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Privacy in Photographs: Misconception since Inception, 18 J. Marshall L. Rev. 969 (1985)

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PRIVACY IN PHOTOGRAPHS: MISCONCEPTION SINCE INCEPTION

The common law concept of privacy has suffered a confused advocacy since its inception.[1] The right to privacy, described as the right to be let alone,[2] or the right to individual autonomy,[3] was originally intended to protect one's dignity and to prevent the public disclosure of private matters.[4] This concept of privacy, however, has been expanded by legal scholars and courts to include interests far beyond those imagined at its inception.[5] The field of photography, as it relates to privacy, has suffered as a result, in that personal dignity is not the focus in privacy suits involving photographs. Because such privacy cases are determined solely on the location of the taking,[6] the conduct of the photographer,[7] or the content of the photograph,[8] photography has been placed under a stricter judicial scrutiny than most forms of expression.[9]

The legal concept of privacy was originally intended to protect a person's dignity far beyond that which can be captured on film.[10] It has developed, however, in an entirely different direction, and

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1. The common law tort of privacy was said to have been born in an article written in 1890. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See infra* notes 12-33 and accompanying text for historical background. Since the birth of privacy, it has been highly advocated and criticized. *See, e.g.*, W. PROSSER & W. KEETON, THE LAW OF TORTS § 117 (5th ed. 1984); Bloustein, *Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611 (1968); Kalven, *Privacy in Tort Law - Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326 (1966).

2. Warren and Brandeis, *supra* note 1, at 205.

3. Comment, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727 (1982).

4. Warren and Brandeis, *supra* note 1.

5. *See infra* notes 23-33 and accompanying text for historical background.

6. *See infra* notes 46-70 and accompanying text for discussion on location.

7. *See infra* notes 71-94 and accompanying text for discussion on conduct.

8. *See infra* notes 95-104 and accompanying text for discussion on content.

9. *See* Warren and Brandeis, *supra* note 1, at 198. "The existence of this right [to privacy] does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music." *Id.*

10. *See* Warren and Brandeis, *supra* note 1, at 205. The protection of thoughts, sentiments, and emotions is an instance of an individual's right to be let alone.

Invading privacy is most often thought of as discovering information through private files, breaking into one's home or tapping one's phone. *E.g.*, Zimmermann v. Wilson, 81 F.2d 847 (3rd Cir. 1936) (unauthorized prying into bank account); Young v. Western & A.R. Co., 39 Ga. App. 761, 148 S.E. 414 (1929) (search without warrant); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46

now includes interests effectively protected under other existing torts such as trespass, defamation, or intentional infliction of emotional distress.[11] In light of this expanded protection, as well as the infringing effect it has on the photographer's right to free expression, privacy needs to be more strictly defined. By clarifying the privacy cause of action, photographers will be better able to determine whether their photographs are within the limits of the law. A clearer definition will also provide the courts a basis with which to determine privacy cases more consistently.

This comment, after a brief historical perspective on privacy, compares the photograph to the written word and lays an important foundation for determining violations of privacy in photography cases. Thereafter, it examines the expansive privacy interests and how they are better protected under different causes of action. Finally, this comment suggests limits within which photography cases may be appropriately adjudicated as an invasion of privacy.

PRIVACY: AN HISTORICAL PERSPECTIVE

The privacy cause of action originated through the efforts of two Bostonian attorneys, Samuel D. Warren and Louis D. Brandeis.[12] Warren, accustomed to a rather lavish lifestyle, became the subject of many explicitly uninvited reportings in the *Saturday Evening Gazette*.[13] Distressed by extensive press coverage, Warren and Brandeis developed the right of privacy in an article for which "the advertisers and the entertainment industry of America were to pay dearly over the next seventy years."[14]

According to Warren and Brandeis, privacy is defined in terms of inviolate personality.[15] Although their definition does not expressly describe the protected interest of personality, it does articulate what it is not.[16] They asserted that the scope of privacy does

(1931) (phone tapping). The taking or publishing of a photograph, however, does not invade one's privacy.

11. Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980). The privacy rhetoric is misleading. When a case suggests that privacy has been invaded, other interests are always found. When we look beyond the semantics, we find that privacy is not being protected at all. If privacy is to be a useful concept, it must be distinct and coherent. *Id.*

12. Warren and Brandeis, *supra* note 1.

13. A. MASON, BRANDEIS, A FREE MAN'S LIFE 70 (1946).

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

15. Warren and Brandeis, *supra* note 1, at 205. What has in the past been dealt with as a property interest is not really that at all. Rather, it is an interest in emotion and sensation. The laws which protect personal writings and productions against publication are laws protecting one's personality. *Id.*

16. *Id.* at 214. Warren and Brandeis noted in their article that it would be difficult to determine the exact boundaries of this right to privacy. This difficulty exists because the exact line where individual dignity and convenience gives way to public welfare cannot be determined in advance. *Id.*

not include matters that are in the public interest, privileged, or published orally or with consent.[17] Nevertheless, Warren and Brandeis intended privacy to be a distinct, independent right protecting feeling, intimacy, and dignity; they did not intend it to be a tort incorporating these interests as they relate to other torts.[18]

From the few legal precedents supporting their view, Warren and Brandeis were able to develop the individual right of privacy.[19] The use of photographs became the first area included in the privacy progeny when New York passed a law making it a misdemeanor and a tort to use someone's name or picture for trade purposes without first obtaining consent.[20] Two years later, the Supreme Court of Georgia became the first court to recognize a personal right to privacy in a person's name and photograph.[21] This decision marked the beginning of a movement by the courts to protect a personal privacy interest.[22]

In 1960, Dean Prosser classified over three hundred privacy cases.[23] In doing so, he identified four distinct torts:[24] intrusion upon the plaintiff's seclusion;[25] public disclosure of private facts;[26]

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17. Warren and Brandeis, *supra* note 1, at 214-18.

18. *Id.* at 205.

19. *Id.* at 202 (citing Prince Albert v. Strange, 2 DeGex & Sm. 652 (1849)). In *Prince Albert v. Strange*, a London printer attained some of the Queen's amateur etchings and published them without her consent. The Prince Consort sued and the court enjoined publication on the theory of the Queen's right to control the etchings because of a common law copyright. *Id.*

20. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1921). The legislature acted in response to the decision in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). *Roberson* involved a young girl whose photograph was used on flour advertisements without her consent. The court held that she had no remedy, and noted that it was up to the legislature to establish a remedy which would contest the right to use another's picture for advertising purposes without authorization. *Id.* Using New York as a model, other states have adopted similar statutes. *E.g.* OKLA. STAT. ANN. tit. 21, §§ 839.1 to .3 (West Supp. 1979); UTAH CODE ANN. §§ 76-9-401 to 406 (1978); VA. CODE §§ 2.1-377 to -386 (1979). Other states adopting a privacy statute include Nebraska, NEB. REV. STAT. §§ 20-201 to -211 (1983), and Wisconsin, WIS. STAT. ANN. § 895.50 (West Supp. 1979). The only state not recognizing a right of privacy in some form or another as of 1980 was Rhode Island. *See generally* Note, *Tort Recovery for Invasion of Privacy*, 59 NEB. L. REV. 808 (1980).

21. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 192, 50 S.E. 68, 71 (1905) (plaintiff's name and picture in an advertisement constituted an invasion of privacy).

22. W. PROSSER & W. KEETON, THE LAW OF TORTS § 117 (5th ed. 1984). *Pavesich* became the leading case in accepting the views of Warren and Brandeis and recognizing the distinct right of privacy.

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

24. *Id.* Prosser found that since *Pavesich*, nearly every state had considered whether a right to privacy existed. In piecing together these cases, four torts rather than one emerged. Prosser noted, however, that because of overlapping within the four torts, confusion may occur. *Id.* at 389.

25. Prosser, *supra* note 23, at 389. This tort includes intruding into a home, hospital room or telephone conversation. Surveillance and trespass are forms

publicity placing the plaintiff in a false light;[27] and appropriation of plaintiff's name or likeness for profit.[28] Since 1960, thousands of cases have been squeezed into these four specific categories.

Dean Prosser's classifications expanded the parameters of privacy far beyond those set forth by Warren and Brandeis.[29] In addition to the individual's dignity interest, which was originally sought to be protected, Prosser borrowed elements from other torts to produce a right to privacy that protects one's reputation, mental distress, and property.[30] Rather than developing as an independent right protecting an individual from uninvited publication of private facts, the right to privacy has grown to encompass myriad situations.[31] The intermingling of Prosser's four privacy torts has caused judicial inconsistency as to what constitutes an invasion of

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of intrusion. *E.g.*, Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931) (intrusion by means of wire tapping).

26. Prosser, *supra* note 23, at 392. Prosser asserts that public disclosure of embarrassing facts is the tort with which Warren and Brandeis were primarily concerned. Disclosures include: publication of a debt, publication of disfigurements and publication of one's past. *E.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940) (a one time child prodigy whose later life as an unknown recluse was disclosed). *See also* Brezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press*, 64 IOWA L. REV. 1073 (1979).

27. Prosser, *supra* note 23, at 398. False light occurs where, through the unintentional use of names, fictionalization, or misuse of name and pictures, a person is falsely portrayed to the public. *E.g.*, Metzger v. Dell Publishing Co., 207 Misc. 182, 136 N.Y.S.2d 888 (1955) (an honest taxi driver's photograph was used to illustrate a story about crooked cabbies). Warren and Brandeis did not have this form of privacy in mind when drafting their article.

28. Prosser, *supra* note 23, at 401. Prosser indicated that Warren and Brandeis did not intend that invasion of privacy include appropriation. *E.g.*, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

29. *See* Zimmerman, *Requiem for a Heavyweight: A Farwell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 296 (1983). In addition to cases clearly in the Warren-Brandeis mold, Prosser identified others such as intrusion, appropriation and false light. Privacy has been expanded to situations unlike those considered by Warren and Brandeis.

30. *See* Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980) (other interests are always involved in right to privacy cases). *See also* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964), arguing that there is no distinctive single value or interest that the four torts protect, that each protects a different interest. "The interest protected by each of these torts is: in the intrusion cases, the interest in freedom from mental distress, in the public disclosure and 'false light' cases, the interest in reputation, and in appropriation cases, the proprietary interest in name and likeness." *Id.* at 965. *But see* Stolijar, *A Re-examination of Privacy*, 4 LEGAL STUD. 67, 68 (1984) (individual liberty, common to all personal wrongs, connects the tort of privacy with other torts).

31. *See* Bloustein, *supra* note 30, at 965. For a state by state listing of common law recognition of some of Prosser's categories, see 1 COMMUNICATIONS LAW 789-819 (1982).

privacy.[32] As a result, courts look at an individual's interests in reputation or property, rather than at whether publication of private facts has intruded upon the individual's dignity.[33]

THE PHOTOGRAPHY PARADOX

The use of photographs has become the focus of much privacy litigation. In reality, however, there are few instances in which a photograph can invade an individual's privacy.[34] All other privacy applications are mere restatements of other torts.[35]

The camera must be viewed as an extension of the public eye and the photograph as its by-product. The spoken word is a viable form of expression even without consent. The same must also be true for the photograph.[36] For example, every time an individual steps into public view or invites another into his home, his appearance, words or actions are capable of descriptive repetition by the observer. Such repetition is permissible without limitation so long as it is not defamatory.[37] A photograph, being another form of repetitive expression, should be evaluated under the same standard as the spoken or written word and should usually not result in an invasion of privacy.[38] An understanding of this basic premise provides the foundation upon which privacy interests in photography cases must be analyzed.

ERRORS OF THE PAST CREATE PROBLEMS IN THE PRESENT

Generally, the operation of a camera is lawful.[39] It is a citizen's privilege to take pictures as a civil right under the United States

32. *See* Bloustein, *supra* note 30, at 962. In 1956 a federal judge said privacy was as confused as a "haystack in a hurricane." Etore v. Philco Television Broadcasting Co., 229 F.2d 481 (3rd Cir. 1956).

33. *See* Bloustein, *supra* note 30, at 965.

34. See *infra* notes 105-31 and accompanying text for those situations where a privacy action may be a viable avenue for plaintiffs.

35. Bloustein, *supra* note 30, at 966. "If Dean Prosser is correct, there is no 'new tort' of invasion of privacy, there are rather only new ways of committing 'old torts.'" *Id.*

36. Warren and Brandeis said the method of expression is immaterial. Therefore, all methods should be treated equally. Warren and Brandeis, *supra* note 1, at 199.

37. *See* Warren and Brandeis, *supra* note 1, at 217. "The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damages." *Id. See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS §§ 111-116 (5th ed. 1984).

38. *Contra* Warren and Brandeis, *supra* note 1, at 217. As long as the statements were oral, it spread over a very small area. Thus, oral publications may not result in an invasion of privacy under the Warren and Brandeis theory.

39. United States v. Gugel, 119 F. Supp. 897, 898 (1954).

Constitution.[40] However, courts have held that the use of a camera may invade an individual's right of privacy.[41] In examining this use of the camera, courts have looked at the location of the taking of the photograph,[42] the conduct of the photographer,[43] and the content of the photograph.[44] The consideration of these factors, as required in Prosser's four privacy torts, has distracted the courts from the proper privacy analysis.[45] In order to define and resolve the problems of overlapping, this comment examines photography cases in these three categories: location of the taking, conduct of the photographer, and content of the photograph.

Location

The location of the taking of the photograph has improperly served as a dispositive test for identifying privacy invasions. Thus, when the photograph was taken in a private place, an invasion of privacy was held to exist.[46] Conversely, if the photograph was taken in a public place, there was no privacy invasion.[47] This dictomous analysis, however, avoids the real single issue: did publi-

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40. *Id.* As to whether one can prevent another from taking the picture, litigation is scarce. However, the angry reaction of some people when their picture is taken is well known. Most times, these people do not even care whether the photographer uses the photographs. Wagner, *Photography and the Right to Privacy: The French and American Approaches*, 25 CATH. LAW. 195, 196, 224 (1980).

41. *Id.* This action can only be raised under a statute or if the one claiming the invasion objects to the use of the pictures. *Id.*

42. *E.g.*, Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). *See generally* Zimmerman, *supra* note 29, at 347 (to distinguish private facts from public facts, courts often look to the location of the taking of the photograph).

43. *E.g.*, Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). *See generally* Zimmerman, *supra* note 29, at 348.

> To avoid the pitfalls of the location test, or sometimes to augment it, courts and commentators have also relied on a subject matter or "zone of privacy" test. Embarrassing events sometimes occur over which the individuals involved have little control, but which are undisputably public under the location test.

Id. For purposes of this article, "photographer" will be used for the taker of the photograph as well as the user of the photograph. For example, the editor of a newspaper or the assignee of the rights to the photograph would be included.

44. *E.g.*, Cape Publications, Inc. v. Bridges, 387 So. 2d 436 (Fla. Dist. Ct. App. 1980).

45. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

46. *E.g.*, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (photographers took pictures in plaintiff's home surreptitiously); Deaten v. Delta Democrat Pub. Co., 326 So. 2d 471 (Miss. 1976) (photographer took pictures of public class of mentally retarded children); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942) (photographers took pictures of plaintiffs over objections); Yoeckel v. Samoning, 272 Wis. 430, 75 N.W.2d 925 (1956) (tavern owner took photograph of plaintiff in women's restroom).

47. *E.g.*, Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933) (photograph taken at airport). *See* Zimmerman, *supra* note 29, at 347. Under a location analysis, information obtained about an individual in public is not pri-

cation of the photograph reveal one's private character sufficiently to arouse emotion or cause loss of dignity? If the answer is in the affirmative, courts should find that an invasion of privacy occurred. The answer to this question should be dispositive regardless of the location of the taking. The inherent difficulties with using a location analysis as a determinative factor is illustrated by the following cases.

In *Dietemann v. Time, Inc.*,[48] a West Coast herbal medicinalist refused to be photographed in his home-laboratory-garden.[49] A reporter and a photographer, under false pretense, gained entrance to Dietemann's home and took pictures with a hidden camera without Dietemann's consent.[50] Dietemann sought recovery for invasion of privacy.[51] The court found that, although the photographer was invited into the home, Dietemann should not be required to bear the risk that what was seen would be conveyed by photograph to the public at large.[52] The court based its decision on the private location of the taking of the photographs, yet found it necessary to justify its decision by alluding to the tort of intentional infliction of emotional distress, and by describing the photographer's conduct as "intrusive."[53]

Importantly, the court examined the use of the photographs under a stricter scrutiny than that which would have been employed with the oral medium of expression. The difference between mediums of expression, however, is inconsequential. Essentially, they both perform the same function: communication of thoughts and ideas. Therefore, the fact that the form of expression was a photograph rather than the spoken word should not have made a difference, and the level of scrutiny used should have been the same.

Dietemann, however, would not have been without a remedy for lack of a privacy action. One obvious alternative is an action for trespass.[54] A visitor who is an invitee as to one part of the premises may become a trespasser if he goes to other parts of the premises beyond the scope of the invitation.[55] Although Dietemann invited

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vate. Such reportings are not invasions merely because the information was further publicized. *Id.*

48. 449 F.2d 245 (9th Cir. 1971).

49. *Id.* at 246.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 248-49.

54. *E.g.*, Dougherty v. Stepp, 18 N.C. (1 Dev. & Bat.) 370 (1835). "From every . . . entry against the will of the possessor, the law infers some damage." *Id.*

55. Whelan v. Van Natta, 382 S.W.2d 205 (Ky. 1964). In *Whelan*, the plaintiff bought cigarettes in defendant's grocery store. Plaintiff asked for an empty

the reporters into his home, it was for the limited purpose of treatment.[56] The defendants in *Dietemann* exceeded the scope of their invitation when they entered plaintiff's home under false pretense. An action for trespass here would have been harmonious with the law of owners and occupiers.[57] It would also have afforded Dietemann a sufficient remedy without diluting the privacy tort.

By contrast, in *Galella v. Onassis*,[58] a freelance photographer stalked the widow of a United States President with his camera in public.[59] In his aggressive pursuit to photograph Jacqueline Onassis, Galella jumped from concealed locations, followed her at close distances, and made strange grunting noises.[60] Onassis filed suit seeking injunctive relief against the photographer's interference.[61] The court found Galella liable for a number of torts,[62] including

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box. The defendant told him he could find some in the back room. The back room was dark and plaintiff fell down the stairs. Plaintiff was an invitee when he entered the store, and when he went into the back room he became a licensee and was afforded a lesser degree of care. *Id.*

56. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). The *Life* magazine reporter and photographer gained access to Dietemann's home by pretending to be a friend of a friend. Dietemann believed he was examining one of them for breast cancer. *Id.* at 248.

57. Whelan v. Van Natta, 382 S.W.2d 205 (Ky. 1964). *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS §§ 57-64 (5th ed. 1984).

58. 487 F.2d 986 (2d Cir. 1973).

59. *Id.* at 991-92.

60. *Id.* at 992. Galella considers himself a paparazzo. Literally, that is an annoying insect. Paparazzi act offensively to their subjects in order to elicit photographable poses and to aid in their advertising. *Id.*

61. *Id.* Initially, it was alleged that Onassis asked her secret service men to intervene on her behalf. Galella brought a plea for an injunction against Onassis' interference with his making a living. Onassis then filed her counterclaim.

62. Galella v. Onassis 353 F. Supp. 196, 226 (S.D.N.Y. 1972), *aff'd in part rev'd in part*, 487 F.2d 986 (2d Cir. 1973). Galella was found liable for assault. Civil assault is the placing of another in apprehension of a battery. Physical harm is not necessary. Therefore, Galella's jumping out at Onassis, and following her at close distances constituted civil assault. In addition to assault, Galella was liable for battery. A civil battery is an intentionally offensive contact. In certain circumstances, Galella flicked Onassis with a camera strap and bumped into her to constitute a battery. The court also found Galella's conduct extreme, intentional and outrageous and that Onassis' emotional distress was severe enough for Galella's conduct to constitute intentional infliction of emotional distress. Finally, the court found Galella in violation of the New York harassment statute. N.Y. PENAL LAW § 240.25 (McKinney 1980) provides:

> A person is guilty of harassment when, with intent to harass, annoy or alarm another person:
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> 1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or
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> *******
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> 3. He follows a person in or about a public place or places; or
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> *******
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> 5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Galella, 353 F. Supp. at 227.

invasion of privacy, despite the fact that the photographs were taken in public places.[63] In granting relief, the court restricted Galella's taking and selling of his pictures.[64] Galella's published photographs, however, revealed only what had already been seen many times in public.[65] If a wrong had existed, it was in the photographer's conduct and more appropriately remedied under assault, battery, or intentional infliction of emotional distress.[66]

Because privacy has been so expanded as to encompass elements of both trespass and intentional infliction of emotional distress, Dietemann and Onassis were able to recover under invasion of privacy. Privacy, however, must be limited in order to allow for the normal application of, and protection afforded by the other torts. As long as privacy serves as a catch-all, use of other torts, such as trespass and intentional infliction of emotional distress, will become increasingly stagnant. If the privacy interest of personal dignity is ever to achieve its intended independent status, the right to privacy must not be merged with other torts.[67]

This independent status is not only important for the natural growth of other torts, but would also serve as a distinct guideline for photographers to follow. A beginning professional photographer is instructed to shoot freely in public places and on public property.[68] Whether photographing a public figure or a private citizen, photographers assume they may shoot anything, anywhere in

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63. *Id.* The court observed:

> Continuously [Galella] has had [Onassis] under surveillance to the point where he is notified of her every movement. He waits outside her residence at all hours. He follows her about irrespective of what she is doing: trailing her up and down the streets of New York, chasing her out of the city to neighboring places and foreign countries when she leaves for recreation or vacation, haunting her at restaurants (recording what she eats), theatres, the opera and other places of entertainment, and pursuing her when she goes shopping, getting close to her at the counter and inquiring of personnel as to her clothing purchases. His surveillance is so overwhelmingly pervasive that he has said he has not married because he has been unable to 'get a girl who would be willing to go looking for Mrs. Onassis at odd hours.'

Id. at 227-28.

64. *Id.* at 241. The district court held that Galella could not go within 100 yards from the defendant's home, 100 yards from the children's schools and at all other places, 75 yards from the children and 50 yards from the defendant. *Id.* The court of appeals modified these distances leaving no restriction from her home, restrictions only from entering schools and play areas and, at all other places, 25 feet from the defendant and 30 feet from the children. *Galella*, 487 F.2d at 998.

65. Onassis was a public figure. Her picture and features are well known throughout the country.

66. *See supra* note 62.

67. Warren and Brandeis intended the right to privacy to be a distinct, independent right of an individual. *See* Warren and Brandeis, *supra* note 1.

68. K. KOBRE, PHOTOJOURNALISM: THE PROFESSIONALS' APPROACH at 317 (1980).

public.[69] As *Galella* makes clear, though, courts do not always agree.[70] As a result, photographers unfamiliar with the law of privacy have no practical guidelines within which to pursue their livelihood.

Conduct

In many instances, courts have found that the photographer's conduct while taking the picture may constitute the wrong, rather than the photograph itself or the subsequent publishing.[71] To ensure that the interests of emotion and dignity are protected, rather than those interests more appropriately protected by causes of action for other torts, the photograph and its contents must be viewed as the wrong. An analysis of the following conflicting cases clarifies the distinction between the photographer's conduct and the resulting photograph.

In *Florida Publishing Co. v. Fletcher*,[72] Cindy Fletcher died in a fire at her home in Jacksonville, Florida.[73] Her mother, away at the time, learned of her daughter's death in the local newspaper.[74] Accompanying the story was a photograph showing where the burned body had left a silhouette on the floor.[75] The picture was taken by a newspaper photographer who entered the home at a policeman's invitation.[76]

Mrs. Fletcher sued the Florida Publishing Company alleging that the photographer had invaded her home without her consent, and therefore violated her right to privacy.[77] The court found it was common practice for a photographer to enter private premises for the purpose of covering a newsworthy event, and therefore dismissed the suit.[78]

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69. *Id.*

70. *E.g.*, Gallella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Cape Publications, Inc. v. Bridges, 387 So. 2d 436 (Fla. Dist. Ct. App. 1980) (photograph taken in public held to be an invasion of privacy). *See generally* Zimmerman, *supra* note 29, at 347 (location as a means of defining private information).

71. *E.g.*, Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (photographer's "paparazzi" conduct); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (photographer's surreptitious conduct).

72. 340 So. 2d 914 (Fla. 1976).

73. *Id.* at 915.

74. *Id.*

75. The police requested this picture in order to evidence the fact that the body was lying there before the fire did any damage to the room. *Id.*

76. *Id.*

77. *Id.*

78. Had the police not invited the photographers in, they still could have entered. Only the owner or occupier may exclude newsmen from entering premises. The police, however, may exclude photographers while a search is being conducted. People v. Berliner, 3 Med. L. Rptr. 1942 (N.Y. 1978).

Conversely, in *Barber v. Time, Inc.*,[79] the plaintiff, a patient in a hospital, sued the defendant newspaper company for invasion of privacy because it had taken and published her picture without her permission.[80] The newspaper claimed that the newsworthiness of the patient's illness, an insatiable appetite, justified the taking.[81] The court, however, found that the photograph was an invasion of the plaintiff's privacy because the patient had refused to be interviewed.[82]

These cases illustrate that some courts are primarily basing the invasion of privacy on the photographer's conduct rather than on the photograph itself or the emotion stemming from the taking or publication. In *Fletcher*,[83] the plaintiff did not invite the photographer into her home;[84] the contents of her home were private. Without Mrs. Fletcher's consent, the police exceeded the scope of their duties[85] when the photographs taken for the police investigation were allowed to be used in the newspaper.[86] Had the court properly looked to Mrs. Fletcher's interests in privacy, rather than at the photographer's conduct, it would have found the published photograph invaded Mrs. Fletcher's privacy.[87] However, because the court looked merely at the photographer's conduct, and determined it to be reasonable, the court concluded that no privacy invasion occurred.[88]

In contrast, the *Barber* court found the photographer's conduct objectionable because the photographs were taken against the patient's will as she lay in her hospital bed.[89] Although the court incorrectly found that the photographers were in a private room, the crucial question was what was the appropriate cause of action. Pri-

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79. 348 Mo. 1199, 159 S.W.2d 291 (1942).

80. *Id* at 1200, 159 S.W.2d at 292.

81. *Id.* at 1204, 159 S.W.2d at 295. Newsworthiness is a very broad defense which protects the publisher. For legal purposes, newsworthiness does not cover everything that an editor elects to print. *See generally* Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Invoking the Press*, 64 IOWA L. REV. 1073 (1979).

82. *Barber*, 348 Mo. at 1205, 159 S.W.2d at 296.

83. Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976).

84. *Id.* Mrs. Fletcher was not at home when the police invited in the photographer. *Id.* at 915.

85. For an explanation of special purpose relationships and how privacy is involved, see *infra* notes 105-19 and accompanying text.

86. The police photographer had problems with his equipment so the newspaper photographer was asked to take the pictures for the purpose of evidence. *Fletcher*, 340 So. 2d at 915.

87. Although the photograph sparked feelings and emotions in Mrs. Fletcher, the feelings did not result from the disclosure of unknown facts to the public. Mrs. Fletcher's anguish, however, constituted emotional distress for which the publisher was liable. *Id.*

88. *Id.* at 918.

89. *Barber*, 348 Mo. at 1205, 159 S.W.2d at 296.

vacy should not have been the answer because the information published was already in the public domain.[90] The elements of trespass[91] and intentional infliction of emotional distress,[92] however, were present. Whenever severe mental pain and anguish occur through intentional harassment or intimidation, the appropriate cause of action is intentional infliction of emotional distress.[93] For an invasion of privacy to have occurred, the photographs and their subsequent publishing must have revealed private facts and induced emotion or a loss of dignity. The *Barber* court's decision based upon the photographer's conduct, therefore, protected Barber from other intentional torts under the guise of protecting her right to privacy.

The preceding cases distinguish the photographer's conduct from the contents of the photograph. They confuse the issue in that the photographer's conduct is not the privacy-invading factor.[94] It is the content of the photograph which must be the form of expression that invades one's privacy by revealing private facts.

Content

Privacy-invading and non-privacy-invading content are often difficult to differentiate. Protection should be afforded only for truly private content that causes emotion or loss of dignity. Some courts, however, have considered the issue of invasion solely on the subject matter of the photograph.[95] These decisions have not considered whether the emotion stems from content revealing facts not known to the public or simply the subject matter of the content on strictly moral grounds.

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90. *Id.* Barber's condition had attracted media attention. Nothing private was revealed through the photographs. *Id.*

91. *See supra* note 55 and accompanying text.

92. *See* Mead, *Suing Media For Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24 (1983). Infliction of emotional distress overlaps the fields of defamation and privacy. Mead analyzes the theory that privacy will be supplanted by the tort of intentional infliction of emotional distress.

93. Nader v. General Motors Corp., 25 N.Y.2d 560, 569, 255 N.E.2d 765, 770, 307 N.Y.S. 2d. 454, 459 (1970).

94. Neither the reasonableness of the photographer's conduct in *Fletcher*, nor the objectionableness of the photographer's conduct in *Barber* effected any revelation of private facts. Thus, the court's use of conduct as the determining factor was incorrect. An individual is more properly protected from another's objectionable conduct through causes of action for other intentional torts.

95. *E.g.*, Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (photograph of a woman in fun house with skirt blown up); Cape Publications, Inc. v. Bridges, 387 So. 2d 436 (Fla. Dist. Ct. App. 1980) (photograph of a woman naked except for a hand towel). *See also* Zimmerman, *supra* note 29, at 348. The problem with the subject-matter test is that it is impossible to determine ahead of time the different events that could occur. Thus, publishers still suffer from uncertainty when deciding which photographs are publishable. *Id.*

In *Cape Publications, Inc. v. Bridges*,[96] for example, a woman was photographed wearing only a hand towel as she escaped from the clutches of her estranged husband.[97] She sued and a jury found the publisher liable because the embarrassment of the woman outweighed any possible public interest.[98] The court disregarded the fact that the photograph was taken in a public place and that the conduct of the photographer in obtaining the photograph was reasonable.[99] Rather, it found the content alone to be beyond the bounds of decency.[100]

The event in *Cape Publications* occurred on a public street.[101] The photograph only revealed what many had already seen.[102] Thus, the photograph did not reveal any "private" matters, and therefore no privacy invasion was involved. It is not to say, however, that Bridges had no remedy. The publication of the photograph and ensuing distress may have given rise to intentional or negligent infliction of emotional distress.[103] Nevertheless, the matter published was already in the public domain and no invasion of privacy should have been found. Content should not be analyzed on the basis of morality. Invasion of privacy is not based upon moralistic considerations.[104] Content should be only one consideration in determining whether the published facts were private.

PRIVACY PROPOSALS

Location, conduct, and content are all factors courts have considered in determining privacy violations through photographs. As previously discussed, they are inadequate to properly determine whether privacy violations have occurred. Therefore, the question becomes under what circumstances can a plaintiff bring a cause of action for invasion of privacy concerning photographs. This section

96. 387 So. 2d 436 (Fla. Dist. Ct. App. 1980).

97. *Id.* at 438. The husband had ordered the woman to disrobe and he then beat her prior to his committing suicide. As the police escorted the woman out of her home, the photographer snapped the photograph. The entire event had attracted much media coverage. *Id.*

98. *Id.* at 440. The court based its decision on Prosser's tort of publishing private embarrassing facts.

99. *Id. See generally* Zimmerman, *supra* note 29, at 348. Information regarding an individual obtained in public cannot be private. Further publication does not create an invasion of privacy. *Id.*

100. *Cape Publications, Inc.*, 387 So. 2d at 440.

101. *Id.* at 438.

102. *Id.*

103. *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS § 12 (5th ed. 1984). Recently, infliction of emotional distress has served as a separate and independent basis of action. Reluctance to advance infliction of emotional distress as a separate category was a result of its being considered too speculative to be measured. *Id.*

104. *See supra* notes 12-33 and accompanying text.

identifies those actions which may be protected under the privacy tort: breach of special relationship, false statements, and appropriation.

Breach of Special Relationships

Certain special relationships call for immunity from suit for invasion of privacy. Where the bounds of this relationship are exceeded, however, there can be an invasion of privacy. The specific purpose of the picture and the use to which it is put dictate whether protection should be given.

One example of a special relationship allowing for photographing without consent is that of the doctor and patient.[105] A doctor may photograph his patient for purposes of treatment without his patient's consent.[106] If the doctor does so for purposes other than treatment over the patient's objections, then the patient may recover for invasion of privacy.[107] Another such special relationship is between the employer and employee.[108] Where the employer has a legitimate purpose in photographing his employees, it will not be held as an invasion of privacy.[109] However, where no legitimating

105. Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976). *Contra* Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940) (distribution or publication of patient's photograph taken by doctor was not necessary for liability). *But cf.* McAndrews v. Roy, 131 So. 2d 256 (La. App. 1961) (doctor took photographs with consent, then published the pictures 10 years later without consent); Griffin v. Medical Society, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (N.Y. Sup. Ct. 1939) (doctor published pictures in medical journal without consent). *See generally* Challener, *The Doctor-Patient Relationship and the Right to Privacy*, 11 U. PITT. L. REV. 624 (1950) (doctor-patient relationship requires utmost good faith and non-disclosure); Wagner, *Photography and the Right to Privacy: The French and American Approaches*, 25 CATH. LAW. 195 (1980).

106. Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976).

107. *Id.* In *Estate of Berthiaume*, a doctor photographed a dying man over his objections. The doctor had taken several photographs over the course of the man's illness as a part of his record. The doctor said the pictures would help him in evaluating similar conditions. Even though the photographs were for a beneficial purpose, the patient had a right to determine whether the picture should be taken. It was the taking that was being objected to, not the publishing. The court here limited the taking of photographs. *Id.*

108. *E.g.*, Thomas v. General Elec. Co., 207 F. Supp. 792 (D. Ky. 1962) (employer's photographs did not violate employee's right to privacy); De Lurvy v. Kretchmer, 66 Misc. 896, 322 N.Y.2d 517 (1971) (employer could take pictures of employees to identify those unlawfully collecting waste for remuneration).

109. Thomas v. General Elec. Co., 207 F. Supp. 792 (D. Ky. 1962). In *Thomas*, the employer took motion pictures of his employees to increase efficiency and to promote safety. The employee complaining of invasion of privacy sought damages of one dollar and an injunction prohibiting the employer from taking further pictures without his consent. The plaintiff argued that the employer's right to photograph was inferior to the employee's right to privacy when it would affect health, welfare or homelife. The employer won. Even if the plaintiff's assertions were correct, he would have lost because he did not testify that the filming had such an effect. *Id.*

purpose exists, an invasion of privacy may follow.[110] Police photographs also fall within this special relationship category.[111] In *People v. Milone*,[112] for example, the court held that it was not an invasion of the defendant's privacy to photograph his teeth to be used in evidence.[113] Photographs were necessary for identification purposes because the defendant had left his teeth impressions on the victim.[114] In *York v. Story*,[115] however, a woman went to the police station because she was assaulted.[116] She was asked to undress and was photographed in the nude.[117] Her picture was then circulated among policemen.[118] The court found an invasion of privacy occurred because the police violated the trust between themselves and the victim.[119]

Thus, as long as the use of the photograph does not exceed the bounds of the special purpose relationship, there is no invasion of privacy. However, if the use of the photograph exceeds the special purpose, then an invasion of privacy occurs.

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110. *Id.*

111. *E.g.*, People v. Milone, 43 Ill. App. 3d 385, 356 N.E.2d 1350 (1976) (police photograph used in evidence).

112. 43 Ill. App. 3d 385, 356 N.E.2d 1350 (1976).

113. *Id.* The defendant relied on Rochin v. California, 342 U.S. 165 (1952). *Rochin* held that the techniques amounted to an unconstitutional invasion of privacy. In *Rochin*, the Supreme Court ruled that the act of pumping a defendant's stomach against his will was shocking and replusive, and therefore an invasion of his right to privacy. *Id.* In *Milone*, the court said that the procedures used by the dentist were standard and such matters did not invade the defendant's right to privacy. *Milone*, 43 Ill. App. 3d at 386, 356 N.E.2d at 1352.

114. *Milone*, 43 Ill. App. 3d at 398, 356 N.E.2d at 1360.

115. 324 F.2d 450 (9th Cir. 1963).

116. *Id.* at 452.

117. *Id.* The woman objected, asserting that there was no need for the photographs because the bruises would not show up anyway. The policeman, however, advised her that it was necessary and directed her to assume various indecent positions. A policewoman was present in the police station but was not in the room where the photographs were taken. *Id.*

118. *Id.* The policeman later told the woman that the photographs did not turn out and that he destroyed them.

119. *Id.* The last two paragraphs of plaintiff's complaint read:

> V. All of the acts of the defendants aforesaid were as police officers of said Chino Police Department; but were in excess of their authority as such police officers. Said acts violated and deprived plaintiff of her right to privacy and liberty and constituted an unreasonable search and seizure contrary to and prohibited by the Fourth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act.
>
> VI. The acts of the defendants aforesaid were committed unlawfully, intentionally, maliciously and oppressively, with the further knowledge on the part of the defendants that they were exceeding their authority as police officers and with the further knowledge that they were depriving the plaintiff of rights guaranteed to her by the Constitution of the United States and by the Federal Civil Rights Act by virtue whereof the plaintiff is entitled to punitive and exemplary damages.

Id. at 452 n.4.

All these examples involve relationships for a limited purpose. The same test may be applied to each limited purpose relationship. As long as the photograph furthers the purpose of the relationship, the photograph should not be held to be an invasion of privacy. If the photograph is for diagnosis, for example, it is permitted. However, if the photograph is for teaching students or for educational journals, the consent of the patient must be obtained. Such use otherwise exceeds the bounds of the relationship and constitutes an invasion of privacy for which protection must be given.

False Statements

When a photograph is coupled with words giving a false view of the subject of the photograph, an invasion of privacy occurs.[120] When someone is put in a false light, feelings and emotions surface which indeed should be protected.[121] For example, a picture of a child who was hit by a car appeared in a newspaper.[122] In that particular instance, there could be no objection to publication of the photograph.[123] Two years later, however, the *Saturday Evening Post* ran the same photograph under the headline, "They Asked to be Killed," in an article concerning child safety.[124] The parents claimed that the combination of words and photographs implied carelessness on their part and placed them in a false light.[125] The newspaper was held liable for creating the false impression.[126]

In such instances, the photograph does not serve the purpose for which it was initially taken. Rather, it is subsequently used in conjunction with words to create a false statement. At first glance, it appears that reputation is being affected and as such, a defamation suit should ensue rather than an action for invasion of privacy.[127] However, the differences between false light and defamation require the separate torts. False light, unlike defamation, is not intentionally damaging to one's reputation, and truth is no defense.[128] Therefore, false light, as an aspect of the privacy

120. This is Prosser's tort of "false light." *See* Prosser, *supra* note 23, at 398.

121. *Id.* Prosser's false light tort, however, is based on reputation, which is not a proper privacy interest. *See* Warren and Brandeis *supra* note 1.

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

123. *Id.* at 975. The picture was a legitimate news story which outweighed any claim to privacy.

124. *Id.* The *Post* had purchased the photograph from the publishing company.

125. *Id.*

126. *Id.* at 978.

127. *See* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962) (for a comparison of the two torts). *See generally* W. PROSSER, THE LAW OF TORTS §§ 111 to 116 (5th ed. 1984).

128. W. PROSSER & W. KEETON, THE LAW OF TORTS § 117 (5th ed. 1984). *See* Prosser, *supra* note 23, at 398. *But see* Kalven, *Privacy in Tort Law-Were War-*

tort, protects the individual's private personality from disparagement created through the wrongful combination of photographs and words.

Appropriation

Appropriation occurs when the photograph is used without consent for the promotion of a product.[129] At its inception, appropriation was based upon the protection of a property interest stemming from the theory that there are property rights in facial features.[130] Warren and Brandeis, however, were concerned with protecting a person's right not to be connected with the promotion of a product.[131] A photograph used in this way does more than show the surface of one's features. It attempts to convey one's ideas concerning a particular product and present an impression of one's personality. Therefore, appropriation must also be retained as an area for protection of private feelings under invasion of privacy.

CONCLUSION

Privacy has been expanded far beyond its intended scope. The privacy tort, as we know it, includes interests better protected under other torts. Photographs must be analyzed closely to determine whether the matter is truly private. A singular consideration of either location, conduct, or content is inadequate to determine an invasion of privacy.

The suggested contours promote Warren and Brandeis' desire to create a distinct and independent right to privacy. Breach of special relationship, false statements, and appropriation will properly protect an individual from the revelation of private facts in photographs. Utilizing privacy in this way will give photographers guidelines, allow for the potential growth of other torts, and inhibit the courts' determination of photography cases on an ad hoc basis.

The photograph can only reveal what has already been seen. Nonetheless, confusion within the privacy tort has caused photographs to suffer a stricter scrutiny than most forms of expression. In spite of this precedent, privacy must develop distinctly and inde-

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ren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 339 (1966) (conceptual and practical difficulties in allowing a privacy action when the statement is false).

129. Prosser, *supra* note 23, at 401. *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS § 117 (5th ed. 1984).

130. Warren and Brandeis, *supra* note 1, at 214-18.

131. *Id.* at 207. The protection granted is not for the property aspect but for the personality aspect.

pendently and the courts must realize that a picture is not worth more than words.

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