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COMMENTS

PRIVACY IN ILLINOIS: TORTS WITHOUT REMEDIES

If the jurisprudence of the last century has taught us anything, it is the necessity of recognizing that law cannot be static, unless a society is also static.¹

INTRODUCTION

Anticipating threats to the individual posed by the advancing technology of the twentieth century, Samuel D. Warren and Louis D. Brandeis published a plea² for the recognition and legal protection of a new personal right,³ the right of privacy.⁴ Warren and Brandeis intended the new right they proposed to protect individual independence, dignity, and integrity.⁵ The legal concepts that have evolved from that seminal article have had a profound impact on our society.⁶

1. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 255 (1966).

2. Many commentators have speculated about why the article was ever written. William L. Prosser wrote that press coverage of the wedding of Warren's daughter prompted the article. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960). Apparently the article was written primarily by Louis Brandeis, at the urging of Samuel Warren who disliked media coverage of Boston social life, particularly social gatherings at his home. *Id.*

3. For a discussion of the nature of the interest protected by a right of privacy, see generally Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U.L. REV. 553 (1960).

4. Privacy was first defined as the right of a person "to be let alone" in T. COOLEY, LAW OF TORTS 29 (2d ed. 1888). The phrase was then quoted in Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 195 (1890). Privacy has also been defined as the right of "inviolate personality." *Id.* at 205. See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 971 (1964). Bloustein defined the principle of "inviolate personality" as the "individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being." *Id.*

The *Right of Privacy* is now regarded as one of the most influential law review articles ever written. Prosser stated that the article "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law." Prosser, *supra* note 2, at 383. See also commentators cited *infra* note 23.

5. Warren & Brandeis, *supra* note 4, at 193-97, 200-05.

6. See *infra* notes 21-50 and accompanying text.

Warren and Brandeis considered the concept of the right of privacy as an extension of the law's "recognition of man's spiritual nature, of his feelings and his intellect."⁷ The interests which had previously been protected were considered to be forms of a protectible property interest.⁸ Warren and Brandeis asserted that the complexity of advancing civilization was threatening to destroy man's cherished need for solitude and privacy.⁹ The right to be protected would be a right to the immunity of the person as against the world, a right to inviolate personality.¹⁰

The diverse circumstances¹¹ in which a right of privacy may be raised preclude precise categorization. In spite of this difficulty, Dean William Prosser identified four distinct torts in his analysis¹² of privacy case law: intrusion upon the plaintiff's physical seclusion or solitude; the public disclosure of embarrassing private facts about the plaintiff; publicity which places the plaintiff in a false light in the public eye; and appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.¹³ Prosser warned that each of his categories may be "subject . . . to different rules" and that confusion would follow from the application of the elements of one privacy tort to another.¹⁴

Despite the fact that Prosser's classification represented an attempt to clarify privacy law, the classification was instrumental in restricting the development of the tort as courts attempted to fit each privacy cause of action into one of the four Prosser

7. Warren & Brandeis, *supra* note 4, at 193. Warren and Brandeis noted the growing recognition of new rights which have expanded protection of the individual beyond physical interference with his life or property. The scope of the law's protection has expanded to include man's spiritual nature. *Id.*

8. *Id.* at 193-94, 200-05.

9. *Id.* at 195-96.

10. *Id.* at 205, 211.

11. One need only consult the legal encyclopedias to recognize the wide variety of cases falling under the privacy rubric. 41 AM. JUR. PRIVACY § 2 n.11 (1942); 77 C.J.S. *Right of Privacy* § 2 (1952).

12. Prosser attempted to classify over three hundred cases according to four different interests. Prosser, *supra* note 2, at 388. See *infra* notes 200-02 and accompanying text.

13. Prosser, *supra* note 2, at 389. Prosser acknowledged the diversity of privacy actions. Based on case law, he stated: "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 . . ." *Id.*

14. *Id.* Prosser believed that confusion would result from the carryover of privacy concepts from one tort to the next. *Id.*

categories.¹⁵ These attempts by the courts have resulted in the confusion which Prosser anticipated.¹⁶ In many instances, the confusion results from the blending and blurring of elements of the four categories of the privacy torts, not only with each other, but with other tort actions, such as defamation¹⁷ and intentional infliction of emotional distress.¹⁸

Illinois in particular has experienced much confusion. It has had considerable difficulty determining which, if any, of the privacy torts are actionable under its current common-law doctrines.¹⁹ In addition, inconsistencies between Illinois state courts and Illinois federal courts in the determination and the application of Illinois law have created further complications.²⁰

This comment proposes a solution to the existing confusion of the Illinois courts. Prosser's categorization should be consolidated into a single, unified theory of a privacy cause of action. That theory would incorporate both the concepts originally enunciated by Warren and Brandeis and the developments of the cause of action caused by sociological and technological advances. A single theory, using all four of Prosser's categories, would provide a conceptual foundation on which any privacy cause of action may stand.

This comment first examines the evolution of privacy law in Illinois, beginning with an analysis of early decisions which restricted its growth. The comment considers the rationale for the Illinois courts' reluctance to expand the right of privacy. The comment then compares the development of Illinois state law to

15. See *infra* notes 34-50 and accompanying text.

16. See *infra* notes 51-165 and accompanying text.

17. "The fundamental difference between a right of privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation." *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753, 755 (1940). See Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962) (defamation and privacy include situations where there was no real injury to the plaintiff's reputation); Prosser, *supra* note 2, at 398 (law of privacy may be capable of swallowing up and engulfing the whole law of defamation). For a general discussion of the mixture of interests in a privacy action, see Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV., 1, 18 (1959).

18. Prosser, *supra* note 2, at 422. The two torts are often alleged in the same suit in cases involving harassing phone calls for collection purposes. See *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950); Smith & Straske, *Collection Procedures and Right of Privacy*, 36 FLA. B.J. 1085 (1962). Dean Wade stated: "[T]here is real reason to conclude that the principle behind the law of privacy is much broader than the idea of privacy itself, and that the whole law of privacy will become a part of the large tort of intentional infliction of mental suffering." Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1124-25 (1962).

19. See *infra* notes 53-167 and accompanying text.

20. See *infra* notes 170-81 and accompanying text.

the contemporaneous, but divergent, decisions in Illinois federal courts and examines the resulting inconsistencies in the determination of state law. The comment begins with a brief history of the changing social values underlying the development of privacy law in other jurisdictions.

THE HISTORY OF PRIVACY LAW

Nearly a century ago, Warren and Brandeis sought to protect the private individual from the mental pain and distress caused by the intrusions of the press.²¹ Their article reflected the general tenor of the times and gave early impetus to the development of the recognition of a tort remedy for the violation of a right of privacy.²² Development of the cause of action was spurred by the recognition it received from legal scholars who reevaluated old problems in light of the newly suggested remedy.²³ Although the Warren-Brandeis plea gained scholarly acceptance, judicial recognition was sporadic.²⁴

21. Warren and Brandeis concerned themselves only with the public disclosure of private, but truthful facts, about an individual which were likely to cause emotional turmoil. Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMPT. PROBS. 326, 330 (1966).

22. Harry Kalven suggests why: "I suspect that fascination with the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators . . ." Kalven, *supra* note 21, at 328 (1966).

23. Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV. 1 (1959) (relationship to defamation, interference with interest in property, physical intrusion, right of publicity); Dickler, *The Right of Privacy, A Proposed Redefinition*, 70 U.S.L. REV. 435 (1936) (analogous to trespass, libel, unfair trade practices & appropriation of potential profits); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948) (examination of interests protected); Green, *The Right of Privacy*, 27 ILL. L. REV. 239 (1932) (analyzed as covering seven different phases of personality); Harper & McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426 (unanimity of interests in privacy); Kacedan, *The Right of Privacy*, 12 B.U.L. REV. 353 (1932) (privacy as absolute right not to be interfered with to a person's distress, discomfort or damage); Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693 (1912) (privacy as protection from publicity); Ludwig, "Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy, 32 MINN. L. REV. 734 (1948) (proposes a uniform statute); Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941) (development of the tort); Ragland, *The Right of Privacy*, 17 KY. L.J. 85 (1929) (review of status of privacy law); Winfield, *Privacy*, 47 LAW. Q. REV. 23 (1931) (privacy joined with a pecuniary or business interest); Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW. 499 (1952) (endorses broader recognition for relief from abuses of media).

24. In the first twenty years following the proposal of the tort by Warren and Brandeis, recognition occurred in only five states. *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (picture of a well-known artist used in an advertisement for life insurance); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909) (use of forged testimonial letter as an endorsement to advertise Doan's Kidney Pills), *aff'd*, 137 Ky. 837, 127

The majority of the early cases were litigated in New York²⁵ and actually were attempts to interpret the New York privacy statute.²⁶ The New York statute,²⁷ approved in 1903, was enacted by the legislature after the New York courts had refused to recognize a common-law right of privacy.²⁸ The New York statute, however, provided only limited protection.²⁹ Based on the language of the statute, New York courts sustained a cause

S.W. 476 (1910); *Shulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906) (criminal suspect sued for return of photograph in police files taken while in jail); *Vanderbilt v. Mitchell*, 72 N.J. 910, 67 A. 97 (1907) (plaintiff attempted to expunge a fraudulent birth records).

By 1930, the common-law right was recognized in three additional states. *Smith v. Suratt*, 7 Alaska 416 (1926) (photographer took pictures of private expedition over North Pole); *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918) (owner of store took secret movies of plaintiff while she shopped and used them as an advertisement in neighborhood theater); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911) (picture and statement attributed to plaintiff used in advertisement).

At the end of 1940, five more states recognized the right. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (film depicted unsavory incidents in life of rehabilitated prostitute); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) (young lady mistakenly identified in advertisement as Mlle. Sally Payne, exotic red-haired Venus); *Holloman v. Life Ins. Co. of Va.*, 192 S.C. 454, 7 S.E.2d 169 (1939) (insurance agent used plaintiff's name without permission).

25. See Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U.L. REV. 553 (1960).

26. *Id.* at 565-90. See, e.g., *D'Altomonte v. New York Herald Co.*, 154 A.D. 453, 139 N.Y.S. 200 (1913) (story on a Congo cannibal feast attributed to a famous explorer); *Goldberg v. Ideal Publishing Corp.*, 210 N.Y.S.2d 928 (Sup. Ct. 1960) (romance magazine published views on sex attributed to rabbi); *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (model's picture used to advertise bedsheets); *Martin v. Johnson Publishing Co.*, 157 N.Y.S.2d 409 (Sup. Ct. 1956) (picture of professional model in magazine article entitled "Man Hungry"); *Metzger v. Dell Publishing Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955) (picture of boy in article called "Gang Boy"); *Valerri v. Hearst Magazines, Inc.*, 99 N.Y.S.2d 866 (Sup. Ct. 1949) (plaintiff's picture used in article about waiters); *Sinclair v. Postal Telegraph & Cable Co.*, 72 N.Y.S.2d 841 (Sup. Ct. 1935) (tampered picture of actor used for advertisement for telegraph company). See also cases discussed in Dickler, *The Right of Privacy, A Proposed Redefinition*, 70 U.S.L. REV. 435, 452-56 (1936).

27. 1903 N.Y. LAWS ch. 132, §§ 1-2 (McKinney 1903), *codified as amended*, N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1903). See *infra* note 29 and accompanying text.

28. Enactment of the statute was the result of the uproar created by the New York court's dismissal of the privacy action in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). Plaintiff sued to enjoin the publication of her portrait on posters advertising Franklin Mills Flour which were displayed in stores, warehouses, saloons, and other public places. She alleged that she was humiliated and caused to suffer greatly by this commercial expression and that her privacy had been invaded. *Id.*

29. The statute provides:

A person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

of action only when a person's name or likeness was used for commercial or trade purposes.³⁰ A publication intended as a news feature was not covered.³¹ The abundance of New York case law interpreting the privacy statute brought the issues to the forefront of judicial inquiry and served to highlight the importance of the new tort.³² Using the New York statute as a model, other states adopted the requirement that an invasion of privacy must be based on a commercial exploitation.³³

The initial number of cases was not so important as the

N.Y. CIVIL RIGHTS LAW § 50 (McKinney 1903). New York state courts have held that New York plaintiffs have no general right to sue for invasion of privacy except as conferred by statute. *E.g.*, *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 382 N.E.2d 1145, 410 N.Y.S.2d 282 (1978) (no so-called common-law right of privacy exists in New York); *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978) (no right to judicial relief for invasion of privacy other than under sections 50 and 51); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959) (right to privacy is limited by statute). The courts' reluctance to go beyond the statute indicates a perception of legislative preemption.

30. *See, e.g.*, *Rhodes v. Sperry & Hutchinson Co.*, 193 N.Y. 223, 85 N.E. 1097 (1908) (plaintiff sued defendant for exhibiting her picture as a redemption premium for its trading stamps), *aff'd*, 220 U.S. 502 (1911); *Wyatt v. James McCreery Co.*, 126 A.D. 650, 111 N.Y.S. 86 (1908) (plaintiff sued photographer for unauthorized circulation and sale of her picture). *See supra* note 26.

The New York privacy statute was initially enacted to provide a remedy for invasions of privacy which enriched the defendant. The New York Court of Appeals, however, affirmed without comment a lower court's incorporation of all four forms of tortious invasion of privacy into the statute. *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (1964), *aff'd*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded on constitutional grounds*, 387 U.S. 239, *aff'd*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967). In addition, after looking to a prior District of Columbia case, the New York court held that the plaintiff's complaint for unreasonable intrusion was legally sufficient under the statute. *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970). This development of New York law flies in the face of a statute seemingly restricting the cause of action to appropriation of name or likeness for commercial purposes and the decision in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), which emphatically stated that there is no common law right to privacy in New York.

31. *See, e.g.*, *Jeffries v. New York Evening Journal Pub. Co.*, 67 Misc. 570, 124 N.Y.S. 780 (1910) (defendant published a serialized biography and picture of famous pugilist; dissemination of information was not a use for trade purposes); *Moser v. Press Pub. Co.*, 59 Misc. 78, 109 N.Y.S. 963 (1908) (news-paper published picture and unpleasant story concerning plaintiff). If the news story is embellished and fictionalized, recovery is often granted. *See, e.g.*, *Hazlitt v. Fawcett Publications, Inc.*, 116 F. Supp. 538 (D. Conn. 1953) (fictionalized article concerning person tried & acquitted of murder); *Gartner v. Triangle Publications, Inc.*, 97 F. Supp. 546 (S.D.N.Y. 1951) (sensationalized stories of murder conviction and subsequent reversal); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945) (publication of plaintiff's photograph in connection with story of crime).

32. *Gordon, supra* note 27.

33. OKLA. STAT. tit. 21, § 839.1 (1965); UTAH CODE ANN. § 76-9-405 (1978); VA. CODE § 650 (1950).

quality of the protection afforded by the decisions.³⁴ The law rapidly became more precise. Restrictions and limitations, first suggested by the Warren-Brandeis article, began to appear. Public figures, such as artists³⁵ and politicians,³⁶ for example, were limited in the protection they received; generally they were not afforded the same protection as private persons.³⁷ Fur-

34. The boundaries of the law became mapped with greater precision. *See, e.g.*, *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948) (plaintiff's picture used in satirical article on cab drivers); *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948) (daughters sued radio station for broadcast of tale recounting how their father, though presumed murdered, had skipped town with family bank account and had established himself in California; his body was returned to Alabama because of a provision in his will); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944) (objectionable character sketch in novel); *Bremmer v. Journal-Tribune Pub. Co.*, 247 Iowa 817, 76 N.W.2d 762 (1956) (picture of mutilated and decomposed body of eight-year-old published on front page); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (landlord and his wife moved into living room of tenant who was unwilling to give up possession); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941) (unauthorized use of individual's name on telegram sent to state's chief executive); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958) (tenant sued landlord for planting listening device in her apartment). *See also supra* note 24 and accompanying text.

35. *Gautier v. Pro-Football Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (unauthorized telecast of plaintiff and his aerial act); *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338 (1938) (respected actress sued burlesque house for displaying her picture on exhibit outside theater). *Contra Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). Plaintiff was a well-known artist whose picture was used in an advertisement for life insurance placed next to a sickly looking, ill-dressed individual. Above the portrait of the artist were the words, "Do It Now. The Man Who Did." Above the other photograph were the words, "Do It While You Can. The Man Who Didn't." *Id.* The case became the leading precedent for many years and provided the legal foundation for similar rulings in many other jurisdictions.

36. *See Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899). The widow of a well-known attorney and politician sued to stop a cigar manufacturer from using the decedent's name and portrait on the label of defendant's cigars. The court, after an extensive examination of authorities, found the "so-called 'right of privacy' ha[d] not as yet found an abiding place" in Michigan jurisprudence. *Id.* at 373, 80 N.W. at 285. *Contra State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 P. 317 (1924). Senator Robert LaFollette of Wisconsin, a Progressive party candidate for President of the United States, sued to stop the secretary of state from certifying the names of persons nominated by the LaFollette State party to fill various state offices. He alleged that the voters would be misled into thinking that a vote for the LaFollette party candidates would be a vote for the presidential electors pledged to support the Wisconsin senator. The court issued the injunction. *Id.* at 94, 229 P. at 318.

37. "Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications." Warren & Brandeis, *supra* note 4, at 215. *See, e.g.*, *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940) (famous child prodigy could not retreat to private life), *cert. denied*, 311 U.S. 711 (1940); *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954) (plaintiff depicted as attempting to persuade woman not to commit suicide); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253

thermore, courts, relying on constitutional guarantees of freedom of press and speech, restricted individual protection;³⁸ freedom of the press was frequently placed above the rights of the private individual.³⁹ Defenses of newsworthiness⁴⁰ or truthfulness were usually upheld.⁴¹ In many cases, publicity was recognized as absolutely essential to the welfare of the public.⁴²

Even as these considerations worked to limit the application of privacy law, the modern development of mass media forced the courts to expand the scope of the privacy right. Where once an individual's privacy could be invaded only through the use of printed matter, the invention of electronic media offered new ve-

P.2d 441 (1953) (photograph of plaintiffs in affectionate pose); *Jacova v. Southern Radio & Tel. Co.*, 83 So. 2d 34 (Fla. 1955) (telecast of gambling raid identifying plaintiff as gambler).

38. *E.g.*, *Corliss v. E. W. Walker Co.*, 64 F. 280 (D. Mass. 1894). The wife of a deceased inventor attempted to enjoin the publication of a biography and picture of her late husband. The court held that Corliss was a public figure, and "an inventor who asks for and desires public recognition may be said to have surrendered his right to the public." *Id.* at 282. *See also* *Smith v. Suratt*, 7 Alaska 416 (1926). Plaintiff organized a private expedition to fly over the North Pole, giving picture rights for the adventure to Pathe News Service. While arrangements were under way, a photographer for International News Service took pictures of the preparations. Plaintiff alleged that the expedition was a business and that the pictures taken by the INS photographer would render the Pathe film valueless. The court said defendant had a right to photograph and gather news about the expedition, that there could be no right of privacy adhering to an enterprise of this public character, even though it was financed by private individuals. *Id.* at 418.

39. *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir.) (eccentric child prodigy could not withdraw from public life), *cert. denied*, 311 U.S. 711 (1940). *See also* *Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962), in which the court stated: "A consideration of the limits of the right of privacy requires the exercise of a nice discrimination between the private right 'to be let alone' and the public right to news and information; there must be a weighing of the private interest as against the public interest." *Id.* at 745, 20 Cal. Rptr. at 413-14. *E.g.*, *Barbieri v. News-Journal Co.*, 56 Del. 67, 189 A.2d 773 (1963) (last person to feel the lash under Delaware's whipping-post law); *Truxes v. Kenco Enterprises, Inc.*, 30 S.D. 104, 119 N.W.2d 914 (1963) (picture used to illustrate story on state's elderly citizens and financial problems posed by retirement).

40. Certain outrageous cases, for example, have forced even the right of the press to give way to an individual's right to seclusion. *E.g.*, *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) (picture published of plaintiff's dead, deformed newborn son); *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958) (news photographs of widow of police officer, who had been killed while arresting an escaped criminal, were republished by defendant three months later accompanying article in *Inside Detective* entitled "If You Love Me Slip Me a Gun"); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912) (photographer printed extra copies of picture of dead baby).

41. *See, e.g.*, *Smith v. Suratt*, 7 Alaska 416 (1926); *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). *See also* *Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1598-1601 (1979).

42. *Felcher & Rubin, supra* note 41.

hicles for tortious actions.⁴³ Consequently, the courts became more generous in providing protection to individuals,⁴⁴ particularly from advertisers and other businessmen who derived their profits through the exploitation of others' privacy.⁴⁵

William Prosser's influence on the growth of the right of privacy may surpass that of Warren and Brandeis.⁴⁶ With Prosser's publication,⁴⁷ and the subsequent adoption of his categorization in the *Restatement (Second) of Torts*,⁴⁸ the concept of a right of privacy was established in American jurisprudence.⁴⁹ Today, nearly every case involving an asserted right of privacy cites either Prosser or the *Restatement (Second) of*

43. *E.g.*, *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (half-time performances of animal trainer were telecast).

44. *E.g.*, *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (plaintiff's picture in advertisement for life insurance); *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918) (film of plaintiff shopping in defendant's store shown as advertisement in local theater); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909) (testimonial letter to advertise kidney pills); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911) (plaintiff's picture in advertisement for watches). *Contra* *Henry v. Cherry and Webb*, 30 R.I. 13, 73 A. 97 (1909) (plaintiff's picture in advertisement for auto coat).

45. At the same time, the courts were forced to recognize a gray area between the two extremes of informing the public and of advertising for profit. Courts today struggle with the concept of fictionalization by balancing private interests against public interests. *See supra* note 39 and accompanying text.

46. *See* Kalven, *supra* note 21, at 330.

47. *See supra* notes 12-13 and accompanying text.

48. RESTATEMENT (SECOND) OF TORTS § 652 (1977). William Prosser was the reporter for the RESTATEMENT (SECOND) OF TORTS (1977). The incorporation of Prosser's analysis replaced a very generalized treatment in the RESTATEMENT, TORTS § 867 (1934).

49. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-73 & 574 n.11 (1977). The right of privacy is legally protected through the common law in most states, with the apparent exception of Minnesota, Nevada, North Dakota, and Wyoming. In nine of these states — Florida, Georgia, Massachusetts, Nebraska, New York, Oklahoma, Rhode Island, Utah, and Virginia — the law is governed by statute. No state rejects the right of privacy, either in its statutes or case law. R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 18 (1981). *See also* Prosser, *supra* note 2, at 386-88.

Recognition of the right of privacy by the states occurred quickly compared to the scholarly disagreement which occurred during the first fifty years of the tort's development. One scholar wrote:

Fifty years ago the right which every normal and decent person feels in living his life to himself appeared likely to be protected by a legal recognition of a right to privacy. Unfortunately the campaign for its recognition, brilliantly begun by the article written by Justice Brandeis and published in the *Harvard Law Review* has almost completely failed.

Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 731 (1937). For examples of the debate over the existence of the right, see Lisle, *The Right of Privacy (A Contra View)*, 19 KY. L.J. 137 (1931); Moreland, *The Right of Privacy Today*, 19 KY. L.J. 101 (1931); O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

Torts.⁵⁰

The problem remains, however, that not every cause of action currently asserted fits within Prosser's categorization. The attempts to fit every privacy cause of action into a specific "Prosser category" have produced problems. In Illinois, the attempts have resulted in divergent decisions which have confused privacy law in Illinois.

THE EARLY DEVELOPMENT OF PRIVACY LAW IN ILLINOIS

The Illinois Supreme Court did not address the question of whether a common law right of privacy existed in Illinois until 1970.⁵¹ The Illinois Appellate Court for the First District, however, had already recognized a cause of action for the Prosser category of commercial exploitation of the plaintiff's name or likeness.⁵² The other three privacy torts—intrusion upon seclusion, public disclosure of private facts, and false-light publicity—were not expressly recognized by any Illinois court. Although privacy torts were frequently alleged, the cases were generally dismissed for two reasons: first, the courts noted that the plaintiffs usually had another theory of recovery which the courts considered adequate,⁵³ and second, Illinois courts appeared to give greater deference to the defenses raised by the defendants than to the injury alleged by the plaintiffs.⁵⁴

Limited Recognition of the Privacy Cause of Action

The first Illinois case to recognize a cause of action for invasion of privacy was *Eick v. Perk Dog Food Co.*⁵⁵ *Eick* involved the commercial exploitation of a photograph of the plaintiff,⁵⁶ an

50. For a listing of some of the cases using the Prosser categorization, see Wade, *supra* note 17, at 1095 n.13.

51. *Leopold v. Levin*, 45 Ill. 2d 343, 259 N.E.2d 250 (1970) (court stated that right of privacy should be recognized although court denied relief to plaintiff because of his public status). See *infra* notes 112-119 and accompanying text.

52. *E.g.*, *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960); *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

53. *E.g.*, *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976) (intentional infliction of emotional distress).

54. See *infra* notes 62-108 and accompanying text.

55. 347 Ill. App. 293, 106 N.E.2d 742 (1952).

56. Defendant used a photograph of the plaintiff without her permission in an advertisement for its dog food. The advertisement showed plaintiff, a blind girl, as a future donee of a seeing-eye dog. Because plaintiff already owned a seeing-eye dog, she had no need for another. Plaintiff claimed that the advertisement caused her to lose respect in the community and to suffer humiliation. *Id.* at 294, 106 N.E.2d at 743.

action which, if brought in New York, would clearly have fallen within the scope of the New York statute.⁵⁷ Although the Illinois Appellate Court for the First District noted that some jurisdictions limited the right of privacy action to commercial exploitation,⁵⁸ the *Eick* court did not discuss such a limitation.⁵⁹ The court instead found that the facts of the case would satisfy even the narrowest definition of an invasion of privacy.⁶⁰ Subsequently, other appellate courts in Illinois limited *Eick*'s application strictly to identical factual situations and refused to extend its findings.⁶¹

The defenses rejected by *Eick* can be applied to all four privacy torts, and not just to the tort based on commercial exploitation. Under *Eick*, the only limitations which may defeat the assertion of a privacy right are consent (express or implied) or matters involving a legitimate public interest.⁶² Shortly thereafter, however, the Seventh Circuit Court of Appeals accepted a defamation defense in a case involving a privacy cause of action.

In *Branson v. Fawcett Publications, Inc.*,⁶³ the plaintiff alleged that the press had invaded his privacy by publishing a photograph of his racing car in a collision.⁶⁴ The court analyzed the case in the same manner it would have had the complaint

57. The New York statute protects plaintiffs from the commercial exploitation of their name or likeness. See *supra* notes 25-33 and accompanying text.

58. *Eick v. Perk Dog Food Co.*, 347 Ill. App. at 299, 106 N.E.2d at 745.

59. *Id.* The court made extensive reference to authorities and decisions of other jurisdictions which had explicitly recognized the right. The court cited cases from Alabama, Alaska, Arizona, California, District of Columbia, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Michigan, Missouri, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania and South Carolina, in addition to statutes from New York, Utah and Virginia which recognized the right of privacy. The court also noted the following authorities and articles in support of its position: F. THAYER, *LEGAL CONTROL OF THE PRESS*, ch. 12 (1944); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L.R. 713 (1948); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Larremore, *The Law of Privacy*, 12 COLUM. L.R. 693 (1912); Nizer, *Right of Privacy*, 39 MICH. L. REV. 526 (1941); Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 362-64 (1915); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Winfield, *Privacy*, 47 LAW Q. REV. 23 (1931). In addition, the court noted that the right is defined and approved in the RESTATEMENT, TORTS § 867.

60. *Id.* The court stated, "[t]he instant case involves unauthorized advertising use of plaintiff's picture and would be comprehended within the narrowest definition of the right of privacy." *Id.*

61. See, e.g., *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976).

62. *Eick v. Perk Dog Food Co.*, 347 Ill. App. at 299, 106 N.E.2d at 745. The court found that these limitations were inapplicable. *Id.*

63. 124 F. Supp. 429 (N.D. Ill. 1954).

64. *Id.* at 430.

alleged an action in defamation.⁶⁵ Although the *Branson* court cited *Eick* and determined that the publication of the photograph might be considered a commercial exploitation,⁶⁶ the court found that it was too blurred for anyone to recognize the plaintiff and, therefore, was not "of and concerning" the plaintiff.⁶⁷

Six years later, the Illinois Appellate Court for the First District cited the *Branson* decision when it held that, generally, a plaintiff must be sufficiently identified in the publication to be entitled to protection against the use of his name or likeness.⁶⁸ The same court then applied a similar defamation defense in *Buzinski v. Do All Co.*⁶⁹ when it held that the mere incidental use of a name or likeness, even for commercial exploitation, does not constitute an invasion of privacy.⁷⁰

The most formidable defense to a privacy cause of action is based on the first amendment. In privacy actions, a first amendment right has usually been found in three circumstances: if the publication is a public record,⁷¹ if the publication concerns a public figure,⁷² or if the publication is of public interest.⁷³ Accepting the first amendment defense, courts in Illinois have repeatedly restricted the assertion of privacy actions when

65. The court stated, "The violation of the right . . . requires the use of the personality, name or likeness of the individual. In this the action resembles the action for libel or slander As in the libel and slander cases, the picture of itself is not of and concerning the plaintiff . . ." *Id.* at 433.

66. *Id.* at 431-32.

67. *Id.* at 433. Several courts have held that there must be a sufficient reference to the plaintiff to amount to an unwarranted invasion of privacy. *E.g.*, *Miller v. National Broadcasting Co.*, 157 F. Supp. 240 (D. Del. 1957) (bank robbery); *Toscani v. Hersey*, 271 A.D. 445, 65 N.Y.S.2d 814 (1946) (plaintiff was identified officer in novel).

68. *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) (plaintiff was not featured or substantially publicized).

69. 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961).

70. Defendant published a picture of a "Land Yacht." Plaintiff's likeness appeared near the car but he was neither named nor otherwise identified. The court dismissed the complaint, stating that the inclusion of plaintiff's unidentified likeness was incidental and that the likeness was not being used for commercial exploitation because there was no suggestion that he endorsed the product. *Id.* at 192-93, 175 N.E.2d at 579-80.

71. *E.g.*, *Oden v. Cahill*, 79 Ill. App. 3d 768, 398 N.E.2d 1061 (1979) (arrest record); *Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 287 S.W.2d 32 (1956) (college newspaper wrote editorial on suit against college magazine). *See also infra* notes 134-35 and accompanying text.

72. *See supra* notes 35-37 and *infra* notes 76-79 and accompanying text.

73. *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951) (movie depicting actual conditions encountered by plaintiff while serving in marine corps); *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940) (picture of plaintiff talking with captain of police). *See infra* notes 74-104 and accompanying text.

matters of public interest were concerned.⁷⁴ Courts have held that there is no invasion of personal privacy when the invasion is deemed newsworthy or is a matter of legitimate public concern.⁷⁵

The first amendment defense was first raised in the district court in *Rozhon v. Triangle Productions, Inc.*,⁷⁶ when a father sued a publisher for printing a photograph of his deceased son next to an article on teenage drug addiction.⁷⁷ The Seventh Circuit Court of Appeals applied the limitation pronounced in *Eick*⁷⁸ and held that at the time of the publication the father had been "catapulted into an area of legitimate public news interest."⁷⁹ In other words, it is not necessary for an individual to seek publicity actively in order to be of legitimate public news interest.

In contrast, the Illinois Appellate Court for the First District rejected the first amendment defense in *Annerino v. Dell Publishing Co.*⁸⁰ In *Annerino*, the widow of a detective killed by a gangster alleged that the defendant had exploited her personality by publishing her photograph beside a story of the murder.⁸¹ Although the *Annerino* court conceded that some invasions of privacy may be justified as a proper exercise of freedom of the press, it stated that the rule was not intended to be a license for the press to "overstep the bounds of propriety and decency."⁸² *Annerino* held that a claim for invasion of privacy would be stated if a published story is really a device to facilitate commercial exploitation, rather than as a means for presenting

74. *E.g.*, *Cassidy v. America Broadcasting Co.*, 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978) (plaintiff's status as policeman on duty is area of public interest); *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965) (publication of fact of murder is newsworthy); *Buzinski v. Do-All Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961) (public interest includes informational material); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) (articles on murder are legitimate public interest).

75. *See infra* notes 90-91 and accompanying text.

76. 230 F.2d 359 (7th Cir. 1956).

77. *Id.*

78. A limitation which would defeat the action is a matter involving a legitimate public interest. *See supra* note 62 and accompanying text.

79. *Rozhon v. Triangle Productions, Inc.*, 230 F.2d at 361.

80. 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958). In *Annerino*, the widow of a detective, killed by a gangster, alleged that defendant had exploited her personality by publishing her photograph beside a story of the murder. *Id.* at 207, 149 N.E.2d at 762.

81. *Id.*

82. *Id.* at 209, 149 N.E.2d at 762. The court conceded that many invasions of privacy by the press are lawful and the violators are not punished. *Id.* at 208-09, 149 N.E.2d at 762, *citing* *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929), and 41 AM. JUR. *Privacy* § 23 (1942).

information.⁸³

By rejecting the first amendment defense, the *Annerino* court implied that it was expanding the holding in *Eick* beyond strictly commercial situations.⁸⁴ The *Annerino* court used the language of Warren and Brandeis when it stated that the *Eick* court "intended to protect inviolate the personality of the individual."⁸⁵ But, in fact, the *Annerino* court's reasoning produced no change in the *Eick* rule; its final holding was that the publication did not constitute a matter of legitimate public interest.⁸⁶ The dicta in the *Annerino* opinion, therefore, raised some troubling questions when, later, the Illinois courts were faced with alleged invasions of privacy in non-commercial settings.⁸⁷ The first amendment defense has frequently precluded consideration of various privacy claims.

An opportunity to consider the tort of "publication of private facts" was precluded, for example, when the court was confronted with a first amendment defense in *Bradley v. Cowles Magazines, Inc.*⁸⁸ The *Bradley* court referred to the decision of the Seventh Circuit Court of Appeals in *Rozhon v. Triangle Productions, Inc.*,⁸⁹ and then agreed with that court's holding that a plaintiff could be "catapulted" into an area of legitimate public news interest even without seeking public notoriety.⁹⁰ Consequently, the publication of private facts concerning a murder victim and his family was allowed as a legitimate public concern;⁹¹ the first amendment defense made unnecessary any con-

83. 17 Ill. App. 2d at 209, 149 N.E.2d at 763. The court focused on the dominant characteristic of a fictional story. If the purpose of the story was not to convey information but merely to enhance circulation, then the story is "a device to facilitate commercial exploitation." *Id.*, quoting Hazlitt v. Fawcett Publications, 116 F. Supp. 538 (D.C. Conn. 1953). The court pointed out that defendants increased the fictional value of the publication by adding continuity and dialogue concerning the plaintiff's personal thoughts. *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 210, 149 N.E.2d at 763. See also *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959) (imaginary conversations indicate a style used by writers of fiction).

84. *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d at 208, 149 N.E.2d at 762.

85. *Id.*

86. *Id.* at 211, 149 N.E.2d at 763.

87. See, e.g., *Adreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1980); *Oden v. Cahill*, 79 Ill. App. 3d 768, 398 N.E.2d 1061 (1979).

88. 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960).

89. 230 F.2d 359 (7th Cir. 1956).

90. The *Bradley* court noted that the plaintiff had not been featured or substantially publicized in the article. *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d at 333, 168 N.E.2d at 66.

91. A mother sued for damages for her mental anguish caused by a publication concerning the murder of her son. *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d at 333, 168 N.E.2d at 65. The court also examined *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939), and noted

sideration of the tort cause of action.

Although the *Bradley* court dismissed the cause of action on the theory that the publication was of legitimate news interest, the court did note an alternative basis for its decision. The *Bradley* court cited two California cases which had held that an invasion of the right of privacy is purely a personal action.⁹² By implication, *Bradley* held that the invasion of privacy of the murder victim could not form the basis of a suit brought by the victim's mother.⁹³ According to the court, the mother would have to prove an invasion of her own right of privacy in order to have any cause of action.⁹⁴

Bradley was decided by the First District Appellate Court, the same court which had first recognized a privacy action in *Eick* and later had reexamined it in *Annerino*. In *Bradley*, the First District Appellate Court began to hedge its position; it noted that the

holding [in *Eick*] is limited to its final conclusion . . . It was recognized that any development of the right beyond that would be subject to scrutiny as particular cases were brought to the court and distinction or extension defined. Eventually, a body of more specific principles than those approved in the *Eick* case will perhaps be formulated.⁹⁵

Finding no well-defined precedent to support the plaintiff, the *Bradley* court had no justification for extending tort coverage in Illinois.⁹⁶

In *Carlson v. Dell Publishing Co.*,⁹⁷ the Appellate Court for the First District attempted to clarify its holding in *Bradley*. Once more, the court faced a first amendment defense and

that, if a person becomes involved in a matter of public interest, no invasion of privacy occurs if his photograph is published with an account of the event. *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d at 336, 168 N.E.2d at 66.

92. In *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (1958), the plaintiff alleged a violation of his right of privacy because of the publication of a photograph of his daughter who was killed in an automobile accident. In *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939), the plaintiff alleged a violation of his right of privacy because of the publication of a photograph of his wife in an article concerning her suicide.

93. *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d at 336, 168 N.E.2d at 66. For a discussion of the survivability of a privacy cause of action, see *infra* notes 101-103 and accompanying text.

Statutes of other jurisdictions allow a representative of a decedent's estate to file a privacy cause of action on behalf of the decedent. OKLA. STAT. tit. 21, § 839.1 (1965); UTAH CODE ANN. § 76-4-8 (1953); and VA. CODE § 8-650 (1950).

94. *Bradley v. Cowles Magazine, Inc.*, 26 Ill. App. 2d at 336, 168 N.E.2d at 66.

95. *Id.* at 333, 168 N.E.2d at 65.

96. *Id.* at 336, 168 N.E.2d at 66.

97. 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965).

found that the article contained information of legitimate public interest.⁹⁸ Moreover, the court found that the article remained newsworthy in spite of a significant time interval between the event and the publication of the article about it.⁹⁹

Again, as in *Bradley*, the court noted that the claim did not survive the death of the principal.¹⁰⁰ Both the *Bradley* and *Carlson* holdings indicate that, in addition to first amendment defenses, a cause of action for privacy may face a defense of abatement¹⁰¹ if the courts view the right as one based on a personal, rather than a property, right.¹⁰² The *Carlson* court treated

98. *Id.* at 215, 213 N.E.2d at 42-43. Plaintiffs, the administrator of the estate and the children of a woman who had been raped and murdered, brought a right of privacy action for damages for the publication of an article about the crime. *Id.* at 210-11, 213 N.E.2d at 40.

99. The court stated that the interval between the news event and the publication of the story in a magazine is greater than the publication of a news story in a newspaper. *Id.* at 215, 213 N.E.2d at 40. The court found that a four-month interval was not significant; therefore, it held that the publication of the article was timely. *Id.* See also *Rozhon v. Triangle Productions*, 230 F.2d 539 (7th Cir. 1956) (five-month interval was not significant). Compare *Levertov v. Curtis Publishing Co.*, 192 F.2d 974 (3d Cir. 1951) (twenty-month interval was not significant), with *Wagner v. Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962). In its *amicus curiae* brief, Field Enterprises, Inc., sought to substitute an alternative test to be applied in determining whether the first amendment protects the publication of a news story. Rather than determining whether the publication is timely, Field Enterprises argued that the test should be whether the publication is of continued public interest. The court found the publication was newsworthy and saw no need to expand the defense. *Id.* at 411.

100. The court held that the estate of a decedent has no cause of action for violation of the right of privacy. *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d at 216, 213 N.E.2d at 42. The court quoted *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (7th Cir. 1965), which stated, "[I]t is anomalous to speak of the privacy of a deceased person." *Id.* at 420. For a further discussion of the survivability of a privacy cause of action, see *infra* notes 101-102 and accompanying text.

101. One of the first major court decisions involving privacy concerned the survivability of the cause of action. Fifteen years after the death of a well-known philanthropist, a group revealed plans to erect a life-size statue of her at the World's Columbian Exposition in Chicago. One of her relatives objected to the display claiming that the feelings of the family would be injured by the exhibition. The New York court permitted the display stating that the relatives of the deceased philanthropist could not maintain an action based on Mrs. Schuyler's right of privacy "because whatever right of privacy Mrs. Schuyler had died with her." *Schuyler v. Curtis*, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895). See also *infra* note 102 and accompanying text.

102. The United States Court of Appeals for the Seventh Circuit has specifically addressed the question of whether a privacy claim rests on a personal right or a property right. In *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965), the administratrix of Al Capone's estate, his wife and son claimed a property right to recover for unjust enrichment arising out of an alleged appropriation by defendants of the "name, likeness and personality" of Al Capone. *Id.* The action resulted from the defendant's commercially televised fictional broadcasts of "The Two-Part Drama — The Untouchables" and the weekly series, "The Untouchables," telecast more than twelve years after Capone's death. *Id.* at

the cause of action as a personal right based on the tort of appropriation of name or likeness.¹⁰³ The *Carlson* court failed to recognize that the plaintiffs were in reality asserting an action which should properly have been classified as an intrusion into seclusion.¹⁰⁴

The defense of consent has also been examined by Illinois courts. In a defense of consent, the issue in dispute is usually the scope of the consent. In *Smith v. WGN, Inc.*,¹⁰⁵ for example, the plaintiff agreed to "pose for a man that takes a movie"¹⁰⁶ that was later shown on television as a commercial.¹⁰⁷ A question of fact existed as to whether the use made of the movie was within the scope of the consent given. In those cases in which the question of the scope of consent was raised, consent was a successful defense each time.¹⁰⁸

420. *Maritote* held that "[c]omment, fictionalization and even distortion of a dead man's career do not invade the privacy of his offspring, relatives or friends. . . ." *Id.* It is apparent that Capone's notoriety influenced the court's decision because the court was moved to quote from Shakespeare, "The evil that men do lives after them. . . ." *Id.* See Saret & Stern, *Publicity and Privacy — Distinct Interests on the Misappropriation Continuum*, 12 LOY. U. CHI. L.J. 675, 694-95 (1981). See also *infra* notes 126, 171-177 and accompanying text.

As implied in the concurring opinion, this case may have been the first case brought under Illinois law that was more properly a claim for an invasion of the right of publicity. *Id.* at 421 (Duffy, J., concurring). Under *Bardley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960), the assertion of the right would not have survived the death of Al Capone since no Illinois court had recognized the type of property right asserted by the plaintiffs. See *supra* note 100 and accompanying text. For a further discussion of the right of publicity, see *infra* notes 171-77 and accompanying text.

Recognition that a privacy claim involves a property right may have the added effect of the availability of a longer statute of limitations. The Illinois statute of limitations for injury to property is five years after the cause of action accrued. ILL. REV. STAT. ch. 83, § 16 (1983). The applicable Illinois statute of limitations for personal actions is one year after the cause of action accrued. ILL. REV. STAT. ch. 83, § 14 (1983).

103. The court stated: "The article . . . does [not] show an appropriation of the personalities of the decedent's children, either by name or by likeness." *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209, 216, 213 N.E.2d 39, 43 (1965).

104. *Id.* at 212, 213 N.E.2d at 41. The plaintiffs contended that the publication "brought the plaintiffs out of the solitude which it was their right to enjoy." *Id.* The plaintiffs alleged that the defendant invaded their privacy by reopening their wounds strictly for commercial exploitation. *Id.*

105. 47 Ill. App. 2d 183, 197 N.E.2d 482 (1964).

106. *Id.* at 185, 197 N.E.2d at 484.

107. *Id.*

108. *Smith v. WGN, Inc.*, 47 Ill. App. 2d 183, 197 N.E.2d 482 (1964) (plaintiff agreed to pose for movie); *Dabbs v. Robert S. Abbott Publishing Co.*, 44 Ill. App. 2d 438, 193 N.E.2d 876 (1963) (plaintiff agreed to supply defendant with photographs for publicity stunts; subsequently, her picture appeared in beauty contest to promote grand opening of defendant's store). See also *Russell v. Marboro Books*, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (1959) (retouched print of famous model used to advertise bed sheets).

Through these decisions, the First District Appellate Court set the boundaries of the cause of action for privacy in Illinois. The First District Appellate Court was the only Illinois appellate court even to consider the right of privacy cause of action until the 1970s.¹⁰⁹ When faced with a claim for appropriation of name or likeness for commercial exploitation, the court had no difficulty in upholding the cause of action.¹¹⁰ When a claim involved one of the other three privacy torts, the court's opinions appeared uncertain and tentative.¹¹¹ It must be remembered that this court was at least willing to address these issues in spite of the absence of legislative and judicial guidelines. On the other hand, the First District's inconsistent holdings have muddied the waters for subsequent courts which are attempting to formulate standards.

Recognition by the Illinois Supreme Court

The recognition of a common law right of privacy by the Illinois Supreme Court in *Leopold v. Levin*¹¹² should have removed any obstacles impeding the growth of the tort. The court cited with approval all of the decisions made by the First District Appellate Court.¹¹³ In defining the right, however, the Illinois Supreme Court indicated that, given the proper circumstances, the cause of action should be liberally construed.¹¹⁴ The *Leopold* court itself, however, applied a conservative interpretation.

In *Leopold*, the plaintiff asserted a violation of his right of privacy by the publication and distribution of a novel, a play, and a motion picture based on his exploits with Richard Loeb.¹¹⁵

109. See *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965); *Buzinski v. Do-All Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961); *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960); *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

110. *E.g.*, *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

111. See, *e.g.*, *Carlson v. Dell Publishing Co.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965); *Buzinski v. Do-All Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961).

112. 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

113. *Id.* at 439-40, 259 N.E.2d at 254.

114. The court stated: "We agree that there should be recognition of a right of privacy . . . Privacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law." *Id.* at 440-41, 259 N.E.2d at 254.

115. In 1924, Richard Loeb and Nathan F. Leopold, Jr., pleaded guilty to the murder and kidnapping of Bobby Franks. The novel, play, and subsequent movie, entitled "Compulsion," were based on the kidnapping and murder of Bobby Franks and the prosecution of Leopold and Loeb. The plaintiff alleged that the constitutional privileges of speech and press do not extend to an exploitation of his personality for profit in "knowingly fiction-

The Illinois Supreme Court's denial of this cause of action was premised on three grounds: constitutional protection in a matter of public interest, continuing public interest in the plaintiff's crime and prosecution, and plaintiff's continuing status as a public figure.¹¹⁶ When misappropriation of a name or likeness is alleged, the court suggested that the public or private status of the plaintiff and the nature of the alleged misuse will be carefully examined in order to determine whether a first amendment defense exists.¹¹⁷ Illinois courts now rely upon this distinction between invasions of privacy for commercial appropriation and invasions of privacy for newsworthy events.¹¹⁸

Leopold has been the only pronouncement on privacy by the Illinois Supreme Court. Unfortunately, the facts of *Leopold* limited the court's discussion of the right of privacy action to the tort of appropriation of name or likeness. The decision, therefore, did little to quell the confusion of the lower courts when questions over the remaining three torts arise.

Despite the fact that the Illinois Supreme Court stated in *Leopold* that there may be circumstances in which privacy rights should be protected,¹¹⁹ the appellate courts have been reluctant to extend protection without more specific direction.¹²⁰ Although the *Leopold* decision has apparently made the lower courts more receptive to the privacy cause of action, the earlier uncertainty demonstrated by the First District Appellate Court in *Annerino*, *Bradley*, and *Carlson* has continued to create confusion.

alized accounts" of his life nor to appropriation of his name or likeness for use in advertising. *Id.* at 436-39, 259 N.E.2d at 253-54.

116. *Id.* at 441, 259 N.E.2d at 254. The court stressed that the plaintiff's notoriety derived from his criminal conduct. The court refused to allow plaintiff to assert a right of privacy in his participation in the highly publicized crime. The court stated that the passage of time did not extinguish public curiosity nor the news interest in the crime, its perpetrators, and their prosecution. Moreover, the court found that the plaintiff had sought public attention by the publication of his autobiography and other writings. Finding that the case had become "an historical cause celebre" and that plaintiff encouraged public attention, the court said he could not withdraw from the public spotlight at his whim. *Id.* at 441-43, 259 N.E.2d at 255.

117. *Id.* at 444-45, 259 N.E.2d at 254.

118. *E.g.*, *Adreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1980) (publication concerning condemnation of land is an area of legitimate public interest); *Beresky v. Teschner*, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978) (publication concerning death of youth from drug overdose concerned matter of legitimate concern to public).

119. *See supra* note 114 and accompanying text.

120. *See, e.g.*, *Kelly v. Franco*, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979) (action for invasion of privacy limited to use of individual's name or likeness for commercial purposes); *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976) (cause of action may be stated for unauthorized use of an individual's name or likeness for commercial purposes).

RECENT DEVELOPMENTS IN PRIVACY LAW IN
ILLINOIS STATE COURTS

Since *Leopold*, privacy actions brought before Illinois courts have been based on all four types of objectionable conduct identified by Prosser and the *Restatement*.¹²¹ Express judicial recognition has been extended, however, only to the tort of appropriation of name or likeness.¹²² The elements of the tort are now well-defined, and no further development of the tort has occurred in Illinois state courts. The privacy torts of intrusion, publication of private facts, and false-light publication have not yet been expressly recognized in Illinois.

Public Disclosure of Private Facts

The cause of action based on the public disclosure of private facts is the only privacy tort, other than appropriation of name or likeness for commercial benefit, which has received significant attention by the Illinois appellate courts.¹²³ Analysis of the decisions to date indicates that the first and second district courts are the most receptive to such claims;¹²⁴ the Fourth District Appellate Court appears to be less receptive.¹²⁵ No other districts have ruled on this question.¹²⁶ The cause of action has yet to be recognized explicitly; in every case the courts have

121. See *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201 (N.D. Ill. 1981) (appropriation of name or likeness); *Adreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1980) (publicity which places the plaintiff in false light); *Kelly v. Franco*, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979) (intrusion upon seclusion); *Geisberger v. Willuhn*, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979) (public disclosure of private facts).

122. See, e.g., *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d (1952) (unauthorized use of photograph in promotion of dog food).

123. See *Oden v. Cahill*, 79 Ill. App. 3d 768, 398 N.E.2d 1061 (1979) (disclosure of expunged arrest records); *Geisberger v. Willuhn*, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979) (disclosure of patient's name); *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976) (disclosure of private debt); *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975) (public disclosure of private debt).

124. In *Midwest Glass Co., v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975), the First District Appellate Court denied the cause of action because the dissemination of the private fact was not to the general public. The court went on to say that an action for invasion of privacy based on the public disclosure of private debts may be brought in Illinois. *Id.* at 135, 339 N.E.2d at 278. In *Geisberger v. Willuhn*, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979), the Second District Appellate Court denied the cause of action because the invasion was not sufficiently offensive or objectionable. *Id.* at 439, 390 N.E.2d at 948.

125. See *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976).

126. In the federal court, however, a corporation asserted a claim for disclosure of private information. The court held that the right of privacy is a personal right designed to protect persons from unwanted disclosure of personal information. *CNA Fin. Corp. v. Local 743 of Int'l Bhd. of Teamsters*,

considered either that the facts have been insufficient to establish the cause of action or successful defenses precluded examination of the issues.¹²⁷

Constitutional protection was given to the publication in *Beresky v. Teschner*.¹²⁸ Although the court noted that the published matter could be interpreted as highly offensive to a reasonable person,¹²⁹ the court addressed only the constitutional guarantees which limit the right of privacy action. The *Beresky* court then determined that the articles were matters of legitimate concern to the public.¹³⁰

In addition to the first amendment defense, the Second District Appellate Court has held that the public character of the fact disclosed may offer a defense in privacy actions. In *Geisberger v. Willuhn*,¹³¹ the court held that, in an invasion of privacy by publication of private facts, the information disclosed must relate to the private, as opposed to the public, life of the plaintiff.¹³² According to the *Geisberger* court, the disclosure of a person's name, in itself, does not constitute an invasion of pri-

Chauffeurs, Warehousemen and Helpers of America, 515 F. Supp. 942, 946 (N.D. Ill. 1981).

127. *E.g.*, *Oden v. Cahill*, 79 Ill. App. 3d 768, 398 N.E.2d 1061 (1979); *Geisberger v. Willuhn*, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979).

128. 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978). The court found the newspaper articles concerning the death of a youth from a drug overdose a matter of legitimate concern to the public. *Id.*

129. *Id.* The article stated that the victim had failed to appear in court to answer a charge of unlawful possession of a hypodermic needle, that the victim had been arrested numerous times on various charges, including traffic violations and burglaries; and that the victim was a major seller and user of heroin. *Id.* at 850, 381 N.E.2d at 981. The plaintiffs alleged that the defendants exposed to the public the plaintiffs' grief, shame and humiliation because of the publication of the articles. *Id.* at 856, 381 N.E.2d at 984.

130. The court found that the community had a legitimate interest in drug activity which caused the death of the teenager. *Id.* at 856, 381 N.E.2d at 984.

131. 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979). This was a case of first impression in Illinois regarding the right of a patient to recover damages from a physician for the alleged unauthorized disclosure of confidential information.

132. The complaint was based upon the disclosure of the name of the plaintiff by an employee of defendant's physician to the police as a possible suspect in the armed robbery of a department store. The plaintiff was arrested, but the criminal charges were subsequently dismissed. The plaintiff sued alleging that the disclosure of his name, resulting in his arrest, constituted an invasion of privacy. The court held that the name of a patient alone is not confidential information protected by statute or by the physician-patient relationship. *Id.* at 436, 390 N.E.2d at 948. The matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities. *Id.* at 439, 390 N.E.2d at 948, *citing*, W. PROSSER, TORTS, § 117 (4th ed. 1971). Those cases which have recognized the cause of action have all involved the publication of facts relating to either the plaintiff's medical condition or the physician's diagnosis or treatment. *Geisberger v. Willuhn*, 72 Ill. App. 3d at 439, 390 N.E.2d at 948.

vacy.¹³³ In *Oden v. Cahill*,¹³⁴ the same court held that even a plaintiff's expunged arrest records were public information.¹³⁵

An action for public disclosure of private debt has been treated by Illinois courts as a subcategory of public disclosure of private facts.¹³⁶ The First District Appellate Court and the Fourth District Appellate Court have reached conflicting conclusions regarding that tort. In *Midwest Glass Co. v. Stanford Development Co.*,¹³⁷ the First District Appellate Court held that an action for invasion of privacy based on the public disclosure of private debt may be brought in Illinois.¹³⁸ The *Midwest Glass* court concluded, however, that it was unable to recognize the tort in that case because the facts failed to satisfy the tort's criteria.¹³⁹

The First District Appellate Court's unequivocal statement that the private debt action could be brought should be a sufficient basis for extending the cause of action when the requisite facts are finally alleged. In *Bureau of Credit Control v. Scott*,¹⁴⁰ the required facts were alleged¹⁴¹ and the Fourth District Appellate Court was asked to extend the right. That court refused, however, to extend the right.¹⁴² Instead, the *Scott* court used

133. *Id.* Not confronted with a first amendment defense, the court discussed the four forms of invasion of privacy and relied exclusively on the *Restatement (Second) of Torts* and Prosser. *Id.*

134. 79 Ill. App. 3d 768, 398 N.E.2d 1061 (1979).

135. The plaintiff charged that the city civil service commission's use of her expunged arrest records in denying her employment as a police officer violated her right of privacy. The plaintiff alleged that this conduct violated not only her common-law right of privacy but also her constitutional right. *Id.* at 772, 398 N.E.2d at 1062. The court avoided the constitutional basis for asserting the right by holding that plaintiff's arrest records were public information. Consequently, neither the common-law nor the constitutional protection extends to matters of public knowledge. *Id.*

136. See *supra* note 124 and accompanying text.

137. 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975).

138. *Id.* at 135, 339 N.E.2d at 278.

139. *Id.* at 132, 339 N.E.2d at 278. Midwest was to install mirrors in apartments in Stanford's condominium development. When Stanford refused to pay for the mirrors, Midwest sent a notice to sixty-five individuals, including each of the persons who had purchased condominiums or who were tenants. The court held that, because the publication was only to a limited number of persons who had a proper interest in the information, defendant's conduct did not substantiate the claim. *Id.*

140. 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976).

141. A collection agency, attempting to force payment of an alleged debt, made phone calls to plaintiff's parents and repeatedly called the plaintiff at work, though she demanded that they cease because the calls jeopardized her job. The plaintiff suffered headaches, loss of appetite, and loss of sleep due to the language used and threats made. *Id.* at 1008, 345 N.E.2d at 38.

142. *Id.* at 1009, 345 N.E.2d at 40. The court implied that the only cause of action explicitly recognized in Illinois is for the appropriation of an individual's name or likeness for commercial benefit. *Id.* In his dissent, Justice Craven found that the efforts at collection had become so unreasonable and

the plaintiff's alternate theory for recovery, intentional infliction of emotional distress.¹⁴³ The *Scott* court implied that the privacy cause of action was subsumed into the cause of action for intentional infliction of emotional distress. Accordingly, the *Scott* court gave only cursory treatment to the privacy cause of action before dismissing it.

The *Scott* court's reliance on the plaintiff's alternative theory not only continues the conflict among the circuit courts but it also emphasizes the court's misconception regarding the fundamental distinction between a privacy cause of action and a cause of action for infliction of mental distress.¹⁴⁴ Mental distress is not the basis of the cause of action in privacy.¹⁴⁵ Special damages are not a requisite element to an action in privacy.¹⁴⁶ The real nature of the complaint in privacy is the affront to the plaintiff's personal dignity.¹⁴⁷ Even if a plaintiff were to suffer mental distress, those consequences would be inseparable from the indignity suffered by the invasion of privacy.¹⁴⁸

The facts in *Scott* also presented the court with an opportunity to discuss two other privacy torts—intrusion and false light

outrageous that they transcended the plaintiff's implied consent. *Id.* at 1010, 345 N.E.2d at 41 (Craven, J., dissenting). A defense of implied consent defeated the cause of action in *Bloomfield v. Retail Credit Co.*, 14 Ill. App. 3d 158, 302 N.E.2d 88 (1973) (plaintiff had supplied the names of former employers in the credit report).

Several courts have held that the creditor will not be found liable if he took reasonable steps under the circumstances to collect the debt. *See* *Cunningham v. Securities Inv. Co.*, 278 F.2d 600 (5th Cir. 1960) (right to take non-oppressive action to collect debt); *Norris v. Moskin Stores, Inc.*, 272 Ala. 174, 132 So. 2d 321 (1961) (conduct must be reasonably related to legitimate effort to collect debt); *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957) (letter to employer is reasonable step); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (creditor must take reasonable steps).

143. *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d at 1007-08, 345 N.E.2d at 40. Because the court upheld Count I of the complaint alleging an intentional infliction of severe emotional distress, the court saw no need to create additional remedies. *Id.* at 1009, 345 N.E.2d at 40.

144. *Id.* at 1007-08, 345 N.E.2d at 40.

145. Bloustein, *supra* note 4, at 1002. Bloustein wrote: "[T]he spiritual characteristic which is at issue is not a form of trauma, mental illness or distress, but rather individuality or freedom." *Id.*

146. *Id.* at 973. *See also* *Young v. Western & A.R. Co.*, 39 Ga. App. 761, 148 S.E. 414 (1929) (recovery for nervous shock from unwarranted search & seizure); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931) (damages allowed although injuries resulted only from mental anguish); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (presumption of detriment and damage when stranger usurps man's home); *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959) (recovery for emotional and mental anguish without ascertainable physical injuries); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958) (special damages not necessary to recover for invasion of privacy); *Prosser, supra* note 2, at 409.

147. Bloustein, *supra* note 4, at 973.

148. *Id.*

publicity—which have not previously been addressed by any Illinois court.¹⁴⁹ The *Scott* majority failed to use the opportunity. In the dissent, Justice Craven found that the plaintiff stated a cause of action, not only for publication of private facts, but also for unreasonable intrusion and for false-light publicity.¹⁵⁰ Justice Craven cited the decision of the First District Appellate Court in *Midwest Glass* and noted that the *Midwest Glass* court would have allowed a remedy for publication of private debts based on these facts.¹⁵¹

The conflict between the holdings in *Midwest Glass* and *Scott* has not yet been resolved. The well-reasoned holding in *Midwest Glass* was reached only after a careful examination of Illinois law,¹⁵² the decisions of other jurisdictions,¹⁵³ and other authorities.¹⁵⁴ The perfunctory dismissal of the privacy claim in *Scott*, on the other hand, may be viewed as an example of a court's reluctance to extend rights in a developing area of the law in the absence of clear judicial or legislative precedent.

Unreasonable Intrusion upon Seclusion

Thus far, Illinois courts have denied recognition of the tort of unreasonable intrusion upon seclusion. It appears that only the first and fifth districts have ruled on this question.¹⁵⁵ Both of

149. One of the other counts of the complaint alleged unreasonable intrusion upon plaintiff's seclusion and solitude, and the other alleged publicity which unreasonably placed her in a false light. *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d at 1008, 345 N.E.2d at 38.

150. *Id.* at 1010, 345 N.E.2d at 40 (Craven, J., dissenting).

151. *Citing Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975), the dissent stated: "A complaint that alleges an intentional giving of unreasonable publicity to private debts without consent of the debtor for the purpose of coercing payment states a cause of action." *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d at 1010, 345 N.E.2d at 41 (Craven, J., dissenting).

152. The court noted that the right of privacy and a remedy for violation of that right are recognized in the Illinois Constitution and by the Illinois Supreme Court in *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970). *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d at 133, 339 N.E.2d at 276-77.

153. The court pointed out that Prosser's categorization has been adopted by many foreign jurisdictions, see, e.g., *Marks v. Bell Tel. Co. of Pennsylvania*, 460 Pa. 73, 331 A.2d 424 (1975); *Dotson v. McLaughlin*, 216 Kan. 201, 531 P.2d 1 (1975). The court also examined other jurisdictions to determine the elements of the tort. The court cited decisions reached in Alabama, California, Georgia, Illinois, Kentucky, Louisiana, Maryland, Missouri, Oregon, and Ohio.

154. Among the authorities discussed by the court are W. PROSSER, *TORTS* § 117 (4th ed. 1971); the *RESTATEMENT (SECOND) OF TORTS*, Annot., 33 A.L.R. 3d 154 (1970); and 62 AM. JUR. 2d *Privacy* § 39 (1942).

155. See, e.g., *Kelly v. Franco*, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979) (First District Appellate Court); *Cassidy v. American Broadcasting Co.*, 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978) (First District Appellate Court); *Bank*

these courts agreed that the acts of the defendant must be "unreasonably" intrusive to support the tort.¹⁵⁶ Even where the acts of a defendant are sufficiently intrusive, however, the plaintiff's status as a public official may prevent assertion of the right.¹⁵⁷

Although in agreement on the issue of intrusiveness, there is still a conflict between the courts. The Fifth District Appellate Court¹⁵⁸ has expressed its opinion that, if the facts were ever sufficient, the Illinois Supreme Court would probably recognize the action in its own right.¹⁵⁹ The First District Appellate Court,¹⁶⁰ on the other hand, has asserted that actions for invasions of privacy in Illinois are limited to appropriation of name or likeness for commercial purposes.¹⁶¹

False Light

Two cases in Illinois have explicitly alleged a cause of action for publicity which placed the plaintiffs in a false light.¹⁶² The facts in each case were insufficient to establish a prima facie

of *Indiana v. Tremunde*, 50 Ill. App. 3d 480, 365 N.E.2d 295 (1977) (Fifth District Appellate Court).

156. *Kelly v. Franco*, 72 Ill. App. 3d at 646, 391 N.E.2d at 58; *Bank of Indiana v. Tremunde*, 50 Ill. App. 3d at 483, 365 N.E.2d at 298.

157. *Cassidy v. American Broadcasting Co.*, 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978). Plaintiff, an undercover police officer investigating prostitution, was filmed by defendant's camera crew who were hidden behind a false wall. The film was shown on a local television news program. The court held that the public has a legitimate interest in the conduct of police officers while on duty. *Id.* at 838, 377 N.E.2d at 128. The court did suggest, however, that had the plaintiff been a private citizen engaged in private conduct or had the plaintiff questioned the motives of the defendants, the outcome may have been different. *Id.* at 839, 377 N.E.2d at 132.

158. *Bank of Indiana v. Tremunde*, 50 Ill. App. 3d 480, 365 N.E.2d 295 (1977).

159. The court said, "[W]e assume, on the basis of the *Leopold* case, that our supreme court would recognize such an action were appropriate facts alleged and proved." *Id.* at 483, 365 N.E.2d at 298. In the dissent, however, Justice Moran found that the facts alleged were sufficient to sustain the cause of action. *Id.* at 486-87, 365 N.E.2d at 298 (Moran, J., dissenting). The plaintiffs, both over seventy years of age, were in possession of a farm when defendant's agents entered onto the farm after dark and replevied the cattle and equipment on the farm onto their trucks. *Id.* at 484-85, 365 N.E.2d at 296-97. The plaintiffs suffered severe mental and physical distress because of the intrusion. *Id.* at 486-87, 365 N.E.2d at 296-97.

160. *Kelly v. Franco*, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979).

161. The court devoted substantial space to a discussion of the cause of action. The court reviewed decisions of other jurisdictions principally to determine whether the facts alleged would have sustained the cause of action in those jurisdictions. The court found no cases which would uphold a cause of action for invasion of privacy based upon unsolicited telephone calls occurring on an unspecified number of occasions but which did not involve any other harassing conduct. *Id.* at 647, 391 N.E.2d at 58.

162. *Adreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1980); *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976).

case.¹⁶³ In addition, the First District Appellate Court found that the proceedings, about which the statements had been made, concerned a matter of legitimate public interest.¹⁶⁴ The court supported its position by stating that the Illinois Supreme Court narrowly construed the right of privacy when balanced against the publication of a matter of public interest.¹⁶⁵

DEVELOPMENTS IN PRIVACY LAW BY ILLINOIS FEDERAL COURTS

The Illinois state legislature and judiciary have apparently not been eager to expand plaintiffs' privacy rights. Illinois federal courts, on the other hand, have been less reticent.¹⁶⁶ The only real advances in privacy law in Illinois have been made by the federal courts sitting in that jurisdiction.

The muddled reasoning and confusion underlying Illinois state court decisions have, of course, affected the decisions of the Illinois federal courts.¹⁶⁷ In two recent cases, decided within seven months of each other, the United States District Court for the Northern District of Illinois reached contradictory holdings. In *CNA Financial Corp. v. Local 743 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*,¹⁶⁸ the court held that the privacy cause of action is based on a personal,

163. In *Adreani*, plaintiffs brought an action for invasion of privacy for statements contained in a letter to the editor which accused them of greed and disgraceful business practices and attacked their integrity, honesty, capacity and ability to carry on their professions. Plaintiffs were builders and real estate developers who were the beneficial owners of property which the park district sought to acquire through condemnation proceedings. 80 Ill. App. 3d at 727, 400 N.E.2d at 680-81. In *Bureau of Credit Control*, a collection agency attempted to collect payment of a debt by making phone calls to plaintiff's parents and to plaintiff at work. The plaintiff demanded that the agency cease making the calls since they jeopardized her job and caused headaches, loss of appetite, and loss of sleep. 36 Ill. App. 3d at 1008, 345 N.E.2d at 38. An Illinois federal district court has recognized this privacy tort. See *infra* notes 185-89 and accompanying text.

164. The court reasoned that the negotiations, as well as the condemnation proceedings, placed plaintiffs in the midst of a public controversy which was of legitimate public interest. *Adreani v. Hansen*, 80 Ill. App. 3d at 730, 400 N.E.2d at 683.

165. *Id.* The court referred to an observation by the Illinois Supreme Court in *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970), that the United States Supreme Court weighed the public and private interests in its decision in *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

166. See *supra* notes 102, 126, and *infra* notes 168-89 and accompanying text.

167. Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the federal court is bound to apply the law as it believes the Illinois Supreme Court would apply it.

168. 515 F. Supp. 942 (N.D. Ill. 1981).

rather than a property, right.¹⁶⁹ The court, therefore, refused to allow a corporation to assert a right of privacy claim.¹⁷⁰ In *Winterland Concessions Co. v. Sileo*,¹⁷¹ on the other hand, the court ignored Illinois law,¹⁷² an earlier holding of the Seventh Circuit Court of Appeals,¹⁷³ and even its own holding in *CNA Financial Corp.*

The *Winterland* court recognized a "right of publicity"¹⁷⁴ based on the appropriation of name and likeness. The com-

169. The corporation alleged a claim for the publication of private facts based on the disclosure of information acquired in the regular course of business. *Id.* See *supra* notes 101-02, 126 and accompanying text.

170. The court cited cases from California, Kentucky, New York and Pennsylvania which have held that a corporation cannot maintain an action for invasion of the right of privacy. *Id.* *Contra* UTAH CODE ANN. § 76-4-8 (1965) which gives corporations, as well as persons, the right to assert a privacy claim.

171. 528 F. Supp. 1201 (N.D. Ill. 1981).

172. The federal court's holding in *Winterland* is contrary to the only statement by an Illinois court on the subject. In *Carlson v. Dell Publishing Co., Inc.*, 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965), an Illinois court held that there is no cause of action for a violation of the right of privacy concerning a publication occurring after the death of the principal. The implication is that the right of privacy is a personal right because a property right may be asserted after the death of the principal. See *supra* notes 101-02, 169 and accompanying text.

173. The *Winterland* decision totally ignores the precedential importance of *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965). The *Maritote* court cited with approval the authorities of other jurisdictions which held that a right of privacy is purely personal. *Id.* at 419. See *supra* note 102 and accompanying text.

174. The publicity right is based on the theory that, if a man has a publicity value in his name or photograph, he should enjoy the exclusive privilege of capitalizing on it. *Haelan Laboratories, Inc. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). See also Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

The right of publicity has been explicitly recognized in other jurisdictions. *E.g.*, *Martin Luther King, Jr. Center for Social Change, Inc.*, 694 F.2d 674 (11th Cir. 1983); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Lugosi v. Universal Pictures Co.*, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977); *McQueen v. Wilson*, 117 Ga. App. 488, 161 S.E.2d 63, *rev'd on other grounds*, 224 Ga. 420, 162 S.E.2d 313 (1968); *Canessa v. J. I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967); *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1966), *rev'd on other grounds*, 433 U.S. 562 (1977).

In *Lerman v. Chuckleberry Publishing, Inc.*, 521 F. Supp. 228 (S.D.N.Y. 1981), the court outlines a three-part test for establishing a right of publicity claim:

An individual claiming a violation of his right to publicity must show: (1) that his name or likeness has publicity value; (2) that he himself has 'exploited' his name or likeness by acting 'in such a way as to evidence his . . . own recognition of the extrinsic commercial value of his . . . name or likeness, and manifested that recognition in some over manner'; and (3) that defendant has appropriated this right of publicity, without consent, for advertising purposes or for the purposes of trade.

plaint alleged the appropriation of the right of publicity for the manufacture, distribution, and sale of shirts bearing the names of Winterland's licensors without their permission.¹⁷⁵ In reaching its decision, the court determined that that right of publicity is a species of the right of privacy.¹⁷⁶ Contrary to the Illinois appellate court decision in *Carlson*, however, the district court held that the right of publicity is transferrable and assignable.¹⁷⁷

Oblivious to the inconsistencies created by the decisions of the First and Fourth District appellate courts, the same district court in *Challen v. Town and Country Charge*¹⁷⁸ looked only to *Midwest Glass Co.*¹⁷⁹ as authority on a claim for public disclosure of private debt. In *Challen*, the defendant had addressed one letter to plaintiff's employer in order to seek the employer's assistance in collecting a debt; he was not making an "unreasonable" attempt to coerce or harass the debtor into paying the debt by holding his private problems up to public disgrace.¹⁸⁰ The court found that the prima facie case for public disclosure of private debt, as articulated in *Midwest Glass Co.*,¹⁸¹ had been

Id. at 232, quoting *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978).

175. *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1203 (N.D. Ill. 1981). Two defendants operated a bootleg shirt business bearing the names and/or likenesses of such entertainers and musical groups as the Rolling Stones, Pat Benetar, Jefferson Starship, Electric Light Orchestra, Santana and others. *Id.* at 1204-05.

176. *Id.* at 1213.

177. The court considered it an extension of the tort of appropriation of a plaintiff's name or likeness. Therefore, the court reasoned that the plaintiffs were entitled to the sole right to exploit their names and likenesses. Citing its own earlier decision in the same case, and cases from the federal courts in California and New York, the court held that the plaintiffs could legally and validly transfer their right of publicity. *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213-14 (N.D. Ill. 1981).

Several courts have described the nature of the right of publicity as a property right. *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Uhlaender v. Hendricksen*, 316 F. Supp. 1277 (D. Minn. 1970). See also *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975); *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134 (S.D.N.Y. 1953); *Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979). *Contra Memphis Dev., Etc. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980); *Sims, Right of Publicity: Survivability Reconsidered*, 49 FORDHAM LAW. R. 453 (1981).

178. 545 F. Supp. 1014 (N.D. Ill. 1982).

179. *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975).

180. 545 F. Supp. at 1016-17. See *supra* notes 137-43 and accompanying text.

181. The elements are: "(1) an intentional giving of unreasonable publicity; (2) to private debts; (3) without the debtor's consent; (4) made for the purpose of coercing or harassing the debtor into payment of the debt or of

stated. Had the facts been sufficient, the court implied that it would have allowed the claim.¹⁸² The *Challen* holding was cited one year later in *Bond v. Pecaut*¹⁸³ when the court held that recovery for publication of private facts would be limited only to "unreasonable" intrusions on plaintiff's privacy.¹⁸⁴

In *Cantrell v. American Broadcasting Companies, Inc.*,¹⁸⁵ the facts were sufficient for the district court to recognize the tort of privacy which unreasonably places another in a false light before the public.¹⁸⁶ In *Cantrell*, the plaintiff sued the television network and two of its employees, Geraldo Rivera and Peter Lance, alleging that a broadcast on ABC, entitled "Newsmagazine 20/20," injured his reputation. The "20/20" investigation concerned an alleged arson-for-profit conspiracy in the Uptown neighborhood of Chicago.¹⁸⁷ The court held that the segment implied that the plaintiff was involved in the commission of a crime, that no constitutional defenses were available to the defendants, and that the defendants acted either with knowledge of the broadcast's falsity or in reckless disregard of its truth.¹⁸⁸ No Illinois case has expressly recognized the privacy tort of false-light publicity. Nevertheless, in a scholarly and well-reasoned opinion, Judge Kocoras determined that the Illinois Supreme Court would have found that this was an area within which "citizens must be left alone."¹⁸⁹

SOLUTION—A REEMERGENCE OF THE UNITY THEORY

A cause of action for invasion of the right of privacy has

exposing the debtor to public contempt or ridicule." *Id.* at 1016, citing *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 133, 339 N.E.2d 274, 277 (1975).

182. 545 F. Supp. at 1016.

183. 561 F. Supp. 1037 (N.D. Ill. 1983).

184. *Id.* at 1041. Plaintiff sued a psychologist for publication of private facts caused by a letter written by the psychologist to the presiding judge in a child custody proceeding. The court stated that the letter was at most a reasonable intrusion on plaintiff's privacy. *Id.*

185. 529 F. Supp. 746 (N.D. Ill. 1981).

186. *Id.* at 759.

187. *Id.* at 748.

188. *Id.* at 759.

189. *Id.* Judge Kocoras cited a decision of the United States Supreme Court concerning privacy and the press. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), Justice Brennan wrote:

We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with the knowledge of its falsity or in reckless disregard of the truth.

Id. at 387-88. The holding does not apply to all privacy suits since only a small percentage involve falsity.

been recognized in Illinois.¹⁹⁰ Inconsistencies in the reasoning and the holdings of the appellate courts, however, have effectively limited the recognition of that right to the single tort of appropriation of name or likeness for commercial purposes. Although some Illinois courts have expressed a willingness to extend the right of privacy action beyond that one tort,¹⁹¹ the right case has apparently never presented the opportunity to do so.

The common law of privacy has experienced significant development in other jurisdictions, spurred by changing social values and technological advances. In Illinois, the development of privacy law is still in its infancy. Virtually, the only privacy action explicitly recognized today is appropriation of name or likeness for commercial exploitation. The absence of clearly-defined standards has created serious problems for plaintiffs in Illinois.

Illinois' problems may stem from the confusion created by the intermingling and blending of privacy concepts.¹⁹² At the heart of this confusion is the failure of the Illinois Supreme Court to articulate clear, consistent guidelines for privacy actions. Consequently, until the Illinois courts, or the Illinois legislature, formulate the basis for a privacy cause of action, Illinois plaintiffs will remain uncertain when, or even if, they are entitled to recover for a particular injury. Without a clearly defined state policy, the success of any given suit would depend on a variety of factors, including which circuit court may be hearing the case.

Awareness of broadening social policies should provide impetus for the judiciary to expand the limited common law privacy action which has already been recognized by the court. Recognizing the need for continued development of the law in the light of changing social attitudes, the Illinois Supreme Court recently granted recovery for negligent infliction of emotional distress.¹⁹³ This action is an indication of the expansion of a plaintiff's right to recover for mental harm alone. In light of the readiness of the Illinois Supreme Court to recognize claims to emotional injury, and in light of the fact that privacy actions

190. *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

191. *See, e.g., Adreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1980); *Cassidy v. American Broadcasting Co.*, 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978); *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1975).

192. *See supra* notes 17-18 and accompanying text.

193. *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). Under *Rickey*, a court would allow recovery for emotional distress to a bystander who has a reasonable fear for his own safety. *Id.* at 552, 457 N.E.2d at 6.

have attendant mental and emotional qualities,¹⁹⁴ the Illinois Supreme court should expand the remedies available to plaintiffs whose privacy has been violated.

In their article, Warren and Brandeis noted that the law has always sought to fully protect the individual in his person and in his property.¹⁹⁵ The right to life is now synonymous with the right to enjoy life. The personal right to live in peace and solitude is threatened by the encroachment of advancing technology. The Warren-Brandeis concept underlying the purpose of the remedy for invading a person's privacy should be revitalized; only in this way can the courts shed the barricades created by Prosser's fourfold categorization of the privacy tort.

Prosser himself predicted the confusion which his categorization could cause.¹⁹⁶ In an article published just four years later, an eminent scholar urged the legal community to discard Prosser's analysis.¹⁹⁷ He examined the Prosser categorization and determined that it was a repudiation of the general theory of individual privacy which Warren and Brandeis invoked.¹⁹⁸

The development of privacy law in Illinois has verified Prosser's prediction. Illinois courts have treated the Prosser categorization as the ultimate definition of the elements of the causes of action for invasion of privacy. The courts' failure to extend the right beyond the categorization has left Illinois plaintiffs without a remedy for the tort which was originally intended to protect man's right to live his life without the world intruding upon him.¹⁹⁹

A unitary approach to the privacy tort may help to clarify the reasoning of the Illinois courts. The unification of the elements of the privacy cause of action, with all applicable defenses and limitations, would reestablish the primacy of human dignity as a cherished value of the American legal system. Despite its widespread recognition and acceptance, it may be time to reconsider Prosser's fourfold categorization in light of the ever-changing needs of a complex society.²⁰⁰ Prosser's article was, after all, only an attempt to classify "over three hundred cases in the books"²⁰¹ according to "four different interests."²⁰² Today, the courts are refusing to recognize threats to a person's

194. See Prosser, *supra* note 2, at 422-34.

195. Warren & Brandeis, *supra* note 4, at 193.

196. Prosser, *supra* note 2, at 389.

197. Bloustein, *supra* note 147, at 963-64.

198. *Id.*

199. *Id.*

200. *Id.*

201. Prosser, *supra* note 2, at 388.

202. *Id.* at 389.

“inviolate personality”²⁰³ because they are bound to a mere categorization of case law, made in the infancy of privacy law.

Although Prosser apparently believed he was exploding the Warren-Brandeis myth of a single distinctive interest known as privacy, he was, in actuality, creating a new myth—that of a composite interest in privacy protecting myriad species of social values.²⁰⁴ The injury which an individual suffers as a result of a violation of his privacy is an injury to his individuality and human dignity.²⁰⁵ A cause of action alleging such a violation should not fail simply because it defies categorization.

CONCLUSION

Illinois state law must be clarified in order to alleviate the problems faced by the Illinois federal courts and the resulting *Erie* problem.²⁰⁶ In addition, Illinois plaintiffs must be allowed a remedy in Illinois state courts, if only to discourage the forum shopping of plaintiffs who look to federal courts for more favorable treatment.

The absence of defined standards, at the same time, presents a real opportunity. Illinois could, as it has done in the past in other areas of law, establish a pattern for the country. It could be the first to totally discard the Prosser categorization. Illinois could develop, in its place, a law of privacy which more accurately reflects the changing character of our modern society and which protects the individual from the many varieties of intrusive conduct made possible by technological advances.

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203. Warren & Brandeis, *supra* note 4, at 205. See also *supra* note 4 and accompanying text. The need to protect individual privacy was recognized by the First District Appellate Court of Illinois in *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958). The court stated that, in its adoption of the broad language of the common-law right of privacy, the court intended to protect the individual from more than commercial exploitation. The court then used the language of Warren and Brandeis to state that it “fully intended to protect inviolate the personality of the individual.”

204. Bloustein, *supra* note 4, at 1003.

205. *Id.*

206. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).