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## INVASION OF PRIVACY—SOME COMMUNICATIVE TORTS WHOSE TIME HAS GONE\*

HARVEY L. ZUCKMAN\*\*

Because invasion of privacy developed from a late nineteenth century law review article motivated in large part by personal animus against the "yellow" press of the era rather than through traditional incremental common-law decision making, and because it has no central trunk but rather four disparate branches whose supposedly protected interests are subject to debate,<sup>1</sup> this complex of torts presents numerous operational problems for our judicial system. Constitutional problems are created as well by the generation of tension if not direct conflict with first amendment interests when civil liability is imposed for certain kinds of communication. And if all this perplexity were not troublesome enough, to a considerable extent the tort is redundant in that a number of its branches overlap or parallel other established torts including trespass to both real and personal property, libel, slander, and intentional infliction of emotional distress.

The operation of this complex of torts is thus so problematic that assessment of its value in a rational and constitutional legal system seems plainly in order as we approach a new century and millennium. In short, the question posed is whether the torts unleashed on our legal and communications system by Charles Warren and Louis Brandeis in their famous *Harvard Law Review* article<sup>2</sup> are worth the candle.

From a communications media perspective, the least troublesome of the complex of privacy torts are intrusion into another's seclusion and appropriation of another's image or persona for trade or commercial purposes. These two privacy torts may be less problematic because the fact is that, narrowly viewed, these torts are not communicative in nature, but simply protect property or financial interests; they are not aimed necessarily at the media. Indeed, intrusion does not even require any publication for its commission. It is enough that the defendant without permission invade the

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1. Compare, e.g., Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964) with Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978) with Bloustein, *Privacy is Dear at Any Price: A Response to Professor Posner's Economic Theory*, 12 GA. L. REV. 429 (1978) and Epstein, *Privacy, Property Rights and Misrepresentation*, 12 GA. L. REV. 455 (1978).

2. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

plaintiff's legally protected zone of privacy, such as his home or his automobile. Appropriation, while often implicating advertising media, does not necessarily require mass communication for its perpetration. For example, the use of photographs of nonconsenting subjects in a photographer's window would suffice.

Noting that intrusion and appropriation are not communicative in nature is not to say that media personnel will not, on occasion, commit these torts in the course of communicating to the public. It is not unheard of for investigative reporters to invade a newsworthy subject's protected zone of privacy to obtain a story,<sup>3</sup> or for the entertainment<sup>4</sup> or advertising<sup>5</sup> media to borrow, without permission or compensation, someone's image or identity for commercial gain. But these torts are designed to protect the individual's property interests and celebrity market value from invasion or misappropriation by *anyone*. Because the communication media and its publication processes are not targeted by these particular torts, the potential for conflict with protected first amendment interests is minimal, and a constitutional problem concerning the continued existence and operation of these torts is generally avoided. That is all to the good because the interests involved with the intrusion and appropriation torts are fairly well defined and substantial, and deserve protection in contemporary society.

Intrusion represents little more than the extension of the ancient torts of trespass to real property and chattels to cover invasions of private spaces such as homes, offices, and automobiles through the employment of photographic and electronic devices not requiring apparent physical incursion. If the intrusive tort did not already exist, it would have to be invented for a society obsessed with snooping and facilitating devices capable of capturing and recording the slightest movements and faintest whispers at considerable distances even behind solid barriers.

One of the inherent needs of human beings which must be met if persons are to retain their individuality and dignity are zones of physical space to which they can truly retreat from the world. This need becomes more acute every day the population continues to increase. Consequently, legal protection for those physical zones of privacy is of paramount importance in a rational democratic society, and the tort of intrusion should only strengthen in the twenty-first century because of its noble purpose.

The appropriation tort realistically protects whatever property value there may be in one's very being such as the distinctive singing voice and musical style, for instance, of a Bette Midler.<sup>6</sup> Thus far this tort appears to be working reasonably well to prevent others from taking a person's celebrity against his will. The main problem, given the tort's incorporation

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3. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

4. See, e.g., *Groucho Marx Prods., Inc. v. Day and Night Co.*, 689 F.2d 317 (2d Cir. 1982) (appropriation not actionable because right of publicity not descendible under facts of case).

5. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

6. *Id.*

in statutes in a number of jurisdictions, most notably celebrity-studded California,<sup>7</sup> New York,<sup>8</sup> and Tennessee,<sup>9</sup> is the scope of protection provided by such statutes. But the scope of protection is merely a problem of statutory construction and does not go to the operation of the tort when applicable.

Fundamental justice would seem to require that the civil law permit one whose identity has commercial value to control the commerce in his identity. The law should protect such individuals so they may decide for themselves whether to defend their privacy by withholding their celebrity from commerce or to waive privacy by making such celebrity available for a price. So long as protection is limited to purely commercial trading in human identity, there can be little objection to a tort that secures control of that commerce to the person whose identity is involved. While the interest implicated here is mainly financial and perhaps not as compelling as that protected by the intrusion tort, it furthers individual autonomy and personhood, and we may expect the appropriation tort to continue to be recognized in the twenty-first century.

On the other hand, because they are poorly rationalized, problematic in operation, and aimed at communication of both true and false news and information, the false light and publicity of private facts torts seem poor candidates for long-term survival.

False light involves the giving of publicity concerning another which portrays the other in a false light with knowledge or reckless disregard by the communicator of the falsity of the publicized matter. Such false portrayal must be highly offensive to a reasonable person.<sup>10</sup> According to Dean Prosser<sup>11</sup> the false light tort originated in 1816 when Lord Byron succeeded in enjoining the advertising for sale of inferior poems falsely attributed to the great poet.<sup>12</sup> This injunction was not a tort case, but instead, the case was what might be characterized today as an action for unfair competition. The modern reported cases recognizing false light do not attempt to rationalize the value of the tort. Rather, they often rely on the Restatement Second codification of Prosser's classification system to justify its existence.<sup>13</sup>

Prosser himself failed to rationalize the need for the false light tort apart from defamation when he stated "The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation."<sup>14</sup> He might have been influenced by Dean Wigmore's early twentieth century article, which Prosser cited,<sup>15</sup> calling for the recognition of an

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7. See CAL. CIV. CODE §§ 990 (deceased persons), 3344 (living persons) (West Supp. 1988).

8. See N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976).

9. See TENN. CODE ANN. §§ 47-25-1101 to -1108 (1984).

10. See RESTATEMENT OF TORTS (SECOND) § 652E (1977).

11. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398 (1960).

12. Lord Byron v. Johnston, 35 Eng. Rep. 851 (1816).

13. Compare Prosser, *Privacy*, *supra* note 11, with RESTATEMENT (SECOND) OF TORTS §§ 652A-E (1977).

14. Prosser, *supra* note 11, at 400.

15. *Id.* at 398 n.129.

actionable right of privacy to protect against certain classes of false statements whether or not falling within the accepted definition of defamation.<sup>16</sup> In support, Wigmore, the great master of the law of evidence, could cite only a handful of cases that did not involve defamation actions.<sup>17</sup> Of these, not one sounded in tort. They were all actions in equity for injunctions, and with but one exception, *Lord Byron's case*, in which writs were issued without explanation, injunctive relief was granted because of the financial liability that might attach from being falsely linked to a business enterprise or to the birth of a child.<sup>18</sup> This precedent is a far cry from supporting a tort right of privacy protecting a *personal* interest in freedom from being falsely portrayed to the public.

Interestingly, in formulating this new tort, Wigmore reveals the same bias against the press of his day that Warren and Brandeis exhibited in theirs<sup>19</sup> when he stated in his article,

Finally there is the common situation . . . in which the defendant falsely attributes to the plaintiff the *possession of some opinion*. . . . [I]t is a not uncommon form of injury in current journalistic practice. The irresponsible vendors of sensations, moved by the meanest motives of mankind, will recklessly attribute to this or that personage some view on current affairs which is alien to his actual thoughts and is calculated to make hard feelings that never can be assuaged by protestation.<sup>20</sup>

Moreover, like Warren and Brandeis, Wigmore did not consider the impact of his proposed tort on the press clause of the first amendment. Presumably he would have championed injunctions to prevent the dissemination of false statements by the press, given his citation almost exclusively to cases in equity granting the writ.

The appellate cases cited by Prosser<sup>21</sup> do support his recognition of the false light category,<sup>22</sup> but they merely recognize the tort action arising out of some general right of privacy or the even more general right to be let alone. Neither the appellate cases nor the decisions explain why the tort is

16. Wigmore, *The Right Against False Attribution of Belief or Utterance*, 4 Ky. L.J. No. 8, p.3 (1916).

17. *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. 982 (D. Mo. 1912); *Edison v. Edison Polyform & Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (1907); *Vanderbilt v. Mitchell*, 72 N.J.L. 910, 67 A. 103 (1907); *Walter v. Ashton*, 2 Ch. 282 (1902); *Dixon v. Holden*, 7 L.R.-Eq. 488 (1869); *Routh v. Webster*, 50 Eng. Rep. 698 (1847).

18. See *Vanderbilt v. Mitchell*, 72 N.J.L. 910, 67 A. 97 (1907) (false statement as to paternity on a birth certificate).

19. See *infra* note 38 and accompanying text.

20. Wigmore, *supra* note 16, at p.7. (Emphasis in original). Apparently Wigmore too was "burned" by a journalist of the time who allegedly misquoted the great scholar to his considerable embarrassment. *Id.* at p.8.

21. Prosser, *supra* note 11, at 398-400 nn. 131-34, 146.

22. See Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1270 (1976).

needed, the interest or interests protected, how it can be harmonized with defamation, and how it might be harmonized with the protections accorded freedom of expression.<sup>23</sup>

Thus, the underpinnings of this twentieth century tort are shaky, but with the publication of Prosser's article in the *California Law Review* the courts accepted the tort almost unquestioningly as an aspect of the common-law right of privacy.<sup>24</sup>

Despite the lack of a clear definition of the interest supposedly served, the prima facie case of false light is straightforward enough.<sup>25</sup> False statements of fact can be exposed by establishing the true facts. The effect of publishing false statements that place the plaintiff in a false light in the eyes of the public can be established by testimony of members of the public regarding the view they had of the plaintiff following their exposure to the false statements. The finder of fact is then in a position to determine whether the false light would be highly offensive to a reasonable person in the plaintiff's position. Finally, while the burden is great, the issue of whether the defendant publicized the false statement with knowledge of its falsity or with reckless disregard as to its falsity is merely a requirement of proving the difficult element of actual malice.

The serious problem arises not from the elements of the prima facie case but from the very nature of the tort as one going beyond defamation. This problem threatens the tort's very existence. While all actionable defamatory statements place the victim in a false light in the eyes of those who receive and accept such communications, the tort also encompasses false nondefamatory statements, thereby increasing the chill on free expression.

This chill can be substantial given the hierarchical nature of the news and information media. News and information is normally gathered by reporters and researchers, and then presented to editors for processing and the decision whether to publish. Because defamatory material injures reputation, such material usually provides to the editors a red warning flag of legal danger that can be countered by careful verification of the questionable material or its modification or excision. But false statements that are neutral or even laudatory with respect to a subject's reputation or status provide no such warning to editors. Consequently, editors are unable to protect themselves and their publishers from liability except at the expense of laboriously checking the accuracy of *all* statements of fact about individuals presented by the reporters and researchers. There are thus two alternatives confronting editors because of the false light tort: either risk liability by

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23. Many of the questions associated with recognition of false light are explored in *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475 (Mo. 1986) (en banc) in which the Missouri Supreme Court refused to decide whether to recognize the tort because the action before it also sounded in traditional defamation. See also *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So. 2d 77, 80 (Miss. 1986).

24. See, e.g., *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 85 U.S. 374 (1967).

25. See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

failing to double check *every* asserted fact about individuals, or avoid liability at a great expenditure of time and money. The news and information media are burdened under either alternative.

The media must accept the burden on free expression of potential civil liability for defamation, because the common law of England sanctioned such liability, and the American Colonies adopted that law at the time of the Declaration of Independence, before the Bill of Rights. Invasion of privacy generally or false light specifically, however, did not comprise part of the English common law that the American Colonies adopted. Consequently, the imposition of civil liability for publicizing false nondefamatory statements gives rise to a potential conflict with the first amendment not presented by libel and slander. The requirement imposed on plaintiffs to establish actual malice on the part of those creating false light<sup>26</sup> does not fully eliminate the risk of such conflict.

The tension between false light and first amendment protection for the media was noted in the groundbreaking case of *Renwick v. News and Observe Publishing Co.*<sup>27</sup> In *Renwick* the plaintiff, an associate dean at the University of North Carolina, brought suit for libel and false light against two North Carolina newspapers that had published editorial comments about apparent bullying of the University by the federal government regarding minority admissions. The newspaper pieces indicated that Dean Renwick, formerly in charge of minority admissions at the school, raised Washington's ire by alleging that "between 1975 and 1978 about 800 black students had been denied admission."<sup>28</sup> Renwick's actions were based on claimed falsity of the reported *number* of black students who had been denied admission. Amplifying on his contention, Renwick stated in his complaint that the error in the opinion pieces gave "the impression that plaintiff is an extremist, a liar and is irresponsible in his profession."<sup>29</sup> The two claims were dismissed by the trial court but were reinstated by the North Carolina Court of Appeals.

The North Carolina Supreme Court in turn reversed the decision of the intermediate appellate court. Regarding the action for libel *per se*, the high court found that the most obvious and natural meaning to be accorded the erroneous statement of fact incorporated by the defendant newspapers in their editorial commentaries was that it did not tend to defame the plaintiff. Turning from defamation to the false light claim, the court indicated two concerns with the tort. First, the right to recover often overlaps actions for libel and slander. Judicial efficiency would not be served by recognizing an essentially duplicative tort action. Of greater concern was the first amendment issue. Because the false light tort would allow recovery for non-

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

27. 310 N.C. 312, 312 S.E.2d 405 (1984).

28. *Renwick v. News and Observe Publishing Co.*, 310 N.C. 312, 312 S.E.2d 405, 407 (1984).

29. *Id.* at 319, 312 S.E.2d at 409.

defamatory false statements, the court thought that its recognition of false light would increase the tension already existing between the first amendment and tort law because it would allow recovery for nondefamatory false statements. The court believed that it would be creating "a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to nondefamatory matter.*"<sup>30</sup>

*Renwick* is significant because it is the first appellate decision wholly and *specifically* rejecting the false light tort, and doing so in part because of the tort's redundant nature in substantially overlapping libel and slander and in part because the nonoverlapping portion of the tort raises the specter of conflict with the first amendment. While such conflict is somewhat remote, the North Carolina Supreme Court may be recognizing that the unrefined interest in protecting individuals from embarrassment and emotional upset arising out of publicity of false nondefamatory statements is not substantial enough to justify running the risk of first amendment violations.

Now that one respected high state court has with persuasive reasoning rejected false light by name, jurisdictions that have previously accepted the tort uncritically may reappraise it, balancing the individual interest in freedom from embarrassment and mental upset against the societal interest in freedom of expression. If such a balance is struck, the false light tort may well disappear in the coming century.<sup>31</sup>

If the conception and operation of false light is doubtful, the tort of unreasonable publicity of private embarrassing fact seems outright ill-conceived. Warren and Brandeis in their seminal article on privacy in the *Harvard Law Review*<sup>32</sup> chose *sui generis* or inapposite English precedents to support their notion that common-law tort protection existed against unreasonable and widespread publicity of one's true but embarrassing private facts. By their article they instigated American common-law development of the tort<sup>33</sup> without giving serious consideration to the substantiality of the

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30. *Id.* at 325, 312 S.E.2d at 413.

31. But apparently the tort will not disappear without a fight. A recent Arizona Supreme Court decision embraces the tort in the face of the defendant newspaper company's first amendment and overlap arguments. The Arizona court was not concerned that both the false light and intentional infliction of mental and emotional distress torts provide compensation for violation of virtually the same interest in emotional tranquility. As for the overlap with defamation, the court stated that the interests protected by the respective torts were different, with defamation actions compensating damage to reputation and false light actions protecting mental and emotional interests even when the private facts published are true. *See Godbehere v. Phoenix Newspapers, Inc.*, 59 U.S.L.W. 2296 (Nov. 21, 1989).

32. Warren & Brandeis, *supra* note 2.

33. Their central authority for the existence of the tort, *Prince Albert v. Strange*, 64 Eng. Rep. 293 (1848), concerned the threatened reproduction and summary description of certain etchings made by Queen Victoria and Prince Albert for their own amusement. Going beyond common-law protection of intellectual property, as the court had to do because a mere



interest to be protected or the dangers posed to freedom of expression by imposing civil liability for dissemination of truthful information.<sup>34</sup> These oversights are mitigated by the requirement that the private facts publicized not be of legitimate concern to the public.<sup>35</sup> Thus, civil liability may be imposed only if media disclosures of private facts are not deemed "newsworthy." But because the concept of newsworthiness is complex<sup>36</sup> and its invocation by the media in any given case subject to debate, such mitigation is only partial.<sup>37</sup>

That Warren and Brandeis failed to come to grips with the interest their proposed tort would protect or the dangers it would pose is not surprising given the motivation for their article. Their obvious concern was denigrating the popular press of the time when they said in sweeping terms, "The press is overstepping in every direction the obvious bounds of propriety and decency."<sup>38</sup> They did refer to the harm of "mental pain and distress, far greater than could be inflicted by mere bodily injury"<sup>39</sup> stemming from true but embarrassing publicity. But the authors did not consider that real pain and distress endured by complaining parties is the result of having their true and more complete personas exposed to public view. While no doubt persons embarrassed by publicity would prefer "to be let alone," their interest in presenting a false or incomplete image to others is not one that seems very compelling.

summary description of the etchings would not have qualified as an invasion of any property interest, Vice Chancellor Knight Bruce said that the courts in proper cases would prevent injurious disclosures as to private matters. Apparently it did not occur to Warren and Brandeis that this was a one of a kind case favoring the nominal ruler of the court handing down the decision. The other cases cited by them deal with breaches of trust or contract. *See* *Abernathy v. Hutchinson*, 47 Eng. Rep. 1313 (1825); *Tuck v. Priester*, 19 Q.B.D. 629 (1887); *Pollar v. Photographic Co.*, 40 Ch. D. 345 (1888), *cited in* Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 207-10 (1890). To this day no tort of invasion of privacy exists in England. *See* *Anderson v. Fisher Broadcasting Co.*, 300 Or. 452, 457, 712 P.2d 803, 808-09 (1986); *Report of the Committee on Privacy, Cmd. 5*, No. 5012 (1972); Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 342 n.268 (1983).

34. In fairness to the authors, it must be noted that at the time they wrote their article the United States Supreme Court had not clearly adopted the theory of incorporation applying portions of the Bill of Rights to the States through the fourteenth amendment. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 361-64 (3d ed. 1986). It was not until 1925 that the Court applied the speech clause of the first amendment to the states in *Gillow v. New York*, 268 U.S. 652, 666 (1925) and not until 1931 that it so applied the press clause in *Near v. Minnesota*, 283 U.S. 697, 701 (1931).

35. *See* RESTATEMENT OF TORTS (SECOND) § 652D (1977).

36. *See* Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Private Actions Involving the Press*, 64 IOWA L. REV. 1061, 1066-69 (1979).

37. *Compare, e.g.,* *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964) with *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426 (1982), *cert. denied*, 464 U.S. 893 (1983); *Sipple v. Chronicle Pub. Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984) with *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983).

38. Warren & Brandeis, *supra* note 2, at 196.

39. *Id.*

The argument is further made that the tort protects societal interests in maintaining social standards and a proper moral climate.<sup>40</sup> The authors might also have mentioned the societal interest in rehabilitation of criminals,<sup>41</sup> the encouragement of public testimony,<sup>42</sup> and the protection of witnesses from physical harm.<sup>43</sup> But common-law tort is designed to protect the interests of individuals, and more recently, classes of individuals. It is not designed to protect society generally. That is best left to legislative action.

In short, the interest protected by Warren and Brandeis' tort is insubstantial,<sup>44</sup> which may explain why there have been few successful actions and why contemporary courts are narrowing their view of what facts are private and embarrassing and, at the same time, broadening their view of the newsworthiness privilege.<sup>45</sup>

Aside from raising serious doubt as to the need for this tort, the insubstantiality of the interest protected has serious constitutional ramifications. When truthful publicity is made the basis for civil liability there can be little doubt as to the chilling effect on free expression. Even in the absence of a broad absolutist view of the protection afforded expression by the first amendment, the narrower *ad hoc* balancing approach currently in vogue in the United States Supreme Court requires some very substantial state interest outweighing free expression before first amendment protection is subordinated.<sup>46</sup> Thus, the vagueness and inconsequentiality of the countervailing interest vindicated by state recognition and enforcement of the tort makes it vulnerable to attack on constitutional grounds whatever first amendment theory is employed.<sup>47</sup>

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40. *Id.*

41. See *Briscoe v. Reader's Digest Assoc.*, 4 Cal. 3d 529, 542, 93 Cal. Rptr. 866, 875, 483 P.2d 34, 43 (1971); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91, 93 (1931).

42. See *Capra v. Thoroughbred Racing Assoc.*, 787 F.2d 463, 465 (9th Cir. 1986), *cert. denied*, 479 U.S. 1017 (1986).

43. *Id.*; *Times Mirror Co. v. Superior Court*, 198 Cal. App. 3d 1420, 1426, 244 Cal. Rptr. 556, 563-64 (1988), *cert. denied*, 109 S. Ct. 1565 (1989).

44. See Epstein, *supra* note 1, at 463 ("Privacy, however lofty its pedigree is the least important tort for a civilized society."); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 328 (1966) (the author calls Warren and Brandeis' tort "petty"); Zimmerman, *supra* note 31, at 323-24.

45. See, e.g., *Virgil v. Sports Illustrated*, 424 F. Supp. 1286 (S.D. Cal. 1976); see also Kalven, *supra* note 42, at 336.

46. For discussion of the absolutist and *ad hoc* balancing approaches to the Bill of Rights, particularly with regard to the first amendment, see J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 837-39 (3d ed. 1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 791-94 (2d ed. 1988); H. ZUCKMAN, M. GAYNES, T. CARTER & J. DEE, MASS COMMUNICATIONS LAW 9-12, 16-19 (3d ed. 1988).

47. This vulnerability has been noted by professor Zimmerman. "[A] state can justify a content-based regulation of speech, such as the private-facts tort, only if it can demonstrate a clearly defined harm and a compelling interest in its prevention. But the nature of the harm done by publication of private facts has continued for almost a century to elude more than vague, subjective definition." Zimmerman, *supra* note 31, at 341.

This tort is also problematic on a less philosophical level. One would think that after one hundred years acquaintance with the tort, American courts would be in agreement at least as to the elements of the prima facie case. Yet there is still uncertainty whether some kind of showing of fault analogous to actual malice in defamation law<sup>48</sup> must be made by plaintiffs.<sup>49</sup> If scienter must accompany the publicity, no one is yet sure exactly what the state of mind of the defendant must be.

The conceptual and practical difficulties with the Warren and Brandeis tort have recently moved two jurisdictions to limit substantially its reach or to reject it entirely. In *Anderson v. Fisher Broadcasting Co.*<sup>50</sup> a television cameraman for the defendant broadcasting company photographed the scene of the plaintiff's automobile accident. Plaintiff was recognizable on the videotape, and was shown bleeding and in pain while receiving emergency medical treatment. The tape was not used on any regular news program, but some time later a brief excerpt showing the plaintiff was used without the plaintiff's consent in promotional spot advertising of a special news report to be aired about a new system for dispatching emergency medical help. Plaintiff sued for general damages for mental anguish occasioned, *inter alia*, by the publicizing of his image in an injured condition. The plaintiff did not allege that the publicity was motivated by any desire to cause severe mental or emotional distress to the plaintiff. The trial court rendered summary judgment for the broadcaster, holding that the tape was newsworthy, that it remained so despite not being promptly aired, and that it did not lose its newsworthy character when used to advertise another newsworthy broadcast. The Oregon Court of Appeals reversed the summary judgment because it believed that there was an issue of fact as to whether the tape was newsworthy when used to promote another program not involving the plaintiff.

In reversing the intermediate court and reinstating the summary judgment, the Oregon Supreme Court confronted the question whether truthfully publicizing allegedly private facts about an individual that he would have preferred to keep private is, without more, a tort. The court, through Justice Hans Linde, answered the question in the negative. It held that to be actionable the complaint of conduct on the part of the media must be designed to cause severe mental or emotional distress, whether for its own sake or as a means to some other end, and the media conduct must qualify as so extraordinary that the finder of fact could determine that the conduct

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48. See *New York Times Co. v. Sullivan*, 377 U.S. 254 (1964).

49. Compare *Hawkins by Hawkins v. Multimedia, Inc.*, 288 S.C. 569, 344 S.E.2d 145 (1986), *cert. denied*, 479 U.S. 1012 (1986), with *Anderson v. Fisher Broadcasting Co.*, 300 Or. 452, 712 P.2d 803 (1986). But see *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989) in which the Supreme Court seems to assume the need for some kind of scienter to accompany the publicity of private facts. Other concerns about the tort on an operational level are expressed by Justice Linde in *Anderson*, 300 Or. at 457, 712 P.2d at 803. See also Kalven, *supra* note 42, at 333-36.

50. 300 Or. 452, 712 P.2d 803 (1986).

went beyond the farthest reaches of socially tolerable behavior.<sup>51</sup> In other words, to be actionable the invasion of privacy would have to amount to the modern tort of intentional infliction of severe emotional distress, or "outrage."<sup>52</sup> Thus, the communicative tort of publicity of private facts has been transformed into a mental and emotional assault in Oregon.

Going beyond the Oregon Supreme Court, the North Carolina Supreme Court in *Hall v. Post*<sup>53</sup> refused to recognize any aspect of the publicity of private facts tort. In *Hall* the *Salisbury Post* published two articles dealing with the search by a woman and her second husband for the baby girl that she had abandoned 17 years earlier. The first article related to the details of her unsuccessful search, and asked for the public's help in locating the daughter. Shortly after the article was published, the couple was called and informed of the child's identity and whereabouts. The second article accurately reported the successful conclusion of the search, the identity of the child and her adoptive mother, the details of a telephone encounter between the natural mother and the adoptive mother, and the emotions exhibited by the parties. Plaintiff, adoptive mother and daughter, sued the reporter and the publisher for invasion of privacy, alleging that they had to flee their home in order to avoid public attention resulting from the articles, and that they had to seek and receive psychiatric care for emotional and mental distress caused by the publicity. The trial court granted summary judgment for the defendants. The North Carolina Court of Appeals affirmed. The summary judgment, however, was reversed by the North Carolina Supreme Court. That court's rejection of Warren and Brandeis' tort was predicated on the substantial overlap with the "outrage" tort that was already recognized in North Carolina,<sup>54</sup> and perhaps more importantly, the constitutionally suspect nature of the tort. Regarding the first amendment issue, the court said, "[I]t would be entirely unrealistic to suggest that adoption of the private facts would do other than add to the tension already existing between the First Amendment and the law of torts."<sup>55</sup> That tension is, of course, created by the imposition of civil liability for the tort of the communication of truthful information.<sup>56</sup>

The *Anderson* and *Hall* cases are thus far unique,<sup>57</sup> but they pinpoint very questionable aspects of the private facts tort and may presage a broader challenge leading to its demise in the second century of its existence. Indeed,

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51. *Anderson v. Fisher Broadcasting Co.*, 300 Or. 452, 455, 712 P.2d 803, 807 (1986).

52. For a discussion of this tort, see generally RESTATEMENT (SECOND) OF TORTS § 46 (1965); W. PROSSER & W. KEETON, TORTS 55-66 (5th ed. 1984).

53. 323 N.C. 259, 372 S.E.2d 711 (1988).

54. *Hall v. Post*, 323 N.C. 259, 268, 372 S.E.2d 711, 717 (1988).

55. *Id.*

56. See Zimmerman, *supra* note 31, at 341.

57. The only other case which could be found even approaching them is *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955), in which the Nebraska Supreme Court rejected the entire idea of common-law invasion of privacy in the context of publicity of private embarrassing facts spread by a nonmedia defendant.

at least three justices of the United States Supreme Court think that such demise may have already occurred.

In *Florida Star v. B.J.F.*,<sup>58</sup> a rape victim reported the sexual assault and accompanying robbery to the local sheriff's department. The department prepared a report of the incident identifying the victim by name. The report was placed in the department's press room where the defendant newspaper's reporter trainee copied it verbatim. A reporter then prepared a short item for the paper's "Police Reports" section naming the sex offense victim in violation of the paper's own policy. The identification slipped past the responsible editor and found its way into print. The victim sued the publisher and the sheriff's department for negligently violating a Florida criminal statute making it a misdemeanor for anyone to publicize in any medium of mass communication the name or address or other identifying fact or information about sex offense victims. After a trial at which the publisher raised the first amendment as a defense, the court directed a verdict of liability for the plaintiff. The jury awarded the plaintiff substantial compensatory and punitive damages. The Florida District Court of Appeal affirmed the judgment in a short per curiam opinion virtually ignoring the first amendment issue. The Florida Supreme Court denied review.

On appeal the United States Supreme Court reversed, holding that where a newspaper publishes truthful information which it has lawfully obtained, criminal punishment or civil liability may be imposed only when narrowly tailored to further a state interest of the highest order. Here, the majority concluded that the Florida statute that the plaintiff relied on to establish the newspaper's negligence *per se* was not properly tailored to further such an interest for three reasons. First, the state itself through a state agency made the information available to the media, thereby suggesting that less constitutionally intrusive means were available to prevent the publicity. Second, the statute permitted automatic tort liability for its violation on a negligence *per se* theory, stripping away the need in a purely common-law privacy action to establish that the disclosure was highly offensive to a reasonable person and that it was accompanied by some kind of scienter. Finally, the statute was underinclusive in permitting criminal punishment or civil liability for the dissemination of a rape victim's identity only through an "instrument of mass communication," thereby permitting such dissemination by neighborhood gossips.

In a dissent joined by Chief Justice Rehnquist and Justice O'Connor,<sup>59</sup> Justice White repeated the idea first expressed by Warren and Brandeis that some private facts should be protected from disclosure by the media, and indicated that the identification of a rape victim was the quintessential private fact. "If the First Amendment prohibits wholly private persons (such as B. J. F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any 'private facts' which persons may

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58. 109 S. Ct. 2603 (1989).

59. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2614 (1989).

assume will not be published in the newspapers, or broadcast on television.”<sup>60</sup> Justice White, perhaps more in sorrow than in anger, plainly stated his belief that the decision in *Florida Star* destroyed the publicity of private facts tort. “By holding that only ‘a state’s interest of the highest order’ permits the state to penalize the publication of truthful information, and by holding that protecting a rape victim’s right to privacy is not among those state interests of the highest order, the court accepts appellant’s invitation . . . to obliterate one of the most note-worthy legal inventions of the 20th-century: the tort of publication of private facts. . . .”<sup>61</sup>

While I rarely agree with anything Justice White has to say on first amendment issues, I do hope that he is correct in his assessment of the status of the private facts tort. It was conceived in irrational anger and should die with few besides White, Rehnquist, and O’Connor mourning its passing. It is content-based regulation requiring a relatively low level of evidence from plaintiffs to establish a prima facie case. This low level of proof in turn gives rise to substantial litigation costs for the media that must of necessity chill truthful communication.

The news and information media have been saddled with this nuisance of a communicative tort for too long. Hopefully the media will not be so burdened in the coming century.

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60. *Id.* at 2618.

61. *Id.*

