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INTERFERENCE WITH PRIVACY—IN WHAT FORMS MIGHT IT BE ACTIONABLE IN VIRGINIA

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Much has been written about the right of privacy since the 1890 law review article by Samuel Warren and Louis Brandeis which first proposed that such a right be recognized.¹ In the ensuing years the tort of invasion of privacy, which is, in reality, an amalgam of four separate torts,² has been widely accepted. In spite of the burgeoning recognition of various rights assembled under the rubric of right to privacy, the Supreme Court of Virginia has never decided whether private citizens are entitled to protection of their personal privacy against invasions by other private citizens. It is the intent of this article to discuss the status of the common law tort of invasion of privacy in Virginia and to consider whether the tort, if it exists in any embryonic stage, would or should be legitimized. Because of the proliferation of articles and cases discussing various facets of the right of privacy, this article is of limited scope. It makes no attempt to discuss in detail whether particular factual situations should or should not fall within the purview of such a right, to catalogue, review or discuss the right of privacy as developed in other jurisdictions, or to deal with constitutional limitations on governments which grant or ensure a limited right of privacy. Neither does the article discuss the first amendment ramifications necessarily raised by certain branches of the tort of invasion of privacy involving publication of private facts, unauthorized appropriation of one's name or likeness or portrayal of an individual in a false light.

With those disclaimers stated, the following two examples should help to focus the discussion. A well-known public figure is about to

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1. Warren and Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren and Brandeis].

2. See, e.g., PROSSER, *THE LAW OF TORTS* § 117 (4th ed. 1971) [hereinafter cited as PROSSER, *TORTS*]; RESTATEMENT (SECOND) OF TORTS §§ 652A - 652I (1977); Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) [hereinafter cited as Prosser, *Privacy*].

publish a book reporting scientific findings which could discourage purchases from a leading manufacturer.³ In an effort to avoid the negative impact on the marketability of its products, the manufacturer undertakes a campaign to discredit the public figure prior to the release of his book. Among the tactics employed by the manufacturer are wiretapping, intimate telephone conversations, and inquiries about the public figure's sexual proclivities directed to his close friends.

Or, consider the case of a socially prominent woman hounded by a photographer who follows the woman and her family everywhere.⁴ Although he never physically threatens the woman, the photographer embarrasses her constantly by taking her photograph in awkward situations. The photographs may be displayed privately by the photographer or may be used commercially.

Both the public figure and the woman have undergone unwanted intrusions into their private lives and have probably suffered injuries to their feelings. Would either or both be able to recover against their tormentor in a Virginia lawsuit?

I. EVOLUTION OF THE NEW YORK APPROACH

In 1977, the United States District Court for the Western District of Virginia held that the common law tort of invasion of privacy did not exist in Virginia. In *Evans v. Sturghill*,⁵ the court considered the case of a plaintiff who was arrested and charged with theft at the behest of the defendant. The plaintiff was ultimately acquitted of all criminal charges but not before he spent days in jail and was allegedly discredited throughout his profession. Invasion of privacy was among the causes of action for which plaintiff sought to recover. As stated in the complaint, ["Defendant's conduct was] calculated to, and did, place the plaintiff in a false light in the public eye, portraying him as a thief and a fugitive from justice, and injuring him in his business and personal life by invading his privacy."⁶

3. See *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

4. See *Galella v. Onassis*, 353 F.Supp. 196 (S.D.N.Y. 1972), *aff'd*, 487 F.2d 986 (2d Cir. 1973).

5. 430 F.Supp. 1209 (W.D.Va. 1977).

6. *Id.* at 1212.

Granting summary judgment in favor of the defendant, the court noted that Virginia had adopted a statute prohibiting the unauthorized commercial appropriation of one's name or likeness⁷ and that the statute closely paralleled one enacted earlier in New York.⁸ Thus, the court looked to New York case law for guidance and concluded that "[t]he courts of New York have consistently held that no general right of privacy exists in the law of New York except for the right conferred by statute."⁹ Electing to follow New York precedent, the court reasoned that Virginia, too, would recognize no right of privacy beyond the statutorily enacted right against unauthorized commercial appropriation.

Since the federal court in *Evans* found no Virginia precedent on which to base its decision, it relied "on the conclusions of other federal courts, state courts, and commentators"¹⁰ to determine whether the Virginia General Assembly, through Title 8.01, section 40 of the Virginia Code,¹¹ intended to preclude a common law right of privacy. The authorities considered in *Evans*, however, were limited to those discussing the New York statutes on which the Virginia statute was apparently modeled.¹² Nevertheless, because of the sim-

7. VA. CODE ANN. § 8.01-40 (Repl. Vol. 1977), formerly VA. CODE ANN. § 8-650 (1950).

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

9. 430 F.Supp. at 1212.

10. 430 F.Supp. at 1213.

11. Formerly VA. CODE ANN. § 8-650 (Repl. Vol. 1957).

12. The New York Civil Rights statutes read as follows:

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

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976).

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so

ilarity of the statutes, the Supreme Court of Virginia would likely employ an identical approach although its analysis could dictate different results. Thus, the law of New York provides an appropriate starting point for study of the right to privacy in Virginia.

Following the then-novel Warren and Brandeis article, the Court of Appeals of New York became the first state tribunal of last resort with the opportunity to recognize the newly expounded common law right of privacy.¹³ The invitation to adopt the Warren-Brandeis reasoning was rejected in the 1902 case of *Roberson v. Rochester Folding Box Co.*¹⁴ That case arose when a milling company engaged a printing firm to make and circulate 24,000 advertising prints. The advertising contained an unauthorized photograph of the plaintiff, a young lady unconnected with either defendant.

The complaint, seeking injunctive relief and damages, was premised entirely on the breach of the plaintiff's right to privacy. In its careful analysis of the question, the court first noted the lack of precedent for a common law right of privacy, looking to "Blackstone, Kent, or any other of the great commentators upon the

construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic production which he has sold or disposed of with such name, portrait or picture used in connection therewith.

N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976).

The Virginia statute states:

A. Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

B. No action shall be commenced under this section more than twenty years after the death of such person.

VA. CODE ANN. § 8.01-40 (Repl. Vol. 1977).

13. See Prosser, *Privacy*, *supra* note 3.

14. 171 N.Y. 538, 64 N.E. 442 (1902).

law"¹⁵ as well as judicial precedent in the twelve years since publication of the Warren-Brandeis article. Then the court reviewed several cases and decided that no precedent existed for legal protection of an individual's feelings as opposed to his purse or his property.¹⁶

However, in rejecting the analysis of Warren and Brandeis, the *Roberson* court appreciated the policy considerations attendant upon the birth of a new cause of action. But, the court balanced the necessity for protection of privacy against the undesirable judicial license necessarily resulting from expanded, and somewhat amorphous rights.¹⁷ Thus, while the court ostensibly understood the plaintiff's agitation as a result of the unauthorized appropriation of her likeness for advertising purposes, it minimized the seriousness of the resulting harm and implicitly ridiculed the plaintiff's sensitivity.¹⁸ Eschewing the opportunity to become embroiled in evaluation of subjective feelings and thoughts, the court justified its decision by stating that a contrary ruling would "necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness. . . ." ¹⁹

15. *Id.* at 539, 64 N.E. at 443.

16. The Warren-Brandeis article acknowledged that no case had explicitly recognized the right to privacy, but found that right protected in decisions based upon the protection of property rights. *E.g.*, *Prince Albert v. Strange*, 1 McN. & G 25, 2 DeGex & Sm. 652 (1849); *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888); *Gee v. Pritchard*, 2 Swinst. 402 (1818); *Duke of Queensbury v. Shebbeare*, 2 Eden 329 (1758). Yet the New York Court in *Roberson* refused to read between the lines of these cases and reached the same conclusion with respect to the following American decisions examined by it: *Corliss v. E. W. Walker Co.*, 57 F. 434 (D. Mass. 1893); *Atkinson v. Doherty*, 121 Mich. Rep. 372, 80 N.W. 285 (1899); *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895); *Murray v. Engraving Co.*, 8 Misc. 36, 28 N.Y.S. 271 (1894); *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (1893).

17. 171 N.Y. at 540, 64 N.E. at 444.

18. For example:

Indeed her grievance is that a good portrait of her, and therefore, one easily recognizable, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendant's impertinence in using her picture, without her consent, for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes. . . .

171 N.Y. at 539, 64 N.E. at 443.

19. The court opined that the task of recognizing such a new right and limiting its scope properly rested with the legislature. In the courts, unlike the legislature, principle and precedent, rather than conscience must resign. *Id.*

In response to *Roberson*, the New York legislature passed Civil Rights Law sections 50 and 51.²⁰ The statutes dealt solely with the situation presented in *Roberson*, unauthorized commercial appropriation of an individual's likeness or name. Whether the narrow confines of the statutes emanated from the legislature's desire to heed the court's advice and restrict the right of privacy to clearly defined, easily manageable areas, is difficult to say. However, an alternative reason for the limited statute may have been the legislature's belief that *Roberson* would have no precedential effect beyond its actual holding. In short, the lawmakers may have believed that in a different, perhaps more serious, situation the courts would recognize a common law right of privacy.²¹

Whatever the legislature's reasoning, *Roberson* and the subsequent enactment of Civil Rights Law sections 50 and 51 determined the law of privacy in New York for the next half century. Citing *Roberson* generally without embellishment, case after case summarily asserted that New York recognized no common law right of privacy.²² Almost all involved unauthorized commercial appropriation of the plaintiff's name or likeness and, thus, are true descendants of the *Roberson* ruling. It was upon this unbroken line of precedent that *Evans* was based.

Yet, as early as 1964 there were indications that *Roberson* might no longer be sacrosanct in all invasion of privacy situations in New York. When baseball giant Warren Spahn sued a publisher for publication of an unauthorized biography containing so many erroneous facts as to constitute fiction, the Supreme Court of New York County expounded at length about the right to privacy as defined

20. See e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940); *Birnbaum v. United States*, 436 F.Supp. 967 (E.D.N.Y. 1977); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959).

21. Of course, whatever may have been the motivating force behind the New York legislature in 1903, the statutes have never been significantly amended. Subsequent to the multiple holdings of the New York courts, discussed *infra*, based on *Roberson* and completely rejecting any common law right of privacy in New York, it can no longer be argued creditably that the legislature favors a right of privacy broader than that statutorily enacted.

22. E.g., *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959) (commercial appropriation); *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S.2d 779 (1947) (unauthorized publication of biography); *In re Hart's Estate*, 193 Misc. 884, 83 N.Y.S.2d 635 (1948); *Wilson v. Brown*, 73 N.Y.S.2d 587 (1947) (unauthorized use of name); *Rosenberg v. Lee's Carpet & Furniture Warehouse Outlet, Inc.*, 80 Misc.2d 479, 363 N.Y.S.2d 231 (1974) (commercial appropriation).

in four categories by Prosser.²³ Once the court found the "biography" to be fiction instead of fact and resolved the first amendment arguments, the case was reduced to a common, unauthorized commercial appropriation well within the New York Civil Rights Law. Yet the trial court found that the defendant "(1) intruded upon the plaintiff's solitude and into his private affairs, (2) disclosed embarrassing 'facts' about the plaintiff, (3) placed the plaintiff in a false light in the public eye, and (4) appropriated, for defendants' advantage, the plaintiff's name and likeness."²⁴ Not satisfied to rest on the statute's express application, the court attempted to include within its coverage all aspects of the tort of invasion of privacy. It is significant that the Court of Appeals, in affirming the judgment, did not repudiate this dictum.

Several years later, in *Nader v. General Motors Corporation*,²⁵ the New York Court of Appeals again kindled anticipation that it was ready to abandon its indiscriminate adherence to *Roberson*. Nader alleged that General Motors had undertaken a campaign to discredit him in advance of the publication of his book *Unsafe at Any Speed*. Among Nader's complaints were that General Motors had interviewed his acquaintances in such a manner as to cast aspersions on his character, kept him under surveillance, wiretapped his phones, harassed him with threatening and obnoxious phone calls, and caused him to be accosted by girls in order to entrap him in illicit relationships.²⁶ Confronted with more than an unauthorized commercial appropriation, the Court of Appeals indicated its disapproval of some of General Motors' activity and its approbation of a right to recover in damages. Key to the case, however, is the fact that the court applied the law of the District of Columbia which had at that time adopted a right of privacy.²⁷ Although the Court of Appeals could have concluded with its decision that the District of Columbia recognized a right of privacy in general, it seized the opportunity to examine closely the activities of which Nader com-

23. Spahn v. Julien Messner, Inc., 43 Misc.2d 219, 250 N.Y.S.2d 529, 543 (1964), *aff'd*, 18 N.Y.2d 324, 274 N.Y.W.2d 877, 221 N.E.2d 543 (1966).

24. 250 N.Y.S.2d at 543. See PROSSER, TORTS, *supra* note 2, at § 117.

25. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

26. *Id.* at 562, 255 N.E.2d at 767, 307 N.Y.S.2d at 650 (1970).

27. See, e.g., Pearson v. Dodd, 133 U.S. App. D.C. 279, 410 F.2d 701 (1969); Peay v. Curtis Publishing Co., 78 F.Supp. 305 (D.C. Cir. 1948).

plained and to analyze each.²⁸ Thus, while there was no analytical need to do so, the court dwelled at length on which facts might fall within the tort of invasion of privacy.²⁹

Discerning dynamic rumblings in New York's law of privacy rights, two years later the United States District Court for the Southern District of New York held that the New York courts would abandon *Roberson*.³⁰ In the celebrated litigation between photographer Ron Galella and ex-First Lady Jacqueline Onassis, the court was confronted with multiple intrusions into the private lives of Mrs. Onassis and her children.³¹ The court's conclusion that New York was ready to embrace the tort of invasion of privacy was based on several factors, not the least of which were facts demanding relief. Summarizing its resolve to stop Galella's conduct, the court said, "Galella has insinuated himself into the very fabric of Mrs. Onassis' life and the challenge of this Court is to get him out."³²

Thus appreciating the interest requiring protection, the court analyzed *Roberson* in light of the common law right of privacy which had subsequently evolved in other jurisdictions. Finding that *Roberson* dealt only with one of the four prongs of the right of privacy described by Prosser³³ and the *Restatement (Second) of Torts*,³⁴ unauthorized commercial appropriation, the court concluded that *Roberson* "does not support the conclusion that invasion of privacy is not actionable under New York law."³⁵ Even if

28. Judge Breitel, in a concurring opinion, chastised the majority for engaging in unwarranted speculation as to what facts would fall within the District of Columbia's right of privacy. 25 N.Y.2d at 569, 255 N.E.2d at 771, 307 N.Y.S.2d at 657 (1970).

29. [T]he extensive analysis of the various facts alleged in *Nader* . . . — an analysis wholly unnecessary to the disposition of that appeal — may well be taken as an effort by the Court of Appeals to "provide a foundation for the acceptance of invasion of privacy by intrusion in New York." Note, 36 Bklyn. L. Rev. 507, 508 (1970).

Galella v. Onassis, 353 F.Supp. 196, 229 (S.D.N.Y. 1972), *aff'd*, 487 F.2d 986 (2d Cir. 1973).
30. *Id.*

31. The photographer's seemingly endless stalking of his prey included, *inter alia*, unexpectedly jumping in front of John Kennedy in Central Park nearly causing a bicycle accident, harassing Caroline Kennedy while she was trying to take a tennis lesson in Central Park, photographing the family at a school play to which the public was not invited, and hiring a man to dress in a Santa Claus costume and to accost Mrs. Onassis in order to photograph her with Santa. 353 F. Supp. at 207-30.

32. *Id.* at 228.

33. PROSSER, TORTS, *supra* note 2, at § 117.

34. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

35. 353 F.Supp. at 229. *Roberson* involved the commercial appropriation of a likeness,

Roberson were construed to apply to intrusion, the district court opined that the New York courts would disavow that precedent.³⁶

Affirming the district court's opinion, the Second Circuit found even more compelling reasons for believing that New York would adopt the common law right of privacy.

There is substantive support today for the proposition that privacy is a "basic right" entitled to legal protection, . . . nor can the "power of the State to control and remedy such intrusion [even] for news gathering purposes . . . be denied." Privacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights. There is an emerging recognition of privacy as a distinct, constitutionally protected right.³⁷

Although the court acknowledged that protection of a person's general right to privacy is largely a matter of state law, the federal constitutional respect for privacy influenced it to ignore the failure of the New York Court of Appeals to recognize such a right independent of the New York Civil Rights Law.

Reasoning similar to that of *Galella* was again applied by a federal district court in *Birnbaum v. United States*³⁸ five years later. Three plaintiffs whose mail was opened illegally by the FBI and CIA sought compensation under the Federal Tort Claims Act. Like *Galella*, *Birnbaum* presented the court with a case of egregious intrusion into the solitude of the plaintiffs. After holding that the unauthorized opening of personal mail contravened *Restatement (Second) of Torts* section 652B, the court attempted to justify application of the principle in light of New York law. Seeking some way to distinguish *Roberson* other than the obvious difference between unauthorized commercial appropriation and intrusion, the district court pointed out:

which, Dean Prosser teaches has "almost nothing in common" with intrusion, the gravamen of the case at bar. *Id.*

36. The court premised its belief in *Nader* and a host of lower court decisions which at least implicitly recognized the right to privacy. The court also drew comfort from the fact that because of *Roberson's* age — seventy years at the time — the reasoning had been tacitly rejected by "most other jurisdictions" which protected the "freedom from extensive shadowing and observation." *Id.*

37. 487 F.2d 986, 995 n. 12 (2d Cir. 1973) (citations omitted).

38. 436 F.Supp. 967 (E.D.N.Y. 1977).

[The *Roberson*] court by a four to three decision rejected the right to privacy as a distinct and independent tort. It stated that "The so-called right of privacy has not as yet found an abiding place in our jurisprudence." The court was careful to note, however, that it was speaking of the developments up to that point—"the doctrine cannot now be incorporated"—and not predicting future development.³⁹

Referring to *Galella* and a New York penal statute prohibiting the unauthorized opening of private communications,⁴⁰ the district court found "the evidence . . . overwhelming that New York would recognize the common law right of privacy" and would compensate plaintiffs for the activity at issue.⁴¹

But, in spite of this pioneering by the federal judiciary, the New York Court of Appeals recently renewed its rejection of the common law right of privacy in *Wojtowicz v. Delacorte Press*.⁴² Affirming the trial court's dismissal for failure to satisfy the elements of New York Civil Rights Law sections 50 and 51, the Court of Appeals stated, "whatever may be the law in other jurisdictions with respect to the right to judicial relief for invasion of privacy in consequence of unreasonable publicity, in our State thus far there has been no recognition of such right other than under sections 50 and 51 of the Civil Rights Law."⁴³

Unfortunately, the *Wojtowicz* decision resolves little. The case concerned a movie based on a bank robbery committed by the plaintiff and presented either a classic unauthorized commercial appro-

39. *Id.* at 977 (citations omitted).

40. NEW YORK PENAL LAW § 250.25 (McKinney 1967).

41. 436 F.Supp. at 978. The court also stated that "lower courts in [New York] have continued to acknowledge *Roberson* while finding ways to avoid it and grant recovery." *Id.* at 977-78.

A recent example of such reasoning may be found in *Doe v. Roe*, 93 Misc.2d 201, 400 N.Y.S.2d 668 (1977), an action by a patient against a psychiatrist who published transcripts of his interview with the patient. The Supreme Court of New York County refused to find a cause of action arising out of a breach of the physician-patient relationship and acknowledged that the Civil Rights Law was not violated because the patient's name or picture had not been used. Further acknowledging that New York recognized no common law right of privacy, the court, nevertheless, found a right to privacy arising from the state's policy to insure the confidentiality of the physician-patient discourse.

42. 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978), *aff'g*, 58 A.D.2d 45, 395 N.Y.S.2d 205 (1977).

43. *Id.* at 130.

priation or a publication of private facts, both of which analytically are within the purview of *Roberson*⁴⁴ or the New York statutes. Arguably, the Court of Appeals intentionally restricted its holding by insertion of the words "in consequence of unreasonable publicity." Thus, cases of intrusion, for example, might not be included in the *Wojtowicz* reaffirmation of *Roberson* and its progeny.

II. THE COMMON LAW RIGHT TO PRIVACY

Before examining further the New York experience, it is instructive to consider briefly the common law right of privacy prevailing in most jurisdictions. Warren and Brandeis reviewed several English cases in which they found that the courts had protected a right of privacy while couching decisions in the language of property and contract rights. In order to avoid criticism that unrestrained judicial license was not a panacea for every societal ailment, Warren and Brandeis insisted that the right to privacy was not being ordained, but had existed for "a century and a half." Recognition, not adoption, was the action for which they called.⁴⁵

The right of privacy deduced by the authors from common law precedent did not, however, protect the individual from all invasions of privacy. Warren and Brandeis found only a right to be free from public dissemination of private information. Thus, the common law protected "the right of one who has remained a private individual, to prevent his public portraiture"⁴⁶ whether that portraiture be in photographic, written or oral form and regardless of the light in which the portraiture was portrayed. Yet, the authors saw no common law protection of the individual's right to seclusion.⁴⁷ Thus, the prying observer who does not take pictures, or the debt

44. See text accompanying notes 59-61 *infra*.

45. The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exists at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

Warren and Brandeis, *supra* note 1, at 213 n. 1.

46. *Id.* at 213.

47. See Prosser, *Privacy*, *supra* note 2, at 389, which states that Warren and Brandeis "do not appear to have had in mind any such thing as intrusion upon the plaintiff's seclusion or solitude."

collector who calls at three in the morning but does not publicize the debt, would not invade the right described in the famous article.

Not surprisingly, the various state courts have been unwilling to limit the protected privacy to the bounds outlined by Warren and Brandeis. As a result, many jurisdictions now recognize a right to seclusion as well as a right to keep private matters private. Indeed, the *Restatement (Second) of Torts* section 652A(2) recognizes four different, though potentially overlapping, actionable invasions of privacy:

- (2) The right of privacy is invaded by
 - (a) unreasonable intrusion upon the seclusion of another, as stated in section 652B; or
 - (b) appropriation of the other's name or likeness, as stated in section 652C; or
 - (c) unreasonable publicity given to the other's private life, as stated in section 652D; or
 - (d) publicity that unreasonably places the other in a false light before the public, as stated in section 652E.⁴⁸

In short, the right of privacy is "not one tort, but a complex of four" which should not be subject to an all-or-nothing analysis.⁴⁹

Unfortunately, as Prosser has observed, analytical problems surrounding the right of privacy often arise from the failure to recognize and deal separately with the four distinct torts.⁵⁰ That failure to treat invasions of privacy as four distinct torts is the reason for sweeping rejection of the right of privacy to date in New York. Indeed, cases such as *Birnbaum*⁵¹ and *Galella*⁵² in which the federal courts have portended New York's abandonment of the *Roberson* doctrine, have involved invasions of seclusion. On the other hand, New York's affirmation of *Roberson* in *Wojtowicz*⁵³ deals only with unauthorized commercial appropriation or publicity attendant to private matters.

48. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

49. Prosser, *Privacy*, *supra* note 2, at 389. *Contra* Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962 (1964).

50. Prosser, *Privacy*, *supra* note 2, at 389.

51. *Birnbaum v. United States*, 436 F.Supp. 967 (E.D.N.Y. 1977).

52. *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972).

53. 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 (1978).

What should be the decision in New York — and perhaps, in turn, in Virginia — when rights of privacy are next asserted? Without pretending at prescience, considerations beyond those previously articulated in New York courts are indicated and can be predicted. Those considerations should distinguish the different causes of action defined in the *Restatement* and evaluate each on its merits, taking into account what precedent is truly applicable and what policy arguments are currently persuasive.

For example, the right of seclusion described by *Restatement (Second) of Torts* section 652B⁵⁴ may give a cause of action when trespass, nuisance and the intentional infliction of emotional distress are for some reason inadequate.⁵⁵ This invasion of privacy is, perhaps, the most difficult with which to deal, for the mental distress or indignity suffered may be acute, but appear insignificant because no publication or public invasion of an individual's privacy is involved or because the indignity did not result in observable emotional harm.

Yet, in today's world of pervasive electronics and sophisticated communications systems, an individual's private sanctum becomes increasingly difficult to maintain. The right to be let alone is subject to assault by ingenious means and seems more in need of protection in this environment⁵⁶ than in the less hectic era of Warren and Brandeis eighty-eight years ago. Thus, the repeated rebuff by the New York courts of a common law right of privacy may be premised on anachronistic authority and reasoning. And, should New York today choose to reexamine the policy considerations underlying an intrusion case, adoption of this particular tort might be warranted on the basis of societal changes over three quarters of a century. That result would not overrule or modify *Roberson*. On the other hand, New York may elect not to join the majority of jurisdictions,

54. RESTATEMENT (SECOND) OF TORTS § 652B states, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

55. Prosser, *Privacy*, *supra* note 2, at 392.

56. The original RESTATEMENT OF TORTS § 867 dealing with privacy read: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." Comment (b) thereto noted that "[T]his interest appears only in a comparatively highly developed state or society."

but rather to treat *Roberson* as a comprehensive and currently applicable rejection of the tort. The point is that consideration of whether such a common law right exists in New York cannot be made on the strength of present jurisprudence there.

The remaining three branches of the right of privacy are more closely related. Each involves some publication affecting an individual's private life. Section 652C⁵⁷ describes as tortious conduct the unauthorized appropriation of one's name or likeness. In *Roberson* the court held there was no such cause of action. Thus, the New York Civil Rights Law, prohibiting only unauthorized commercial appropriation and enacted in response to *Roberson*, may properly be read as a limitation on the right. As to this particular tort, New York precedent is sound and no analytical reason for departure from the rule obtaining can be advanced.

Section 652D⁵⁸ addresses publicity given to private life and makes actionable publication of private matters not of legitimate public concern where such publication would be highly offensive to a reasonable person. It was to this branch of the tort that Warren and Brandeis spoke expressly.⁵⁹ Since this section relates most closely to the Warren and Brandeis piece, the New York courts might justifiably reject its inclusion in the common law of New York on the basis of *Roberson*. Although *Roberson* was an unauthorized appropriation case, it considered at length the article and rejected its findings. At that time the New York legislature knew that the judiciary would not agree to the ideas expressed in the article. Yet the legislative response was not the enactment of a statute as broad as the Warren and Brandeis article. Instead, the much narrower sections 50 and 51 of the New York Civil Rights Law were passed.

Section 652E⁶⁰ speaks to a publication that places a person in a

57. RESTATEMENT (SECOND) OF TORTS § 652C states that: "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

58. RESTATEMENT (SECOND) OF TORTS § 652D states: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."

59. Prosser suggests the authors' motivation arose from the annoying press coverage accorded the social life of Mr. Warren, a prominent Boston figure. Prosser, *Privacy*, *supra* note 2, at 383.

60. RESTATEMENT (SECOND) OF TORTS § 652E states:

false light. In order to be actionable, the light into which the victim is cast must be highly offensive to a reasonable person and the publisher must have acted recklessly or with knowledge of the falsity. In the pure sense, the tort is not one necessarily involving a right of privacy but, instead, more frequently amounts to defamation or overlaps commercial misappropriation of a person's name or likeness. Indeed, in *Roberson* the plaintiff was cast in a false light and that similarity may cause the courts of New York to apply the rationale of *Roberson*, ignoring the distinction between the two torts, with the same result.

In summary, analysis of the privacy right in New York, using the *Restatement* framework, leads to the view that only the tort of intrusion might be recognized there absent a decision completely to abandon the entrenched *Roberson* line of precedent.

III. THE PRECEDENTIAL VALUE OF NEW YORK LAW ON PRIVACY

Should the New York law of privacy, which has not reached its apogee, be considered precedent in the development of a Virginia right to privacy? In addition to *Evans v. Sturgill*⁶¹ one other federal court decision has purportedly construed the Virginia law of privacy. In *Bernstein v. National Broadcasting Co.*,⁶² the District Court for the District of Columbia dealt with the claim of an individual who had twenty years previously been accused and acquitted of bank robbery. The plaintiff's life was the subject of a television program focusing on a newspaper reporter who played a major role in proving the plaintiff's innocence. At the time of the broadcast the plaintiff was living a normal life, with no apparent connection with his past, in a relatively small Virginia community. The suit was based solely on the alleged invasion of privacy, the theory being that the lapse of twenty years should afford an individual some protec-

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

61. 430 F.Supp. 1209 (W.D.Va. 1977).

62. 129 F.Supp. 817 (D.D.C. 1955).

tion against the distress caused by publicizing his past.⁶³ Construing Virginia law in accord with that of New York, and not mentioning the common law right of privacy, the *Bernstein* court held the Virginia statute⁶⁴ afforded no right to relief.

Evans relied in part on *Bernstein*.⁶⁵ Importantly, the only New York cases which the *Evans* opinion discussed were *In re Hart's Estate*⁶⁶ and *Wilson v. Brown*.⁶⁷ The former was a pure and simple unauthorized appropriation case in which the New York court in dictum stated that New York recognized no common law right of privacy.⁶⁸ The *Wilson* case involved the use by a local fraternal organization of the name of the chief officer of its national parent organization with which the local was in a dispute. Significantly, the cause of action alleged was that afforded by the statute. No common law right was considered.

From the preceding review of the New York precedent and of the two federal cases purportedly applying Virginia law, one thing is clear: the New York line of precedent as considered in *Bernstein* and *Evans* should not provide the foundation for a decision as to whether Virginia should recognize any form of a common law right to privacy. In addition to the fact that New York cases have largely dealt with invasions of privacy stemming from some form of publication, the reasoning followed in *Evans* and *Bernstein*, especially the former, is faulty in its failure to consider anything more recent than the 1948 decision of *Hart's Estate*. As seen from the earlier discussion, the potential transition in the New York approach has only become apparent since 1964.⁶⁹

63. Compare *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), where a former child academic prodigy who rejected his accomplishments and retired to a reclusive life as a clerk was held to have no right of action for an article about his past and present life published in a magazine's "Where Are They Now?" column.

64. VA. CODE ANN. § 8-650 (1950), recodified as § 8.01-40 (Repl. Vol. 1977).

65. 430 F.Supp. at 1213.

66. 193 Misc. 884, 83 N.Y.S.2d 635 (1948).

67. 189 Misc. 79, 73 N.Y.S.2d 587 (1947).

68. The issue considered in *Hart's Estate* concerned the ramifications of the purchase of the rights to make a movie about a deceased composer's life. Since the New York Civil Rights Law provided no survival right, the court held that the agreement by the composer's estate could not have been valued in terms of a waiver of the invasion of privacy.

69. See, text accompanying notes 46-61, *supra*. A search of reported New York decisions using the LEXIS system revealed that between January, 1976 and June, 1978, alone, there were seventy-three cases using the phrase "right to privacy", "right of privacy", or "invasion

Nevertheless, consideration of the right to privacy in Virginia need not begin in a legal vacuum. Although the Supreme Court of Virginia has not confronted the issue directly, an evolving line of precedent affords some clue as to how the court might rule. Reliance on that precedent for guidance is bottomed on this threshold premise: the gravamen of invasion of privacy is injury to feelings, in short, mental distress not arising out of physical injury. Hence, analysis of the right to privacy should begin with review of Virginia's attitude towards recovery for mental distress. The task is made easy by a discernable line of decisions, culminating in the 1974 decision, *Womack v. Eldridge*.⁷⁰

One of the earlier cases dealing with mental anguish was *Awtrey v. Norfolk & Western Railway Company*.⁷¹ There a mother sued the railroad for failing to notify her of the death of her son, killed in an accident, and for allowing the coroner to bury the boy even though the body carried papers identifying the deceased and his next of kin. Although the court noted the common law right of near relatives of the deceased to the solace of burying the body, it absolved the railroad of any wrongful act. The court stated:

The plaintiff's real grievance is her mental anguish because of the tragic death of her son and the heartrending and deplorable circumstances of his burial in Virginia; but under well-settled principles, she cannot recover for this, because there can be no recovery for mental anguish which is unaccompanied by actionable physical or pecuniary damage caused by the wrongful act of another.⁷²

This doctrine was explained and expanded somewhat in *Bowles v. May*,⁷³ where it was dispositive that negligently caused mental distress, unaccompanied by contemporaneous physical injury from without, posed too difficult a problem of proof of harm and would lead to an endless flood of litigation.⁷⁴ If, the court observed, recov-

of privacy". While some of these cases involve criminal matters, particularly search and seizure issues, a large number considered the tort discussed in this article.

70. 215 Va. 338, 210 S.E.2d 145 (1974).

71. 121 Va. 284, 93 S.E. 570 (1917).

72. *Id.* at 289, 93 S.E. at 572.

73. 159 Va. 419, 166 S.E. 550 (1932).

74. The difficulty in proof to which the court referred must have been the difficulty in proving that the mental injury in fact occurred. Otherwise, the dichotomy established in

ery were permitted for injuries to "feelings caused by someone else, the chief business of mankind might be fighting each other in the courts."⁷⁵

The court prophetically recognized, however, that if the wrong committed was "wilful, wanton and vindictive" recovery might be had for mere mental injury if proven by clear and convincing evidence.⁷⁶

The next expansive step of the Supreme Court of Virginia was taken in 1967 with the decision in *Moore v. Jefferson Hospital, Inc.*⁷⁷ There litigation was instituted by a patient who had been prepared for surgery only to have a hospital employee wilfully and maliciously refuse to allow the surgeon into the operating room. As a result, the patient allegedly suffered shock and severe emotional distress ultimately manifested in physical pains. In its decision in favor of the patient, the Supreme Court of Virginia adopted the cause of action articulated in *Restatement (Second) of Torts* section 312⁷⁸:

If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause,

- (a) although the actor has no intention of inflicting such harm, and
- (b) irrespective of whether the act is directed against the other or a third person.

Bowles v. May between negligence and intentional torts makes little sense. Once the fact of injury is established, determining the extent of the injury will be just as difficult regardless of the source of the injury. In fact, establishing the existence of mental distress is only more certain in the case of an intentional tort because triers of fact are generally willing to presume that certain unacceptable behavior will lead to emotional upset. The validity of this dichotomy, if premised on the presumption just discussed, is open to question. For example, compare the emotional distress of a person who is assaulted, but not battered, with the upset suffered by the person who, while sitting on his front porch, sees an automobile negligently go out of control and head speedily for the person's house. A more probable reason for the distinction is the fear of a flood of litigation. A line must be drawn somewhere and, by definition, a willful or vindictive act is more reprehensible and deserving of judicial attention than a merely negligent one.

75. 159 Va. at 433, 166 S.E. at 555.

76. *Id.* at 438, 166 S.E. at 557.

77. 208 Va. 438, 158 S.E.2d 124 (1967).

78. *Id.* at 442, 158 S.E.2d at 127.

With *Jefferson Hospital*, Virginia thus recognized the right to be free from intentional or reckless behavior causing unreasonable emotional distress so long as the difficulty of proving mental distress was overcome by proof of a resulting physical injury. Two safeguards existed. One, only intentional or reckless behavior, both easily recognizable, would suffice. Two, emotional injury alone was not enough.

Then, in *Hughes v. Moore*,⁷⁹ the Supreme Court considered how to deal with emotional distress caused by negligent behavior. Analytically, the question was whether the court was ready to abandon the safeguard of intentional or reckless behavior established by *Jefferson Hospital*. In *Hughes* a mother watched as an automobile driver lost control and his vehicle smashed into her porch. Frozen with fear, the mother suffered no physical injury "from without," but experienced trauma. Her emotional upset manifested itself in an inability to breast feed her three-month old baby and premature recommencing of her menstrual period.

Conceding that *Bowles v. May* was subject to several interpretations, the *Hughes* decision analyzed at length the so-called no-impact rule. It observed that the leading no-impact case⁸⁰ had in 1961 been overruled by the New York Court of Appeals.⁸¹ The Virginia court posited, then repudiated, three arguments against allowing recovery in a negligence case for mental distress without impact: (1) the difficulty in proving causation between the claimed damages and the alleged fright; (2) the fear of fraudulent or exaggerated claims; and (3) the fear that the absence of such a rule would precipitate a flood of litigation. In clarification the court stated:

We adhere to the view that where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone. We hold, however, that where the claim is for emotional disturbance *and* physical injury resulting therefrom, there may be recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or shock

79. 214 Va. 27, 197 S.E.2d 214 (1973).

80. *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896).

81. *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

proximately caused by the defendant's negligence. In other words, there may be recovery in such a case if, but only if, there is shown a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury.⁸²

Jefferson Hospital was thus expanded to include negligent, as well as intentional or reckless, behavior. Of the safeguards earlier deemed necessary, only one remained, viz., the emotional distress must be physically manifest.

One year after *Hughes v. Moore*, the Supreme Court of Virginia decided *Womack v. Eldridge*.⁸³ There plaintiff's picture had been deceitfully obtained and subsequently shown in court to an infant victim of molestation. Although the defendant knew the plaintiff could not have been the molester, the photograph was exhibited with the implicit suggestion that the plaintiff had participated in the sordid crime. *Womack* adopted a rule converse to *Hughes*. The latter dispensed with the safeguard of intentional or reckless behavior if physical injury arose from the mental distress. The former eliminated the need for physical manifestation of the injury so long as the conduct was intentional or reckless.

We adopt the view that a cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.⁸⁴

In short, where injury is primarily emotional, recovery is no longer inflexibly denied in Virginia. If negligent conduct results in emo-

82. 214 Va. at 34, 197 S.E.2d at 219.

83. 215 Va. 338, 210 S.E.2d 145 (1974).

84. *Id.* at 342, 210 S.E.2d at 148.

tional distress manifested in physical injury, relief is available. Intentional or reckless conduct causing emotional injury may impose liability without the necessity of an accompanying physical problem. Hence, while the law has not recognized the right to relief for mere hurt feelings, it has surpassed the idea embraced by *Roberson* that it "has no concern with the feelings of an individual, or with considerations of moral fitness, except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property."⁸⁵ It is upon this foundation that the common law right to relief for an invasion of privacy in Virginia may be examined in each of its four parts.

A. *False Light*

Womack was essentially a false light case and, therefore, serves as a convenient beginning point for analysis of the common law and prediction of its future in Virginia. The plaintiff's complaint was that the showing of his photograph in connection with a child molestation investigation, while not expressly accusatory, created the public impression that he had some connection with the molesting incident.

Under both the *Restatement* and *Womack*, the conduct at issue must be intentional or reckless, although the focus of the requisite intent differs slightly. The *Womack* test requires intent to cause emotional distress or a reckless disregard of the fact that the conduct would lead to emotional distress. On the other hand, section 652E requires knowledge or reckless disregard of the "falsity of the publicized matter."⁸⁶ According to the *Restatement* section 652E requirement, if an actor knows he is portraying someone in a false light he should know he is likely to inflict emotional distress. While there might be instances in which the actor would deem the false light insignificant, and thus not expect emotional distress to follow, such instances will be eliminated by both the *Womack* and section 652E requirement of offensiveness or outrageousness.

The second *Womack* requirement is also satisfied in a slightly different form by section 652E(a). While *Womack* calls for conduct which is "outrageous and intolerable in that it offends against the

85. 171 N.Y. at 539, 64 N.E. at 444.

86. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

generally accepted standards of decency and morality,"⁸⁷ Comment c of section 652E emphasizes that minor errors will not satisfy its "highly offensive" test and that "[i]t is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy."⁸⁸ In this context "highly offensive" and "outrageous and intolerable" address the same kind of conduct and though the semantics differ, the purpose should be the same. That is, both phrases should be construed as limitations on the circumstances giving rise to claims for "hurt feelings".

The last two requirements of *Womack* likewise do not conflict with the false light tort. First, causation is an element of every tort and is expressly required by section 652H of the *Restatement*.⁸⁹ Second, even though the invasion of privacy tort does not specifically incorporate the fourth element of *Womack*, severe emotional distress, the addition of this limitation would merely eliminate false light cases involving only indignity or minor emotional upset.⁹⁰

With this limitation, any false light case can now be maintained under the *Womack* doctrine. All that remains is for the Supreme Court of Virginia to utter the words "invasion of privacy."⁹¹

B. *Unauthorized Appropriation*

Judicial treatment of the tort of unauthorized appropriation similarly may be predicted in light of existing Virginia law. Section

87. 215 Va. at 342, 210 S.E.2d at 148.

88. RESTATEMENT (SECOND) OF TORTS § 652E, Comment c (1977).

89. RESTATEMENT (SECOND) OF TORTS § 652H states as follows:

One who has established a cause of action for invasion of his privacy is entitled to recover damages for

- (a) the harm to his interest in privacy resulting from the invasion;
- (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
- (c) special damage of which the invasion is a legal cause.

90. Often the extreme offensive or outrageous nature of the conduct will imply the existence of severe emotional distress since emotional upset is difficult to prove. See RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

91. It is possible, however, that for this very reason the Supreme Court of Virginia will refuse expressly to recognize this facet of the privacy tort. There may be a fear that recognition of one type of invasion of privacy will open the door to all four by lower courts who will not engage in the necessary analytical segregation of the different types of invasion of privacy.

652C, which defines this aspect of the invasion of privacy tort, corresponds closely to Va. Code Ann. section 8.01-40, the statute which proscribes unauthorized commercial appropriation of a name or picture of any person. Since the Virginia statute is modeled on the New York Civil Rights Law sections 50 and 51, the New York precedent applying that statute to the exclusion of the common law right should be followed. The Virginia General Assembly's decision not to include non-commercial unauthorized appropriation is clearly reflected in the express limitation "for advertising purposes or for the purposes of trade,"⁹² the only substantive difference between the statute and the common law right.

C. *Publicity of Private Matters*

The cause of action described in section 652D under the general heading of "Publicity Given to Private Life" presents greater difficulty both analytically and as a matter of policy. This tort imposes liability for giving publicity to a matter concerning the private life of another where the matter publicized would be highly offensive to a reasonable person and is not a matter of legitimate public concern. Immediately apparent are potential first amendment problems and definitional problems surrounding the terms "private life" and "not of legitimate concern to the public." Less apparent, but perhaps more formidable, are policy considerations which might lead to the rejection of this tort.

Of the factors favoring adoption, the most persuasive is its close relationship to the cause of action provided by *Womack*. As with the false light tort, section 652D arguably requires outrageous conduct in the publicizing of "highly offensive" material. Although the Restatement provision does not expressly require intentional or reckless conduct designed or destined to inflict emotional distress, publication of private matters highly offensive and not of legitimate public concern, must be an intentional act. And if the material publicized is of no public concern and is offensive, the actor must, or should, know of the mental anguish likely to result from the publicity. For reasons stated earlier, the causation and severity of harm elements described by *Womack* do not conflict with this tort. Therefore, analytically, actions constituting the tortious publicizing

92. VA. CODE ANN. § 8.01-40 (Repl. Vol. 1977).

of another's private life could be brought now under the *Womack* rule in many, if not most, instances.

Problems abound however. Perhaps foremost is the potential conflict between this tort and the first amendment. This article makes no attempt to analyze the conflict, yet the problem is significant because the first amendment area is a hotbed of judicial activity. At least one "private facts" case has reached the United States Supreme Court. In *Cox Broadcasting Corp. v. Cohn*,⁹³ however, the Court left open the question of the constitutionality of such a tort because the allegedly private facts were a matter of public record. Certainly the spectre of the tort would chill the publication of many facts for lack of a precise test of whether the facts are private or are of legitimate public concern.

The notion of liability for publicity of private matters also may not be legally viable because of limitations imposed through the years in defamation actions. Indeed, an appealing argument can be made that the publicity of private true facts, if true, should never constitute the intolerable or outrageous behavior required by *Womack*. That is, truth has traditionally been a defense to actions involving injury to reputation and abrogation of the defense would certainly be considered a radical departure from historic notions that one may make use of the truth with impunity.

Finally, it must be remembered that the Virginia General Assembly may have rejected the tort by its passage of the unauthorized commercial appropriation statute. That is, the Virginia lawmakers may have intended their statute to have the same effect as the New York statute on which it was modeled. As was noted earlier, a strong argument can be advanced that the New York legislature declined to embrace this tort by passing its limited Civil Rights Law.

D. *Intrusion*

The right to seclusion, or freedom from intrusion, is the portion of the privacy tort most foreign to the Warren and Brandeis article and to the Virginia statute since it has nothing to do with publicity or publication. Nevertheless, man's vulnerability to sophisticated

93. 420 U.S. 469 (1975).

means of intrusion into private matters might cause this aspect of the right to privacy to be of more concern than others.

Again, this tort is not inconsistent with the *Womack* dictates. Section 652B requires an intentional intrusion and is, therefore, stricter than *Womack* which also embraces reckless behavior. Since the tort is limited to intrusion in a highly offensive manner, frivolous litigation should be eliminated, thus effecting the purpose of the "outrageous and intolerable" requirement. Third, causation must be proved to collect damages. And fourth, the severity requirement can easily be engrafted on the section 652B test.

Moreover, there is a greater void in the established law concerned with the interest of seclusion. The torts of assault and trespass offer limited protection, but only in special circumstances. It is easy to imagine flagrant breaches of privacy not involving fear or apprehension of physical injury of the invasion of some property interest. The *Galella* and *Nader* cases, which prompted the federal courts' view that New York imminently will abandon *Roberson's* hard-line position, presented gross invasions of the right to be let alone. Perhaps the constant harrassment of Jacqueline Onassis by her photographer nemesis could be considered an assault, although in many instances she was in neither physical danger nor fear of harm. Yet such an interpretation of the law of assault would require expansion of its standards to include mental injury rather than the apprehension of physical injury. And since assault does not require outrageous conduct, application of its rules in a privacy case would deprive the legal system of one of the safeguards against trivial or insubstantial litigation.

However, in spite of the need for protection, privacy is an ineffable notion, indeed a fluid concept, involving constantly changing sensitivities. The subjective aspect inherent in most privacy questions may, as a matter of policy, militate against embracing this tort.

IV. SHOULD VIRGINIA RECOGNIZE THE COMMON LAW RIGHT TO PRIVACY?

Having concluded that at least certain of the rights to privacy would not conflict with, or may be currently actionable under Virginia law, the more difficult inquiry becomes whether the Supreme

Court of Virginia should expressly recognize the common law right to privacy in all or any of its four forms. From the analytical, the article now turns to the philosophical.

One obvious point of view is that if Virginia precedent, culminating in the *Womack* decision, affords relief for some invasions of privacy, there is no need to clutter the law by expressly recognizing the tort or any of its parts. Explicit recognition will likely lead to a proliferation of litigation as "right to privacy" becomes a new rallying cry for the plaintiffs' bar.

That view should not, however, overlook the fact that *Womack* provides relief only where severe emotional distress occurs, a situation of greater limitation than the *Restatement* tort simply because some invasions cause indignity but not serious emotional distress. That is, the *Restatement* tort and the *Womack* rule emphasize different issues. *Womack* focuses on the nature of the injury, while the *Restatement* tort focuses on the interest invaded. Thus, the stable person who suffers no emotional injury, but instead considerable indignity and outrage, when his privacy is invaded, would have no right of action under *Womack*.

The opposite view is, of course, that privacy is of such legitimate value as to warrant a shift of focus and the transition from *Womack* to the *Restatement* tort. These reasons are advanced in support of that view.

First, there is a need for protection of the seclusion interest and the envelope of privacy protecting that interest. Some protection should be afforded against unauthorized intrusions into private lives regardless of whether increased litigation results. In other words, one should not have to live the life of a recluse in order to enjoy some privacy and the choice to be a part of society should not result in forfeiture of all rights to privacy.

Second, an answer to those who portend the onslaught of "hurt feelings" lawsuits is provided by *Womack*, which limited litigation to instances of outrageous and intolerable behavior. The "highly offensive" element of the privacy tort should similarly eliminate frivolous or trivial cases. While *Womack* imposes a second limitation that the resulting injury be severe emotional distress, the need

to protect the privacy interest warrants the removal of this extra safeguard.⁹⁴

The economics of litigation may also eliminate many unjustified cases. If the intrusion results in no identifiable emotional injury, but only in indignity, humiliation or the like, damages will be highly speculative and will more resemble punitive, rather than compensatory, damages. Unless sufficiently outrageous conduct occurred and, thus, provided the expectation of a large damage award, a plaintiff could not justify the litigation expense.⁹⁵

Additionally, compensation for indignity absent severe emotional harm is not new in Virginia's law. The tort of assault affords just such a cause of action where damages may be awarded for shame, mortification, humiliation and indignities to feelings.⁹⁶

With the need present, express recognition of the right of privacy would allow Virginia courts to draw on the abundance of precedent from other jurisdictions now allowing this cause of action. Accordingly, trial courts would more readily be able to rule on evidentiary questions and jury instructions without the degree of uncertainty

94. See *Hughes v. Moore*, 214 Va. at 33, 197 S.E.2d at 218-19, where the court stated that "[t]he possibility of fraud should not prevent those with legitimate claims from proving their cases; and . . . courts should not shirk their duty merely because of the possibility of an increase in litigation. . . ." Prosser has observed that:

One cannot fail to be aware, in reading privacy cases, of the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored. Taking intrusion first, the gist of the wrong is clearly the intentional infliction of mental distress, which is now itself a recognized basis of tort liability. Where such mental disturbance stands on its own feet, the courts have insisted upon extreme outrage, rejecting all liability for trivialities, and upon genuine and serious mental harm, attested by physical illness, or by the circumstances of the case. But once "privacy" gets into the picture, and the fact of intrusion is added, such guarantees apparently are no longer required. No doubt the cases thus far have been sufficiently extreme; but the question may well be raised whether there are not some limits, and whether, for example, a lady who insists upon sun-bathing in the nude in her own back yard should really have a cause of action for her humiliation when the neighbors examine her with appreciation and binoculars.

Prosser, *Privacy*, *supra* note 2, at 422. Prosser's sun-goddess might be thrown out of court on at least two grounds: (1) by exhibiting her attributes in the backyard she may have forfeited whatever privacy she enjoyed; and (2) the neighbors' attention to such activity would probably not be considered outrageous, intolerable or offensive.

95. See Kalven, *Privacy in Tort Law — Were Warren & Brandeis Wrong?* 31 LAW AND CONTEMP. PROB. 326 (1966).

96. *E.g.*, *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 49 S.E.2d 363 (1948); PROSSER, TORTS *supra* note 2, § 10 at 38.

surrounding only a tacit recognition of the right through the broad *Womack* rule. Further, litigants themselves, through research of precedent from other states could better assess their respective cases and thereby settle or refrain from litigating their disputes. Since other states have recognized the privacy tort, there will be little precedent dealing with invasions of privacy under the *Womack* rule for intentional infliction of emotional distress.

Finally, express judicial recognition of the right affords the public a better opportunity to respond than would the limited evolution of the right likely to occur pursuant to *Womack*. Potential litigants would know when they may have been legally wronged. More importantly, express recognition would challenge the General Assembly either to reject the tort through legislation or to recognize it tacitly by inaction. In either case the law would be rid of the imprecise speculation of legislative intent now surrounding section 8.01-40 of the Virginia Code and its New York counterpart.

On the other hand, the remaining three branches of the privacy tort find some expression now in the law or may be analytically rejected on the strength of existing precedent. The tort of unauthorized appropriation has been legislatively enacted in a limited form applicable to commercial appropriation. Recognition of the broader common law right would contravene the obvious legislative intent to limit the right of action.

Similarly, the publicizing of private matters is a tort which the Virginia General Assembly may have rejected through its decision to emulate New York which enacted only a limited response to *Roberson's* complete rejection of the Warren and Brandeis article. Potential abandonment of the truth defense also militates against its adoption. And, in many instances, conduct resulting in the publicity of private facts will be covered by the intrusion tort. If the private facts are gleaned by an invasion of an individual's seclusion, consequential damages should account for any resulting publication of those facts.⁹⁷

Lastly, judicial approval of the false light tort is likewise unwarranted. The extent to which false portrayals will not rise to the level

97. See, e.g., *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939); *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958).

of actionable defamation will probably be few. Moreover, this tort overlaps in part with the unauthorized commercial appropriation statute. Those limited instances in which a person is portrayed in a false light and has no defamation or statutory action should be restricted to the *Womack* criteria, including severe emotional distress. Otherwise, every actual or perceived implication of every printed word may provide fodder for unjustified litigation.

