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Privacy and the Right to One's Image: A Cultural and Legal History

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CHAPTER NINE

PRIVACY AND THE RIGHT TO ONE'S IMAGE

A Cultural and Legal History

Samantha Barbas

After receiving calls from her neighbors, a woman found that her daughter's picture had been used in an ad for a local ice cream store, without the daughter's or the mother's consent. Her daughter had simply "liked" the ice cream store on Facebook. The woman was outraged and embarrassed. People across the country whose photographs had been similarly exploited under Facebook's Sponsored Stories advertising program sued Facebook (Henn 2013).

In 1948, the *Saturday Evening Post* ran a critique of cab drivers in Washington, DC that accused them of cheating their customers. A photograph appeared with the article that depicted a woman cab driver, Muriel Peay, talking to the article's author on the street. The caption did not name her, and the article did not refer to her. Although the woman consented to be photographed, she did not know that the picture would be used in an article on cheating cabbies. She was humiliated, and she sued the magazine.[1]

Angry and insulted, these individuals could have done any number of things to address their sense of injury and violation. They chose to sue. In the past hundred years, in increasing number, Americans have turned to the law to help them defend their reputations and public images. The twentieth century saw the creation of what I describe as a *law of public image*, and the phenomenon of *personal image litigation*.

[1] *Peay* v. *Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948).

Under these laws of image, you can sue if you've been depicted in an embarrassing manner, even if no one thinks less of you for it. If a newspaper or website publishes your picture in a way you find offensive, you can, under certain circumstances, receive monetary damages for your sense of affront – for the outrage that someone has taken liberties with your public image and interfered with the way you want to be known to others. These "laws of image" consist principally of the tort actions for invasion of privacy, libel, and intentional infliction of emotional distress.

One's *image* or *public image*, as I define it, is one's public face, the persona one projects to the world through such external signs and attributes as one's gestures, speech, dress, and social behavior. An image is something that one has, and that one creates: it is our conscious externalization of self. Image overlaps with, but is distinct from *reputation*, which is an external judgment – how other people see you. Image law protects both the right to a good reputation and the right to one's image – the right to control one's public image and to feel good about one's public presentation of self.

These laws of image are a modern invention, created to address conceptions of the self and personal injury that have become dominant in the United States in the past hundred years. This essay explores the origins of these laws of image, tracing them to the rise of what I describe as an *image-conscious self*, the modal self of our mass-mediated, mass consumer society. The laws of image are an expression of a people who have become fascinated – even obsessed – with their personal images; who have come to see their images as coextensive with their identities, so that an injury to one's image constitutes an injury to one's self.

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The story begins at the end of the nineteenth century, with the rise of major urban centers in the United States. In 1860, only 20 percent of the population lived in towns of 2,500 or more. By 1900, a third of the population lived in towns and cities. Between 1860 and 1910, America's urban population increased sevenfold (Hofstadter 1955: 173).

The process of urbanization unsettled long-established ways of creating a social self. In small towns and villages, a person's social identity had been a product of ongoing interactions with a known and familiar community. While reputations and social identities were by no means unchangeable, they were somewhat fixed. The collective memory in

small communities was strong, and a person "knows better than to suppose that he can deceive [others] into thinking that he is something radically different from what he is" (Blumenthal 1932: 44).

By contrast, in the cities, surrounded by strangers, one's social identity was more often a function of first impressions rather than continued contact. While in a small community there was little need for an individual to carefully "signal" herself – to display her background, beliefs, and social status on the surface of her appearance – the more socially fluid and fragmented conditions of city life demanded that people externalize their identities. As sociologist George Simmel observed in 1903, the "brevity and rarity" of meetings between individuals on the streets and other urban venues created a desire to "make oneself noticeable" upon first glance, to distinguish oneself through one's manners, looks, and gestures (Simmel 1950: 421).

The heightened importance of surfaces and first impressions led to increased attention to the presentation of self in public. In the cities and large towns of the late nineteenth century, there was a new preoccupation with mastering and perfecting one's social appearance. "Impression management," to use sociologist Erving Goffman's phrase, became an important personal project and goal (Goffman 1955). People began to speak of life in theatrical metaphors – of social existence as an "act" on a "stage." One "performed" one's identity, went out in public to "see and be seen." It was thought that these "presentational performances" required proper costume, diction, and gestures; advice and etiquette books, with elaborate instructions on how to dress, how to greet people, and what to say in public, were issued at an unprecedented rate (Schlesinger 1946: 35).

Technological and industrial developments enhanced this attentiveness to self-presentation in public. Portrait photography was becoming popular, and mass-produced clothing, ubiquitous by the 1890s, put a fashionable appearance within the reach of the ordinary consumer (Schorman 2003: 13). Advertisements encouraged people to scrutinize their appearances and to purchase items that would help them enhance their looks and images. While public visibility had always been an essential part of life for the famous, the notion that "everyone could and should be looked at" was a novel, modern concept (Braudy 1997: 506).

By the late nineteenth century, individuals across the social spectrum were being encouraged to cultivate an attitude toward their bodies, appearances, and feelings that was strategic and instrumental.

They were adopting an external perspective on themselves, considering how they might appear before strangers, and seeing themselves as *images* in the eyes of others (Kasson 1991: 114). There was to be a reward for this scrupulous management of personal image – respect, upward mobility, and the possibility of social and material success. Especially in the new urban centers, where social hierarchies were unstable, it was thought that the "self-made" man could create a new identity and advance socially by appearing more refined and genteel than he really was.

To be clear: people were not becoming "superficial." We can see, nonetheless, a new attentiveness to public images, and to potential threats to those images. John Kasson, in his history of urban life and manners in the nineteenth century, has noted the great fear in this time of being discredited and "exposed" – that nosy neighbors, gossiping houseguests, and whispering co-workers might reveal the "truth" behind one's social façade (Kasson 1991: 114). The mass media were posing especially formidable threats to personal image, threats that the average citizen was seemingly helpless to control, manage, or defend against.

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In the late 1800s, with urbanization, an expanding audience for publications, and advances in publishing technology, a massive volume of printed material flooded the market. Mass-circulation magazines such as the *Ladies' Home Journal* debuted and became popular (Kaestle and Radway 2009: 57, 60–1). Total national circulation of monthly magazines rose from 18 million in 1890 to 64 million in 1905 – nearly four magazines per American household (ibid.: 103). Newspaper readership increased 400 percent between 1870 and 1900, and the number of newspapers doubled (Pember 1972: 10).

In the early 1800s, the typical subject of press coverage had been the activities of "public figures" – politicians, public officials, captains of industry. Publishers eventually realized that "human interest" stories – "chatty little reports of tragic or comic incidents in the lives of the people" – attracted more readers than dry copy about the comings and goings of officials and statesmen (Hughes 1940, Dicken Garcia 1989: 64). Crimes, love affairs, divorces, holidays, social outings, illnesses, births, deaths – matters of ordinary existence were scooped out of neighborhoods by aggressive "roving reporters" and fed to a curious public. "The interest in other people's affairs in this country is almost

measureless," observed the *Outlook* magazine in 1896. "The morning and evening papers make us feel as if we belonged to a great village and ... as if our chief interest lay in what is going on at the other end of the street" (The Passion for Publicity 1896: 738). In the 1880s and 1890s, several states proposed and passed laws providing for civil liability or criminal punishment for sensational press content.[2] There was also a turn to the tort of libel.

For centuries, the twin torts of defamation – libel and slander – had protected reputations against scandalous falsehoods. One's reputation is one's good name among one's peers – the "estimate in which he is held by the public in the place he is known."[3] In order to be legally actionable as a libel or slander, a statement had to be both defamatory and false. A defamatory statement was one that seriously lowered a person's esteem in his community: it "expose[d] a person to hatred or contempt ... injure[d] him in his profession or trade, [and] cause[d] him to be shunned by his neighbors" (Odgers 1887: 19). The rise of the sensationalistic press and "human interest" journalism led to a surge in libel lawsuits. In his study of tort litigation in turn of the century New York, Randall Bergstrom found that the number of libel cases before the New York Supreme Court increased by over twenty times between 1870 and 1910 (Bergstrom 1992: 20). Francis Laurent's study of a trial court in Wisconsin showed a significant increase in libel cases between 1875 and 1914, most of them against local newspapers (Laurent 1959: 49, 164).

Initiating a lawsuit is, inevitably, an assertion of rights. When plaintiffs commenced a libel lawsuit, they were claiming, in effect, that they had a legal entitlement to their reputations. There was nothing novel about this. In theory, the common law had always protected reputation. Yet the fact that more people were claiming the right – that men and women across the social spectrum felt compelled to bring libel lawsuits – suggests not only that people saw their public images and reputations as being especially imperiled, but also that those aspects of the self had become more valuable and treasured. A good reputation was a sign of virtue and rectitude; it was also critical to socioeconomic mobility in the late 1800s, a time of greatly expanding opportunities

[2] Several states passed laws that prohibited the publication of "criminal news, police reports ... or accounts of ... bloodshed, lust, or crime." See *Winters* v. *New York*, 333 U.S. 507 (1948).

[3] *Cooper* v. *Greeley & McElrath*, 1 Denio, 347 (N.Y. Sup. Ct. 1845).

for social advancement. There was another reason for this protectiveness of reputation – Americans' increasing image-consciousness, their attunement to social appearances and the impressions they made in the eyes of others.

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Defamation law dealt with false statements that lowered one's standing among one's peers. It did not always or adequately address the problem of media "gossip" – facts that were often true, and that did not necessarily injure reputation, but nonetheless caused humiliation and distress. The search for legal remedies for the gossip problem led to the invention of the legal "right to privacy," credited to the famous 1890 *Harvard Law Review* article "The Right to Privacy."

The article, by the future Supreme Court justice Louis Brandeis and his colleague Samuel Warren, attacked gossip columns and information about personal affairs "spread broadcast in the columns of the daily papers." "Persons with whose affairs the community has no legitimate concerns" were "being dragged into an undesirable and undesired publicity" (Brandeis and Warren 1890: 193). To a dignified person seeking respect and status, having the details of one's personal life publicized in the press caused embarrassment and "mental pain and distress," "far greater than could be inflicted by mere bodily injury" (ibid.: 214).

The article accused the press of "invading privacy" when it revealed a person's emotions, activities, and personal idiosyncrasies before a public audience, even though such matters were not "private," in the sense of being secret or concealed. Newspapers could "invade privacy" when they published a person's photograph, even if it was taken at a public event, or when they described one's participation in social activities such as weddings or balls. The article discussed the recent case of *Manola* v. *Stevens*, involving flash photographs of an actress obtained without her permission as she appeared on the stage (Brandeis and Warren 1890: 195). The description of a woman at a social gathering was technically not "private," nor were pictures of an actress performing in public. These publications were nonetheless said to "invade privacy" because in presenting the subject out of context, and before an audience not of her own choosing, they impaired her ability to create her own social identity, to define her public image as she wished.

Brandeis and Warren proposed a common law cause of action that would allow the victims of such "invasions of privacy" to sue and

recover monetary damages (Brandeis and Warren 1890: 219). Unlike libel, their tort of invasion of privacy did not protect a person's esteem in the eyes of others so much as one's capacity to define his own public persona: "the right of determining ... to what extent his thoughts, sentiments, and emotions shall be communicated to others" (ibid.: 198). The right to privacy was the right to keep one's personal affairs out of the public eye, and more broadly, to determine one's own public image without undue interference from the mass media. A manifestation of the emerging image consciousness of the time, it was the right to control one's public image and to receive damages for injuries to one's feelings about one's image. By 1910, eight states had recognized a "right to privacy" as a right to control one's public image and to protect one's image against unwanted, humiliating media depictions.[4]

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As the image-conscious sensibility gained purchase on the popular imagination in the twentieth century, and the mass media posed ongoing threats to people's public images, existing areas of law were expanded and new laws created to protect what was being described as a right to one's public image. In the 1930s and 1940s, a majority of states recognized the tort right to privacy, described as a right to avoid undesirable and "unwarranted publicity."[5] Libel claims increased, and courts expanded libel doctrine to reach a wider range of emotional harms and image-based harms. In a number of different contexts, courts were recognizing a right to one's image, and the *personal image lawsuit* became a fixture of American legal culture.

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In the first few decades of the twentieth century, the United States became an *image society*, marked by an escalating cultural emphasis on images, surfaces, and social appearances. An especially intense brand

[4] At common law: *Pavesich* v. *New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Pritchett* v. *Knox Cty. Bd. of Comm'rs*, 85 N.E. 32 (Ind. App. 1908); *Foster-Millburn Co.* v. *Chinn*, 120 S.W. 364 (Ky. 1909), *appeal after remand*, 127 S.W. 476 (Ky. 1910); *Schulman* v. *Whitaker*, 39 So. 737 (La. 1906); *Vanderbilt* v. *Mitchell*, 67 A. 97 (N.J. E. and A. 1907). By statute: New York, 1903, N.Y. Civ. Rights Law § 50; Utah, 1909, Utah Code Ann. §§ 76-4-8 and 76-4-9; Virginia, 1904, Va. Code Ann. § 8-650.

[5] *Sidis* v. *F-R Pub. Corp.*, 113 F.2d 806 (C.A. 2d Cir. 1940).

of image consciousness took root in the 1920s, a decade that is often described by historians as the first "modern" decade in US history – one that saw the rise of a mass society, the mass media, mass-marketed products, and increasing cultural standardization and homogeneity (see Dumenil 1995).

In 1920, the census registered, for the first time, more Americans living in cities than in rural areas (McNeese and Jensen 2010: 107). As sociologists Robert Park and Ernest Burgess wrote in their 1925 study *The City*, the contacts of the city might have been face-to-face, "but they are ... superficial, transitory, and segmental" (Wirth 1938: 12). The perceived depersonalization of daily life, and the superficiality of social exchange, produced something of an existential crisis for Americans in this time. American culture became preoccupied with the dilemma of personal distinction – the difficulty of "standing out from the crowd." How could one preserve a sense of self amidst a sea of strangers? The answer posed by advertisers, personnel managers, psychologists and other cultural arbiters lay in *personal image* – a distinctive appearance, "magnetic personality," and pleasing first impression. A "winning image" was one that was so stunning and unforgettable – so charismatic and appealing – as to secure for a person instant notice.

As a practical matter, the cultivation of a positive image had practical application in many areas of life in which the rise of a mass society and constant interaction with strangers posed very real and tangible problems of distinction and recognition. One domain in which the positive image and first impression was coming to be seen a critical asset was the burgeoning white-collar sector of the economy – business, sales, and customer relations. Success in these areas, it was said, hinged on the ability to cultivate a pleasing image – on "salesmanship," "people skills," and brand recognition. The basis of effective selling was the positive first impression – creating a desirable image of a product and, even more, of the salesperson. Before long, the imperatives of the world of sales and service were applied to social relations more generally. The efforts of salespeople to sell products to skeptical customers became a metaphor for the social struggle waged by every person in an effort to distinguish themselves in the modern world. Attracting the attention and positive regard of strangers, the basis of success in any pursuit, demanded that an individual put forth an ideal impression on the first try.

The relatively new advertising industry, in conjunction with the new field of popular psychology, promised individuals that they could

use conspicuous consumption and the strategic display of goods to achieve a stunning image, distinguish themselves from the crowd, and "win friends and influence people" (Carnegie, Carnegie, and Pell 1936). Advertisers heightened concerns with personal image; the mission of the ad agency was to create discomforts and dissatisfactions with one's image that could only be assuaged through purchasing goods. Advertisers encouraged consumers to see themselves through the searching gaze of strangers who needed to be persuaded or impressed. "Do you wonder, when you meet a casual friend, whether your nose is shiny?" asked an ad for Woodbury's Soap. "Do you anxiously consult store windows and vanity cases at every opportunity?" (Peiss 1998: 142). Ads played upon popular insecurities with identity and appearance, and they reinforced the perception that images were essential to social advancement (Marchand 1986: 14).

The 1920s gave rise to a new, defining phenomenon of American society, perhaps the single greatest force behind the new culture of images – the entertainment celebrity. The United States became a "celebrity culture." Film actors, who had seemingly mastered the art of "impression management," became role models and cultural heroes. Audiences were fascinated with the way film actors put themselves together – how they created a stunning image and constantly manipulated that image to please, amuse, and fascinate others. In the image-conscious culture, the actor had become the modal self.

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In the period between the two world wars, the mass media suffused and transformed American life. Daily newspaper circulation increased from 22.4 million copies in 1910 to 39.6 million copies in the 1930s. Ninety percent of Americans were estimated to be newspaper readers (Lee 1947: 731). Nearly 4,500 periodicals were published each year in the 1930s and circulated a combined 180 million copies per issue (Kyvig 2004: 190–1). By the end of the decade, half the homes in the United States contained at least two radios, which were on for about five hours a day (Cashman 1989).

The proliferation of mass communications brought more injuries to public images and reputations, and with them, the continued expansion of libel law and litigation. As soon as radio and motion pictures were popularized, their creators were sued for libel. The threat of libel litigation had become so significant that major newspapers, magazines, and

book publishing houses retained libel lawyers for prepublication review, and insurance organizations began writing libel and slander insurance for publishers and broadcasters (Berger 1937, Thayer 1943: 340).

Libel doctrine transformed and expanded to meet the demands of the image-conscious society. In the 1930s and 1940s, courts were broadening the definition of a defamatory publication. A defamatory publication was not only one that cast a person into disrepute. A publication could be defamatory if it tarnished a person's reputation or image *in his own eyes*, causing mental distress (Wade 1962: 1093–5). In 1935, the torts scholar Calvert Magruder noted an increasing number of libel cases where plaintiffs had won damages, not for an objective loss of reputation, but for "the sense of outrage and chagrin that the defendant should have made an attack upon his reputation" (Magruder 1935: 1055). Courts were turning their focus from external, interpersonal relations inward, to the realm of one's self-perception and one's feelings about one's public image.

Thus it was that a court held that a woman had a cause of action for libel when a newspaper said that she had been served with process while sitting in a bathtub – an accusation that did not impute immoral conduct or likely damage her reputation, but nonetheless embarrassed her.[6] In *Zbyszko* v. *New York American*, from 1930, the newspaper had published an article on the theory of evolution. In one part of the article, the text read: "The Gorilla is probably closer to man, both in body and in brain, than any other species of ape now alive. The general physique of the Gorilla is closely similar to an athletic man of today, and the mind of a young gorilla is much like the mind of a human baby." Near that text appeared a photograph of the wrestler Stanislaus Zbyszko, in a wrestling pose, and under it a caption: "Stanislaus Zbyszko, the Wrestler, Not Fundamentally Different from the Gorilla in Physique."[7] Though it was unlikely that any reader would think worse of the wrestler for this, the jury sympathized with his sense of affront and awarded him $25,000 (A Collect As You Go Tour of the Publisher's Chain 1936: 50).

The major development in image law was the growing recognition of the tort of invasion of privacy. By 1940 the privacy tort, as a right to control one's public image, had been recognized in at least fifteen jurisdictions (Nizer 1940: 526, 536). The *Restatement of Torts* acknowledged the tort in

[6] *Snyder* v. *New York Press Co.*, 137 A.D. 291, 121 N.Y.S. 944 (N.Y. App. Div. 1910).
[7] *Zbyszko* v. *New York American*, 228 A.D. 277, 239 N.Y.S. 411 (N.Y. App. Div. 1930).

1939: "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," read its summation (American Law Institute 1939: 389). At a time of great public criticism of media invasions of privacy, and increasing cultural demands to control and perfect one's public image, there was much popular support for the privacy tort. Media audiences wanted to gawk, to peer in on others' lives, even to be voyeurs, but were upset when the gaze was turned back on them.

It was not total solitude, concealment, or anonymity that people seemed to want, but rather *selective self-exposure*. In an age when actors and other performers were seen as cultural heroes, celebrated for their personal lifestyles, publicity of one's private affairs was not always unwelcome, intrusive, or annoying. In a celebrity culture, being thrust into the spotlight for one's proverbial 15 minutes of notoriety was, for some, an appealing possibility. Many of the "gregarious millions," "crave to be lifted out of the morass of anonymity," and believed that "any publicity, even though unfavorable, is better than none at all" (Ragland 1928: 87).

Regardless of whether one sought fame or was content in the confines of a narrower world, control over one's publicity and public image – the ability to put one's own "spin" on one's persona – was seen as critical. Writers discussed the importance of a broad legal right to control one's image, a right to create one's image on one's own terms. In the face of "multiplying hordes of newsmongers," a "right to privacy" was essential (Levy 1935: 190).

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A few privacy cases from this time involved the publication of deeply intimate, personal material. In 1939, *Time* magazine published an article titled "Starving Glutton," about a woman who had a metabolic disorder that led her to eat huge quantities without gaining weight. The picture published with the article, taken by a reporter over the woman's protests, showed Dorothy Barber in bed in a long-sleeved hospital gown. She sued for invasion of privacy and won damages at trial. "Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition ... without personal publicity," an appeals court concluded, upholding the judgment.[8]

[8] *Barber* v. *Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (Mo. 1942).

The majority of privacy cases did not involve publications that were especially private, however. Truly intimate depictions – deeply personal gossip, explicit stories about people's romantic affairs, lurid photographs – were typically not the subject of lawsuits; legal action would only attract further attention to the sensitive, embarrassing material (Dawson 1948: 39). Instead, most privacy cases involved situations where people had been presented in a manner they found unfavorable, misrepresentative, upsetting, or annoying, even though the activities portrayed were not especially scandalous, personal or secret. A number of privacy suits, for example, involved photographs of a person taken on the street and published without consent. In these cases, the law of privacy had very little to do with "privacy." No exposure of "private life" had occurred. Rather, the right to privacy was a right to not be depicted in a fashion that contradicted one's own, desired self-presentation, "under circumstances which are complimentary as well as those which are critical."[9] "Privacy" was about the right to choose one's own audiences, about shielding people from unwanted publicity that clashed with how they wanted to be known to the public.

In the 1929 case *Jones* v. *Herald Post*, a woman named Lillian Jones witnessed her husband assaulted and stabbed to death on the street, and tried to fight back against the attackers. She sued for invasion of privacy when the *Louisville Herald Post* published her picture with a truthful account of her heroic efforts. She claimed that the publication was offensive to her. In *Hillman* v. *Star Publishing*, a woman sued the *Seattle Star* for invasion of privacy when it ran her photo along with an article about her father's arrest for mail fraud. She claimed that this caused her "shame, humiliation, and a sense of disgrace."[10]

The plaintiff in *Blumenthal* v. *Picture Classics* was an "elderly and respectable" woman, a bread vendor, who sued over newsreel footage that depicted her selling her wares on the streets of the lower East Side. The footage was a candid, unaltered street scene, part of a newsreel titled "Sight Seeing in New York with Nick and Tony." The woman complained that the portrayal was "foolish, unnatural, and undignified," and an "invasion of privacy." A trial court issued an injunction restraining the distribution of the newsreel.[11] In *Sweenek* v. *Pathe News*,

[9] *Hull* v. *Curtis Pub. Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956).

[10] *Hillman* v. *Star Pub. Co.*, 64 Wn. 691, 117 P. 594 (1911).

[11] *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y.S. 800 (N.Y. App. Div. 1932).

from 1936, a woman claimed that unauthorized newsreel footage taken of her in an exercise course for overweight women – "a group of corpulent women attempting to reduce with the aid of some rather novel and unique apparatus" – was an invasion of privacy because the footage was embarrassing.

Some of these lawsuits – though certainly not all – could be described as fairly petty. The law professor Harry Kalven, Jr believed that most parties who came forward with privacy claims had "shabby, unseemly grievances and an interest in exploitation." "I suspect that the fascination with the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored," he wrote in an article titled "Privacy in Tort Law – Were Brandeis and Warren Wrong?" (Kalven 1966: 332).

Even the most seemingly 'thin-skinned' of these plaintiffs were not necessarily insincere or duplicitous, however. Although we can't know for sure, the men and women presented in an inaccurate or otherwise displeasing manner in various newsreels, comic strips, and articles may well have been hurt. This sense of injury and affront is a testament to the image consciousness of the time. It is only in a culture where people feel deeply possessive and protective of their public images that such misrepresentations, even if objectively benign, will be experienced as serious harms. It is only in a culture that has invested great importance in images, that has freighted public images with such emotional and psychological weight, that the law will recognize such harms and take them seriously. The law tracked the growing cultural focus on personal image, and in recognizing these "privacy" claims as worthy of judicial attention, and in some cases monetary judgments, courts validated, even heightened the image-conscious sensibility.

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Sympathetic to the importance of public image, and plaintiffs' interests in controlling and shaping their public personae, courts provided relief in a number of these cases. Yet at the same time as the courts were recognizing a right to one's image that made embarrassing or distressing media representations legally actionable, they were also acknowledging another kind of image right: the rights of publishers, writers, and filmmakers to depict people's likenesses and life stories, and the

public's right to consume them. In a culture where politics and social life were being transacted through images, where media images had become the common currency of social exchange, the ability to freely depict individuals and public affairs was critical to the "free and robust" public discourse that was beginning to be described as a central value of the First Amendment. By the 1940s, imposing liability for truthful commentary about a person, even if distressing to him, was coming to be seen as a form of state control over expression that smacked of the totalitarian governments in Europe and Asia against which the United States was at war.

Brandeis and Warren and courts adjudicating early twentieth-century privacy cases had recognized a privilege that would exempt the publication of "matters of public interest," or "matters of public concern." Before the 1930s, the definition of a "matter of public concern" had been narrow. What was a matter of "public concern" or "public interest" was not what actually *interested* the public – for then gossip and sensationalism might be immune – but rather, what judges believed that the public *should* know, in its own best interest. In the 1930s and 1940s, courts began to expand the "matters of public interest" privilege. Purely entertaining, titillating publications, such as a highly dramatized account of a criminal trial, gossip columns, and even murder mysteries were said to be matters of legitimate "public interest" or "public concern" that could be written about freely, even if the individuals involved were unwilling to be publicized.[12] For judges to create their own definition of "matters of public interest," one that overrode the media's publishing decisions and implicitly, the public's consumption choices, was to some courts an impermissible censorship of the press.

Because there was great curiosity about public figures' private lives, their personal affairs were usually "matters of public interest," said courts. As such, public figures – defined as those who submitted themselves to "public approval" – had very little in the way of privacy (American Law Institute 1939). According to some courts, even ordinary people "waived" their right to privacy when they went into public places, or were involved in "matters of public interest" (ibid.). In *Jones* v. *Herald Post*, involving the woman who tried to attack her husband's murderer, the court concluded that the woman had, albeit unwillingly,

[12] *Colyer c. Richard K. Fox Pub. Co.*, 162 A.D. 297, 146 N.Y.S. 999 (N.Y. App. Div. 1914); *Elmhurst* v. *Pearson*, 80 U.S. App. D.C. 372, 153 F.2d 467 (1946); *Middleton* v. *News Syndicate Co.*, 162 Misc. 516, 295 N.Y.S. 120 (N.Y. Misc. 1937).

become an "innocent actor in a great tragedy in which the public had a deep concern," and as such, it was not an invasion of privacy to publish her photograph.[13] Insofar as they generated public interest or curiosity, there was "no invasion of a right of privacy in the description of the ordinary goings and comings of a person or of weddings, even though intended to be entirely private."[14]

Not everyone in the legal world endorsed this expansive view of privileged material. To some, the public's interest in learning about people and public affairs, and the right of the press to convey that information, did not justify interfering with a person's public image when that interference created serious emotional or psychic harm. There was a battle underway. The ideals of modern expressive freedom cut both ways: liberty meant the right to express oneself through one's image, and at the same time, the freedom to make images of others. This tension would trouble courts, lawyers, legal theorists, and the public in the coming decades. When were the media justified in overriding people's right to create their own images? Could *the right to one's image* and *the freedom to image* be reconciled?

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In the post-Second World War era, courts imposed further limitations on the image torts in the name of freedom of speech and the public's "right to know." Despite this, the proliferation of the media, new communication technologies, and a cultural focus on personal images and "image management" led to the significant growth of image law and personal image litigation. There was deep cultural confusion around image laws and image rights. At the same time that the laws of image were being narrowed, they expanded to accommodate people's increasing protectiveness of their public images in an image-saturated society, what was being described as an "age of images" (Boorstin 1962).

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In postwar America, images – of affluence, desire, mobility, and fame – "reached ... into every corner of our daily lives," observed historian Daniel Boorstin (1962: 249). The Second World War had brought

[13] *Jones* v. *Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (Ky Ct. App. 1929).
[14] *Barber* v. *Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (Mo. 1942).

with it unprecedented prosperity, and the middle-class lifestyle came within the reach of millions. By the end of the 1950s, most families owned their homes, their cars, and a television set. It was a culture of appearance and aspiration; advertising in glossy magazines and on television spread bright pictures of consumer products and their happy users for envy and emulation.

In his landmark work *The Lonely Crowd*, sociologist David Riesman wrote of the rise of a new personality type that was emerging as an "influential minority" in "contemporary, highly industrialized, and bureaucratic America," particularly among "the upper middle-class of our larger cities" (Riesman 1950: 19). He called this the "other-directed" personality (ibid.: 9). The "other-directed" individual – the product of an affluent, mobile, consumerist society – was deeply concerned with his image and appearance; he continually reinvented and adjusted his public persona in an effort to please and impress others. Riesman noted the manifestations of this other-directed orientation in various cultural practices and texts of the time, from children's novels to stories and ads in women's magazines that dealt with "modes of manipulating the self in order to manipulate others," for the attainment of such "intangible assets" as prestige, acceptance and affection (ibid.: 106).

This "other-direction" – an orientation toward appearances, surfaces, packaging, glamour, and perfecting and controlling one's image in the eyes of others – should be familiar to us, with its origins in the pre-Second World War era. There were, however, significant developments in postwar culture that escalated the emphasis on personal image and image management. By the 1950s, the number of white-collar workers outnumbered blue-collar workers for the first time in US history. Labor power, more than ever, took the form of "personality" and "people skills." The burgeoning service occupations placed on their participants intense requirements for managed self-presentation – in sociologist Erving Goffman's words, that "one give a perfectly homogeneous performance at every appointed time" (Goffman 1955: 56). The phrase "personal image" first entered popular culture in the 1960s. With willpower and focus, advised a 1962 business success manual titled *The Magic Power of Putting Yourself Over with People*, "you can have the kind of personal image you want," and through your image, "sell yourself" to others (Arnold 1962).

The guiding theme of postwar advertising was that everyone and everything had an image that could be successfully marketed to anyone if presented convincingly enough. Advertising surged in the 1950s.

By the mid-1950s, the United States was spending $9 billion annually to sell products (Moskowitz 2001: 157). As ever, product advertisements encouraged consumers to view themselves with the critical gaze of spectators, as performers under the constant scrutiny of friends and strangers. Other "image industries" flourished; the affluent society generated and consumed media images in unprecedented volume. Newspaper circulation reached historic highs (Young and Young 2004: 153). A paperback "revolution" in the 1950s made books available for only 25 cents (Burress 1989: 73). The cosmetics industry was selling over $1 billion a year, and the garment industry was producing $2 billion dollars' worth of goods annually (Koshetz 1952: F1; Breines 2001: 95).

Celebrity culture flourished, and it spread beyond the realm of entertainment to virtually every other area of endeavor. The mass-mediated "superstar" was emblematic of the age, obsessed as it was with images, entertainment, and fame. Celebrities knit together a national culture based on shared images – "Jackie's hairdo, Marilyn Monroe's pout, Marlon Brando's swagger" (Farber and Foner 1994: 49). As ever, the essence of celebrity remained style rather than substance. Modern celebrity rewarded those who had appealing lifestyles and personalities, and who could project those personalities in an alluring fashion. Since media attention – and little else – was the basis of fame, it remained an eminently democratic aspiration. Celebrities continued to serve as role models of successful self-presentation, and there was great fascination with the ways that stars publicized themselves, how they transformed, manipulated, and spun their images. The public was enthralled with "backstages," with the activities of publicists and press agents, and the inner workings of Hollywood and other image-making "factories" (Boorstin 1965: 194).

In his widely acclaimed 1962 book *The Image: A Guide to Pseudo Events in America*, Daniel Boorstin observed that the United States had entered an "age of images." Like Riesman, Boorstin lamented what he saw as the alienating effects of mass communication and mass consumption, the vaunting of surfaces over depth, and the centrality of simulated, vicarious experiences to cultural life (Pells 1985: 225–56). Politics had become a form of shadow theater, enacted through television clips, sound bytes, press conferences, and other staged "pseudo-events," Boorstin (1965: 194) wrote. It was becoming a matter of faith that the right image could "elect a President or sell an automobile, a religion, a cigarette, or a suit of clothes" (ibid.: 192). "Before the age of images, it was common to think of a conventional person as one who

strove for an ideal of decency or respectability." Now one tried to "fit into the images found vividly all around him." "We have fallen in love with our own image, with images of our making, which turn out to be images of ourselves" (ibid.: 192).

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The state of image law and litigation reflected the growth of the media, its heightened sensationalism, and the image consciousness in the culture of the time. Legal protections for personal image, and one's right to control one's image, increased in the postwar era, as did Americans' use of the law to protect those interests. Libel assumed increasing prominence in legal and popular culture, and privacy law and litigation expanded.

At its 1953 meeting, the American Newspaper Publishers' Association noted that libel claims against newspapers were on the rise. Arthur Hanson, counsel for the ANPA, claimed that the number of libel suits had grown by several 100 percent in the 1950s (Rosenberg 1995: 247). According to one torts treatise, libel suits had been far "more numerous" in the 1950s than in previous years (Miller 1952: 191). There was great inflation in the size of judgments and claims; some plaintiffs were claiming that their reputations were worth millions (Rosenberg 1995: 247; Forde 2008: 113).

Courts continued to expand the definition of a defamatory publication to include representations that were not necessarily harmful to a person's social relations, but that were nonetheless injurious to his feelings about his image (Developments in the Law of Defamation 1956: 881). As the law professor Edward Bloustein summarized in 1964, there was an "increasing tendency" in the law of defamation to go "beyond the traditional reaches" of the protection of reputation to protect "personal humiliation and degradation" (Bloustein 1964: 993). Law professor John Wade noted that "the law of defamation has been expanded to include certain situations where there was no real injury to plaintiff's reputation but he was held up to ridicule or otherwise subjected to mental disturbance" (Wade 1962: 1094).

By the late twentieth century, the bulk of the money paid out in damage awards in defamation suits went to "compensate for psychic injury, rather than any objectively verifiable damage to one's reputation," observed law professor Rodney Smolla (1986: 24). The tort's protected interest broadened from "extrinsic, community-based reputation" to

"freedom from psychic or emotional harm to the individual" (Bezanson 1988: 541). The focus of the action, in many instances, is the "decline in self-reputation" suffered by the plaintiff. The actions for defamation and privacy were converging; courts were "assimilat[ing] defamation cases to privacy" (Kalven 1966: 334).

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In the 1950s, the privacy tort came into its own. The number of privacy cases more than doubled that of any previous decade (Pember 1972: 147). By the 1960s, there were more than 300 reported privacy cases, most of them involving the media (Kalven 1972: 361). "How many more (privacy cases) are settled in lower courts or out of court cannot even be estimated," wrote *Journalism Quarterly* in 1953. "The number of cases can be said to be definitely increasing" (Davis 1953: 187). By 1960, the invasion of privacy tort was "declared to exist by the overwhelming majority of American courts" (Prosser 1960: 389).

In 1963, a forty-four-year-old mother, Flora Bell Graham, the wife of a chicken farmer from rural Cullman County, Alabama, attended the county fair with her sons, and she went with them into a fun house. As she left, her dress was blown up by air jets – part of the "fun." A photographer from the local paper got a snapshot, and the picture of the woman ran on the front page. Even though the picture was taken in a public place, the trial court made an award of several thousand dollars, upheld by the state's Supreme Court. "Not only was th[e] photograph embarrassing to one of normal sensibilities," the court concluded, but was "offensive to modesty or decency" to the point of being "obscene" (County Fair Picture 1964).[15]

It was not only suggestive or explicit portrayals that invaded privacy. Courts found invasions of privacy in all manner of media depictions that plaintiffs claimed to be embarrassing, offensive, or otherwise injurious to their public images. The film industry was a real "target for invasion of privacy lawsuits," noted one publishing trade journal in 1953 (Davis 1953: 187). A California trial court issued a $290,000 judgment against the film company Loew's Inc over a complaint by a woman who was the model for an Army nurse in the film *They Were Expendable*. The court found that depicting her romance with a Navy lieutenant on screen was an invasion of her privacy (ibid.).

[15] *Daily Times Democrat* v. *Graham*, 276 Ala. 380, 162 So2d 474 (Ala. 1964).

Privacy cases continued to be brought – and won – over publications that were benign in most people's eyes, in some cases even complimentary, albeit displeasing to the subjects of publicity. In the early 1960s, Warren Spahn, the famous baseball player, sued over an unauthorized biography that he claimed was too flattering. The biography depicted him as a war hero who had been awarded the Bronze Star. Spahn had served in the Army, but had not been decorated. The book also inaccurately portrayed his relationship with his father, who appeared in the story as a kind mentor and coach, and it incorporated false, invented dialog. Spahn found all this to be offensive, sued for invasion of privacy, and was successful at trial. Spahn later told an interviewer that he was embarrassed at the way his military experience had been glorified and was concerned that people would think he planted the account to make himself look heroic (Yasser 2008: 49). The publication was enjoined and Spahn awarded damages.[16]

The "privacy" right to one's public image was widely supported, in both popular culture and in the legal world. The idea of a legal right to protect one's public image against unwanted or distorted media depictions resonated with the cultural ideals in the image-conscious society. Privacy was the individual's "rightful claim ... to determine the extent to which he wishes to share himself with others," in the words of one legal scholar. Everyone had a right to "choose those portions of the individual which are to be made public" (Breckenridge 1970: 1–3). Wrote one federal judge, "in a society predicated on individual rights, each person should be entitled to choose the face he or she wishes to present to the public unless that right is waived or some other right is paramount" (Forer 1987: 19).

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The privacy right to control one's personal image was prized in postwar America, but freedom of speech had also become a core cultural and legal value. The student movement of the 1960s had begun with the famous Berkeley free speech protests, and the right to dissent, question authority, and challenge the status quo was a critical demand of the counterculture (Farber and Foner 1994: 196–8). In the era of Vietnam, the Pentagon Papers, anticommunist purges, and the public revelation of extensive government spying, political criticism was being described

[16] *Spahn* v. *Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543 (N.Y. 1966).

as a "public duty".[17] The "crusading journalist," risking punishment to expose injustice, was romanticized in the popular culture of the time (Gajda 2009: 1039).

The Supreme Court's protection of free speech was unprecedented. Between the end of the Second World War and the 1970s, the Court issued decisions that protected a wide range of previously proscribed material (Hale 1987: 3, Strossen 1996: 71–2). Almost three-fourths of the free speech cases that came before the Court in the 1950s and 1960s were decided in favor of free expression (Strossen 1996: 69). The Court's opinions described free expression as an important personal liberty, furthering "self-fulfillment," and the "right to autonomous control over the development and expression of one's intellect, tastes, and personalities."[18] The ability to freely express one's thoughts, beliefs, and personal identity was seen as essential to the growth and enhancement of the individual (Sandel 1998: 80). Decisions also emphasized the importance of freedom of speech and press to democratic self-governance through "public discussion" (*New York Times* v. *Sullivan* [1964]). With the public dependent on the mass media as a source of information about public affairs, "a broadly defined freedom of the press" was necessary to "assure the maintenance of our political system and an open society."[19]

In this free speech zeitgeist, courts often dismissed privacy suits against the media under the common law "matters of public interest" privilege. Fearing a "judicial censorship" of the press, courts continued to define the content of the popular media as synonymous with the "public interest." In this view, if something appeared in the "press" – a film, novel, television episode, or even tabloid or detective magazine – by definition, it was a matter of public interest, and "newsworthy." The public had a "right to be informed," whether the information was material about a politician's home and family life or a sensationalistic article about a homicide in *Official Detective Stories* magazine.[20]

Every person, celebrity or not, surrendered one's right to privacy by becoming part of an event that was a "newsworthy" matter of public concern, whether voluntarily or involuntarily, in the view of some

[17] *New York Times* Co. v. *Sullivan*, 376 U.S. 254 (1964).

[18] *Doe* v. *Bolton*, 410 U.S. 179 (1973).

[19] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

[20] *Blount* v. *T.D. Pub. Corp.*, 423 P.2d 421 (N.M. 1967); *Kapellas* v. *Koffman*, 1 Cal. 3d 20, 31, 459 P.2d 912 (Cal. 1969).

courts. A newspaper that ran a large picture of a murdered boy's decomposed body was not liable to the boy's parents. The court concluded that the boy, albeit unwillingly, became part of an event of "public interest" by virtue of being murdered and waived his right to privacy.[21] Likewise, given live television coverage, the paparazzi, and the increasing presence of cameras in public, people were said to "assume the risk" of unwanted publicity whenever they went outside their homes. The dominant rule was that "photographers on public property may take pictures of anyone they want to, objection or not" (The Press: Freedom to Photograph 1954).

In the seventy years after the famous Brandeis and Warren invention, the legal action for invasion of privacy, as the right to one's public image, had developed, flourished, and been pruned back by courts that could not reconcile that right with American society's dependence on media images, and its commitment to freedom of expression. The history of American image law is a saga of simultaneous expansion and limitation – the increasing recognition of personal image rights over the course of the twentieth century, and at the same time, their restriction by legal doctrines and concepts of freedom of speech.

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By the 1970s, the modern doctrines of the tort laws of image had been established, as had the "image-conscious sensibility." As this chapter has illustrated, the twentieth century witnessed the rise of a cultural attitude or outlook, rooted in the middleclass but not limited to it, in which the self is conceptualized in terms of images. Influenced by a variety of cultural forces, from the "image industries" to celebrity culture to the mobile and fluid conditions of modern, urban life, Americans became aware of having public images and *being* images: one's identity was embedded, at least in part, in the image or persona one strategically constructed and presented to others. In a world of crowds, surfaces, and distant and impersonal social relations, the ability to perfect and manage one's image came to be regarded as critical to social mobility, public recognition, and material success. Individuals from a variety of backgrounds and circumstances asserted that they owned their images, that they had an entitlement to their images and a right to control them, and that this prerogative was critical to their ability to live and

[21] *Bremmer* v. *Journal-Tribune Pub. Co.*, 247 Ia 817, 76 N.W.2d 762, 766-67 (Ia, 1956).

function as free and self-determining individuals, and to pursue the fabled American Dream.

The law both responded to and contributed to this focus on images and the rise of the image-conscious self. By the 1940s, as we have seen, a body of tort law protected the individual's public image, their ability to control this image, and their feelings about their image. We saw the expansion of litigation in these areas, and despite doubts and resistance among some sectors, widespread support for these laws – in the judiciary, among academics, in the public at large. Tort law became a venue for, and participant in, modern America's intense concerns with personal image.

Personal image was *legalized*: images, and people's feelings about their images, came to be viewed as appropriate matters for legal intervention, regulation, and supervision. This is not to say that every person who was insulted, maligned, or misrepresented undertook legal action – far from it. Most libels, "invasions of privacy," and other image-based harms never made it to a lawyer, never made it to court. They were endured, or dealt with informally. I am not suggesting that Americans have been litigious around their reputations and public images in any absolute sense. We can see, nonetheless, a growing "claims consciousness" around personal image (Kalven 1966: 338). As the law expanded its authority over image-based harms and emotional harms, as privacy and libel litigation gained publicity and apparent social approval, there was a popular awareness that affronts to one's public persona could be dealt with legally, if one chose – that legal recourse was one avenue, among many, that could be pursued, and perhaps should be pursued.

The effect of this legalization of image, I suggest, was to validate and reinforce the sense of possessiveness and protectiveness toward one's public image and persona. In acknowledging a right to control one's image and one's feelings about one's image, the law affirmed the image-conscious sensibility. As in so many other areas of conduct, the law marked out a terrain of normative, socially acceptable behavior and feeling, through the reasonableness, or "reasonable person" standard (Green 1968: 241). Particularly in the latter half of the twentieth century, courts and juries often defined the reasonable person with respect to image as an individual who was conscious of, and quite sensitive to, their social appearance; who was likely to be hurt, perhaps deeply so, when publicized in a false, misleading, miscontextualized or humiliating manner – or in any fashion that sharply clashed with their own self-image. While there was much disagreement as to the thickness of the

normal person's skin, and the free speech limitations on image rights, the law recognized emotional distress as a reasonable response to a tarnished or distorted public persona, and deemed such injuries significant enough to merit recognition and recompense, although perhaps less so than some may have wished. This legal affirmation legitimated the seriousness toward personal image that was being cultivated and urged upon the public by the other cultural forces we have seen. Free speech limitations notwithstanding, American culture embraced the idea of a legal right to be vindicated and compensated for image-based harms, part of a broader, fundamental right to possess and control the self.

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