions have followed, involving the use of the plaintiff's name in a radio dramatization of a robbery of which he was the victim,[86] and publicity given to his debts,[87] to medical pictures of his

anatomy,[88] and to embarrassing details of a woman's masculine characteristics, her domineering tendencies, her habits of profanity, and incidents of her personal conduct toward her friends and neighbors.[89] Some limits, at least, of this branch of the right of privacy appear to be fairly well marked out, as follows:

First, the disclosure of the private facts must be a public disclosure, and not a private one. There must be, in other words, publicity. It is an invasion of the right to publish in a newspaper that the plaintiff does not pay his debts,[90] or to post a notice to that effect in a window on the public street[91] or cry it aloud in the highway;[92] but, except for one decision of a lower Georgia court which was reversed on other grounds,[93] it has been agreed that it is no invasion to communicate that fact to the plaintiff's employer,[94] or to any other individual, or even to a small group,[95] unless there is some breach of contract, trust or confidential relation which will afford an independent basis for relief.[96] Warren and Brandeis[97] thought that the publication would have to be written or printed unless special damage could be shown; and there have been decisions[98] that the action will not lie for oral publicity; but the growth of radio alone has been enough to make this obsolete,[99] and there now can be little doubt that writing is not required.[100]

Second, the facts disclosed to the public must be private facts, and not public ones. Certainly no one can complain when publicity is given to information about him which he himself leaves open to the public eye, such as the appearance of the house in which he lives, or to the business in which he is engaged. Thus it has been held that a public school teacher has no action for a compulsory disclosure of her war work and other outside activities.[101]

Here two troublesome questions arise. One is whether any individual, by appearing upon the public highway or in any other public place, makes his appearance public, so that any one may take and publish a picture of him as he is at the time. What if an utterly obscure citizen, reeling along drunk on the main street, is snapped by an enterprising reporter, and the picture given to the world? Is his privacy invaded? The cases have been much involved with the privilege of reporting news and other matters of public interest,[102] and for that reason cannot be regarded as very conclusive; but the answer appears to be that it is not. The decisions indicate that anything visible in a public place may be recorded and given circulation by means of a photograph, to the same extent as by a written description,[103] since this amounts to nothing more than giving publicity to what is already

public and what any one present would be free to see.[104] Outstanding is the California case[105] in which the plaintiff, photographed while embracing his wife in the market place, was held to have no action when the picture was published. It has been contended[106] that when an individual is thus singled out from the public scene, and undue attention is focused upon him, there is an invasion of his private rights; and there is one New York decision to that effect.[107] It was, however, later explained upon the basis of the introduction of an element of fiction into the accompanying narrative.[108]

On the other hand, it seems clear that when a picture is taken surreptitiously, or over the plaintiff's objection, in a private place,[109] or one already made is stolen,[110] or obtained by bribery or other inducement of breach of trust,[111] the plaintiff's appearance which is thus made public is at the time still a private thing, and there is an invasion of a privaté right, for which an action will lie.

The other question is as to the effect of the fact that the matter made public is already one of public record. If the record is a confidential one, not open to public inspection, as in the case of income tax returns,[112] it is not public, and there can be no doubt that there is an invasion of privacy. But it has been held that no one is entitled to complain when there is publication of his recorded date of birth or his marriage,[113] or his military service record;[114] and the same must certainly be true of his admission to the bar or to the practice of medicine, or the fact that he is driving a taxicab. The difficult question is as to the effect of lapse of time, and the extent to which forgotten records, as for example of a criminal conviction, may be dredged up in after years and given more general publicity. As in the case of news,[115] with which the problem may be inextricably interwoven, it has been held that the memory of the events covered by the record, such as a criminal trial,[116] can be revived as still a matter of legitimate public interest. But there is the leading case of Melvin v. *Reid*,[117] which held that the unnecessary use of the plaintiff's name, and the revelation of her history to new friends and associates, introduced an element which was in itself a transgression of her right of privacy. The answer may be that the existence of a public record is a factor of a good deal of importance, which will normally prevent the matter from being private, but that under some special circumstances it is not necessarily conclusive.

Third, the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.[118] All of us, to some extent, lead lives exposed to the public gaze or to

the public inquiry, and complete privacy does not exist in this world except for the eremite in the desert. Any one who is not a hermit must expect the more or less casual observation of his neighbors and the passing public as to what he is and does, and some reporting of his daily activities. The ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned from a visit, or gone camping in the woods, or that he has given a party at his house for his friends; and very probably Mr. Warren would never have had any action for the reports of his daughter's wedding. The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity.[119] It is quite a different matter when the details of sexual relations are spread before the public gaze,[120] or there is highly personal portrayal of his intimate private characteristics or conduct.[121]

Here the outstanding case is *Sidis v. F-R Publishing Corporation.*[122] The plaintiff, William James Sidis, had been an infant prodigy, who had graduated from Harvard at sixteen, and at the age of eleven had lectured to eminent mathematicians on the fourth dimension. When he arrived at adolescence he underwent some unusual psychological change, which brought about a complete revulsion toward mathematics, and toward the publicity he had received. He disappeared, led an obscure life as a bookkeeper, and occupied himself in collecting street car transfers, and studying the lore of the Okamakammessett Indians. The *New Yorker* magazine sought him out, and published a not unsympathetic account of his career, revealing his present whereabouts and activities. The effect upon Sidis was devastating, and the article unquestionably contributed to his early death. The case involved the privilege of reporting on matters of public interest;[123] but the decision that there was no cause of action rested upon the ground that there was nothing in the article which would be objectionable to any normal person. When this case is compared with *Melvin v. Reid,*[124] with its revelation of the past of a prostitute and a murder defendant, what emerges is something in the nature of a "mores" test,[125] by which there will be liability only for publicity given to those things which the customs and ordinary views of the community will not tolerate.

This branch of the tort is evidently something quite distinct from intrusion. The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation, into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth.[126] As such, it has no doubt gone far to remedy the deficiencies of the defamation actions, hampered as they are by technical rules inherited from ancient and long forgotten jurisdictional conflicts, and to provide a remedy for a few real and serious wrongs that were not previously actionable.

III. False light in the public eye

The third form of invasion of privacy, which Warren and Brandeis again do not appear to have had in mind at all, consists of publicity that places the plaintiff in a false light in the public eye. It seems to have made its first appearance in 1816, when Lord Byron succeeded in enjoining the circulation of a spurious and inferior poem attributed to his pen.[127] The principle frequently, over a good many years, has made a rather nebulous appearance in a line of decisions[128] in which falsity or fiction has been held to defeat the privilege of reporting news and other matters of public interest, or of giving further publicity to already public figures. It is only in late years that it has begun to receive any independent recognition of its own.

One form in which it occasionally appears, as in Byron's case, is that of publicity falsely attributing to the plaintiff some opinion or utterance.[129] A good illustration of this might be the fictitious testimonial used in advertising,[130] or the Oregon case[131] in which the name of the plaintiff was signed to a telegram to the governor urging political action which it would have been illegal for him, as a state employee, to advocate. More typical are spurious books and articles, or ideas expressed in them, which purport to emanate from the plaintiff.[132] In the same category are the unauthorized use of his name as a candidate for office,[133] or to advertise for witnesses of an accident,[134] or the entry of an actor, without his consent, in a popularity contest of an embarrassing kind.[135]

Another form in which this branch of the tort frequently has made its appearance is the use of the plaintiff's picture to illustrate a book or an article with which he has no reasonable connection. As remains to be seen,[136] public interest may justify a use for appropriate and pertinent illustration. But when the face of some quite innocent and unrelated citizen is employed to ornament an article on the cheating propensities of taxi drivers,[137] the negligence of children,[138] profane love,[139] "man hungry" women,[140] juvenile delinquents,[141] or the peddling of narcotics,[142] there is an obvious innuendo that the article applies to him, which places him in a false light before the public, and which is actionable.

Still another form in which the tort occurs is the inclusion of the plaintiff's name, photograph and fingerprints in a public "rogues' gallery" of convicted criminals, when he has not in fact been convicted of any crime.[143] Although the police are clearly privileged to make such a record in the first instance, and to use it for any legitimate purpose pending trial,[144] or even after conviction,[145] the element of false publicity in the inclusion among the convicted goes beyond the privilege.

The false light need not necessarily be a defamatory one, although it very often is,[146] and a defamation action will also lie. It seems clear, however, that it must be something that would be objectionable to the ordinary reasonable man under the circumstances, and that, as in the case of disclosure,[147] the hypersensitive individual will not be protected.[148] Thus minor and unimportant errors in an otherwise accurate biography, as to dates and place, and incidents of no significance, do not entitle the subject of the book to recover,[149] nor does the erroneous description of the plaintiff as a cigarette girl when an inquiring photographer interviews her on the street.[150] Again, in all probability, something of a "mores" test must be applied.

The false light cases obviously differ from those of intrusion, or disclosure of private facts. The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation. There is a resemblance to disclosure; but the two differ in that one involves truth and the other lies, one private or secret facts and the other invention. Both require publicity. There has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie. The privacy cases do go considerably beyond the narrow limits of defamation, and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other tort.

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

IV. Appropriation

There is little indication that Warren and Brandeis intended to direct their article at the fourth branch of the tort, the exploitation of attributes of the plaintiff's identity. The first decision[151] had relied upon breach of an implied contract, where a photographer who had taken the plaintiff's picture proceeded to put it on sale; and this is still one basis upon which liability continues to be found.[152] By reason of its early appearance in the *Roberson* case,[153] and the resulting New York statute,[154] this form of invasion has bulked rather large in the law of privacy. It consists of the appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.[155] Thus in New York, as well as in many other states, there are a great many decisions in which the plaintiff has recovered when his name[156] or picture,[157] or other likeness,[158] has been used without his consent to advertise the defendant's product, or to accompany an article sold,[159] to add luster to the name of a corporation,[160] or for other business purposes.[161] The statute in New York,[162] and the others patterned after it[163] are limited by their terms to use for advertising or for "purposes of trade," and for that reason must be somewhat more narrow in their scope than the common law of the other states;[164] but in general, there has been no significant difference in their application in the field that they cover.

It is the plaintiff's name as a symbol of his identity that is involved here, and not his name as a mere name. There is, as a good many thousand John Smiths can bear witness, no such thing as an exclusive right to the use of any name. Unless there is some tortious use made of it, any one can be given or assume any name he likes.[165] The Kabotznicks may call themselves Cabots, and the Lovelskis become the Lowells, and the ancient proper Bostonian houses can do nothing about it but grieve. Any one may call himself Dwight D. Eisenhower, Henry Ford, Nelson Rockefeller, Eleanor Roosevelt, or Willie Mays, without any liability whatever. It is when he makes use of the name to pirate the plaintiff's identity for some advantage of his own, as by impersonation to obtain credit or secret information,[166] or by posing as the plaintiff's wife,[167] or providing a father for a child on a birth certificate,[168] that he becomes liable. It is in this sense that "appropriation" must be understood.

On this basis, the question before the courts has been first of all whether there has been appropriation of an aspect of the plaintiff's identity. It is not enough that a name which is the same as his is used in a novel,[169] a comic strip,[170] or the title of a corporation,[171] unless

the context or the circumstances,[172] or the addition of some other element,[173] indicate that the name is that of the plaintiff. It seems clear that a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use.[174] On the other hand, there is no liability for the publication of a picture of his hand, leg and foot,[175] his dwelling house,[176] his automobile,[177] or his dog,[178] with nothing to indicate whose they are. Nor is there any liability when the plaintiff's character, occupation, and the general outline of his career, with many real incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.[179]

Once the plaintiff is identified, there is the further question whether the defendant has appropriated the name or likeness for his own advantage. Under the statutes this must be a pecuniary advantage; but the common law is very probably not so limited.[180] The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be "for purposes of trade," they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper is sold; and that the presence of advertising matter in adjacent columns does not make any difference.[181] Any other conclusion would undoubtedly have been an unconstitutional interference with the freedom of the press.[182] Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book[183] or a motion picture[184] or even in a commentary upon news which is part of an advertisement,[185] is not an invasion of his privacy; nor is the publication of a photograph[186] or a newsreel[187] in which he incidentally appears.

This liberality toward the publishers was brought to an abrupt termination, however, when cases began to appear in which false statements were made. It was held quite early in New York[188] that the publication of fiction concerning a man is a use of his name for purposes of trade, and that in such a case the mere sale of the article is enough in itself to provide the commercial element. It follows that when the name or the likeness is accompanied by false statements about the plaintiff,[189] or he is placed in a false light before the public,[190] there is such a use. The result of this rule for the encouragement of accuracy in the press is that the New York court has in fact recognized and applied the third form of invasion of privacy[191] under a statute which was directed only at the fourth.

It seems sufficiently evident that appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in

the public eye. The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity. It seems quite pointless to dispute over whether such a right is to be classified as "property."[192] If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses. Its proprietary nature is clearly indicated by a decision of the Second Circuit[193] that an exclusive license has what has been called a "right of publicity,"[194] which entitles him to enjoin the use of the name or likeness by a third person. Although this decision has not yet been followed,[195] it would seem clearly to be justified.

V. Common features

Judge Biggs has described the present state of the law of privacy as "still that of a haystack in a hurricane."[196] Disarray there certainly is; but almost all of the confusion is due to a failure to separate and distinguish these four forms of invasion, and to realize that they call for different things. Typical is the bewilderment which a good many members of the bar have expressed over the holdings in the two *Gill* cases in California. Both of them involved publicity given to the same photograph, taken while the plaintiff was embracing his wife in the Farmers' Market in Los Angeles. In one of them,[197] which involved only the question of disclosure by publishing the picture, it was held that there was nothing private about it, since it was a part of the public scene in a public place. In the other,[198] which involved the use of the picture to illustrate an article on the right and the wrong kind of love, with the innuendo that this was the wrong kind, liability was found for placing the plaintiff in a false light in the public eye. The two conclusions were based entirely upon the difference between the two branches of the tort.

Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest. Obviously this is an area in which one must treat warily and be on the lookout for bogs. Nor is the difficulty decreased by the fact that quite often two or more of these forms of invasion may be found in the same case, and quite conceivably all four.[199]

There has nevertheless been a good deal of consistency in the rules

that have been applied to the four disparate torts under the common name. As to any one of the four, it is agreed that the plaintiff's right is a personal one, which does not extend to the members of his family,[200] unless, as is obviously possible,[201] their own privacy is invaded along with his. The right is not assignable;[202] and while the cause of action may[203] or may not[204] survive after his death, according to the survival rules of the particular state, there is no common law right of action for a publication concerning one who is already dead.[205] The statutes of Oklahoma, Utah and Virginia,[206] however, expressly provide for such an action. It seems to be generally agreed that the right of privacy is one pertaining only to individuals, and that a corporation[207] or a partnership[208] cannot claim it as such, although either may have an exclusive right to the use of its name, which may be protected upon some other basis such as that of unfair competition.[209]

So far as damages are concerned, there is general agreement that the plaintiff need not plead or prove special damages,[210] and that in this respect the action resembles one for libel or slander per se. The difficulty of measuring the damages is no more reason for denying relief here than in a defamation action.[211] Substantial damages may be awarded for the .presumed mental distress inflicted, and other probable harm, without proof.[212] If there is evidence of special damage, such as resulting illness, or unjust enrichment of the defendant,[213] or harm to the plaintiff's own commercial interests,[214] it can be recovered. Punitive damages can be awarded upon the same basis as in other torts, where a wrongful motive or state of mind appears,[215] but not in cases where the defendant has acted innocently, as for example in the belief that the plaintiff has given his consent.[216]

At an early stage of its existence, the right of privacy came into head-on collision with the constitutional guaranty of freedom of the press. The result was the slow evolution of a compromise between the two. Much of the litigation over privacy has been concerned with this compromise, which has involved two closely related, special and limited privileges arising out of the rights of the press.[217] One of these is the privilege of giving further publicity to already public figures. The other is that of giving publicity to news, and other matters of public interest. The one primarily concerns the person to whom publicity is given; the other the event, fact or other subject-matter. They are, however, obviously only different phases of the same thing.

VI. Public figures and public interest

A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling

which gives the public a legitimate interest in his doings, his affairs, and his character, has become a "public personage."[218] He is, in other words, a celebrity—one who by his own voluntary efforts has succeeded in placing himself in the public eye. Obviously to be included in this category are those who have achieved at least some degree of reputation[219] by appearing before the public, as in the case of an actor,[220] a professional baseball player,[221] a pugilist,[222] or any other entertainer.[223] The list is, however, broader than this. It includes public officers,[224] famous inventors[225] and explorers,[226] war heroes[227] and even ordinary soldiers,[228] an infant prodigy,[229] and no less a personage than the Grand Exalted Ruler of a lodge.[230] It includes, in short, any one who has arrived at a position where public attention is focused upon him as a person. It seems clear, however, that such public stature must already exist before there can be any privilege arising out of it, and that the defendant, by directing attention to one who is obscure and unknown, cannot himself create a public figure.[231]

Such public figures are held to have lost, to some extent at least, their right of privacy. Three reasons are given, more or less indiscriminately, in the decisions: that they have sought publicity and consented to it, and so cannot complain of it; that their personalities and their affairs already have become public, and can no longer be regarded as their own private business; and that the press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest. On one or another of these grounds, and sometimes all, it is held that there is no liability when they are given additional publicity, as to matters reasonably within the scope of the public interest which they have aroused.[232]

The privilege of giving publicity to news, and other matters of public interest, arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them. "News" includes all events and items of information which are out of the ordinary humdrum routine, and which have "that indefinable quality of information which arouses public attention."[233] To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news. A glance at any morning newspaper will sufficiently indicate the content of the term. It includes homicide[234] and other crimes,[235] arrests[236] and police raids,[237] suicides,[238] marriages[239] and divorces,[240] accidents,[241] a death from the use of narcotics,[242] a woman with a rare disease,[243] the birth of a child to a twelve year old girl,[244] the filing of a libel suit,[245] a report to the police concerning the escape of a black panther,[246] the reappearance of one supposed to have been murdered years ago,[247] and undoubtedly many other sim-

ilar matters of genuine, if more or less deplorable, popular appeal.[248]

The privilege of enlightening the public is not, however, limited to the dissemination of news in the sense of current events. It extends also to information or education, or even entertainment and amusement,[249] by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general,[250] and the reproduction of the public scene as in newsreels and travelogues.[251] In determining where to draw the line the courts have been invited to exercise nothing less than a power of censorship over what the public may be permitted to read; and they have been understandably liberal in allowing the benefit of the doubt.

Caught up and entangled in this web of news and public interest are a great many people who have not sought publicity, but indeed, as in the case of the accused criminal, have tried assiduously to avoid it. They have nevertheless lost some part of their right of privacy. The misfortunes of the frantic woman whose husband is murdered before her eyes,[252] or the innocent bystander who is caught in a raid on a cigar store and mistaken by the police for the proprietor,[253] can be broadcast to the world, and they have no remedy. Such individuals become public figures[254] for a season; and "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."[255] The privilege extends even to identification and some reasonable depiction of the individual's family,[256] although there must certainly be limits as to their own private lives into which the publisher cannot go.[257]

What is called for, in short, is some logical connection between the plaintiff and the matter of public interest. The most extreme cases of the privilege are those in which the likeness of an individual is used to illustrate a book or an article on some general topic, rather than any specific event. Where this is appropriate and pertinent, as where the picture of a strikebreaker is used to illustrate a book on strikebreaking,[258] or that of a Hindu illusionist is employed to illustrate an article on the Indian rope trick,[259] it has been held that there is no liability, since the public interest justifies any invasion of privacy. On the other hand, where the illustration is not pertinent, and a connection is suggested which does not exist, as where the face of an honest taxi driver appears in connection with an article on the cheating practices of the trade,[260] or the picture of a decent model illustrates one on "man hungry" women,[261] the plaintiff is placed in a false light, and may recover on that basis. The difference is well brought out by two cases in California and New York. In one of them[262] a photograph

of the plaintiff arguing with a would-be suicide on a bridge was held properly used to illustrate an article on suicide. In the other[263] the picture of a boy in the slums, taken while he was innocently talking baseball on the street, was used with an article about juvenile delinquency, entitled "Gang Boy," and he was allowed to recover.

VII. Limitations

It is clear, however, that the public figure loses his right of privacy only to a limited extent,[264] and that the privilege of reporting news and matters of public interest is likewise limited. The decisions indicate very definitely that both privileges apply only to one branch of the tort, that of disclosure of private facts about the individual. The famous motion picture actress who "vants to be alone"[265] unquestionably has as much right as any one else to be free from intrusion into her home or her bank account; and so has the individual whose divorce is the sensation of the day.[266] The celebrity can undoubtedly complain of the appropriation of his name or likeness for purposes of advertising, or the sale of a product,[267] and so can the victim of an accident.[268] It was once held that even the Emperor of Austria had a right to object when his name was bestowed on an insurance company.[269] And while it seems to be agreed that the courts are not arbiters of taste, and the fact that a publication is morbid, gruesome, lurid, sensational, immoral, and altogether cheap and despicable will not forfeit the privilege,[270] it is also clear that either the public figure[271] or the man in the news[272] can maintain an action when false or fictitious statements are published about him, or when his picture is used with an innuendo which places him in a false light before the public.[273]

But even as to the disclosure of private facts, it appears that there must be some rather undefined limits upon these privileges. Warren and Brandeis[274] thought that even a celebrity was entitled to his private life, and that he would become a public figure only as to matters already public and those which directly bore upon them. The development of the law has not been so narrow. It has recognized a legitimate public curiosity about the personalities of celebrities, and about a great deal of otherwise private and personal information concerning them. Their biographies can be written,[275] and their life histories and their characters set forth before the world in unflattering detail. Discreditable facts about them can be exposed.[276] And as our newspapers demonstrate daily, the public can be treated to an enormous amount of petty gossip as to what they eat for breakfast, wear, read, do with their spare time, or say to their friends.

Some boundaries, however, still remain; and one may venture the

guess that the private sex relations of actresses and baseball players, to say nothing of inventors and the victims of automobile accidents, are still not in the public domain.[277] As some evidence of popular feeling in such matters, one might look to the statutes in several states[278] prohibiting the public disclosure of the names of victims of sex crimes. The private letters, even of celebrities, cannot be published without their consent;[279] and the good Prince Albert was once held to have an action when his private etchings were exhibited to all comers.[280] An excellent illustration of the privacy of a public figure is a case[281] in a trial court in Los Angeles, not officially reported, in which the actor Kirk Douglas, after engaging in some undignified antics before a home motion picture camera for his friends, was held to have a cause of action when the film was put upon public exhibition.

Very probably there is some rough proportion to be looked for, between the importance of the public figure or the man in the news, and of the occasion for the public interest in him, and the nature of the private facts revealed. Perhaps there is very little in the way of information about the President of the United States, or any candidate for that high office,[282] that is not a matter of legitimate public concern; but when a mere member of the armed forces is in question, the line is drawn at his military service, and those things that more or less directly bear upon it.[283] And no doubt the defendant in a spectacular murder trial which draws national attention can expect a good deal less in the way of privacy than an ordinary citizen who is arrested for ignoring a parking ticket. But thus far there is very little in the cases to indicate just where such lines are to be drawn.

One troublesome question, which cannot be said to have been fully resolved, is that of the effect of lapse of time, during which the plaintiff has returned to obscurity. There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest. If it is only the event itself which is recalled, without the use of the plaintiff's name, there seems to be no doubt that even a great lapse of time does not destroy the privilege.[284] Most of the cases have held that even the use of his name[285] or likeness[286] is not enough in itself to lead to liability. Thus a luckless prosecuting attorney who once made the mistake of allowing himself to be photographed with his arm around a noted criminal was held to have no remedy when the picture was republished fifteen years later in connection with a story of the criminal's career.[287] Such decisions indicate that once a man has become a public figure, or news, he remains a

matter of legitimate recall to the public mind to the end of his days.

There is, however, *Melvin v. Reid*,[288] in which it was held that the use of the name of a former prostitute and murder defendant made the publisher liable when a motion picture narrated her story; and there are a few other cases[289] that look in the same direction. One may speculate that the real reason for the decision in the *Melvin* case was not the use of the name in connection with past history, but the disclosure of the plaintiff's whereabouts and identity, which were no part of the revived "news," or perhaps that the explanation lay in the shocking enormity of the revelation of a woman's past when she was trying to lead a decent life, and that again something in the nature of a "mores" test is to be applied. There is, however, almost nothing in the cases to throw any satisfactory light upon such speculations. All that can be said is that there appear to be situations in which ancient history cannot safely be revived.

VIII. Defenses

Next in order are the various defenses to the claim of invasion of privacy. It is clear first of all that the truth of the matter published does not arise in the cases of intrusion, and can be no defense to the appropriation of name or likeness, nor to the public disclosure of private facts.[290] It may, however, be in issue where the third form of the tort is involved, that of putting the plaintiff in a false light in the public eye,[291] and to that extent it has some limited importance, and cannot be entirely ruled out.

Chief among the available defenses is that of the plaintiff's consent to the invasion, which will bar his recovery as in the case of any other tort.[292] It may be given expressly, or by conduct, such as posing for a picture with knowledge of the purposes for which it is to be used,[293] or industriously seeking publicity of the same kind.[294] A gratuitous consent can be revoked at any time before the invasion;[295] but if the agreement is a matter of contract it is normally irrevocable, and there is no liability for any publicity or appropriation within its terms.[296] But if the actual invasion goes beyond the contract, fairly construed, as by alteration of the plaintiff's picture,[297] or publicity materially differing in kind or in extent from that contemplated,[298] the consent is not effective to avoid liability. The statutes[299] all require that the consent be given in writing. As against the contention that this can still be "waived" by consent given orally, the rule which has emerged in New York is that the oral consent will not bar the cause of action, but is to be taken into account in mitigation of damages.[300]

Other defenses have appeared only infrequently. Warren and Brandeis[301] thought that the action for invasion of privacy must be subject to any privilege which would justify the publication of libel or slander, reasoning that that which is true should be no less privileged than that which is false. There is still no reason to doubt this conclusion, since the absolute privilege of a witness,[302] and the qualified one to report the filing of a nominating petition for office[303] or the pleadings in a civil suit[304] have both been recognized. The privilege of the defendant to protect or further his own legitimate interests has appeared in a case or two, where a telephone company has been permitted to monitor calls,[305] and the defendant was allowed to make use of the plaintiff's name in insuring his wife without his consent.[306] It has been held that where uncopyrighted literature is in the public domain, and the defendant is free to publish it, the name of the plaintiff may be used to indicate its authorship,[307] and that when the plaintiff has designed dresses for the defendant it is no invasion of his privacy to disclose his connection with the product in advertising.[308]

The conflict of laws, so far as the right of privacy is concerned, is in the same state of bewildered confusion as that which surrounds the law of defamation. The writer has attempted to deal with it elsewhere,[309] and will not repeat it here.

Conclusion

It is evident from the foregoing that, by the use of a single word supplied by Warren and Brandeis, the courts have created an independent basis of liability, which is a complex of four distinct and only loosely related torts; and that this has been expanded by slow degrees to invade, overlap, and encroach upon a number of other fields. So far as appears from the decisions, the process has gone on without any plan, without much realization of what is happening or its significance, and without any consideration of its dangers. They are nonetheless sufficiently obvious, and not to be overlooked.

One cannot fail to be aware, in reading privacy cases, of the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored. Taking intrusion first, the gist of the wrong is clearly the intentional infliction of mental distress, which is now in itself a recognized basis of tort liability.[310] Where such mental disturbance stands on its own feet, the courts have insisted upon extreme outrage, rejecting all liability for trivialities, and upon genuine and

serious mental harm, attested by physical illness, or by the circumstances of the case. But once "privacy" gets into the picture, and the fact of the intrusion is added, such guarantees apparently are no longer required. No doubt the cases thus far have been sufficiently extreme; but the question may well be raised whether there are not some limits, and whether, for example, a lady who insists upon sunbathing in the nude in her own back yard should really have a cause of action for her humiliation when the neighbors examine her with appreciation and binoculars.

The public disclosure of private facts, and putting the plaintiff in a false light in the public eye, both concern the interest in reputation, and move into the field occupied by defamation. Here, as a result of some centuries of conflict, there have been jealous safeguards thrown about the freedom of speech and of the press, which are now turned on the left flank. Gone is the defense of truth, and the defendant is held liable for the publication of entirely accurate statements of fact, without any wrongful motive. Gone also is the requirement of special damage, where what is said is not libel or slander "per se"—which, however antiquated and unreasonable the rigid categories may be, has at least served some useful purpose in the discouragement of trivial and extortionate claims. Gone even is the need for any defamatory innuendo at all, since the publication of nondefamatory facts, or of even laudatory fiction concerning the plaintiff, may be enough. The retraction statutes, with their provision for demand upon the defendant, and the limitation to proved special damage if a demand is not made or is complied with, are circumvented; and so are the statutes requiring the filing of a bond for costs before a defamation action can be begun. These are major inroads upon a right to which there has always been much sentimental devotion in our land; and they have gone almost entirely unremarked. Perhaps more important still is the extent to which, under any test of "ordinary sensibilities," or the "mores" of the community as to what is acceptable and proper, the courts, although cautiously and reluctantly, have accepted a power of censorship over what the public may be permitted to read, extending very much beyond that which they have always had under the law of defamation.

As for the appropriation cases, they create in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness. They confer upon him rights much more extensive than those which any corporation engaged in business can expect under the law of unfair competition. These rights are subject to the verdict of a jury. And there has been no hint that they are in

any way affected by any of the limitations which have been considered necessary and desirable in the ordinary law of trade marks and trade names.

This is not to say that the developments in the law of privacy are wrong. Undoubtedly they have been supported by genuine public demand and lively public feeling, and made necessary by real abuses on the part of defendants who have brought it all upon themselves. It is to say rather that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.

All this is a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren. One is tempted to surmise that she must have been a very beautiful girl. Resembling, perhaps, that fabulous creature, the daughter of a Mr. Very, a confectioner in Regent Street, who was so wondrous fair that her presence in the shop caused three or four hundred people to assemble every day in the street before the window to look at her, so that her father was forced to send her out of town, and counsel was led to inquire whether she might not be indicted as a public nuisance.[311] This was the face that launched a thousand lawsuits.

NOTES

1 "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.'' Warren and Brandeis, ***The Right to Privacy,*** **4** Harv. L. Rev. **193, 196 (1890).**

2 Mason, Brandeis, A Free Man's Life 70 **(1946).**

3 **4** Harv. L. Rev. **193 (1890).**

4 Woolsey v. Judd, **4** Duer (11 N.Y. Super.) **379, 11** How. Pr. **49 (N.Y.1855)** (publication of private letters); Gee v. Pritchard, **2** Swans. **402, 36** Eng. Rep. **670 (1818)** (same); Prince Albert v. Strange, **2** De G. & **Sm. 652, 41** Eng. Rep. **1171, 1** Mac. & G. **25, 64** Eng. Rep. **293 (1849)** (exhibition of etchings and publication of catalogue).

5 Yovatt v. Winyard, **1** Jac. & W. **394, 37** Eng. Rep. **425 (1820)** (publication of recipes surreptitiously obtained by employee); Abernethy v. Hutchinson, **3** L.J. Ch. **109 (1825)** (publication of lectures to class of which defendant was a member); Pollard v. Photographic Co., **40** Ch. D. **345 (1888)** (publication of plaintiff's picture made by defendant).

6 Larremore, ***The Law of Privacy,*** **12** Colum. L. Rev. **693 (1912);** Ragland, ***The Right of Privacy,*** **17** Ky. L.J. **101 (1929);** Winfield, ***Privacy,*** **47** L.Q. Rev. **23 (1931);** Green, ***The Right of Privacy,*** **27** Ill. L. Rev. **237 (1932);** Kacedan, ***The Right of Privacy,*** **12** B.U.L. Rev. **353, 600 (1932);** Dickler, ***The Right of Privacy,*** **70** U.S.L. Rev. **435 (1936);** Harper & McNeely, ***A Re-examination of the Basis for Liability for Emotional Distress,*** [1938] Wis. L. Rev. **426;** Nizer, ***The Right of Privacy,*** **39** Mich. L. Rev. **526 (1941);** Feinberg, ***Recent Developments in the Law of Privacy,*** **48** Colum. L. Rev. **713 (1948);** Ludwig, ***"Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy,*** **32** Minn. L. Rev. **734 (1948);** Yankwich, ***The Right of Privacy,*** **27** Notre Dame Law. **429 (1952);** Daims, ***What Do We Mean by "Right to Privacy,"*** **4** S.D.L. Rev. **1 (1959).**

Also Notes in **8** Mich. L. Rev. **221 (1909); 12** Colum. L. Rev. **1 (1912); 43** Harv. L. Rev. **297 (1929); 7** N.C.L. Rev. **435 (1929); 26** Ill. L. Rev. **63 (1931); 81** U. Pa. L. Rev. **324 (1933); 33** Ill. L. Rev. **87 (1938); 13 So.** Cal. L. Rev. **81 (1939); 15** Temp. L.Q. **148 (1941); 25** Minn. L. Rev. **619 (1941); 30** Cornell L.Q. **398 (1945); 48** Colum. L. Rev. **713 (1948); 15** U. Chi. L. Rev. **926 (1948); 6** Ark. L. Rev. **459 (1952); 38** Va. L. Rev. **117 (1952); 28** Ind. L.J. **179 (1953); 27** Miss. L.J. **256 (1956); 44** Va. L. Rev. **1303 (1958); 31** Miss. L.J. **191 (1960).**

The foreign law is discussed in Gutteridge, ***The Comparative Law of the Right to Privacy,*** **47** L.Q. Rev. **203 (1931);** Walton, ***The Comparative Law of the Right to Privacy,*** **47** L.Q. Rev. **219 (1960).**

7 O'Brien, ***The Right of Privacy,*** **2** Colum. L. Rev. **437 (1902);** Lisle, ***The Right of Privacy (A Contra View),*** **19** Ky. L.J. **137 (1931);** Notes, **2** Colum. L. Rev. **437 (1902); 64** Albany L.J. **428 (1902); 29** Law Notes **64 (1925); 43** Harv. L. Rev. **297 (1929); 26** Ill. L. Rev. **63 (1931).**

8 Manela v. Stevens (N.Y. Sup. Ct. **1890),** in N.Y. Times, June **15, 18, 21, 1890.**

9 Mackenzie v. Soden Mineral Springs Co., **27** Abb. N. Cas. **402, 18** N.Y.S. **240** (Sup. Ct. **1891)** (use of name of physician in advertising patent medicine enjoined); Marks v. Jaffa, **6** Misc. **290, 26** N.Y.S. **908** (Super. Ct. **N.Y.** City **1893)** (entering actor in embarrassing popularity contest); Schuyler v. Curtis, **147** N.Y. **434, 42** N.E. **22 (1895)** (erection of statue as memorial to deceased; relief denied only because he was dead).

10 Corliss v. E. W. Walker Co., **64** Fed. **280** (D. Mass. **1894)** (portrait to be inserted in biographical sketch of plaintiff; relief denied because he was a public figure).

11 Atkinson v. John E. Doherty & Co., **121** Mich. **372, 80** N.W. **285 (1899).**