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Tortious Invasion of Privacy: Minnesota as a Model

TORTIOUS INVASION OF PRIVACY: MINNESOTA AS A MODEL

Many authorities have analyzed the tort of invasion of privacy. Probably the most authoritative approach to this tort presently is that enunciated by the late William Prosser. This Note evaluates Prosser's approach against the sociopsychological concept of privacy and concludes that Prosser's approach is overinclusive, protecting interests other than privacy. However, the aspects of Prosser's approach which are consistent with the sociopsychological concept of privacy are used, together with analogous Minnesota common law, to formulate a modified definition of tortious invasion of privacy. In addition, the constitutional and common law limitations on the modified tort are examined.

I. INTRODUCTION

The human desire for privacy may well be instinctive.[1] Almost all animals seek periods of seclusion, manifesting territorial behavior in which they seek private claim to a geographically proximate area of land, water, or air.[2] Privacy is also a function of human institutions. The importance of privacy varies among cultures;[3] the importance of privacy in highly advanced civilizations may depend upon social and political

1. *See generally* R. ARDREY, THE TERRITORIAL IMPERATIVE (1966); E. HALL, THE HIDDEN DIMENSION 7-40 (1966). It also has been observed that there is a universal tendency for humans and other primates to seek invasion of others' privacy, probably as a derivative of instinctive curiosity. A. WESTIN, PRIVACY AND FREEDOM 19-21 (1967). *See also* THE SOCIOLOGY OF GEORG SIMMEL 332-33 (K. Wolff ed. 1950) (humans have a fascination with secrecy).

2. *See, e.g.*, Carpenter, *Territoriality: A Review of Concepts and Problems*, in BEHAVIOR AND EVOLUTION 230-42 (A. Roe & G. Simpson eds. 1958); Hediger, *The Evolution of Territorial Behavior*, in SOCIAL LIFE OF EARLY MAN 34-57 (S. Washburn ed. 1961). *See also* H. HOWARD, TERRITORY IN BIRD LIFE (1920); V. WYNEE-EDWARDS, ANIMAL DISPERSION IN RELATION TO SOCIAL BEHAVIOUR (1962).

3. Many studies have revealed the differing emphasis of privacy among primative societies. *Compare, e.g.*, D. LEE, FREEDOM AND CULTURE 75 (1959) (virtue of unending companionship among the Ontong-Javanese) *and* M. MEAD, COMING OF AGE IN SAMOA 20-21, 133-37 (1928) (bathing, sexual relations, birth, and death are completely public in Samoan society) *with, e.g.*, Murphy, *Social Distance and the Veil*, 66 AM. ANTHROPOLOGIST 1257 (1964) (veils worn by men of North African tribe symbolizing the "distance setting" process).

values. Unlike totalitarian societies,[4] democratic societies emphasize the importance of pursuing individual interests beyond those of citizenship and politics.[5] Privacy is a shield for the protection of these interests.[6] As Justice Douglas once said: "The right to be let alone is indeed the beginning of all freedom."[7]

However, even democratic ideals of individuality are no justification for an absolute right of privacy. Democratic societies cannot function without inquiry into legitimate matters of public interest such as unlawful deviation from societal norms.[8] Under many circumstances the public has a legitimate "right to know."[9] Privacy, therefore, must yield when it significantly endangers the democratic paradigm.

The task of the law, then, is to strike the proper balance between the individual's right of privacy and the public's right to know.[10] This task has assumed special importance in view of the highly advanced tools which have been developed to acquire and disclose information.[11] Cameras capable of telescoping images located one thousand yards away or penetrating through walls leave little untouched by the intruding eye.[12] Laser beams, one-quarter inch thick, capable of detecting sound waves

4. Totalitarian and authoritarian advocates frequently attack the concept of privacy. *E.g.*, Dicks, *Observations on Contemporary Russian Behaviour*, 5 HUMAN REL. 111, 140, 163-64 (1952); Mead & Calas, *Child-training Ideals in a Postrevolutionary Context: Soviet Russia*, in CHILDHOOD IN CONTEMPORARY CULTURES 190 (M. Mead & M. Wolfenstein eds. 1955) (child-training writings in Soviet Russia). *See generally* Hollander, *Privacy: A Bastion Stormed*, 12 PROB. COMMUNISM 1 (Nov.-Dec. 1963).

5. *See, e.g.*, Shils, *Social Inquiry and the Autonomy of the Individual*, in THE HUMAN MEANING OF THE SOCIAL SCIENCES 114-57 (D. Lerner ed. 1959) (problems of obtaining data for the social sciences in democratic cultures which emphasize the importance of individuality and privacy).

6. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1019 (1966).

7. Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

8. *See, e.g.*, State v. Cross, 296 Minn. 16, 21, 206 N.W.2d 371, 375 (1973) ("with due regard for the right of privacy," a police officer may search an arrested person to the extent necessary to protect the safety of the officer and prevent the destruction of evidence); Westin, *supra* note 6, at 1020.

9. *See* Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. RES. L. REV. 34, 35-36 (1961). *See also* H. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953) (discussing the routes of access to public records and proceedings); J. HOBSON, THE DAMNED INFORMATION (1971) (same).

10. *See, e.g.*, Pound, *supra* note 9, at 35-36; Westin, *supra* note 6, at 1050; Note, *Right to Privacy: Social Interest and Legal Right*, 51 MINN. L. REV. 531, 533 (1967).

11. *See* Katz v. United States, 389 U.S. 347 (1967) (fourth amendment and the exclusionary rule of evidence protects against illegal wiretapping); Oppenheim, *I Wonder Who's Watching Me Now*, 4 CABLE REPORT 1 (Jan. 1975) (threat to privacy from cable television), *reprinted in* THE RIGHT TO PRIVACY 156-61 (G. McClellan ed. 1976).

12. *E.g.*, A. WESTIN, *supra* note 1, at 70-73; Int'l Comm'n of Jurists, *The Legal Protection of Privacy: A Comparative Survey of Ten Countries*, 24 INT'L SOC. SCI. J. 417, 424 (1972).

in a room blocks away leave little untouched by the intruding ear.[13] Computers storing a plethora of private data pose an ominous threat to privacy.[14]

Minnesota law, in several contexts, already has struck the balance between the individual's right of privacy and the public's right to know. For example, the Minnesota Data Privacy Act limits the use of confidential and private information collected by state agencies.[15] The Privacy of Communications Act places severe restrictions on interception of wire or oral communications by electronic, mechanical, or other devices.[16]

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13. *E.g.*, A. WESTIN, *supra* note 1, at 75; Int'l Comm'n of Jurists, *supra* note 12, at 425.

14. *E.g.*, A. MILLER, THE ASSAULT ON PRIVACY 24-53 (1971). *See generally* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS (1973). For a discussion of various secret files kept on citizens, see A. NEIER, DOSSIER (1975).

15. *See* MINN. STAT. §§ 15.162-.169 (1976), *as amended by* Act of June 2, 1977, ch. 375, 1977 Minn. Laws 825, *as amended by* Act of June 9, 1977, ch. 455, § 94, 1977 Minn. Laws 1446. The Minnesota Data Privacy Act provides that public, private, or confidential data shall not be used, collected, or disseminated by state agencies, except as necessary for the lawful purpose of administering and managing programs specifically authorized by the government. *See* MINN. STAT. § 15.1641 (1976).

"Public data" is defined as that information which is on public record. *See id.* § 15.162(5b). "Private data" is defined as information which is not on public record but which by law is accessible to the individual subject of that information. *See id.* § 15.162(5a). Confidential data is defined as information which is (1) "not public . . . and is inaccessible to the individual subject of that data" or (2) "collected by a civil or criminal investigative agency as a part of an active investigation undertaken for the purpose of the commencement of a legal action . . . ." *Id.* § 15.162(2a), *as amended by* Act of June 2, 1977, ch. 375, § 1, 1977 Minn. Laws 825, *as amended by* Act of June 9, 1977, ch. 455, § 94, 1977 Minn. Laws 1446.

Classification of the data is largely within the discretion of the local state agency, although each political subdivision must designate a "responsible authority" to oversee the collection and use of data. *See* MINN. STAT. § 15.162(6) (1976), *as amended by* Act of June 2, 1977, ch. 375, § 5, 1977 Minn. Laws 826. Considerable confusion over the availability of some data has resulted, and in 1976 the Commissioner of Administration for the State of Minnesota concluded: "There is little uniformity in the classification of data on individuals and the policies and practices followed to administer that data." COMMISSIONER OF ADMINISTRATION, STATE OF MINNESOTA, REPORT TO THE LEGISLATURE OF THE STATE OF MINNESOTA 24 (1976). The Commissioner found, for example:

> One county classified portions of welfare board minutes as confidential. Another county classified them as private. One sheriff reported juvenile records as the only records classified as private or confidential. Other sheriffs indicated that adult criminal histories, investigation records, traffic violations, etc. are either private or confidential.

Id. at 8.

If data is classified as either private or confidential, special limitations are placed on its use. Private and confidential data cannot be used, collected, or disseminated pursuant to a lawful purpose unless: (1) the responsible authority files a statement with the Commissioner of the Department of Administration describing the purpose, and the Commissioner approves the purpose; or (2) the purpose is authorized by the state or federal legislature; or (3) the individual subject of the data has given informed consent to the use. MINN. STAT. § 15.1641(c) (1976).

16. MINN. STAT. §§ 626A.01-.23 (1976), *as amended by* Act of May 11, 1977, ch. 82, §

Rules of evidence protect privacy by privileging several types of confidential communications.[17] Also, pretrial discovery cannot involve an unwarranted invasion of privacy.[18]

Still, Minnesota law affords no comprehensive protection for privacy, either by statute or judicial decision. Perhaps existing torts such as intentional infliction of mental distress, trespass, and nuisance can provide adequate protection;[19] most probably they cannot.[20] The purpose of this Note is to analyze the tort of invasion of privacy and to set forth a new definition of the tort using Minnesota law as a model. It will not

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6, 1977 Minn. Laws 134. The Act not only prohibits interception of communications by electronic, mechanical, or other devices, MINN. STAT. § 626A.02(1)(a)-(b) (1976), but also prohibits the use of intercepted communications, *id.* § 626A.02(c)-(d), the manufacture or distribution of interception devices, *id.* § 626A.03, and the deception of telephone or telegraph companies to obtain protected information or access to certain company premises, *id.* § 626A.14. The Act exempts, however, parties to the communication and communication common carriers or the Federal Communications Commission while discharging their monitoring obligations. *See id.* § 626A.02(2). The Act imposes criminal as well as civil penalties for its violation. *Id.* §§ 626A.02(1), .13.

17. Minnesota law protects confidential communications arising out of the attorney-client relationship, the physician-patient relationship, the husband-wife relationship, the clergyman-penitent relationship, and other relationships. *See* MINN. STAT. § 595.02 (1976). These privileges define situations where the interest in protecting private information outweighs the judiciary's need to know the information for the proper administration of justice. *See, e.g.*, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72, at 152 (2d ed. E. Cleary 1972); Loevinger, *Minnesota Exclusionary Rules of Evidence*, Rule VII, Comment, in 38 MINN. STAT. ANN. 108 (West Cum. Supp. 1977). Thus if the communication is not made in confidence, the privilege does not apply. *E.g.*, Schwartz v. Wenger, 267 Minn. 40, 42-43, 124 N.W.2d 489, 491-92 (1963). *But see* Newstrom v. St. Paul & D. R.R., 61 Minn. 78, 82-83, 63 N.W. 253, 254-55 (1895) (privileged communication between husband and wife need not be confidential; court apparently equating intimate subject matter with meaning of "confidential"); Leppla v. Minnesota Tribune Co., 35 Minn. 310, 29 N.W. 127 (1886) (same).

18. *See* Haynes v. Anderson, 304 Minn. 185, 232 N.W.2d 196 (1975). Privacy must yield, however, to pretrial discovery which is reasonable in scope. *See, e.g.*, Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 167-68, 132 S.E.2d 119, 124-25 (1963); McLain v. Boise Cascade Corp., 271 Ore. 549, 554-55, 533 P.2d 343, 346 (1975).

For a discussion of the *Haynes* decision, see notes 88-89 *infra* and accompanying text.

19. *E.g.*, Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV. 1, 18-20 (1959); Lisle, *The Right of Privacy (A Contra View)*, 19 KY. L.J. 137, 144 (1931). *See also* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 327 (1966) ("[T]ort law's effort to protect the right of privacy seems to me a mistake.").

20. *E.g.*, Note, *supra* note 10, at 541-42; Comment, *Assault Upon Solitude—A Remedy?*, 11 SANTA CLARA LAW. 109, 114-16 (1970) (inability of nuisance law to provide redress for many types of unreasonable intrusions upon solitude and seclusion); *see, e.g.*, Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956) (recovery denied to a woman who had her picture taken while using a tavern bathroom because there is no common law right of privacy); RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977) (four new torts needed to protect against unreasonable invasions of privacy).

focus on statutory[21] or constitutional[22] rights of privacy, except insofar

21. In Minnesota there are several statutory sanctions for privacy. The two most important statutes are the Minnesota Data Privacy Act and the Privacy of Communications Act. For a discussion of these two statutes, see notes 15-16 *supra*.

Another group of statutes require various business organizations to keep certain information confidential. The business organizations affected include the following:

Debt collection agencies: Records and accounts of a debt collection agency relating to the individual debtor and his transactions with creditors must be kept confidential. MINN. STAT. § 332.22(2) (1976). Willful violation of this statute is a gross misdemeanor. *Id.* § 332.26.

Health care facilities: Statute provides a bill of rights for patients and residents of health care facilities. MINN. STAT. § 144.651(5) (1976) states: "Every patient and resident [of a health care facility] shall have the right to respectfulness and privacy as it relates to his medical care program. Case discussion, consultation, examination, and treatment are confidential and should be conducted discreetly . . . ." Enforcement of these rights is normally assured by a grievance procedure, but a civil action is not precluded. *See id.* § 144.652, *as amended by* Act of May 27, 1977, ch. 326, § 1, 1977 Minn. Laws 660.

Hospitals and abortion facilities: Hospital and abortion facilities must keep abortion reports confidential. MINN. STAT. § 145.413 (1976).

Savings associations: Savings associations are required to keep confidential all books and records pertaining to accounts and loans of its members. *Id.* § 51A.11(1).

Telephone and telegraph companies: It is a misdemeanor for an employee of a telephone or telegraph company entrusted with a telephonic or telegraphic message to intentionally or negligently disclose its contents to a person other than the intended receiver. *Id.* § 609.775(1).

Several of the statutes provide a criminal penalty for their violation. There is an issue, however, of whether a civil lawsuit can be predicated on violation of these statutes, creating what might be termed an "invasion of privacy per se."

It is well-settled in Minnesota that where a statute imposes a duty for the protection of others, a violation of the statute imposes liability for the injuries suffered if they are of a character which the statute was designed to prevent, *e.g.*, Smith v. Kahler Corp., 297 Minn. 272, 277, 211 N.W.2d 146, 150 (1973); Osborne v. McMasters, 40 Minn. 103, 104, 41 N.W. 543, 543 (1889), and the plaintiff is a member of the class for whose protection that statute or ordinance was enacted, *e.g.*, Standafer v. First Nat'l Bank, 236 Minn. 123, 126-28, 52 N.W.2d 718, 720-21 (1952), *rev'd second appeal on other grounds*, 243 Minn. 442, 68 N.W.2d 362 (1955). *See also* Gibbons v. Yunker, 142 Minn. 99, 170 N.W. 917 (1919) (statute naming the class protected), *aff'd second appeal on other grounds*, 145 Minn. 401, 177 N.W. 632 (1920). *See generally* Note, *Negligence—Violation of Statute or Ordinance as Negligence or Evidence of Negligence—Rules in Minnesota*, 19 MINN. L. REV. 666 (1935).

Violation of a statute is frequently viewed as failure to exercise reasonable care, thereby proving an element of negligence rather than creating a new tort. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 *passim* (1914). Some authorities, however, argue that certain statutes create an implied civil action sounding in an independent tort. *See* Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932). *See generally* Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441 (1974). Whatever the precise nature of the wrong, it seems that the Minnesota courts might afford civil relief for violation of the privacy statutes, even if violation of the statute also creates criminal liability. *See, e.g.*, Barsness v. Tiegen, 184 Minn. 188, 190, 238 N.W. 161, 162 (1931).

as the Constitution places a limitation on recovery for tortious invasion

22. Although the existence of a constitutional right of privacy is no longer subject to serious debate, the scope of the right is still unclear. Various amendments in the Bill of Rights have been cited as providing a constitutional guarantee to the right of privacy.

First amendment protections of speech are usually viewed as antithetical to privacy. *See* notes 253-343 *infra* and accompanying text. However, the United States Supreme Court has also used the first amendment to protect the right of anonymity in public expression. *See* Talley v. California, 362 U.S. 60 (1960) (ordinance requiring name and address of handbill sponsor is unconstitutional). It is also clear that the first amendment protects associational privacy. In NAACP v. Alabama, 357 U.S. 449 (1958), *decision on remand rev'd per curiam*, 360 U.S. 240 (1959), a unanimous Court held unconstitutional Alabama's attempt to compel the disclosure of NAACP membership lists in connection with the qualification of the NAACP as a foreign corporation. Justice Harlan, writing for the Court, declared: "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462; *accord*, Schneider v. Smith, 390 U.S. 17, 24-26 (1968); Shelton v. Tucker, 364 U.S. 479 (1960).

The third amendment prohibitions against peacetime quartering of troops in private homes has the plain object of protecting privacy by securing "the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle . . . ." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 621 (4th ed. 1873).

Within the Bill of Rights, the fourth amendment prohibition against unreasonable searches and seizures is the clearest expression of a constitutional right of privacy. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212, 215. Both the courts and legal authorities have recognized that privacy interests are protected by the fourth amendment. *See, e.g.*, Katz v. United States, 389 U.S. 347, 350 (1967); State v. Burch, 284 Minn. 300, 305, 170 N.W.2d 543, 548 (1969); T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 218 (2d ed. 1891); 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON 179-80 (1968).

The fourth amendment provides protection only against government searches and seizures. *E.g.*, Burdeau v. McDowell, 256 U.S. 465, 475 (1921). A few courts, however, have extended fourth amendment-type protections to private searches and seizures as well. *See, e.g.*, Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971); Young v. Western & Atl. R.R., 39 Ga. App. 761, 766, 148 S.E. 414, 417 (1929), *aff'd second appeal on other grounds*, 43 Ga. App. 257, 158 S.E. 464 (1931); Lebel v. Swincicki, 354 Mich. 427, 434-41, 93 N.W.2d 281, 284-88 (1958). *But see* Sutherland v. Kroger Co., 144 W. Va. 673, 683-84, 110 S.E.2d 716, 723 (1959). *See also* B. SCHWARTZ, *supra* at 198-201 (Elkins v. United States, 364 U.S. 206 (1960) and Mapp v. Ohio, 367 U.S. 643 (1961) signal a change in the attitude of the Court on fourth amendment protections; fourth amendment protection should be extended to private searches and seizures).

The fifth amendment's privilege against self-incrimination also provides protection for privacy by guaranteeing freedom from forced disclosure. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 458-61 (1966); Tehan v. United States, 382 U.S. 406, 416 (1966) (the privilege against self-incrimination reflects the concern of society "for the right of each individual to be let alone"). *But see* Schmerber v. California, 384 U.S. 757, 760-65 (1966) (forced blood-alcohol test is not the type of testimonial compulsion prohibited by the fifth amendment).

The right of privacy has also been said to be a fundamental or natural right within the meaning of "liberty" protected by the due process clause. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 515-22 (1961) (Douglas, J., dissenting); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949); York v. Story, 324 F.2d 450, 454-56 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E. 68, 70-71 (1905); *cf.* Melvin v. Reid, 112 Cal. App. 285, 291, 297 P. 91, 93-94 (1931) (privacy is a type of "liberty" or "pursuit of happiness" guaranteed by the California constitution).

In conclusion, various amendments in the Bill of Rights will protect privacy in certain

of privacy.

To strike the balance between the individual's right of privacy and the public's right to know as they exist in a common law context, three broad issues must be resolved. First, privacy must be defined. This involves an examination of the sociopsychological concept of an invasion of privacy.[23] Once this concept has been defined, a second issue is to delineate the elements of a common law action for invasion of privacy.[24] Several authorities, including William Prosser, have defined a common law tort for invasion of privacy.[25] The position of this Note, however, is that the tort has not been defined satisfactorily by Prosser or anyone else because their definitions are either incomplete or inconsistent with the concept of privacy as understood by social scientists. Therefore, a new definition of tortious invasion of privacy will be proposed based on sociopsychological considerations.[26] Finally, the constitutional limitations and common law defenses on this proposed tort will be examined.[27]

II. Defining an Invasion of Privacy in a Sociopsychological Context

Tortious invasion of privacy cannot be defined without an understanding of the sociopsychological concept of privacy. One cogent criticism concerning many legal authorities who have examined the right of privacy is that they have focused on court decisions and legal publications, often overlooking the theories of privacy enunciated by sociologists and psychologists.[28] When a court is presented with a question of

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contexts. The fact that protections of privacy run thoughout the Bill of Rights led Justice Douglas, writing for the Court, to conclude in Griswold v. Connecticut, 381 U.S. 479, 484 (1965) that the right of privacy was fundamental to the Bill of Rights: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . . [These] create zones of privacy." Although disagreement over which amendments protect privacy resulted in five concurring opinions and two dissenting opinions, it is agreed that *Griswold* definitely introduces a right of privacy into constitutional law. *See, e.g.*, M. Shapiro & R. Tresolini, American Constitutional Law 731 (4th ed. 1975); A. Westin, *supra* note 1, at 355. But because *Griswold* itself involved governmental interference with the right of privacy, it is likely that a constitutional right of privacy still protects only against governmental intrusions. *See* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) (broadcast of radio programs by a railway company into its streetcars and buses); B. Schwartz, *supra* at 178. Furthermore, attempts to "constitutionalize" the broader common law right of privacy have generally failed. *E.g.*, McNally v. Pulitzer Pub. Co., 532 F.2d 69, 76-77 & n.9 (8th Cir. 1976).

23. See notes 28-54 *infra* and accompanying text.

24. See notes 55-252 *infra* and accompanying text.

25. See notes 122-74 *infra* and accompanying text.

26. See notes 175-252 *infra* and accompanying text.

27. See notes 253-360 *infra* and accompanying text.

28. *See, e.g.*, Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. Rev. 962 (1964); Gross, *The Concept of Privacy*, 42 N.Y.U.L. Rev. 34 (1967); Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960); Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); Note, *supra* note 10.

physics, chemistry, or medicine, it turns to the expert physicist, chemist, or physician for insight.[29] Similarly, when the legal profession attempts to define "invasion of privacy," it should seek assistance from psychologists and sociologists.[30]

Most psychologists and sociologists agree that privacy is a concept which describes an individual's control over the presentation of his "self" to others, that is, control over how and when to interact with others.[31] This control is dialectic in nature. Privacy encompasses control both over when social input from others will be received and when social output will be given to others.[32] The sociopyschological forces acting upon the individual at a given time determine whether he will present himself to or preserve himself from others.[33]

Humans use various mechanisms to achieve the desired amount of privacy.[34] One is geographical distance from others.[35] The desired distances may range from miles to inches, depending on the extent of desired social contact.[36] Another mechanism is the use of objects and phys-

29. *See, e.g.*, Orwick v. Belshan, 304 Minn. 338, 345-46, 231 N.W.2d 90, 95-96 (1975) (metallurgical expert); Krueger v. Knutson, 261 Minn. 144, 158-59, 111 N.W.2d 526, 536 (1961) (medical expert); Johnson v. Agerbeck, 247 Minn. 432, 441-43, 77 N.W.2d 539, 545-46 (1956) (civil engineer).

30. Recently the Minnesota Supreme Court adopted new rules of evidence. MINN. R. EVID. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, training, or education, may testify thereto in the form of an opinion or otherwise.

Under this rule, it is conceivable that an alleged invasion of privacy could be rebutted by a sociologist or psychologist who testifies that the facts do not describe injury to privacy as that concept is understood by the profession. It is well-recognized that the plaintiff's description of his physical injuries can be challenged by an adverse medical expert. *See, e.g.*, Shymanski v. Nash, ___ Minn. ___, ___, 251 N.W.2d 854, 857 (1977). This principle might also be applicable to allow a similar challenge by a sociologist or psychologist when the injury is mental and allegedly due to an invasion of privacy.

31. *See, e.g.*, Altman, *Privacy*, 8 ENVIRONMENT & BEHAVIOR 7, 8 (1976); Bates, *Privacy—A Useful Concept?*, 42 SOC. FORCES 429, 430 (1964); Schwartz, *The Social Psychology of Privacy*, 73 AM. J. SOC. 741, 751-52 (1968). *See also* A. WESTIN, *supra* note 1, at 33.

32. Altman, *supra* note 31, at 11-12; *see* Simmel, *Privacy is Not an Isolated Freedom*, in PRIVACY 72 (J.R. Pennock & J. Chapman eds. 1971).

33. *E.g.*, Pastalan, *Privacy as a Behavioral Concept*, 45 SOC. SCI. 93, 95-96 (1970).

34. Altman, *supra* note 31, at 17-22; Pastalan, *supra* note 33, at 96.

35. *See, e.g.*, R. SOMMER, PERSONAL SPACE 39-57 (1969); Altman, *supra* note 31, at 20. *See generally* R. ARDREY, *supra* note 1; E. HALL, *supra* note 1.

36. One anthropologist has proposed that humans have four distance zones. One zone consists of intimate distance, ranging from bodily contact to 18 inches. E. HALL, *supra* note 1, at 116-19. This zone permits communication through smell, heat, and physical contact as well as through vision and sound. It is not uncommon for a person to feel discomfort when a stranger is inappropriately inside the intimate sphere.

The second zone consists of personal distance, ranging from 18 inches to four feet. *Id.*

ical barriers.[37] Obvious examples are telephones, doors, and walls.[38] Verbal statements are a third means of achieving desired privacy.[39] Statements such as "come in" and "keep out" often are effective to induce or avoid social interaction.[40]

Desired privacy, however, may not always be equivalent to achieved privacy. The reaction of others to privacy mechanisms cannot always be calculated with precision.[41] Thus when achieved privacy exceeds desired privacy, the person is bored and lonely.[42] On the other hand, when achieved privacy is less than desired privacy, the person experiences an invasion of privacy.[43]

Descriptions of an invasion of privacy vary among sociologists and psychologists. Some emphasize that an invasion of privacy occurs when others "bombard" the individual with more social inputs than he desires,[44] for example, when he is denied physical or psychological seclu-

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at 119-20. At this distance there is little, if any, physical contact. Communication at this distance consists mainly of visual and verbal cues.

The third zone consists of social distance, ranging from four to 12 feet. *Id.* at 121-23. Most business and social interaction is conducted at this distance.

The fourth zone is public distance, consisting of 12 feet or more. *Id.* at 123-25. This distance is used mainly in formal interactions with persons of higher status.

37. *See, e.g.*, E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 106-40 (1959); Altman, *supra* note 31, at 21.

38. D. LEE, *supra* note 3, at 31; Schwartz, *supra* note 31, at 746-50. For a pictorial description of objects and their effect on territorial spacing, see E. HALL, *supra* note 1, at 106-07, plates 13-26.

39. *See, e.g.*, Davis & Oleson, *Communal Work and Living: Notes on the Dynamics of Social Distance and Social Space*, 55 SOC. & SOC. RESEARCH 191, 198 (1971) (using a foreign language can achieve privacy because it prevents others from understanding the conversation).

40. Altman, *supra* note 31, at 18.

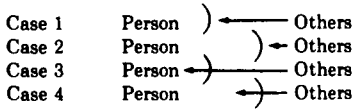
41. *See, e.g.*, E. GOFFMAN, *supra* note 37, at 209. Crowding and overpopulation may render privacy mechanisms largely ineffective. *See* E. HALL, *supra* note 1, at 167-68.

42. Altman, *supra* note 31, at 14; *see* Schwartz, *supra* note 31, at 751.

43. Altman, *supra* note 31, at 14.

44. Irwin Altman, a psychologist, illustrates this phenomenon with a diagram similar to the following:

Control of Inputs from Others



See Altman, *supra* note 31, at 14-17. For a diagram illustrating undesired social outputs, see note 49 *infra*. The curved lines around the "Person" symbolize his desired level of social inputs. The space between the "Person" and the curved lines symbolize desired social distance. The arrows symbolize the level of actual inputs from others.

In Case 1 the person's desired privacy equals his achieved privacy because he desires a high input level and he actually receives a high input level. In Case 2 the person's desired privacy is again equal to his achieved privacy because he desires a low input level and he actually receives a low input level. Cases 3 and 4 symbolize the situation where the person's privacy is invaded because actual inputs exceed desired inputs. In Case 3, the

sion from the presence of other persons or stimuli.[45] The individual thereby is annoyed by this presence, a phenomenon typical of crowding.[46] This situation does not involve the unwanted acquisition or disclosure of information about the individual, but rather involves the unwanted bombardment of stimuli.[47]

Other sociologists and psychologists emphasize that privacy is invaded when the individual is prevented from choosing the conditions under which information about himself is communicated to others.[48] This situation exists when actual social outputs are forced from the individual in excess of desired social outputs.[49] The individual thereby

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person desires a high level of social input, but his privacy is invaded because he actually receives an even greater level of social input. In Case 4, the person receives very few social inputs, but they nevertheless invade his privacy because he desires even fewer social inputs.

45. Chapin, *Some Housing Factors Related to Mental Hygiene*, 7 J. Soc. Issues 164, 165 (1951) (privacy is invaded when there is interference with the "freedom to be by oneself" or when the person is denied relief from the "pressures of the presence of others"); Milgram, *The Experience of Living in Cities*, 167 Sci. 1461, 1462 (1970) (privacy is invaded when the person is prevented from avoiding "input overload").

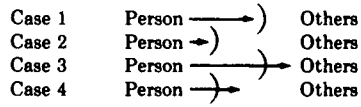
46. E. Hall, *supra* note 1, at 118 (defenses used by adults in crowded buses and subways to combat intrusions into zones of intimate distance); Pastalan, *supra* note 33, at 94 (devices used to achieve psychological distance in crowded settings to offset close physical proximity).

47. *See* Altman, *supra* note 31, at 13-17.

48. *See* Jourard, *Some Psychological Aspects of Privacy*, 31 Law & Contemp. Prob. 307, 307 (1966) (privacy is invaded when there is interference with "a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future"); Pastalan, *supra* note 33, at 94 (privacy is invaded when there is interference with "the right of the individual to decide what information about himself should be communicated to others and under what conditions"); Schwartz, *supra* note 31, at 747 (privacy is invaded when the "self has lost control of its audience; it can no longer regulate who may and who may not have access to the property and information that index its depths").

49. Psychologist Irwin Altman illustrates this phenomenon with a diagram similar to the following:

Control of Outputs to Others



See Altman, *supra* note 31, at 14-17. For a diagram illustrating undesired social inputs, see note 44 *supra*. The curved lines around the "Person" symbolize his desired level of social outputs. The space between the "Person" and the curved lines symbolize desired social distance. The arrows symbolize the level of actual outputs to others.

In Case 1 the person's desired privacy equals his achieved privacy because the person desires a high output level and achieves a high output level. Also, in Case 2 the person's desired privacy equals his achieved privacy because he desires low outputs and achieves low outputs. In Cases 3 and 4 the person's privacy is invaded because achieved social outputs exceed desired social outputs, thereby causing unwanted social interaction with others. In Case 3 the person desires a high level of social output, but he achieves an even

is annoyed from the "unwanted revelation" of the self to others, such as when he loses his anonymity in a crowd[50] or is the subject of unwanted revelations about his intimate relationships.[51] This situation does not involve the unwanted bombardment of stimuli, but rather the unwanted acquisition or disclosure of private information with its attendant effect on social interaction.[52]

Finally, there are sociologists and psychologists who combine these two theories into one.[53] Psychologist Irwin Altman states: "We hypothesize a two-way privacy process involving control over social inputs and social outputs. First, [privacy] includes control over *inputs* from persons and stimuli outside the self. . . . Privacy can also be viewed from the perspective of [controlling] *outputs* from the self."[54]

In recognition of these two theories—"bombardment" and "unwanted revelation"—and the combined-theory approach taken by some, this Note defines the sociopsychological concept of invasion of privacy as follows:

> Privacy is invaded:
> (1) when the individual is subjected to unwanted social inputs and stimuli, creating annoyance from the presence of persons or things which prevent the individual from achieving his desired degree of seclusion; or
> (2) when the individual is subjected to unwanted social outputs, creating annoyance from the unauthorized acquisition or disclosure of private information concerning the individual which results in undesired social interaction.

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higher level. In Case 4 the person achieves a low level of social output, but his privacy is invaded because he desires an even lower level.

50. *See* THE SOCIOLOGY OF GEORG SIMMEL 402-08 (K. Wolff ed. 1950) (concept of the "stranger" who remains relatively anonymous); A. WESTIN, *supra* note 1, at 31; Pastalan, *supra* note 33, at 96 (description of environmental factors, antecedent factors, and behavior associated with the desire to avoid personal identification and the responsibility for social conduct).

51. *See* R. PARK & E. BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY 284-87 (1921) (discussion of difference between distant secondary social contacts and close primary social contacts which include intimate relationships); Pastalan, *supra* note 33, at 96 (description of environmental factors, antecedent factors, and behavior associated with the need to have close, relaxed, and frank relationships).

52. *See* Altman, *supra* note 31, at 15-16.

53. *See, e.g.*, Bates, *supra* note 31, at 429 (privacy is invaded when there is interference with "a person's feeling that others should be excluded from something which is of concern to him"); A. Rapaport, Some Perspectives on Human Use and Organization of Space (May 1972) (paper presented at Australian Association of Social Anthropologists, Melbourne, Australia) (privacy is invaded when there is interference with "the ability to control interaction, to have options, devices and mechanisms to prevent unwanted interaction and to achieve desired interaction"), *definition of privacy reprinted in* Altman, *supra* note 31, at 8. *See also* THE SOCIOLOGY OF GEORG SIMMEL 320-24 (K. Wolff ed. 1950) (control over presentation and withdrawal of a person's "intellectual private-property").

54. Altman, *supra* note 31, at 14 (emphasis in original).

This does not, of course, define tortious invasion of privacy. Rather, it defines the sociopsychological concept of an invasion of privacy. It provides a basis, however, for the analysis of the legal protection given privacy. The problem of defining a common law right of privacy, therefore, should be solved in a manner consistent with this broader theoretical concept.

III. A COMMON LAW RIGHT OF PRIVACY

Although tortious invasion of privacy was not recognized at early common law,[55] most jurisdictions have now recognized the tort.[56] Only three states have expressly rejected it.[57] The Minnesota Federal District

55. *E.g.*, Elmhurst v. Shoreham Hotel, 58 F. Supp. 484, 485 (D.D.C. 1945), *aff'd sub nom.*, Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946); Melvin v. Reid, 112 Cal. App. 285, 287, 297 P. 91, 92 (1931); Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 544, 64 N.E. 442, 443 (1902). *But see* Prince Albert v. Strange, 64 Eng. Rep. 293, 312 (V.C. 1849) (the common law protects private sentiments contained in writings); Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769) (same).

56. *See, e.g.*, Peay v. Curtis Pub. Co., 78 F. Supp. 305, 307-09 (D.D.C. 1948); Smith v. Doss, 251 Ala. 250, 252-53, 37 So. 2d 118, 120 (1948); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 304-05, 162 P.2d 133, 138 (1945); Olan Mills, Inc. v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Rugg v. McCarty, 173 Colo. 170, 175-76, 476 P.2d 753, 754-56 (1970); Korn v. Rennison, 21 Conn. Supp. 400, 401-03, 156 A.2d 476, 477-78 (1959); Barbieri v. News-Journal Co., 56 Del. 67, 69, 189 A.2d 773, 774 (1963); Cason v. Baskin, 155 Fla. 198, 207-15, 20 So. 2d 243, 247-53 (1944) (en banc), *rev'd second appeal on other grounds en banc*, 159 Fla. 31, 30 So. 2d 635 (1947); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 193-95, 50 S.E. 68, 69-81 (1905); Fergerstrom v. Hawaiian Ocean View Estates, 50 Hawaii 374, 441 P.2d 141 (1968); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 294-306, 106 N.E.2d 742, 743-48 (1952); Continental Optical Co. v. Reed, 119 Ind. App. 643, 646-51, 86 N.E.2d 306, 308-09 (1949) (in banc); Bremmer v. Journal-Tribune Pub. Co., 247 Iowa 817, 821-22, 76 N.W.2d 762, 765 (1956); Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 432, 120 S.W. 364, 366 (1909); Itzkovitch v. Whitaker, 115 La. 479, 480-81, 39 So. 499, 501 (1905); Carr v. Watkins, 227 Md. 578, 586-88, 177 A.2d 841, 845-46 (1962); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948), *aff'd second appeal*, 334 Mich. 282, 54 N.W.2d 595 (1952); Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951); Barber v. Time, Inc., 348 Mo. 1199, 1204, 159 S.W.2d 291, 293 (1942); Welsh v. Roehm, 125 Mont. 517, 522-25, 241 P.2d 816, 819 (1952); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 A. 97 (1907); Blount v. TD Pub. Corp., 77 N.M. 384, 387-89, 423 P.2d 421, 424 (1967); Flake v. Greensboro News Co., 212 N.C. 780, 790-93, 195 S.E. 55, 63-64 (1938); Housh v. Peth, 165 Ohio St. 35, 38-39, 133 N.E.2d 340, 343 (1956); Hinish v. Meier & Frank Co., 166 Ore. 482, 502-05, 113 P.2d 438, 446-47 (1941); *In re* Mack, 386 Pa. 251, 259-60, 126 A.2d 679, 682-83 (1956), *cert. denied*, 352 U.S. 1002 (1957); Holloman v. Life Ins. Co., 192 S.C. 454, 458-59, 7 S.E.2d 169, 171 (1940); Truxes v. Kenco Enterprises, Inc., 80 S.D. 104, 107-09, 119 N.W.2d 914, 916-17 (1963); Langford v. Vanderbilt Univ., 199 Tenn. 389, 401-04, 287 S.W.2d 32, 38 (1956) (by implication); Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1973); Roach v. Harper, 143 W. Va. 869, 871-77, 105 S.E.2d 564, 568 (1958).

57. *See* Brunson v. Ranks Army Store, 161 Neb. 519, 524-25, 73 N.W.2d 803, 806 (1955); Henry v. Cherry & Webb, 30 R.I. 13, 43, 73 A. 97, 109 (1909); Yoeckel v. Samonig, 272 Wis. 430, 434, 75 N.W.2d 925, 927 (1956). The Nebraska and Wisconsin courts explicitly left creation of the tort to the legislature.

Court has decided at least four cases brought for invasion of privacy,[58] yet the Minnesota Supreme Court has neither rejected nor recognized a common law right of privacy. The Minnesota Supreme Court has decided only one case brought specifically for tortious invasion of privacy: *Hendry v. Conner*.[59]

In *Hendry*, a 1975 case, the plaintiff had taken her child to a hospital for medical treatment. While waiting to have the child admitted, an employee of the credit department told the plaintiff that her child could not be treated unless a bill for prior treatment was paid, referring to the fact that the debt had been discharged in bankruptcy. Because a number of people in the waiting room overheard the conversation, the plaintiff brought an action for invasion of privacy. The Minnesota Supreme Court, applying the analysis of William Prosser,[60] held that the plaintiff did not state a cause of action because bankruptcy is not a private fact[61] and the disclosure to the few people present was insufficient publicity.[62] The court, therefore, found it unnecessary to determine whether a common law right of privacy should be recognized in Minnesota.[63]

58. The Minnesota Federal District Court denied the claim for invasion of privacy in each of the four cases. In Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948) the plaintiff brought an action for invasion of privacy when a photographer took his picture in a courtroom during child custody proceedings. The court considered whether Minnesota would recognize a common law right of privacy, and held a cause of action was not stated because the proceedings were newsworthy.

A similar case was presented by Hurley v. Northwest Pubs., Inc., 273 F. Supp. 967 (D. Minn. 1967), *aff'd per curiam*, 398 F.2d 346 (8th Cir. 1968), in which defendant newspaper published a condensed but essentially accurate report of a complaint filed in a lawsuit brought by the administrator of an estate against the plaintiffs, their mother, and four sisters. The complaint alleged that they had conspired to unduly influence the decedent's transfer of security proceeds to them. The claim for invasion of privacy was denied because the published statements were derived from a public record.

In the unpublished case of Benner v. National Broadcasting Co., Civil No. 4-72-67 (D. Minn. June 18, 1975), a St. Paul branch president of the NAACP brought an action against NBC after it displayed in a television broadcast an index card bearing plaintiff's name which was part of a file prepared by the Army for domestic intelligence purposes. Although the court found that this constituted a prima facie case for invasion of privacy, it ordered summary judgment for NBC on the basis of first amendment protections.

Finally, in Morris v. Danna, 411 F. Supp. 1300 (D. Minn. 1976), *aff'd per curiam*, 547 F.2d 437 (8th Cir. 1977), the plaintiff brought an action against an assistant county attorney and a county welfare fraud unit for invasion of privacy based on the publication of private facts which allegedly could have been obtained only from his welfare records. The court dismissed for lack of subject matter jurisdiction because the narrow constitutional right of privacy was not violated and no other federal question was involved.

See also Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970) (misappropriation of a professional baseball player's name may be enjoined even though it does not constitute an invasion of privacy), *discussed in* text accompanying notes 164-66 *infra*.

59. 303 Minn. 317, 226 N.W.2d 921 (1975) (per curiam).

60. *See id.* at 318, 226 N.W.2d at 922.

61. *Id.* at 319, 226 N.W.2d at 923.

62. *Id.*

63. *See id.*

Two broad questions arise from the *Hendry* decision. Because the court in *Hendry* did not refute a common law right of privacy, the first question is whether the tort should be recognized in Minnesota. If the tort should be recognized, the second question involves a determination of its elements. These questions are discussed below.

A. Should Privacy Be Protected by a Common Law Tort?

Common law torts evolved to protect important personal and social interests. Some interests might not be sufficiently important to deserve the sanction of a common law tort. For example, ingratitude does not give rise to tortious liability.[64] Thus, one issue confronting the Minnesota court is whether privacy is a sufficiently important interest to qualify for tort sanction.

Privacy may be important to the individual for several reasons. First, it protects personal autonomy, individuality, and personal choice.[65] Privacy also provides emotional release from playing social roles, allowing the individual to deviate from social norms without being held accountable for it.[66] In addition, privacy affords self-evaluation because it allows the individual to process and organize accumulated information and social stimuli.[67] Moreover, privacy allows the individual to engage in confidential interaction with trusted friends.[68]

In contrast to value for the individual, privacy also has political and social value. It furthers democratic values because it protects autonomy, individuality, and freedom of association in organizations advocating unconventional ideas.[69] In addition, the sanctity of social norms is pre-

64. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 21 (4th ed. 1971).

65. *See* Lasswell, *The Threat to Privacy*, in CONFLICT OF LOYALTIES 135-36 (R. MacIver ed. 1952); Rossiter, *The Pattern of Liberty*, in ASPECTS OF LIBERTY 17 (M. Konvitz & C. Rossiter eds. 1958). Individuality and personal choice are furthered because privacy allows the person to withdraw from the manipulation or domination of others. A. WESTIN, *supra* note 1, at 33.

The Minnesota Supreme Court has also recognized that privacy serves personal autonomy. In Price v. Sheppard, ___ Minn. ___, 239 N.W.2d 905 (1976), the court was confronted with the issue of whether involuntary electroshock treatment to persons committed for mental illness was an unconstitutional invasion of privacy. In discussing the nature of privacy the court said: "At the core of the privacy decisions, in our judgment, is the concept of personal autonomy—the notion that the Constitution reserves to the individual, free of governmental intrusion, certain fundamental decisions about how he or she will conduct his or her life." *Id.* at ___, 239 N.W.2d at 910.

66. Pastalan, *supra* note 33, at 93. *See generally* E. GOFFMAN, *supra* note 37, at 128-82 (persons have "backstage" areas in which they relax from playing social roles).

67. Bates, *supra* note 31, at 433; Pastalan, *supra* note 33, at 94.

68. A. WESTIN, *supra* note 1, at 37-39; Pastalan, *supra* note 33, at 94; *see* Jourard, *Self-Disclosure and Other-Cathexis*, 59 J. ABNORMAL & SOC. PSYCH. 428 (1959) (study showing that persons disclose more confidential matters to another if the other reciprocates with similar disclosures).

69. A. WESTIN, *supra* note 1, at 34; *see* NAACP v. Alabama, 377 U.S. 288 (1964) (state

served when harmless deviation occurs in a private setting, invisible to the public eye.[70] Third, privacy helps to maintain the division between groups.[71] Privacy may even preserve important relationships by allowing withdrawal from those relationships when sporadic frictions and conflicts occur.[72]

The cumulative value of these interests would appear sufficiently important for the sanction of a common law tort. Courts in at least thirty-three states have so concluded.[73] Even the three courts which have rejected a common law right of privacy have not concluded that privacy is undeserving of legal protection; instead, they concluded that because an action for invasion of privacy was not recognized at early common law,[74] adoption of the tort would be an improper exercise of judicial power. Thus, even if the Minnesota Supreme Court decides that privacy deserves common law protection, the court must also decide whether it is appropriate to adopt a tort which was not recognized at early common law.

Presently, Nebraska,[75] Rhode Island,[76] and Wisconsin[77] are the only states which reject a common law tort for invasion of privacy. The reasons stated for rejection were that first, a right of privacy had not yet found an "abiding place" in the state's jurisprudence[78] and that second, the creation of a right unknown at common law is a task for the legislature.[79]

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of Alabama cannot compel the NAACP to disclose a list of its members); Shelton v. Tucker, 364 U.S. 479 (1960) (school board cannot compel teachers to disclose all groups in which they are members). *See also* Moore & Tumin, *Some Social Functions of Ignorance*, 14 AM. SOC. REV. 787, 792 (1949) (privacy is necessary in competitive economies to assure confidential business decisions).

70. Moore & Tumin, *supra* note 69, at 791; Schwartz, *supra* note 31, at 744.

71. J. HONIGMANN, THE WORLD OF MAN 349 (1959); Schwartz, *supra* note 31, at 742-43.

72. *See* Rosenblatt & Budd, *Territoriality and Privacy in Married and Unmarried Cohabiting Couples*, 97 J. SOC. PSYCH. 67 (1965) (hypothesis that married couples are more territorial than unmarried couples because a long-term commitment requires defined territoriality to minimize the frictions of living together); Schwartz, *supra* note 31, at 741-42.

73. *See* cases cited in note 56 *supra*.

74. *See* cases cited in note 55 *supra*.

75. *See* Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955).

76. *See* Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909).

77. *See* Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956); State *ex rel.* Distenfeld v. Neelen, 255 Wis. 214, 218, 38 N.W.2d 703, 704-05 (1949); Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 525-27, 269 N.W. 295, 301-02 (1936). *See generally* Comment, *The Right of Privacy*, 1952 WIS. L. REV. 507.

However, the Wisconsin court does allow recovery for intentional and outrageous infliction of mental distress, which conceivably could be caused by an invasion of privacy. *See* Alsteen v. Gehl, 21 Wis. 2d 349, 356-61, 124 N.W.2d 312, 316-18 (1963).

78. *See* Henry v. Cherry & Webb, 30 R.I. 13, 43, 73 A. 97, 109 (1909); Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 526, 269 N.W. 295, 302 (1936).

79. *See* Brunson v. Ranks Army Store, 161 Neb. 519, 525, 73 N.W.2d 803, 806 (1955);

The first reason probably is not applicable in Minnesota. The Minnesota court may have recognized privacy interests as early as 1890 in the case of *Moore v. Rugg*.[80] In that case, the defendant photographer had given the picture of a customer to another person without the customer's consent. The customer brought an action for damages. The Minnesota Supreme Court affirmed an order overruling a general demurrer, stating that implicit in the customer's contract with the defendant was an understanding that the picture would be used only for purposes authorized by the customer.[81] Although the court did not analyze the use of the customer's picture in terms of an invasion of privacy, several courts have stated that such use of a person's picture constitutes the tort of "appropriation"[82] or interference with a person's "right of publicity."[83] These torts often protect against the usurpation of a celebrity's pecuniary rights in his name and picture.[84] In some instances, however, the torts may provide protection to privacy,[85] and therefore the Minnesota court in *Moore* may have recognized privacy interests as well as contract rights.

A clearer instance of protection to privacy appears in *Lesch v. Great Northern Railway*,[86] a 1906 case. While the plaintiff was home and her husband was away, the defendant's employees entered the plaintiff's house without permission and searched all the rooms for stolen tools. After they left she developed severe mental distress and was confined to bed for two weeks. The Minnesota Supreme Court affirmed a judgment for the plaintiff because an unlawful or wanton invasion of the peaceful enjoyment of her home was "a tort."[87] Although the court did not define the tort, the essence of the wrong was undoubtedly the inva-

Yoeckel v. Samonig, 272 Wis. 430, 434-35, 75 N.W.2d 925, 926-27 (1956). In *Yoeckel*, defendant photographed plaintiff while she was using a tavern bathroom. Defendant then distributed the picture among the tavern patrons. Plaintiff's common law claim for invasion of privacy was rejected in view of the Wisconsin legislature's failure to pass a bill which had been introduced to create a right of privacy. This has been described as "truly an appalling decision." *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 n.20 (4th ed. 1971).

At one time the Texas courts also rejected a common law right of privacy on the grounds that creation of the right was for the legislature. *See* Milner v. Red River Valley Pub. Co., 249 S.W.2d 227, 229 (Tex. Ct. Civ. App. 1952), *discussed in* Seavey, *Can Texas Courts Protect Newly-Discovered Interests*?, 31 TEX. L. REV. 309 (1953). The Texas Supreme Court has since retreated from that position and it now recognizes a common law right of privacy. *See* Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1973).

80. 44 Minn. 28, 46 N.W. 141 (1890).
81. *Id.* at 29, 46 N.W. at 141.
82. *See* notes 154-56 *infra* and accompanying text.
83. *See* note 168 *infra*; note 174 *infra* and accompanying text.
84. *See* notes 157-68 *infra* and accompanying text.
85. *See* notes 169-74 *infra* and accompanying text.
86. 97 Minn. 503, 106 N.W. 955 (1906).
87. *Id.* at 506, 106 N.W. at 957.

sion of her privacy.

More recently, the Minnesota Supreme Court has expressly relied upon a right of privacy to protect against intrusive pretrial discovery. In *Haynes v. Anderson*,[88] the defendant in a personal injury action sought discovery of the plaintiff's psychological condition through use of the Minnesota Multiphasic Personality Inventory, a series of extremely personal and intimate questions. The district court ordered discovery and plaintiff sought a writ of prohibition from the supreme court. The supreme court held that submission to the test could be compelled only if several conditions were satisfied, one of which was that the probative value of the anticipated answers outweigh any unnecessary intrusion into the plaintiff's privacy.[89]

The Minnesota Supreme Court also has used a constitutional right of privacy[90] as a basis for protection against unwanted electroshock therapy[91] and unreasonable searches and seizures.[92] Furthermore, the Minnesota Legislature has enacted the Data Privacy Act, which limits the use of data collected by state agencies,[93] and the Privacy of Communications Act, which protects against unauthorized wiretapping and bugging.[94]

These developments indicate the right of privacy has been given recognition in Minnesota law. Therefore, the tort of invasion of privacy probably cannot be rejected on the ground that the right of privacy, unknown at early common law, has not been given an "abiding place" in Minnesota jurisprudence.

The Minnesota court might, however, adopt the second reason for rejecting the tort and hold that creation of a new right is a task for the legislature and not the judiciary.[95] Case law seems to indicate, however,

88. 304 Minn. 185, 232 N.W.2d 196 (1975).

89. *Id.* at 190, 232 N.W.2d at 200.

90. For a discussion of the constitutional right of privacy, see note 22 *supra*.

91. In the recent case of Price v. Sheppard, ___ Minn. ___, 239 N.W.2d 905 (1976) the Minnesota Supreme Court was confronted with the issue of whether involuntary electroshock treatment to persons committed for mental illness was an unconstitutional infringement upon their privacy. The court found it unnecessary to resolve this issue because it held that defendant, the medical director of a Minnesota security hospital, was immune from liability. The court indicated, however, that resolution of the constitutional issue would depend upon whether electroshock was a "necessary and reasonable" means for the state to fulfill its duty of protecting the well-being of citizens who are incapable of acting for themselves. *Id.* at ___, 239 N.W.2d at 910-12.

92. *See, e.g.*, State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970); State v. Burch, 284 Minn. 300, 305, 170 N.W.2d 543, 548 (1969); State *ex rel.* Branchaud v. Hedman, 269 Minn. 375, 378-79, 130 N.W.2d 628, 630 (1964), *cert. dismissed per stipulation*, 381 U.S. 907 (1965). *See also* Roberts v. Whitaker, 287 Minn. 452, 178 N.W.2d 869 (1970) (subpoena duces tecum issued by a public examiner cannot involve an unnecessary invasion of privacy).

93. *See* note 15 *supra* and accompanying text.

94. *See* note 16 *supra* and accompanying text.

95. *See* note 79 *supra* and accompanying text.

that the Minnesota court will not defer to the legislature. In formulating common law concepts of tort, the Minnesota Supreme Court has set forth the following principle:[96]

> Novelty of an asserted right and lack of common-law precedent therefor are no reasons for denying its existence. The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation. Its principles have been determined by the social needs of the community and have changed with changes in such needs. These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require.

Other authorities agree that the common law is based on social customs, and thus a court may change or fill voids in the common law as the needs and customs of society change.[97] In accordance with this principle, the Minnesota court has changed those common law concepts of tort which are no longer useful to achieve justice in today's society. The Minnesota court has abolished the government's tort immunity,[98] abolished intrafamily tort immunity,[99] removed the distinction between the duty of care owed by a landowner to a licensee and that owed to an invitee,[100] and removed the requirement of common liability in certain actions for contribution against an employer.[101] In the context of products liability, the Minnesota court has adopted a theory of strict liability

96. Miller v. Monsen, 228 Minn. 400, 406, 37 N.W.2d 543, 547 (1949); *accord, e.g.*, Silesky v. Kelman, 281 Minn. 431, 433-34, 161 N.W.2d 631, 632-33 (1968). *But see* American Auto. Ins. Co. v. Molling, 239 Minn. 74, 86, 57 N.W.2d 847, 854-55 (1953), in which the Minnesota court said that it would not change the common law requirement of common liability for contribution or interspousal immunity because they are as well-established as statutes. Yet the court has even retreated from this stance by modifying the requirement of common liability for contribution, *see* note 101 *infra* and accompanying text, and by abolishing interspousal immunity, *see* note 99 *infra* and accompanying text.

97. *See, e.g.*, 1 W. BLACKSTONE, COMMENTARIES *68-70; R. POUND, THE SPIRIT OF THE COMMON LAW 166-86 (1921). *See also* Stabs v. City of Tower, 229 Minn. 552, 565, 40 N.W.2d 362, 371 (1949) (although the common law is flexible, courts should not adopt rules which the legislature rejected); Lenhoff, *Extra-Legislational Progress of Law: The Place of the Judiciary in the Shaping of New Law*, 28 NEB. L. REV. 542, 552 (1949) (courts may fill voids in the common law, provided a statute is not contravened).

98. *See* Nieting v. Blondell, ___ Minn. ___, 235 N.W.2d 597 (1975) (abolition of state tort immunity); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962) (abolition of municipal tort immunity).

99. *See* Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969) (abolition of interspousal immunity); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968) (abolition of parent's immunity from suit by child); Balts v. Balts, 273 Minn. 419, 426-34, 142 N.W.2d 66, 71-75 (1966) (rejecting doctrine of child's immunity from suit by parent).

100. *See* Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972).

101. *See* Lambertson v. Cincinnati Corp., ___ Minn. ___, ___, 257 N.W.2d 679, 688 (1977).

in tort,[102] a theory unknown at early common law.[103]

It therefore appears likely that the right of privacy deserves the protection of a common law tort and that the Minnesota court will so hold if it is presented with the proper facts. If the court decides to adopt this common law tort, one of the difficult problems confronting it will be to define its elements. Although solutions to this problem have been suggested by William Prosser and other authorities, a different solution will be proposed by this Note.

B. Elements of an Action for Tortious Invasion of Privacy

Early common law often provides assistance in defining torts. Unfortunately, modern courts attempting to define tortious invasion of privacy are denied this assistance because the action was not recognized at early common law.[104] This void prompted Samuel Warren and Louis Brandeis in 1890 to write one of the first articles advocating and outlining a common law right of privacy.[105] They emphasized that the protection afforded to private life should not be based on property interests, but rather on the inviolate nature of personality.[106] At the time, this emphasis represented a significant departure from judicial attitudes, particularly in the courts of equity, which were cognizant of property rights but reluctant to develop new personal rights.[107] In fact, it is not surprising that early American decisions involving privacy issues often were decided in part on theories of breach of trust,[108] breach of contract,[109] or interference with other types of property interests.[110] Thus, early American precedent contributed little toward advancement of an independent tort for invasion of privacy.[111]

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102. *See* McCormack v. Hankscraft Co., 278 Minn. 322, 337-40, 154 N.W.2d 488, 499-501 (1967), *aff'd second appeal on other grounds per curiam*, 281 Minn. 571, 161 N.W.2d 523 (1968).

103. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641-42 (4th ed. 1971).

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

105. *See* Warren & Brandeis, *supra* note 28.

106. *Id.* at 205.

107. *See, e.g.*, Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899); Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909). One reason the early courts were reluctant to create an independent tort for invasion of privacy is because the injury to privacy is purely mental and not connected to any physical injury from which the state of mind can be inferred. Davis, *supra* note 19, at 6.

108. *See, e.g.*, Corliss v. E.W. Walker Co., 57 F. 434, 436 (1st Cir. 1893), *rev'd second hearing on other grounds*, 64 F. 280 (1st Cir. 1894); Douglas v. Stokes, 149 Ky. 506, 508, 149 S.W. 849, 850 (1912).

109. *See, e.g.*, Moore v. Rugg, 44 Minn. 28, 46 N.W. 141 (1890), *discussed in* text accompanying notes 80-85 *supra*.

110. *See, e.g.*, Munden v. Harris, 153 Mo. App. 652, 660, 134 S.W. 1076, 1079 (1911); Edison v. Edison Polyform & Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (1907).

111. Note, *The Right to Privacy Today*, 43 HARV. L. REV. 297, 298 (1929); *see* Davis,

Modern courts have been assisted, however, by the many authorities who have attempted to define the right of privacy.[112] The most popular approach is that proposed by William Prosser. Although his approach has been subjected to much criticism,[113] it has been adopted by several courts[114] and is used in the *Restatement (Second) of Torts*.[115] An examination of early cases sanctioning privacy led Prosser to conclude that the right of privacy was protected not by one tort, but rather by a complex of four torts.[116] Prosser labels the four torts as intrusion,[117] public disclosure of private facts,[118] false light in the public eye,[119] and appropriation.[120]

When the Minnesota Supreme Court decided *Hendry v. Conner*, it relied rather heavily upon Prosser's approach.[121] Although the court did not adopt his approach, the use of it implicitly indicates a willingness to do so. In light of that approval, it is important to determine whether that approach would be compatible with existing Minnesota law and also serve the purpose of protecting privacy. It is submitted that Pros-

supra note 19, at 3-4; Lisle, *supra* note 19, at 142. *But see* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (recognition of independent right of privacy).

112. *See, e.g.*, A. WESTIN, *supra* note 1, at 7 (the right to withdraw from society); Bloustein, *supra* note 28, at 1003 (emphasizing human dignity and individuality); Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968) (privacy is not merely an absence of information about ourselves in the mind of others, it is control over information); Gross, *supra* note 28, at 35-36 (the condition of human life in which acquaintance with one's personal affairs is limited); Ludwig, *"Peace of Mind" in 48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734, 764 (1948) (intrusion upon or disclosure of another's private activities); Moore, *A Newspaper's Risks in Reporting "Facts" from Presumably Reliable Sources: A Study in the Practical Application of the Right of Privacy*, 22 S.C.L. REV. 1 (1970) (right to prevent embarrassment from publication of a matter which is not newsworthy); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 280 (1974) ("control over who can sense us").

113. *See, e.g.*., Bloustein, *supra* note 28 (privacy protects human dignity and individuality; Prosser is misguided in stating it protects mental, proprietary, or reputational interests); Gross, *supra* note 28, at 46-51 (Prosser fails to identify the correct elements of tortious invasion of privacy because he fails to distinguish the single interest which is harmed); Note, *supra* note 10, at 539-41.

114. *See, e.g.*, Guthridge v. Pen-Mod, Inc., 239 A.2d 709, 711 (Del. Super. 1967); Dotson v. McLaughlin, 216 Kan. 201, 207-08, 531 P.2d 1, 6 (1975); Earp v. City of Detroit, 16 Mich. App. 271, 276-77, 167 N.W.2d 841, 845 (1969); Hamberger v. Eastman, 106 N.H. 107, 110-11, 206 A.2d 239, 241 (1964); Shibley v. Time, Inc., 69 Ohio Op. 2d 495, 497, 321 N.E.2d 791, 794 (C.P. 1974), *aff'd*, 74 Ohio Op. 2d 101, 341 N.E.2d 337 (Ct. App. 1975); Vogel v. W.T. Grant Co., 458 Pa. 124, 129-30, 327 A.2d 133, 135-36 (1974).

115. *Compare* RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977) *with* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804-14 (4th ed. 1971).

116. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th ed. 1971).

117. *Id.* at 807-09.

118. *Id.* at 809-12.

119. *Id.* at 812-14.

120. *Id.* at 804-07.

121. *See* notes 59-63 *supra* and accompanying text.

ser's approach, consisting of four torts to protect a single interest, is overinclusive by protecting interests other than privacy. This Note, therefore, will propose a new approach to tortious invasion of privacy. The elements of the proposed tort will be based in part, however, on those aspects of Prosser's approach which are consistent with the sociopsychological concept of privacy. For this reason, both the strengths and weaknesses of Prosser's approach must be examined.

1. *The Strengths and Weaknesses of Prosser's Approach*

Prosser asserts that the common law right of privacy is protected by four torts: intrusion, public disclosure of private facts, false light in the public eye, and appropriation.[122] His approach results from a categorization of statutes and judicial decisions relating to privacy rather than a theoretical analysis of a common law right of privacy.[123] He cannot be criticized for declaring that the torts are actionable in some jurisdictions,[124] but he can be criticized for characterizing them as invasions of privacy. An examination of the four torts will demonstrate that Prosser's approach does not satisfactorily define the conduct which causes an invasion of privacy.

a. *Intrusion; Public Disclosure of Private Facts*

One tort which Prosser classifies as an invasion of privacy is "intrusion." The tort is defined as follows: "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."[125] A second tort which Prosser classifies as an invasion of privacy is "public disclosure of private facts." He defines this tort as "publicity, of a highly objectionable kind, given to private information about the plaintiff . . . ."[126]

Essentially, these two torts characterize the situations which involve the sociopsychological phenomenon of an invasion of privacy. This Note has proceeded on the assumption that this phenomenon occurs in two broad situations:[127]

122. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).

123. *See id.* at 804.

124. *See, e.g.*, Linehan v. Linehan, 134 Cal. App. 2d 250, 285 P.2d 326 (1955) (false light); Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365, 108 S.E. 309 (1921) (intrusion); Selsman v. Universal Photo Books, Inc., 18 App. Div. 2d 151, 238 N.Y.S.2d 686 (1963) (appropriation); Tollefson v. Price, 247 Ore. 398, 430 P.2d 990 (1967) (in banc) (public disclosure of private fact).

125. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

126. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 809 (4th ed. 1971).

127. *See* text at 174 *supra*.

(1) when the individual is subjected to unwanted social inputs and stimuli, creating annoyance from the presence of persons or things which prevent the individual from achieving his desired degree of seclusion; or
(2) when the individual is subjected to unwanted social outputs, creating annoyance from the unauthorized acquisition or disclosure of private information concerning the individual which results in undesired social interaction.

The first situation of unwanted social inputs and stimuli could be an actionable "intrusion" under Prosser's analysis because the person's "solitude or seclusion" is being invaded.[128] The second situation of unwanted social outputs is characterized by the unauthorized acquisition and disclosure of private information. The unauthorized acquisition of private information could involve an actionable "intrusion" under Prosser's analysis because it involves an invasion into the "private affairs or concerns" of the person.[129] The unauthorized disclosure of private information could obviously be an actionable "public disclosure of private facts" under Prosser's analysis.[130] Thus, Prosser is correct in characterizing the torts of "intrusion" and "public disclosure of private facts" as invasions of privacy. However, weaknesses in the other torts—"false light" and "appropriation"—are revealed by the ensuing discussion.

b. False Light in the Public Eye

A third tort in Prosser's four-pronged privacy analysis is "false light." Prosser defines the tort of "false light" as "publicity which places the plaintiff in a false light in the public eye."[131] The tort protects against publications which falsely portray some attribute of the plaintiff.[132] For example, a claim of false light might arise if the picture of an honest person is used without his consent in connection with a magazine article on the cheating propensities of taxi drivers.[133]

The false light need not be defamatory, but it very often is.[134] There-

128. *See, e.g.*, Galella v. Onassis, 353 F. Supp. 196, 227-31 (S.D.N.Y. 1972) (constant "haunting" of Jackie Onassis by a photographer), *modified*, 487 F.2d 986 (2d Cir. 1973); Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970) (harrassment from numerous telephone calls); Summit Loans, Inc. v. Pecola, 265 Md. 43, 288 A.2d 114 (1972) (same).

129. *See, e.g.*, Hamberger v. Eastman, 106 N.H. 107, 111-13, 206 A.2d 239, 241 (1964) (bugging of a married couple's bedroom); Nader v. General Motors Corp., 25 N.Y.2d 560, 565-67, 255 N.E.2d 765, 768-70, 307 N.Y.S.2d 647, 651-53 (1970); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 131-37, 201 N.E.2d 533, 536-38 (1963).

130. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); Tollefson v. Price, 247 Ore. 398, 430 P.2d 990 (1967) (in banc).

131. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 812 (4th ed. 1971).

132. *See* RESTATEMENT (SECOND) OF TORTS § 652E, Comment a (1977).

133. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 812-13 (4th ed. 1971) (citing Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948)).

134. *Id.* at 813.

fore, Prosser states that like the tort of defamation, the tort of false light protects reputation.[135] Because the tort is designed to protect reputation, and, more importantly, because there is no requirement that the false light relate to private information,[136] the efficacy of using the false light tort as a protection for privacy is cast in considerable doubt. A helpful starting point in determining whether the tort of false light involves an invasion of privacy is to dichotomize the false light tort into false statements of public fact and false statements of private fact.

i. False Public Fact in the Public Eye

One manner in which the plaintiff can be placed in a false light is through the false publication of a public fact. For example, inclusion of an unconvicted person's name or photograph in a "rogue's gallery" of convicted criminals places a false public fact (criminal conviction) in the public eye.[137] False portrayal of a public fact, however, probably does not cause an invasion of privacy because the defendant has not interfered with the plaintiff's interest in controlling the disclosure of private information. The plaintiff could even correct the harm, without revealing any private information, by publishing the true public fact in rebuttal. Consequently, false publication of a public fact probably creates only potential injury to the plaintiff's reputation and not his privacy. Because it is the plaintiff's reputation which is potentially injured, rather than his privacy, relief from false public fact in the public eye should be based on the theory of common law defamation rather than tortious invasion of privacy.[138]

Aside from the lack of injury to privacy, allowing recovery merely on the basis of a false public fact in the public eye would be objectionable for another reason. The Minnesota Supreme Court has allowed recovery for the publication of a false statement only if the statement injures the plaintiff's reputation.[139] If the false light claim was adopted in Minne-

135. Prosser, *supra* note 28, at 400.

136. RESTATEMENT (SECOND) OF TORTS § 652E, Comment a (1977) states in part:

> The form of invasion of privacy covered by the [false light] rule stated in this Section does not depend upon making public any facts concerning the private life of the individual. On the contrary, it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true.

137. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 813 (4th ed. 1971).

138. *See* Patton v. Royal Indus., Inc., 263 Cal. App. 2d 760, 767, 70 Cal. Rptr. 44, 48 (1968); Gross, *supra* note 28, at 47-48. The Minnesota Supreme Court will allow recovery for defamation if the false public fact injures the plaintiff's reputation. *See, e.g.*, Brill v. Minnesota Mines, Inc., 200 Minn. 454, 274 N.W. 631 (1937) (if false, a published statement that an attorney solicited the representation of minority stockholders for his own purpose, rather than to assert the minority's rights, was an actionable defamation); Hrdlicka v. Warner, 144 Minn. 277, 175 N.W. 299 (1919) (a false statement that plaintiff mail carrier threatened boys on his route is an actionable defamation).

139. *See, e.g.*, Larson v. R.B. Wrigley Co., 183 Minn. 28, 235 N.W. 393 (1931) (state-

sota as a theory of recovery, the Minnesota Supreme Court, in effect, would be eliminating the requirement that the statement be defamatory and substituting instead the requirement that it be "highly offensive to a reasonable person."[140] The tort of defamation would thereby be engulfed.[141]

Although several jurisdictions have expressly recognized the tort of false light,[142] the Minnesota court might not recognize that aspect of the tort which encompasses false public fact in the public eye because that aspect does not protect privacy and it is inconsistent with prior defamation decisions. If the tort of false public fact in the public eye is adopted in Minnesota, justification must be based on a person's interest in having his public life accurately portrayed and not on his interests in privacy.

ii. False Private Fact in the Public Eye

A second manner in which the plaintiff can be placed in a false light is through the false publication of a private fact. For example, false statements that the plaintiff engages in "profane love" or is a "man hungry" woman creates a claim for false light.[143] Conceivably, a false private fact in the public eye could be both an actionable invasion of privacy and defamation.

When a defendant falsely publishes a private fact, there are two pertinent aspects to his conduct. First, the defendant has published information concerning the plaintiff's private life. Second, the defendant has falsely portrayed this information. If only the first aspect was involved,

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ment that the plaintiff was too dirty to be served in a restaurant is not actionable because the words do not have "substance and body enough to constitute an injury by affecting the reputation"); Note, *Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander*, 3 WM. MITCHELL L. REV. 81, 83-84 (1977).

However, in Marudas v. Odegard, 215 Minn. 357, 359-61, 10 N.W.2d 233, 235 (1943) the Minnesota Supreme Court said that publication of a false statement gives rise to a claim in tort, even though it is not defamatory, if the publication is malicious and calculated to injure the plaintiff's business. The court apparently was distinguishing injury to personal reputation from injury to business reputation. Yet it is well-established in Minnesota that the publication of falsehoods injurious to a person's business reputation are defamatory per se. *See, e.g.*, Gadach v. Benton County Co-op Ass'n, 236 Minn. 507, 510, 53 N.W.2d 230, 232 (1952); Froslee v. Lund's State Bank, 131 Minn. 435, 155 N.W. 619 (1915). Thus the implication in *Marudas* that an action can be predicated on a nondefamatory falsehood seems to be inconsistent with existing Minnesota law.

140. *See* RESTATEMENT (SECOND) OF TORTS § 652E(a) (1977).

141. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1095 (1962).

142. *See, e.g.*, Cantrell v. Forest City Pub. Co., 419 U.S. 245, 248 & n.2 (1974) (discussing Ohio and West Virginia law); Brown v. Capricorn Records, Inc., 136 Ga. App. 818, 818-19, 222 S.E.2d 618, 619 (1975); Froelich v. Werbin, 219 Kan. 461, 463-64, 548 P.2d 482, 484 (1976) (dictum); Reed v. Ponton, 15 Mich. App. 423, 426, 166 N.W.2d 629, 630 (1968).

143. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 813 n.16 (4th ed. 1971).

the plaintiff's privacy clearly would have been invaded because the conduct would result in unwanted revelations of private information. The issue, therefore, is whether the second aspect of falsity alters this effect of publishing private information.

The essence of the injury to privacy from the disclosure of information is not that the public adopts an unfavorable or false opinion about the plaintiff; rather, it is that some aspect of the plaintiff's life, favorable or unfavorable, has been placed before the public without his consent.[144] Thus, merely because the private fact is falsely published does not justify the imposition of liability for invasion of privacy. Liability is justified only if the false publication of private fact interferes with the plaintiff's interest in controlling revelations and private information concerning himself.[145]

Arguably, such publication does not involve an invasion of privacy because the plaintiff's control over the true private information remains intact. Nothing private has escaped; the defendant merely lied. A stronger argument, however, can be made that the false private fact does interfere with the plaintiff's privacy. By publishing a private fact, the defendant places the plaintiff's private life in issue even if the publication is false. The plaintiff may either acquiesce in or controvert the false publication. If the plaintiff acquiesces, his privacy is invaded because the revelation still coerces new and unwanted social outputs with its attendant social interaction, even though the revelation is false. Thus, the injury to dignity is compounded because the private life of a person is exposed to the public and it is falsely portrayed. If, on the other hand, the plaintiff contests the false publication, he must do so by disclosing the true private fact. Unlike injury caused by a false statement of public fact, embarrassment from false publication of a private fact cannot be redressed by more speech such as retraction and correction.[146] Thus, regardless of whether plaintiff acquiesces in or controverts the false statement of private fact, the defendant has interfered with the plaintiff's control over his private life and thereby invaded his privacy. The tort of false private fact in the public eye, therefore, involves an invasion of privacy.[147]

144. *E.g.*, Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 57, 27 N.E.2d 753, 755 (1940) ("The fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation . . . ."); Bloustein, *supra* note 28, at 981; Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 958-59 (1968).

145. *See* notes 48-54 *supra* and accompanying text.

146. *E.g.*, Kapellas v. Kofman, 1 Cal. 3d 20, 35, 459 P.2d 912, 921, 81 Cal. Rptr. 360, 369 (1969); Nimmer, *supra* note 144, at 961.

147. *See, e.g.*, Linehan v. Linehan, 134 Cal. App. 2d 250, 285 P.2d 326 (1955) (false statement that plaintiff was not lawfully married to the person with whom she was living);

The false publication of a private fact might also give rise to an action for libel or slander.[148] To recover for libel or slander in Minnesota, the statement must be false and defamatory.[149] The plaintiff must at least prove that the defendant negligently or intentionally communicated the statement to a third party and intentionally referred to the plaintiff.[150] If first amendment limitations are applicable, the plaintiff must also prove the defendant negligently or knowingly failed to ascertain the statement's falsity.[151]

Although the plaintiff should be entitled to recover only once for a claim involving the false publication of defamatory private facts, there is little theoretical objection to computing damages on the basis of injury to reputation together with injury to privacy.[152] In computing damages for invasion of privacy, the jury should disregard the falsity of the statement and assume it is true because the gist of the injury to privacy is not that the statement is false, but rather that the statement puts the plaintiff's private life in issue and reveals it to the public. In computing damages for defamation, the jury should examine the falsity of the statement and determine its damage to reputation.[153]

c. *Appropriation*

Prosser's fourth privacy tort, "appropriation," consists of "the appro-

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Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 127 P.2d 577 (1942) (false attribution of desire for sexual relationship); Wade, *supra* note 141, at 1106-07 & n.84.

148. *See, e.g.*, Ernster v. Eltgroth, 149 Minn. 39, 182 N.W. 709 (1921) (imputation that an unmarried woman is unchaste); Reitan v. Goebel, 33 Minn. 151, 22 N.W. 291 (1885) (statement charging an unmarried woman with fornication).

149. *See, e.g.*, Matthis v. Kennedy, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954); RESTATEMENT (SECOND) OF TORTS §§ 558-559 (1977).

150. Olson v. Molland, 181 Minn. 364, 232 N.W. 625 (1930) (defendant must negligently or intentionally communicate the statement); Kramer v. Perkins, 102 Minn. 455, 456-59, 113 N.W. 1062, 1063-64 (1907) (same); Knox v. Meehan, 64 Minn. 280, 281-82, 66 N.W. 1149, 1149-50 (1896) (defendant must intentionally refer to the plaintiff); Dressel v. Shipman, 57 Minn. 23, 58 N.W. 684 (1894) (same). For a detailed discussion of the common law elements to an action for defamation, see Note, *supra* note 139, at 83-89.

151. If the plaintiff is a public figure or public official, he must prove the defendant acted with actual malice, that is, with knowledge of the statement's falsity or reckless disregard for the truth. *See* Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) (public figures); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public officials). If the plaintiff is neither a public figure nor a public official, he may recover actual damages upon a showing that the defendant negligently failed to ascertain falsity. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See generally* Note, *supra* note 139.

152. Damages which can be recovered for a defamation include injury to reputation, special harm, and mental distress. RESTATEMENT (SECOND) OF TORTS §§ 620-623 (1977). Damages recoverable for an invasion of privacy include injury to privacy, special harm, and mental distress. *Id.* § 652H. The plaintiff should not be able to recover twice for the same special harm and mental distress, but there is no reason why the plaintiff should not be allowed separate recovery for injury to reputation and injury to privacy.

153. *See, e.g., id.* § 616.

priation, for the defendant's benefit or advantage, of the plaintiff's name or likeness."[154] A claim for appropriation would arise, for example, if a person's picture was used without his consent to promote a product.[155] Courts frequently afford relief against commercial appropriation of one's name or likeness.[156] But because Prosser himself recognizes that the tort protects a property interest,[157] he is misguided in characterizing the tort as an invasion of privacy.[158] The protection of privacy through principles of property law has long been discredited,[159] and for good reasons.

Property has been defined as "the exclusive right of possessing, enjoying, and disposing, of a thing . . . ."[160] It is easy to understand how this definition could be adapted to protect privacy merely by giving private information the characteristics of property. Indeed, legal principles of trespass or copyright might well serve the purpose of protecting privacy of the home or of letters.

In many situations, however, concepts of property law probably afford inadequate protection for privacy. The unlawfulness of an interference with a property right has traditionally involved judicial inquiry into the extent of economic injury or unjust enrichment.[161] This inquiry would

154. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th ed. 1971).

155. *Id.* at 805.

156. *See, e.g.*, Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970); Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719 (Tex. Ct. App. 1975). *See generally* Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. L. REV. 553 (1960); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

Also, several states have statutes prohibiting the appropriation of another's name or likeness. *See, e.g.*, FLA. STAT. ANN. §§ 540.08-.10 (West 1972); N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976); VA. CODE § 8-650 (1957).

157. Prosser, *supra* note 28, at 406.

158. *See* Pearson v. Dodd, 410 F.2d 701, 708 (D.C. Cir.) (plaintiff's "right to keep his files from prying eyes" distinguished from "whether the information taken from those files falls under the protection of the law of property"), *cert. denied*, 395 U.S. 947 (1969). Decisions involving appropriation "typically involve arm's-length transactions or the appropriation of commercial values, and are wholly devoid of privacy considerations." A. MILLER, *supra* note 14, at 213.

159. As early as 1890, Samuel Warren and Louis Brandeis stated:

> [W]here the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation of that term.

Warren & Brandeis, *supra* note 28, at 200-01.

Contemporary legal scholars have also discussed the inability of property concepts to adequately protect privacy. *See, e.g.*, A. MILLER, *supra* note 14, at 211-16 (difficult policy issues of privacy should not be solved by contorting property and misappropriation theories, which were originally developed to serve radically different purposes).

160. Banning v. Sibley, 3 Minn. (Gil.) 282, 298 (1859).

161. *See, e.g.*, Baillon v. Carl Bolander & Sons, ___ Minn. ___, ___, 235 N.W.2d 613, 614-15 (1975) (damages for trespass to property measured by diminution in value); Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974)

be absurd when the interests to be protected are human dignity and inviolability of personality.[162] Thus, to prevent any confusion between economic and dignitary interests, principles of property law should be avoided in formulating a tort for invasion of privacy.[163]

This conclusion finds support in a 1970 decision by the Minnesota Federal District Court. In *Uhlaender v. Henricksen*,[164] the defendants manufactured and sold a table baseball game which used the names and statistics of professional baseball players. Several of the players brought an action seeking an injunction against the unauthorized use of their names. The court granted the injunction, stating that misappropriation of a name, likeness, or personality can give rise to a cause of action which is not dependent upon an invasion of privacy in the technical sense.[165] The court found that a celebrity has a legitimate proprietary interest in his public personality, and rejected as irrelvant the defendants' argument that the prevalence of the names and statistical information in the public domain precluded an invasion of privacy.[166]

The *Uhlaender* decision reveals the anomaly which results when a celebrity's right to control his name or likeness is characterized as a right of privacy: as the celebrity's name becomes less private, more popular, and commercially valuable, his interest in controlling its unauthorized use deserves greater protection. Consequently, the tort of appropriation allows the greatest recovery when the plaintiff's name or likeness is the least private. Moreover, the distinction between privacy and property is revealed by those decisions which hold that a cause of action for invasion of privacy is personal and does not survive after death,[167] whereas an action for appropriation survives in favor of the

(inverse condemnation requires a substantial invasion of property rights with a definite and measurable diminution of the market value of the property).

162. The right of privacy is designed to protect personal feelings and sensibilities rather than business or pecuniary interests. *See* Copley v. Northwestern Mut. Life Ins. Co., 295 F. Supp. 93, 95-96 (S.D.W. Va. 1968) (disclosure of private facts and statistics concerning business is not an actionable invasion of privacy); Maysville Transit Co. v. Ort, 296 Ky. 524, 525-26, 177 S.W.2d 369, 370 (1944) (violation of government official's statutory duty not to reveal tax information of a business is not an invasion of privacy). *See also* Moreland, *The Right of Privacy To-day*, 19 KY. L.J. 101, 113 (1931) (right of privacy should be recognized as an independent tort protecting inviolate personality; legal fictions used in the past should be discarded).

163. *See* Davis, *supra* note 19, at 11-12. The approach of equating privacy with property has been rejected by those courts which hold that a corporation has no right of privacy. *See* Oasis Nite Club, Inc. v. Diebold, Inc., 261 F. Supp. 173, 175 (D. Md. 1966); Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc., 43 App. Div. 2d 178, 180, 349 N.Y.S.2d 736, 738 (1973).

164. 316 F. Supp. 1277 (D. Minn. 1970).

165. *Id.* at 1281.

166. *Id.* at 1282-83.

167. *See, e.g.*, James v. Screen Gems, Inc., 174 Cal. App. 2d 650, 344 P.2d 799 (1959) (widow not allowed to recover for broadcast concerning her deceased husband). *See also*

decedent's estate.[168]

Why, then, have some courts equated the appropriation of a person's name or picture with an invasion of privacy? One probable reason is that anonymity is an aspect of privacy.[169] Anonymity will be lost if embarrassing facts are associated with a particular person. For example, depicting a child in a published photograph as mentally retarded would be an offensive invasion of privacy only if his face is visible or there are other means of identifying him.[170] In this situation, the appropriation of the person's name or likeness is merely a means of identifying him with private information. If the name or likeness is not associated with private information, there is no invasion of privacy.[171]

The interest in anonymity should be protected, but there is no reason to adopt an overly broad tort such as appropriation. Instead, loss of

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Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) (mother's privacy not invaded by a publication concerning her son's murder).

168. A leading case on this point is Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975), in which the primary issue was who had the ownership of the commercial rights to use the names and likenesses of Laurel and Hardy, two deceased comedians. Applying New York law, the court held that the comedians' "right of publicity" was a property right which did not terminate upon their deaths, but rather was descendible. The court said:

> Since the theoretical basis for the classic right of privacy, and of the statutory right in New York, is to prevent injury to feelings, death is a logical conclusion to any such claim. In addition, based upon the same theoretical foundation, such a right of privacy is not assignable during life. When determining the scope of the right of publicity, however, one must take into account the purely commercial nature of the protected right. Courts and commentators have done just that in recognizing the right of publicity as assignable. There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a "property right."

Id. at 844; *accord*, Lugosi v. Universal Pictures Co., 172 U.S.P.Q. (BNA) 541, 551-53 (1972). *See also* Gordon, *supra* note 156, at 594-605; Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 247-48 (1932).

169. *E.g.*, THE SOCIOLOGY OF GEORG SIMMEL 402-08 (K. Wolff ed. 1950) (phenomenon of the "stranger"); A. WESTIN, *supra* note 1, at 31-32.

170. *See* Brauer v. Globe Newspaper Co., 351 Mass. 53, 57-58, 217 N.E.2d 736, 739-40 (1966). In Lambert v. Dow Chem. Co., 215 So. 2d 673 (La. App. 1968) an employee brought an action for invasion of privacy after a picture of a "ghastly" wound on his thigh was used by his employer in connection with a safety program. A Louisiana trial court found that the use of the picture was not actionable because it was used in good faith and did not reveal any part of the plaintiff's body except for the wound. The Louisiana appellate court reversed, however, holding the use of the photograph was unreasonable because the plaintiff was identified from use of his name in connection with the photograph.

171. *See, e.g.*, Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 230-31, 253 P.2d 441, 444-45 (1953) (photograph of a couple at a public market place); Thayer v. Worcester Post Co., 284 Mass. 160, 163-64, 187 N.E. 292, 293-94 (1933) (photograph of plaintiff taken at an airport). *See also* Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (recovery allowed when a photograph taken at a county fair shows plaintiff with her dress blown up by air jets in a fun house).

anonymity can be analyzed under other aspects of Prosser's four-tort approach. If the person's name or likeness was associated with true private facts, an action for redress could proceed under the tort of public disclosure of private facts.[172] If the person's name or likeness was associated with false private facts, an action for redress could be analyzed under the theory of false private fact in the public eye.[173]

All of these considerations result in two conclusions. First, if the publicity to a person's name or likeness merely causes the usurpation of commercial value, the name or likeness should be viewed as property and any liability for its appropriation should be based on principles of property law. Some courts refer to this property right as the "right of publicity."[174] Second, if the publicity to a person's name or likeness results in the loss of anonymity and an unwanted association with private information, whether true or not, any liability for the publication should be based on an invasion of privacy.

2. *A Proposed Definition of Tortious Invasion of Privacy*

An examination of Prosser's approach has revealed several weaknesses. It must be borne in mind that his approach is based upon a categorization of early cases which spoke of privacy[175] but which were often decided on theories of breach of trust, breach of contract, and interference with a property interest.[176] If, as has been suggested, the early cases on privacy represent little advancement in the law[177] and create confusion analogous to a "haystack in a hurricane,"[178] then Prosser's reliance on such cases represents doubtful improvement.

Prosser can also be criticized for his failure to identify the true nature of privacy interests.[179] He states that proprietary interests are protected by the tort of appropriation,[180] mental interests are protected by the tort of intrusion,[181] and reputation is protected by the torts of false light[182] and publicity given to private facts.[183] As a general proposition, then,

172. *See* notes 126, 130 *supra* and accompanying text.

173. *See* notes 131-36, 143-53 *supra* and accompanying text.

174. *See, e.g.*, Haelan Labs., Inc. v. Topps, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 843-47 (S.D.N.Y. 1975). *See generally* Nimmer, *supra* note 156, at 203.

175. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th ed. 1971).

176. *See* notes 108-10 *supra* and accompanying text.

177. *See* note 111 *supra* and accompanying text.

178. Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

179. *E.g.*, Bloustein, *supra* note 28, at 1004-05; Gross, *supra* note 28, at 46-51; Note, *supra* note 10, at 540-41.

180. Prosser, *supra* note 28, at 406.

181. *Id.* at 392.

182. *Id.* at 400.

183. *Id.* at 398.

Prosser's approach is overinclusive, protecting interests other than privacy.

If Minnesota recognizes a common law right of privacy, however, the experience of other jurisdictions and the scholarship of Prosser should not be totally overlooked in defining the elements of tortious invasion of privacy. What is first necessary, therefore, is to reassemble those elements of Prosser's categories which define the potentially actionable means of invading privacy.[184] Gaps in the tort will remain, however, and therefore it also is necessary to define the protected zone of privacy[185] and determine whether liability should be predicated upon strict liability, negligence, or intent.[186]

a. The Potentially Actionable Means of Invading Privacy—The Reassembly of Prosser's Approach

An examination of Prosser's four-prong privacy approach is beneficial because it reveals the types of conduct upon which courts have based recovery. Generally speaking, Prosser has not overlooked any of the actionable means of invading privacy. His approach, however, is overinclusive because it also protects interests other than privacy. What is needed in defining the potentially actionable means of invading privacy, therefore, is the reassembly of those aspects which are consistent with the broader sociopsychological concept of privacy.

In this regard, an analysis of the strengths and weaknesses of Prosser's approach reveals that only certain aspects of his four-tort complex should be used as a basis for defining the potentially actionable means of invading privacy. The two torts which make the greatest contribution to the formulation of a common law right of privacy are "intrusion" and "public disclosure of private facts." Both protect the plaintiff's control over how and when he will present himself to society, and therefore both achieve the goal of protecting privacy.[187] Second, the elements in the tort of "false light" bear little relevance to the protection of privacy.[188] Only in those limited instances of false private fact in the public eye should the publication be recognized as an invasion of privacy.[189] Third, the elements in the tort of "appropriation" provide little assistance in defining a tort which focuses on the protection of privacy. The tort of appropriation essentially protects the plaintiff's property interest in his name or likeness against commercial exploitation. Although privacy may be involved if publicity to plaintiff's identity results in the unwanted loss

184. See notes 187-90 *infra* and accompanying text.
185. See notes 191-200 *infra* and accompanying text.
186. See notes 201-45 *infra* and accompanying text.
187. *See* notes 125-30 *supra* and accompanying text.
188. *See* notes 131-42 *supra* and accompanying text.
189. *See* notes 143-53 *supra* and accompanying text.

of anonymity, this situation seems to be adequately encompassed by the torts of false private fact in the public eye and public disclosure of private facts.[190] Therefore, the tort of appropriation probably should not be used in formulating a common law right of privacy.

Consequently, three aspects of Prosser's analysis bear relevance to the determination of the means of invading privacy which should be potentially actionable at common law. First, intrusion upon the plaintiff's solitude or seclusion should be a potentially actionable invasion of privacy. Second, the acquisition or disclosure of private facts should be a potentially actionable invasion of privacy. Finally, false publication of a private fact should be a potentially actionable invasion of privacy.

Although these adequately define the potentially actionable means of invading into a person's zone of privacy, they do not provide insight on defining the perimeters of the legally protected zone of privacy or the standard of fault with which the invading means must be accomplished.

b. *The Zone of Privacy and its Perimeter of Legal Protection*

Privacy is a matter of degree; some expectations of privacy are greater than others. An actionable interference with privacy requires that privacy expectations be within the legally protected zone of privacy. The zone of privacy to which the common law will afford protection appears limited by at least two requirements. One is that the invasion must be "highly offensive."[191] Thus, supersensitivity is probably not protected.[192] A second, more troublesome, requirement is that the plaintiff's expectation of privacy must be objectively reasonable to society as well as subjectively actual to the plaintiff.[193] The requirement of reasonableness, in fact, is often stated in connection with the requirement of offensiveness. The Minnesota court has said: "[The invasion] must lift the curtain of privacy on a subject matter that a *reasonable man* of

190. *See* notes 154-74 *supra* and accompanying text.

191. *E.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 808, 811 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D(a) (1977).

192. *E.g.*, Hendry v. Conner, 303 Minn. 317, 319 n.1, 226 N.W.2d 921, 923 n.1 (1975) (per curiam); Meetze v. Associated Press, 230 S.C. 330, 337-38, 95 S.E.2d 606, 610 (1956).

193. *E.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 808, 811 (4th ed. 1971) (invasion must be objectionable to a "reasonable man"); RESTATEMENT (SECOND) OF TORTS § 652D, Comment c (1977). In the determination of whether a person has a fourth amendment right of privacy against government searches and seizures, the Minnesota Supreme Court has stated:

> [T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

State v. Bryant, 287 Minn. 205, 210, 177 N.W.2d 800, 803 (1970) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

ordinary sensibilities would find offensive and objectionable . . . ."[194]

The reasonableness requirement is disturbing because privacy is often sought to protect abnormal and unreasonable aspects of a person's character. Strictly applied, therefore, the reasonableness requirement would deny legal protection to the very conduct or beliefs which, without the shield of privacy, cannot survive society's disapproval and pressure towards normality. Consequently, the law might fail when it is needed the most.

The reasonableness requirement does, however, have the advantage of preventing recovery when the invasion is trivial or claimed merely on the basis of subjective expectations of privacy. The tort obviously would be unworkable if the plaintiff was allowed to recover, for example, on the grounds that the defendant stood too close to the plaintiff in the elevator,[195] took a photograph of the plaintiff in a public place,[196] or disclosed a fact appearing on public record.[197]

In view of both the disadvantage and advantage of a reasonableness requirement, perhaps the best compromise can be struck by applying a standard of "community mores" based on analogy to standards used in determining obscene or defamatory matter. Proscribable obscenity is determined by community standards.[198] Like protection to privacy, the proscription of obscenity has the purpose of preventing offensive conduct detrimental to the individual and society.[199] It is only logical that the nature and extent of this offensiveness be measured by the standards of the local community in which the conduct occurs. The common law of defamation tests the defamatory nature of a statement by the mores of any substantial and respectable group in which the plaintiff is a member, even if somewhat abnormal, rather than the mores of society as a whole.[200] The application of the "community mores" standard

194. Hendry v. Conner, 303 Minn. 317, 319 n.1, 226 N.W.2d 921, 923 n.1 (1975) (per curiam) (emphasis added).

195. *Cf., e.g.*, Horstman v. Newman, 291 S.W.2d 567, 568 (Ky. Ct. App. 1956) (per curiam) (landlord's business visit to tenant's house on a Sunday not an actionable invasion of privacy); Forster v. Manchester, 410 Pa. 192, 195-98, 189 A.2d 147, 149-50 (1963) (trailing plaintiff in a public area is not an actionable invasion of privacy).

196. *See, e.g.*, Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 230, 253 P.2d 441, 444-45 (1953) (in bank).

197. *See, e.g.*, Hubbard v. Journal Pub. Co., 69 N.M. 473, 368 P.2d 147 (1962); Rome Sentinel Co. v. Boustedt, 43 Misc. 2d 598, 252 N.Y.S.2d 10 (Sup. Ct. 1964).

198. *See* note 300 *infra*.

199. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484-85 (1957) (first amendment does not protect obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[Obscene utterances] are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

200. *See, e.g.*, Brauer v. Globe Newspaper Co., 351 Mass. 53, 55, 217 N.E.2d 736, 738 (1966); Munden v. Harris, 153 Mo. App. 652, 665-66, 134 S.W. 1076, 1080-81 (1910);

would, for example, determine the actionability of an invasion of privacy caused by "junk phone calls" from city businesses to a rural farmer on the basis of the expectation of privacy held by farmers in that rural area, not those held by city dwellers.

Once the protected zone of privacy is defined and the potentially actionable means of invading it are ascertained, a court should also consider the defendant's fault in accomplishing the particular means of invasion into the protected zone of privacy. This requires the court to determine whether it will impose strict liability or condition liability upon a showing of fault.

c. *The Culpability of Defendant's Conduct—The Standard of Fault for Imposition of Liability*

Assuming the defendant has accomplished one of the means of invading privacy and that he has penetrated the legally protected zone of the plaintiff's privacy, the court must still determine whether it will impose strict liability or condition liability upon proof that the invading act was a result of some fault, such as negligence or intent. This determination will be a function of balancing the conflicting interests of the plaintiff, the defendant, and the public.[201]

This determination is complicated further because there are at least two ways in which a person can be at fault in the course of invading another's privacy.[202] One aspect concerns the defendant's fault in failing to foresee injury to privacy. There would be no fault in this aspect, for example, if the defendant intended to publish a fact but had no reason to know it was a private fact or that it would invade the plaintiff's privacy. A second aspect of the invading conduct in which the defendant might be at fault is the physical act itself. There would be no fault in this aspect, for example, if the plaintiff gave the defendant a document known to contain highly private information and the defendant accidently published the document. Discussed below are the factors which should be considered in the selection of the fault standard, if any, for each of the two aspects of the defendant's invading conduct.

RESTATEMENT (SECOND) OF TORTS § 559, Comment e (1977).

201. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 3 (4th ed. 1971). *See generally* R. POUND, THE TASK OF LAW (1944).

202. In two recent cases concerning the construction of insurance policies, the Minnesota Supreme Court has recognized the distinction between fault with regard to the physical act and fault with regard to the injury. In Caspersen v. Webber, 298 Minn. 93, 97-99, 213 N.W.2d 327, 330 (1973) the court held that an exclusion in a liability policy for "intentional" injuries was not applicable, even though the defendant intentionally pushed the plaintiff, because her resulting fall and injury were not intended by the defendant. This rule was followed subsequently in Continental W. Ins. Co. v. Toal, ___ Minn. ___, ___, 244 N.W.2d 121, 124-25 (1976).

i. Foreseeability of the Injury to Privacy

If the defendant failed to foresee that his conduct would cause an invasion of privacy, liability probably will not be imposed unless this failure was at least negligent. The Minnesota court and the courts of other jurisdictions have indicated that a plaintiff's privacy will not receive legal protection unless the expectation of privacy is objectively reasonable.[203] Moreover, objective reasonableness might be tested by community mores.[204] The requirement that expectations of privacy be objectively reasonable can be transposed into a requirement that the expectation of privacy be foreseeable to a reasonable person. Thus if the defendant, acting as a reasonable person, had no reason to foresee that his act would cause an invasion of privacy, the plaintiff's expectation of privacy cannot be said to be objectively reasonable and recovery should be denied. Several courts have taken this position, stating that recovery will be denied when the injury to privacy is not reasonably foreseeable.[205]

Although it is relatively clear that the Minnesota court will require reasonable foreseeability of injury to privacy, it is not as clear whether it will require an even higher standard of fault: actual foreseeability of the injury to privacy. If the defendant actually foresees the injury to privacy, he actually believes that his conduct will cause an invasion of privacy. In effect, this borders on common law malice because the defendant has the "sinister intent" to injure the plaintiff's privacy.[206] It is generally agreed by most courts, however, that an invasion of privacy need not be malicious.[207] If Minnesota follows these jurisdictions, there-

203. *See* notes 193-94 *supra* and accompanying text.

204. *See* notes 195-200 *supra* and accompanying text.

205. *See, e.g.*, Samuel v. Curtis Pub. Co., 122 F. Supp. 327, 329 (N.D. Cal. 1954); Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 229, 253 P.2d 441, 444 (1953) (in bank); Bitsie v. Walston, 85 N.M. 655, 659, 515 P.2d 659, 663 (Ct. App.), *cert. denied*, 85 N.M. 639, 515 P.2d 643 (1973).

206. Warren & Brandeis, *supra* note 28, at 218-19; *see* State v. Jankowitz, 175 Minn. 409, 410, 221 N.W. 533, 533 (1928) ("[A] person is deemed malicious when he does an act intending to injure another."); Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 264, 214 N.W. 754, 755 (1927) (malice defined as "the intentional doing of a wrongful act . . ., malice in the sense of ill-will or spite not being essential") (quoting Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 462, 205 N.W. 630, 631-32 (1925)); Lammers v. Mason, 123 Minn. 204, 205-06, 143 N.W. 359, 360 (1913) ("Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious.").

207. *See, e.g.*, Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 87, 291 P.2d 194, 197 (1955), *aff'd second appeal on other grounds*, 158 Cal. App. 2d 53, 322 P.2d 93 (1958); Cason v. Baskin, 155 Fla. 198, 205, 20 So. 2d 243, 246 (1945) (en banc), *rev'd second appeal on other grounds en banc*, 159 Fla. 31, 30 So. 2d 635 (1947); Lucas v. Ludwig, 313 So. 2d 12, 14 (La. Ct. App. 1975), *cert. denied*, ___ La. ___, 318 So. 2d 42 (1975); Warren & Brandeis, *supra* note 28, at 218-19.

fore, actual foreseeability of the injury to privacy would probably not be required.

ii. Fault Concerning the Physical Act

The second aspect of the defendant's conduct in which he might be at fault is the manner in which he physically accomplishes the means of invading privacy. Thus even if a defendant realizes that a certain act will cause an invasion of privacy, he would be without fault in this aspect of his conduct if he exercises reasonable care to prevent the act. The court could impose strict liability, or it could require that the act be negligently or intentionally accomplished.

There is little justification for adopting a standard of strict liability. Perhaps the only argument in favor of imposing strict liability can be made by analogy to nuisance law. Intrusive noises which disrupt the peace and quiet of a neighborhood might constitute a nuisance as well as an invasion of privacy.[208] Because neither intent nor negligence is required to impose liability for a nuisance,[209] this common law tort lends some support to the adoption of a standard which would impose strict liability for invasion of privacy.

The common law has also imposed strict liability on those industries where injuries are inevitable and therefore made a cost of doing business in an attempt to distribute losses among consumers and reduce losses through competitive incentives.[210] In Minnesota this rationale for strict

208. *See, e.g.*, Robinson v. Westman, 224 Minn. 105, 112, 29 N.W.2d 1, 3 (1947); Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 200 N.W. 350 (1924); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919), *aff'd second appeal*, 146 Minn. 406, 178 N.W. 820 (1920).

209. *See, e.g.*, Hill v. Stokely-Van Camp, Inc., 260 Minn. 315, 319, 109 N.W.2d 749, 752 (1961); H. Christiansen & Sons v. City of Duluth, 225 Minn. 475, 482-83, 31 N.W.2d 270, 275-76 (1948) (dictum); Mokovich v. Independent School Dist. No. 22, 177 Minn. 446, 449, 225 N.W. 292, 293 (1929) (dictum). In State v. Lloyd A. Fry Roofing Co., ___ Minn. ___, 246 N.W.2d 692 (1976) the defendant attempted to defend against a criminal action for nuisance on the grounds that the nuisance was not created intentionally or negligently. The court rejected the argument because "[w]hile intent and the failure to act reasonably are not essential elements of common-law nuisance violations, they are even less relevant to nuisances which are codified in statutes or ordinances." *Id.* at ___, 246 N.W.2d at 695. Although the reference to common law nuisance is dictum, the court seems to have taken a strong position that liability for such nuisances can be imposed without a showing of fault.

One situation which should be distinguished is where a negligent act also constitutes a nuisance. In this situation the Minnesota court will apply common law principles of negligence rather than nuisance. *See* Scott v. Village of Olivia, 260 Minn. 346, 352, 110 N.W.2d 21, 26 (1961); Randall v. Village of Excelsior, 258 Minn. 81, 86, 103 N.W.2d 131, 135 (1960).

210. *See* Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases* (pts. 1-2), 78 U. PA. L. REV. 805 (1930), 79 U. PA. L. REV. 742 (1931); Ognall, *Some Facets of Strict Tortious Liability in the United States and Their Implications*, 33 NOTRE DAME LAW. 239, 269-71 (1958); Prosser, *The Fall of the Citadel (Strict Liability to*

liability primarily has been confined to products liability.[211] Application of this rationale to mental injuries resulting from invasion of privacy would represent an unexpected extension of the doctrine.

The common law similarly imposes strict liability for injuries caused by abnormally dangerous activities. In *Cahill v. Eastman*,[212] the Minnesota equivalent of *Rylands v. Fletcher*,[213] the Minnesota Supreme Court imposed liability without fault for damages sustained by an adjoining landowner when river water broke through defendant's underground tunnels. The rationale of *Cahill*, of Minnesota cases following it,[214] and of Minnesota cases relating to damage caused by animals,[215] is that strict liability is imposed for damage caused by an activity which is known to have a natural tendency to cause harm. In other words, strict liability is imposed if the activity is abnormally dangerous.[216]

It is possible for a business to specialize in an activity which is abnormally dangerous to privacy. Private detective and debt collection agencies have frequently been the subjects of liability for invasion of privacy.[217] As a practical matter, however, most enterprises are probably

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the Consumer), 50 MINN. L. REV. 791, 800 (1966). *But see* Wights v. Staff Jennings, Inc., 241 Ore. 301, 307-10, 405 P.2d 624, 627-29 (1965) (rejecting rationale of enterprise liability).

211. *See, e.g.*, Farr v. Armstrong Rubber Co., 288 Minn. 83, 88-94, 179 N.W.2d 64, 68-71 (1970); McCormack v. Hankscraft Co., 278 Minn. 322, 337-40, 154 N.W.2d 488, 499-501 (1967), *aff'd second appeal on other grounds per curiam*, 281 Minn. 571, 161 N.W.2d 523 (1968).

212. 18 Minn. 324 (Gil. 292) (1871).

213. L.R. 3 E. & I. App. 330 (1868).

214. *See* Gould v. Winona Gas Co., 100 Minn. 258, 259-64, 111 N.W. 254, 254-56 (1907) (natural gas lines do not have inherent tendency to cause damage), *aff'd second appeal per curiam sub nom.*, Sherman v. Winona Gas Co., 103 Minn. 518, 114 N.W. 654 (1908); Wiltse v. City of Red Wing, 99 Minn. 255, 109 N.W. 114 (1906) (municipality's storage of 800,000 gallons of water has the natural tendency to cause harm); Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 300-01, 62 N.W. 336, 337-38 (1895) (storage of 250,000 gallons of petroleum has natural tendency to cause harm if it escapes); Hannem v. Pence, 40 Minn. 127, 129-31, 41 N.W. 657, 658-59 (1889) (slope of roof having natural tendency to throw snow on street and cause damage).

215. *See, e.g.*, Matson v. Kivimaki, 294 Minn. 140, 148-50, 200 N.W.2d 164, 169 (1972) (alternative holding) (strict liability imposed for harm caused by dog known to be "vicious"); Clark v. Brings, 284 Minn. 73, 75, 169 N.W.2d 407, 409 (1969) (strict liability imposed for harm caused by domesticated animal if it is proven to be "abnormal and dangerous"; strict liability imposed for harm caused by a wild animal because its owner is "conclusively presumed to know of the danger").

216. *See* Ferguson v. Northern States Power, ___ Minn. ___, ___, 239 N.W.2d 190, 193-94 (1976) (dictum); Quigley v. Village of Hibbing, 268 Minn. 541, 542-43, 129 N.W.2d 765, 767 (1964) (dictum). *See also* RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977) (imposition of liability for abnormally dangerous activity; definition of "abnormally dangerous").

217. *See, e.g.*, Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963) (detective agency); Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439 (La. Ct. App. 1968) (debt collection agency); Souder v. Pendleton Detectives, Inc., 88 So.

not abnormally dangerous to privacy, and therefore a general rule of strict liability would be unjustified. In addition, this rationale for strict liability has apparently never been invoked when the harm to plaintiff is purely mental.

Adoption of a negligence standard finds greater support in existing law than the imposition of strict liability. Minnesota law allows recovery for negligent infliction of mental distress, even though it is not caused by physical impact, if the distress is severe enough to cause physical symptoms.[218] The mental harm caused by infliction of mental distress obviously is similar to that suffered from an invasion of privacy. The Minnesota court's recognition of a right to recover for negligent infliction of severe mental distress therefore is persuasive of adopting a negligence standard for actionable invasion of privacy.

Analogy to defamation law also supports the adoption of at least a negligence standard. The interest protected by defamation law, of course, differs from the interest protected by privacy law because defamation law recognizes reputational injury from a false viewing of the

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2d 716 (La. Ct. App. 1956) (detective agency); Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959) (debt collection agency).

218. Early Minnesota cases have spoken of a right to recover for mental distress when it is proximately caused by a "legal wrong." *See* Sanderson v. Northern Pac. Ry., 88 Minn. 162, 166-67, 92 N.W. 542, 543-44 (1902); Larson v. Chase, 47 Minn. 307, 310-12, 50 N.W. 238, 239-40 (1891). This statement begs the question, however, of whether negligent infliction of mental distress is a legal wrong.

In the classic case of Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892), however, the Minnesota Supreme Court made it clear that a person can recover for the negligent infliction of mental distress. In that case the plaintiff suffered severe emotional distress after the cable car in which she was riding came close to colliding with another cable car. The near-collision was caused by the negligence of defendant transit company. The court affirmed an order which overruled a general demurrer to the complaint because the plaintiff was entitled to recover for the severe illness if proximately caused by the negligence.

This rule was clarified in Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259 (1969). In that case the plaintiff suffered severe mental distress after witnessing the collapse of a wall in a store where she was shopping. As a result of the mental distress, she was hospitalized and suffered pain in her head, back, and leg. The plaintiff brought an action against the construction company which allegedly was negligent in removing lateral supports for the wall. The court held that plaintiff could recover for her injuries. Relying on the rule in *Purcell*, the court stated:

> We noted [in *Purcell*] that a cause of action would not exist for fright or mental distress alone, but where fright results in a physical injury the plaintiff does have a cause of action.
>
> . . . Here, there was a physical injury sustained as a result of . . . [plaintiff's] fear and not merely mental anguish unaccompanied by symptoms of physical suffering . . . .

Id. at 404, 165 N.W. at 262.

Apparently, therefore, the rule is that a person can recover for negligent infliction of mental distress if the mental distress is accompanied by physical manifestations such as pain, vomiting, convulsions, or other similar symptoms.

plaintiff's personality, whereas privacy law should recognize dignitary injury from any viewing at all of the plaintiff's private life.[219] But there are similarities because both injuries can be caused by means of publication[220] and both injuries involve mental distress.[221]

The Minnesota common law does not impose liability for defamation unless the defendant at least negligently communicated the statement to a third party[222] and intentionally referred to the plaintiff.[223] If these principles are carried into privacy law, a plaintiff could not recover for the disclosure of private information unless the defendant at least negligently disclosed it and intentionally identified the plaintiff as the subject of the information.[224]

A requirement that the defendant intentionally accomplish the physical act finds support in the *Restatement (Second) of Torts*. It takes the position that an intrusion into the plaintiff's solitude or seclusion is not actionable unless it is intentional.[225] This position has been reiterated by several courts, although the question of intent was never at issue.[226] Apparently only one court has expressly stated that negligent intrusions are not actionable;[227] on the other hand, at least one court has rejected this position and held that even a negligent intrusion is actionable.[228]

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219. *See* note 144 *supra* and accompanying text.

220. *Compare, e.g.*, Mahnke v. Northwest Pubs., Inc., 280 Minn. 328, 160 N.W.2d 1 (1968) (defamation appearing in a newspaper) *and* Rose v. Koch, 278 Minn. 235, 154 N.W.2d 409 (1967) (defamation appearing in a circular) *with, e.g.*, Tollefson v. Price, 247 Ore. 398, 430 P.2d 990 (1967) (in banc) (private debt revealed in a newspaper advertisement). *See generally* Wade, *supra* note 141.

221. *Compare, e.g.*, Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 204, 251 N.W. 177, 179 (1933) (mental distress is an element of damages for libel) *with, e.g.*, Hinish v. Meier & Frank Co., 166 Ore. 482, 506, 113 P.2d 438, 447-49 (1941) (mental distress is an element of damages for invasion of privacy) *and* RESTATEMENT (SECOND) OF TORTS § 652H(b) (1977) (same).

222. *E.g.*, Olson v. Molland, 181 Minn. 364, 232 N.W. 625 (1930). *See also* RESTATEMENT (SECOND) OF TORTS § 577 (1977) (requiring negligence or intent).

223. *See* Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947) (applying Minnesota law); Knox v. Meehan, 64 Minn. 280, 281-82, 66 N.W. 1149, 1149-50 (1896); Dressel v. Shipman, 57 Minn. 23, 58 N.W. 684 (1894).

224. Several courts have expressly recognized the analogy between fault in the context of defamation and fault in the context of publicity given to private information. *See, e.g.*, Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 213, 127 P.2d 577, 581 (1942); Blount v. TD Pub. Corp., 77 N.M. 384, 389, 423 P.2d 421, 424-25 (1967).

225. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

226. *See* Froelich v. Werbin, 219 Kan. 461, 464, 548 P.2d 482, 484 (1976); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 131, 201 N.E.2d 533, 536 (1963); Marks v. Bell Tel. Co., ___ Pa. ___, ___, & n. ___, 331 A.2d 424, 430 & n.8 (1975) (by implication).

227. McCormick v. Haley, 37 Ohio App. 2d 73, 78, 307 N.E.2d 34, 38 (1973).

228. *See* Thompson v. City of Jacksonville, 130 So. 2d 105, 105-08 (Fla. Dist. Ct. App. 1961), *cert. denied*, 147 So. 2d 530 (Fla. 1962). *See also* Lucas v. Ludwig, 313 So. 2d 12, 15 (La. Ct. App.) (intruding conduct which was "improper and *unreasonable*") (emphasis added), *cert. denied*, ___ La. ___, 318 So. 2d 42 (1975).

Aside from these cases and the *Restatement*, analogy to four common law torts—assault, battery, false imprisonment, and trespass—may provide some support for a requirement of intent. The tort of assault protects against the apprehension of harmful and offensive contact with the plaintiff[229] and battery protects against the contact itself.[230] False imprisonment protects against restraint of free movement.[231] Thus an assault can result from shaking a fist under the plaintiff's nose,[232] a battery can result from grabbing an object from the plaintiff's hand,[233] and false imprisonment can result from confining the plaintiff in an automobile.[234] Because none of these involve physical injury, the interests protected by the torts go beyond mere physical safety. All three torts, in a broad sense, interfere with a person's right "to be let alone."[235] In addition, the basis of all three torts is the protection of human dignity, inviolability of personality, and individuality.[236] These, essentially, are the interests underlying a right of privacy.[237] The fourth tort, trespass, is also relevant because intrusion upon seclusion often involves entry upon private property.[238]

An obvious argument in favor of requiring intent for actionable invasion of privacy is that intent is the threshold for actionable assault,

229. *E.g.*, Johnson v. Sampson, 167 Minn. 203, 205, 208 N.W. 814, 815 (1926); Cressy v. Republic Creosoting Co., 108 Minn. 349, 354, 122 N.W. 484, 485 (1909); *cf.* MINN. STAT. § 609.22(1) (1976) (definition of criminal assault).

230. *E.g.*, Smith v. Hubbard, 253 Minn. 215, 225, 91 N.W.2d 756, 764 (1958) (tearing the shirt and breaking the badge of a police officer is sufficient physical contact to constitute a battery); Mohr v. Williams, 95 Minn. 261, 271, 104 N.W. 12, 15-16 (1905), *rev'd second appeal on other grounds*, 98 Minn. 494, 108 N.W. 818 (1906).

231. *E.g.*, Lundeen v. Renteria, 302 Minn. 142, 146, 224 N.W.2d 132, 135 (1974) (per curiam); Durgin v. Cohen, 168 Minn. 77, 79, 209 N.W. 532, 533 (1926); *cf.* MINN. STAT. § 609.255 (1976) (definition of criminal false imprisonment).

232. *See, e.g.*, Mitchell v. Mitchell, 45 Minn. 50, 47 N.W. 308 (1890), *rev'd second appeal on other grounds*, 54 Minn. 301, 55 N.W. 1134 (1893), *rev'd on condition third appeal on other grounds*, 60 Minn. 12, 61 N.W. 682 (1895).

233. Morgan v. Loyacomo, 190 Miss. 656, 663, 1 So. 2d 510, 511 (1941) (package); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 629 (Tex. 1967) (plate).

234. Jacobson v. Sorenson, 183 Minn. 425, 236 N.W. 922 (1931); *cf.* Turney v. Rhodes, 42 Ga. App. 104, 155 S.E. 112 (1930) (confinement in an elevator).

235. *See* T. COOLEY, LAW OF TORTS 29 (2d ed. 1888).

236. Bloustein, *supra* note 28, at 1005. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 9-11, at 35, 37-38, 42-43 (4th ed. 1971) (assault and battery protect human "integrity"; false imprisonment protects "dignitary" interests).

237. *See, e.g.*, Kelly v. Johnson Pub. Co., 160 Cal. App. 2d 718, 721, 325 P.2d 659, 661 (1958); Steding v. Battistoni, 3 Conn. Cir. Ct. 76, 79-80, 208 A.2d 559, 561-62 (1964). *See generally* Bloustein, *supra* note 28; Parker, *supra* note 112. *See also* Shils, *supra* note 5, at 120-21.

238. *See, e.g.*, Ford Motor Co. v. Williams, 108 Ga. App. 21, 29, 132 S.E.2d 206, 211-12 (forced entry into plaintiff's home), *rev'd on other grounds*, 219 Ga. 505, 134 S.E.2d 32 (1963); Lucas v. Ludwig, 313 So. 2d 12 (La. Ct. App.) (unlawful entry into landlord's residence by tenant seeking the return of seized property), *cert. denied*, ___ La. ___, 318 So. 2d 42 (1975).

battery, and false imprisonment.[239] Yet there may be countervailing arguments. It is arguable that one of the justifications for requiring intent in connection with assault, battery, and false imprisonment is not present when privacy is invaded. An intentional assault, battery, or false imprisonment is much more offensive to human dignity, inviolability, and individuality than unintended fright, contact, or confinement.[240] Thus the element of intent in these torts may well address the severity of injury to plaintiff rather than focus on the culpability of defendant's conduct. Perhaps this is not the case when privacy is invaded. The annoyance from an invasion of privacy might be the same regardless of how it occurred. Accordingly, the fact that intent is required to establish actionable assault, battery, and false imprisonment does not necessarily provide justification for imposing the same requirement to establish an actionable invasion of privacy.

Trespass, which is an intentional tort,[241] might support a conclusion that intent is required for an actionable invasion of privacy. A person who negligently enters upon another's property cannot be held liable for trespass,[242] and therefore it might be anomalous to impose liability for invasion of privacy. On the other hand, it is arguable that intent is required for trespass only because actual injury to the property is not required.[243] Thus if the property is actually damaged by a negligent trespass, the owner can usually recover merely by changing his theory from trespass to negligence.[244] Because an invasion of the plaintiff's privacy could be caused by a negligent trespass, perhaps recovery should be allowed even though it was not intentional.

An evaluation of each standard—strict liability, negligence, and intent—results in the conclusion that the court should allow recovery for

239. *See, e.g.*, Blaz v. Molin Concrete Prods. Co., ___ Minn. ___, ___, 244 N.W.2d 277, 279 (1976) (false imprisonment); Schumann v. McGinn, ___ Minn. ___, ___, 240 N.W.2d 525, 529 (1976) (battery); Dahlin v. Fraser, 206 Minn. 476, 478-79, 288 N.W. 851, 853 (1939) (assault).

240. The intent of the defendant to be offensive is such an important element that Chief Justice Holt stated in his classic remark: "The least touching of another in anger is a battery." Cole v. Turner, 87 Eng. Rep. 907, 907 (K.B. 1704). This also appears to be the law in Minnesota. *See* Mailand v. Mailand, 83 Minn. 453, 455, 86 N.W. 445, 445 (1901) ("An intent to do violence is an essential ingredient of the offense, *but the degree of violence is, of course, immaterial.*") (emphasis added).

241. *E.g.*, Victor v. Sell, 301 Minn. 309, 313, 222 N.W.2d 337, 340 (1974); RESTATEMENT (SECOND) OF TORTS § 158 (1965).

242. *See, e.g.*, Victor v. Sell, 301 Minn. 309, 222 N.W.2d 337 (1974) (unintentional placement of a radiator upon plaintiff's property is not an actionable trespass).

243. *See, e.g.*, Sime v. Jensen, 213 Minn. 476, 481, 7 N.W.2d 325, 328 (1942); Whittaker v. Stangvick, 100 Minn. 386, 389, 111 N.W. 295, 296 (1907); Moe v. Chesrown, 54 Minn. 118, 55 N.W. 832 (1893).

244. *See, e.g.*, Rector of St. Christopher's Episcopal Church v. C.S. McCrossan, Inc., ___ Minn. ___, 235 N.W.2d 609 (1975); Waldron v. Page, 191 Minn. 302, 253 N.W. 894 (1934).

tortious invasion of privacy only if the defendant's physical act involves some fault. Imposing strict liability in a situation where the defendant exercised due care to prevent his act would be inconsistent with the requirements of fault used in connection with torts somewhat analogous to an invasion of privacy. Moreover, the policy reasons for imposing strict liability on industries or enterprises having an inevitable or natural tendency to cause harm are absent in most invasions of privacy.

Whether a standard of negligence rather than intent strikes the proper balance is a more difficult question. Both standards find support in existing law and neither would create significant inconsistencies in the scheme of common law. Still, it is submitted that a negligence standard strikes the most appropriate balance between the conflicting interests of the plaintiff, the defendant, and the public. The law may well be too harsh if intent is required because recovery for even the most devastating injuries to privacy would be precluded when the defendant acted unreasonably but not intentionally. Furthermore, a flood of trivial claims for negligent invasions will not result because a different element to tortious invasion of privacy requires that the injury be highly offensive.[245]

d. Conclusion

This Note has considered the strengths and weaknesses of Prosser's approach to tortious invasion of privacy by evaluating it against the broader sociopsychological concept of an invasion of privacy.[246] As a result of this evaluation and the reassembly of Prosser's analysis, it was determined that an invasion of privacy should be potentially actionable if the defendant intruded into the plaintiff's solitude or seclusion by subjecting him to unwanted social stimuli, or if the defendant acquired or disclosed private information without the consent of plaintiff.[247] It was also concluded that the truth or falsity of such a disclosure was irrelevant to actionability.[248]

This Note has also considered the limits to which the law will protect a person's zone of privacy. It was concluded that the invasion should not be actionable unless it was highly offensive and the plaintiff had both actual expectations of privacy and objectively reasonable expectations measured by community mores.[249]

Finally, this Note has considered the fault, if any, which a court should require as a condition to actionability.[250] It was concluded that

245. *See* notes 191-92 *supra* and accompanying text.
246. *See* notes 28-54, 122-74 *supra* and accompanying text.
247. *See* notes 187-90 *supra* and accompanying text.
248. *See* notes 143-53, 188-89 *supra* and accompanying text.
249. *See* notes 191-200 *supra* and accompanying text.
250. *See* notes 201-45 *supra* and accompanying text.

as a general rule, a standard of negligence would be appropriate with regard to both the foreseeability of injury and the physical accomplishment of the invading act.[251]

Based on this analysis, it is submitted that tortious invasion of privacy should be characterized as "intrusion" and "the unauthorized use of private information." The tort of intrusion provides redress for the invasion of privacy caused by unwanted sociopsychological inputs. These inputs might be noise, persons, or other stimuli which prevent the self from being alone. Here the acquisition or disclosure of private information generally is not relevant to actionability.

The tort of unauthorized use of private information, on the other hand, is designed to provide redress for the invasion of privacy caused by coerced social outputs. These outputs might consist of unwanted revelations, loss of anonymity, or other communications of private information which thrust the individual into social interaction. Here bombardment with sociopsychological stimuli generally is not relevant to actionability.

These two torts should have the following elements:

INTRUSION
(1) Interference, physical or otherwise, with the plaintiff's solitude or seclusion;
(2) the physical act of interference was intentionally or negligently accomplished;
(3) the intrusion is highly offensive and objectionable;
(4) the plaintiff had actual subjective expectations of solitude or seclusion;
(5) the expectations were objectively reasonable according to community mores.

THE UNAUTHORIZED USE OF PRIVATE INFORMATION
(1) The acquisition or disclosure of information concerning aspects of the plaintiff's private life, even if the disclosure is false;
(2) the physical act of acquisition or disclosure was intentionally or negligently accomplished;
(3) the acquisition or disclosure is highly offensive and objectionable;
(4) the plaintiff had actual subjective expectations of preventing the acquisition or disclosure;
(5) the expectations were objectively reasonable according to community mores.

This is a detailed enumeration of the elements which technically should be required. Jury instructions, however, could be simplified.[252]

251. *See* text at 204-05 *supra*.

252. A simplified jury instruction could read:
An invasion of privacy is not unlawful unless it is highly offensive to a reasonable person. An invasion of privacy occurs if the plaintiff actually and reasonably

Apart from the limitations on recovery inherent in these elements, additional obstacles to recovery may confront the plaintiff. Two are particularly significant: constitutional limitations and common law defenses. These obstacles are the next subject of consideration.

IV. Constitutional Limitations and Common Law Defenses

Recovery for tortious invasion of privacy might be precluded because of constitutional limitations or common law defenses. The constitutional limitations are derived mainly from the first amendment protection given to certain types of invading conduct or speech. The common law defenses, on the other hand, are derived primarily from considerations of the plaintiff's fault, the matter's newsworthiness, and privilege.

A. Constitutional Limitations

The first amendment to the United States Constitution provides: "Congress shall make no laws . . . abridging the freedom of speech, or of the press . . . ."[253] This provision has also been held applicable to common law abridgments imposed by the states.[254] Thus, the first amendment confronts the ability of the states to grant redress for invasions of privacy because the invading conduct might be protected by the first amendment.

Tortious invasion of privacy has been characterized by this Note as one, intrusion and two, the unauthorized use of private information.[255] For the purposes of evaluating constitutional limitations, however, it is helpful to create three aspects of the tort by dichotomizing the unauthorized use of information into the unauthorized acquisition of information and the unauthorized disclosure of information because each aspect involves different types of conduct and first amendment interests. Each of these three aspects of the tort will be considered separately to determine the first amendment limitations.

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expected to prevent [(interference with his solitude or seclusion) or (the acquisition or disclosure of information)] and defendant [(interfered with such solitude or seclusion) or (acquired or disclosed the information)] by acting intentionally or by failing to exercise reasonable care.

To avoid complex instructions, the jury should be read only one set of the terms appearing in the parentheticals above, depending on whether the action is based on intrusion or the unauthorized use of private information. Further instructions could, of course, be added to clarify the effect of falsity, fault, or other aspects of the parties' conduct.

253. U.S. Const. amend. I.

254. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487-97 (1975) (liability for invasion of privacy); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (liability for defamation).

255. *See* text at 206 *supra*.

1. The First Amendment Limitations on an Action for Intrusion

Liability could be imposed under the tort of intrusion when a person's solitude or seclusion is invaded by unwanted stimuli.[256] It is clear, however, that the first amendment will afford some protection against liability when the intrusive conduct involves the communication of ideas. The basic test is whether the limits placed on the communication are reasonable as to "time, place and manner."[257] Thus, the extent of first amendment protection will vary, depending upon where the person seeks solitude and seclusion.

One first amendment limitation arising from this principle is that the plaintiff must have been a member of a "captive audience" at the time his solitude or seclusion was invaded.[258] The concept of captive audience describes a situation in which reasonable steps to avoid the intrusive speech or conduct are unavailing.[259] The geographical area where the plaintiff seeks solitude or seclusion is an important factor in determining the reasonableness of taking steps to avoid the intrusive speech or first amendment conduct.

A person probably is most "captive" in his own home; therefore the first amendment probably affords the least protection when the intrusion is into the solitude and seclusion of the home. In recognition of substantial privacy interests while at home, courts have upheld the constitutionality of narrowly drawn statutes and ordinances which forbid activities such as the use of sound amplification devices in residential areas,[260] door-to-door solicitation,[261] residential picketing,[262] and the

256. *See id.*

257. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Adderley v. Florida, 385 U.S. 39, 46-48 & n.6 (1966); Cox v. Louisiana, 379 U.S. 536, 558 (1965).

258. *See* Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 Nw. U.L. REV. 153, 193-95 (1972); note 269 *infra*. For a discussion of the cases considering the question of whether a person is part of a "captive audience," see Orazio v. Town of North Hempstead, 426 F. Supp. 1144, 1148-49 (E.D.N.Y. 1977).

259. *See* Public Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (Douglas, J., dissenting). *See generally* Haiman, *supra* note 258, at 177-85.

260. *See* Kovacs v. Cooper, 336 U.S. 77 (1949); NAACP v. City of Chester, 253 F. Supp. 707 (E.D. Pa. 1966); Haggerty v. Associated Farmers, Inc., 44 Cal. 2d 60, 279 P.2d 734 (1955) (in bank).

An absolute or standardless prohibition of sound amplification devices will, however, be struck down as unconstitutionally vague or overbroad. *See* Saia v. New York, 334 U.S. 558 (1948); United States Labor Party v. Rochford, 416 F. Supp. 204, 206-08 (N.D. Ill. 1975); Maldonado v. County of Monterey, 330 F. Supp. 1282, 1284-87 (N.D. Cal. 1971); Phillips v. Township of Darby, 305 F. Supp. 763 (E.D. Pa. 1969); Wollam v. City of Palm Springs, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963) (in bank).

261. *See* Breard v. Alexandria, 341 U.S. 622, 641-45 (1951); Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933). *See also* Hynes v. Mayor of Oradell, 96 S. Ct. 1755, 1759 (1976) (reasonable limitations can be imposed on door-to-door solicitation, but the limitations must be narrow and specific).

However, if the door-to-door solicitation involves religious, political, or charitable purposes, the Court might give it greater first amendment protection and strike down broad

mailing of sexually explicit materials over the protest of the addressee.[263] As Chief Justice Burger has said, "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . . ."[264] A tortious intrusion into the home, therefore, probably is not protected by the first amendment.

When a person leaves the sanctity of his home, however, the courts have been willing to give greater first amendment protection to intrusive communications. In *Erznoznik v. City of Jacksonsville*[265] the Court observed:[266]

> [S]elective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure . . . .
>
> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather,

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ordinances which preclude such activity. *See* Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); Haiman, *supra* note 258, at 160. *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (state cannot enjoin the peaceful distribution of leaflets near the residence of a "blockbusting" realtor).

262. *See* Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975); DeGregory v. Giesing, 427 F. Supp. 910 (D. Conn. 1977). *See also* Abernathy v. Conroy, 429 F.2d 1170, 1173-74 (4th Cir. 1970) (ordinance prohibiting peaceful parades after eight p.m. is constitutional because of the substantial public interest in rest, relaxation, and prevention of crime).

Residential picketing might be prosecuted under statutes prohibiting disorderly conduct. The Minnesota Supreme Court has sustained three convictions on this theory without discussing any first amendment limitations. *See* State v. Cooper, 205 Minn. 333, 285 N.W. 903 (1939); State v. Perry, 196 Minn. 481, 265 N.W. 302 (1936) (per curiam); State v. Zanker, 179 Minn. 355, 229 N.W. 311 (1930).

263. Rowan v. United States Post Office Dep't, 397 U.S. 728, 735-38 (1970); United States v. Treatman, 408 F. Supp. 944 (C.D. Cal. 1976); Pent-R-Books, Inc. v. United States Postal Serv., 328 F. Supp. 297 (E.D.N.Y. 1971). *See generally* Note, *Federal Pandering Advertisements Statute: The Right of Privacy Versus the First Amendment*, 32 OHIO ST. L.J. 149 (1971).

264. Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970). Similarly, Justice Black has said:

> I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.

Gregory v. City of Chicago, 394 U.S. 111, 125-26 (1969) (Black, J., concurring).

265. 422 U.S. 205 (1975).

266. *Id.* at 209-11 (citations omitted) (quoting in part Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970) and Cohen v. California, 403 U.S. 15, 21 (1971)).

> . . . the burden normally falls on the viewer to "avoid further bombardment . . . ."

Consistent with these principles, the Court has made it clear that peaceful picketing[267] and handbilling[268] are protected by the first amendment when conducted in an area open to the public, though such activities admittedly disrupt peace and tranquility. Also, constant intrusions into a bus or other public transit vehicle might be protected by the first amendment.[269]

Even if the plaintiff arguably is a member of a captive audience at the time of the intrusion, the 1971 case of *Cohen v. California*[270] indicates an additional first amendment limitation on recovery for intrusion. In *Cohen* the defendant had been convicted of breach of the peace after he wore on the back of his jacket, while in a courthouse, an emblem reading "Fuck the Draft." The United States Supreme Court reversed the conviction on the grounds that it violated the first amendment. Because the offensiveness could have been avoided merely by looking away from the emblem, the Court rejected the argument that such communications should be prevented to protect the sensitivities of unwilling recipients.[271] In addition, however, the Court went on to say that first amendment protection can be overcome only if "*substantial* privacy interests are being invaded in an essentially intolerable manner."[272]

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267. *E.g.*, Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (picketing at privately owned shopping center); Thornhill v. Alabama, 310 U.S. 88, 101-06 (1940); Starr v. Cooks, Waiters, Waitresses & Helpers Union Local 458, 244 Minn. 558, 564-65, 70 N.W.2d 873, 877-78 (1955).

268. *E.g.*, Jamison v. Texas, 318 U.S. 413 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938); Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319 (2d. Cir.), *cert. denied*, 419 U.S. 838 (1974); Farmer v. Moses, 232 F. Supp. 154, 161-62 (S.D.N.Y. 1964).

269. In Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) a city government permitted the use of radio broadcasts in public buses after it concluded that they did not interfere with the comfort and safety of the riders. Thus the Court was not addressing the issue of whether a state could prohibit such broadcasts, but rather whether the radio broadcasts violated the riders' fifth amendment right of privacy. The Court found that it did not and said: "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance." *Id.* at 464. In a vigorous dissent, Justice Douglas indicated that the broadcasts should be prohibited where an unwilling listener is part of a "captive audience." *Id.* at 468.

The concept of "captive audience" was subsequently used by the Court in sustaining the constitutionality of prohibitions against political advertisements in the facilities of a rapid transit system. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The Court had stated, however, that "[n]o First Amendment forum is here to be found" because the communication consisted of advertising rather than protected speech. *Id.* at 304.

It is not clear, therefore, whether instrusive speech or expression on public transit vehicles may be proscribed without violating the first amendment.

270. 403 U.S. 15 (1971).

271. *Id.* at 21.

272. *Id.* (emphasis added).

This analysis reveals that the Constitution precludes liability for intrusive speech or other first amendment conduct if it occurs in a relatively public area or if it does not invade substantial privacy interests in an intolerable manner. Still, these limitations do not significantly affect the tort of intrusion proposed by this Note. The tort proposed by this Note, like the constitutional limitation, tends to deny recovery as the area where plaintiff seeks solitude or seclusion becomes more public because generally a plaintiff seeking solitude or seclusion in a public area cannot satisfy the tort requirement that his expectation of solitude or seclusion be reasonable.[273] In addition, the tort proposed by this Note allows recovery only for intrusions which invade substantial privacy interests because the tort requires a "highly offensive" intrusion.[274] Moreover, it must be remembered that many intrusions, such as noise, might not involve first amendment speech or conduct at all.

2. *The First Amendment Limitations on an Action for the Unauthorized Acquisition of Private Information*

The unauthorized acquisition of private information is a second aspect of tortious invasion of privacy. The first amendment might limit liability for this tort because the Court has recognized a narrow first amendment right to gather information.[275]

It is clear that the first amendment affords the press a right to gather information from sources willing to disclose it. In *Branzburg v. Hayes*,[276] the Court was confronted with the issue of whether journalists could be compelled to appear before grand juries and reveal their sources of news stories involving crimes or suspected criminal activity. The Court held that journalists could be so compelled. However, the Court cautioned that news gathering is afforded some first amendment protection, and therefore the government cannot force such testimony unless it has a compelling need and can show both that a crime has been committed and that the journalist has information concerning it which cannot be obtained from alternative sources.[277] "[W]ithout some protection for

273. *See* text at 206 *supra*. *See also* notes 193-200 *supra* and accompanying text.

274. *See* text at 206 *supra*.

275. For a general discussion of the first amendment right of access to the news, see Lewis v. Baxley, 368 F. Supp. 768, 775-78 (M.D. Ala. 1973); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

276. 408 U.S. 665 (1972).

277. *Id.* at 707 n.41. In response to the *Branzburg* decision, the Minnesota Legislature passed a statute which allows a member of the news media to protect the anonymity of his sources unless there is probable cause to believe he has information on a violation of law other than a misdemeanor, the information cannot be obtained by another source, and there is a compelling interest in requiring the disclosure of the information. *See* MINN. STAT. § 595.024 (1976).

seeking out the news," said the Court, "freedom of the press could be eviscerated."[278]

It is relatively clear from *Branzburg* that the first amendment right to gather news is very narrow. Thus, the Court in *Zemel v. Rusk*[279] rejected an argument that the first amendment right to gather news about foreign policy justifies the issuance of a passport. The Court stated: "The right to speak and publish does not carry with it the unrestrained right to gather information."[280] Therefore, in the context of tortious invasion of privacy, the issue confronting the courts is whether this narrow first amendment right to gather information from willing sources extends to the gathering of private information from unwilling sources.

Although not directly on point, the Supreme Court's view on the right to interview prisoners is instructive on the legitimate scope of the right to gather private information. In *Pell v. Procunier*,[281] the Court considered the validity of a prison regulation which allowed the media to interview inmates on the condition that the media not select the particular inmate and the inmate not initiate the interview. The purpose of the condition was to avoid the notoriety and attendant disciplinary problems which could result from media exposure.[282] The Court sustained the regulation, stating:[283]

> The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to jour-

278. 408 U.S. at 681. The Court also stated in dictum, however, that the press can be excluded, for example, from grand jury proceedings, court conferences, and certain meetings of official organizations even though news gathering is impaired. *Id.* at 684.

279. 381 U.S. 1 (1965).

280. *Id.* at 17.

281. 417 U.S. 817 (1974).

282. *Id.* at 831-32.

283. *Id.* at 834-35 (citations omitted); *accord, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972) (the press has the right to gather news in a public area). *Pell* was followed in a similar case decided the same day by the Supreme Court. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974). *See also* Newspaper Guild Local 82 v. Parker, 480 F.2d 1062, 1066-67 (9th Cir. 1973) (state may deny media an interview with inmates confined in areas of maximum security).

> nalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.

This language indicates that the first amendment will protect the acquisition of information from voluntary sources who wish to remain anonymous, but the first amendment does not require that government afford the media a special privilege to obtain information which is not available to the general public. In accordance with this view, lower courts have not hesitated to deny first amendment protection in cases for invasion of privacy where the unauthorized acquisition of information involved private information not accessible to the general public.[284]

Two leading federal cases which denied first amendment protection in this situation are *Dietemann v. Time, Inc.*[285] and *Galella v. Onassis*.[286] In *Dietemann*, journalists from *Life* magazine deceitfully entered plaintiff's home to investigate plaintiff's illegal practice of medicine. The plaintiff was led to believe they were friends of an acquaintance seeking treatment; he did not know they were journalists or had hidden cameras. When *Life* published the pictures and a news account of the investigation, plaintiff brought an action for invasion of privacy. *Life* contended that the first amendment right to publish news includes the right to acquire it. The court of appeals conceded the media's right to publish newsworthy material, but rejected the argument that it also gave the media a right to invade a person's privacy to acquire it. "The First Amendment," said the court, "has never been construed to accord newsmen immunity from torts or crimes committed during newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."[287]

In *Galella*, a photographer brought an action in a federal district court seeking damages for false arrest and malicious prosecution and an injunction against defendant Jacqueline Onassis from interfering with his efforts to photograph her while she was in public areas. Onassis counterclaimed for damages and injunctive relief, alleging in part that plaintiff had invaded and would continue to invade her privacy by his constant snooping and taking of photographs. In evaluating the merits of the counterclaim, the court determined that the photographer's first

284. Garland v. Torre, 259 F.2d 545, 548 n.4 (2d Cir.) ("[A] journalist's professional status does not entitle him to sources of news inaccessible to others."), *cert. denied*, 358 U.S. 910 (1958); Lewis v. Baxley, 368 F. Supp. 768, 777 (M.D. Ala. 1973) ("[N]ewsmen have a right to go where the public generally may go . . . ."); Trimble v. Johnston, 173 F. Supp. 651, 656 (D.D.C. 1959) ("[T]he Constitutional privilege of freedom of the press does not include a right on the part of representatives of the press to inspect documents not open to members of the public generally.").

285. 449 F.2d 245 (9th Cir. 1971).

286. 353 F. Supp. 196 (S.D.N.Y. 1972), *modified*, 487 F.2d 986 (2d Cir. 1973).

287. 449 F.2d at 249.

amendment interests were outweighed by her privacy interests and therefore the first amendment would not be violated by enjoining his conduct.[288] The court seemed to rely on the lack of legitimate public interest in the information acquired by the plaintiff photographer.[289] On appeal to the Second Circuit, the court affirmed the holding that an injunction could be imposed, although it modified its scope.[290] The Second Circuit summarily rejected the plaintiff's argument that his conduct was protected by the first amendment because "[c]rimes and torts committed in news gathering are not protected."[291]

The decisions of the Supreme Court and other courts indicate the first amendment probably will not limit an action in tort for the unauthorized acquisition of private information. The only significant first amendment limitation is that liability cannot be imposed if the acquired information would have been available to the general public. By its very definition, however, information which is available to the general public cannot be private; therefore first amendment limitations will rarely, if ever, be available in an action for tortious acquisition of private information.

3. *The First Amendment Limitations on an Action for the Unauthorized Disclosure of Private Information*

Liability for tortious invasion of privacy also can be based on the unauthorized disclosure of private information. The determination of the first amendment limitations on this liability requires the resolution of several complex issues. Two issues relate solely to the content of the publication. One of these is whether the first amendment provides absolute protection to the publication of truthful statements. If it does not, the second issue concerns the relationship between newsworthiness and first amendment protection. A third issue relates to the fault of the defendant rather than solely to the content of the statement. These issues are discussed below.

a. *Does the First Amendment Afford Absolute Protection to Truth?*

One issue which has not been resolved by the United States Supreme Court is whether truthful publications of private fact are absolutely protected by the first amendment. In the 1975 decision of *Cox Broadcasting Corp. v. Cohn*,[292] the defendant violated a Georgia criminal statute by publishing a rape victim's name appearing on public record. The victim's parents brought a civil action under a Georgia statute which

288. *See* 353 F. Supp. at 223-26.
289. *See id.* at 225-26.
290. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).
291. *Id.* at 995.
292. 420 U.S. 469 (1975).

seemed to allow civil redress for violation of a criminal statute. The Georgia Supreme Court held that a civil action could not be based on the statute, but could be based on a common law tort. The United States Supreme Court granted certiorari to consider the issue of whether first amendment protections precluded liability for publication of the victim's name appearing on public record. Because the publication was found to be true and accurate, the Court recognized the seemingly irreconcilable conflict between the first amendment and privacy. It said:[293]

> Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent . . . .

The appellants in *Cox* had argued that truth was an absolute defense under the first amendment.[294] The Court, however, confined itself to the narrow issue presented and held that a state cannot impose liability for the accurate publication of a fact on public record.[295] Thus, the Court left open the broader question of "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press . . . ."[296]

Since *Cox*, the Ninth Circuit[297] and a Minnesota Federal District Court[298] have taken the position that truthful publications of private fact are not absolutely protected under the first amendment. A strong argument can be made against absolute protection to truthful publications because the first amendment has never been construed as granting an absolute right to publish statements which present a clear and present danger to compelling state interests.[299] In addition, analogy to Supreme Court decisions on obscenity is persuasive of a conclusion that truth, in itself, will not afford an absolute first amendment defense to privacy actions. Cases concerning the proscription of obscenity are relevant because when a state proscribes the publication of obscenity or of private facts, it is inhibiting the disclosure of accurate information in the interest of public welfare. Because the present posture of the Supreme Court is that states can proscribe obscenity,[300] it should follow that truthful

293. *Id.* at 489.
294. *See id.*
295. *See id.* at 489-91.
296. *Id.* at 491.
297. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1127-28 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).
298. *See* Benner v. NBC, No. 4-72-67, slip op. at 10 (D. Minn. June 18, 1975).
299. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
300. A state may proscribe the publication of material which satisfies the following

publications of private fact are not absolutely protected by the first amendment.

The 1977 case of *Zacchini v. Scripps-Howard Broadcasting Co.*[301] also supports a conclusion that truth is not absolutely protected under the first amendment. In *Zacchini*, an entertainer in a "human cannonball" act brought an action to recover damages after the defendant televised his entire act contrary to his request that it not be filmed or televised. The Ohio Supreme Court gave judgment to defendant television station on the basis of first amendment privilege to report newsworthy events.[302] The United States Supreme Court reversed, holding that the first amendment did not protect the appropriation of the plaintiff's pecuniary rights in his profession. "The Constitution," the Court said, "no more prevents a State from requiring [the defendant] to compensate [the plaintiff] for broadcasting his act on television than it would privilege [the defendant] to film and broadcast a copyrighted dramatic work without liability to the copyright owner."[303] Although this broadcast involved the commercial appropriation of a property right rather than an invasion of privacy,[304] implicit in the Court's holding is a recognition that even truthful publications may be without first amendment protection when they interfere with sufficiently compelling personal rights.

In conclusion, therefore, a defendant probably will not be able to invoke the first amendment protection against liability for the unauthorized disclosure of private information merely on the basis that the disclosure is true.

b. Newsworthiness as a Limitation

Although the first amendment probably does not afford absolute protection to truthful publications of private facts, Supreme Court decisions and lower court decisions indicate the publication of private information will be afforded first amendment protection on another basis. The Court's decisions in areas of obscenity and defamation demonstrate a concern for protecting the discussion of public controversies and issues. Under the Court's present test for obscenity, a state cannot proscribe the publication of information which has serious literary, artistic,

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requirements: (1) the average person, applying contemporary community standards, finds that the work as a whole appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) the work as a whole lacks serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973).

301. 97 S. Ct. 2849 (1977).

302. 47 Ohio St. 2d 224, 233-36, 351 N.E.2d 454, 460-62 (1976).

303. 97 S. Ct. at 2857.

304. *See* 97 S. Ct. at 2854-56; notes 154-74 *supra* and accompanying text.

political, or scientific value.[305] Under the defamation decisions, the discussion of public officials and other persons involved in public controversies receives more protection against defamation liability than the discussion of purely personal matters or matters in which the public is merely curious.[306]

In accord with these principles, many courts have denied recovery for an invasion of privacy when the published matter is "newsworthy" or of "legitimate public interest."[307] Although this limitation can be criticized because it involves an *ad hoc* balancing of the competing interests on a case-by-case basis,[308] it has received the support of some legal authorities.[309] In addition, courts seem to recognize several guiding principles in balancing the first amendment interests against the privacy interests.

One principle is that the plaintiff's name generally should be withheld from publication of private fact when a disclosure of the event, and not the participant, serves a legitimate public interest.[310] Thus a person's name should be important only when relevant to the public's interest in altering any relationship with the person because of his private behavior.[311]

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305. See note 300 *supra*.

306. See notes 312-16 *infra* and accompanying text.

307. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (first amendment protections apply to "matters of public interest"); Pearson v. Dodd, 410 F.2d 701, 703 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969); Varnish v. Best Medium Pub. Co., 405 F.2d 608, 611 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); Fletcher v. Florida Pub. Co., 319 So. 2d 100, 111 (Fla. Dist. Ct. App. 1975), *rev'd in part on other grounds*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 97 S. Ct. 2634 (1977); Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 447-50, 299 N.Y.S.2d 501, 506 (Sup. Ct. 1968).

308. "*Ad hoc*" balancing of the plaintiff's right of privacy against the public's right to know causes an objectionable chilling effect because the press might be unable to determine, before publication, whether the interests weigh in its favor. Nimmer, *supra* note 144, at 944.

309. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (1977); Pember & Teeter, *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 76-77 (1974). A leading authority, Alexander Meiklejohn, viewed the first amendment as protecting the public's right to hear information which is relevant to self-government in a democratic society, not the speaker's right to express himself. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1960). Meiklejohn's analysis has received the applause of several writers on the subject. *See, e.g.*, Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 *passim* (1974); Comment, *Privacy: The Search for a Standard*, 11 WAKE FOREST L. REV. 659, 670-72 (1975).

310. *See* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 537-38, 483 P.2d 34, 39-40, 93 Cal. Rptr. 866, 871-72 (1971) (in bank); Deaton v. Delta Democrat Pub. Co., 326 So. 2d 471, 474 (Miss. 1976); Barber v. Time, Inc., 348 Mo. 1199, 1207, 159 S.W.2d 291, 295 (1942); Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren & Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 623 (1968); Comment, *supra* note 309, at 684.

311. Bloustein, *supra* note 309, at 58-61 (name should be disclosed only when it serves

Because a democratic society depends on the free flow of information relating to the administration of government and public business, a second principle is that the first amendment protects the disclosure of information concerning public officials.[312] Thus, a publisher should generally not be liable for an invasion of privacy when the disclosed information relates to official conduct of any kind[313] or to private conduct which touches the official's fitness for public office.[314]

A third principle is that the plaintiff's notoriety will affect the determination of newsworthiness. The Supreme Court's defamation decisions have created two categories of public figures. One category consists of those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes"; the other category consists of those who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[315] Defamatory publications which relate to the public activities of such persons receive greater first amendment protection than publications which relate only to a person's private affairs.[316] By analogy, the courts should be more willing to find newsworthiness if the private information is directly related to the public conduct of the general public figure or to the conduct of the limited public figure which touches on his participation in the public controversy.[317]

In summary, the first amendment will afford significant protection against liability for the unauthorized disclosure of private information

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the public's need to know for self-governing purposes); Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 128-30 (1963) (public interest in a rape victim's name differs from its interest in a prostitute's name because the public would not alter its behavior with regard to the former but should be allowed to take precautionary steps with regard to the latter).

312. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Mahnke v. Northwest Pubs., Inc., 280 Minn. 328, 160 N.W.2d 1 (1968).

313. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (first amendment analysis and holding limited to defamatory statements which concern the official conduct of public officials).

314. *See* Garrison v. Louisiana, 379 U.S. 64, 76-77 (1964); Moore, *supra* note 112, at 22; Note, *supra* note 139, at 96 & n.137. *See also* Klaus v. Minnesota State Ethics Comm'n, ___ Minn. ___, 244 N.W.2d 672 (1976) (statute requiring a candidate for public office to disclose certain financial interests is not an unconstitutional invasion of privacy; there are compelling state interests in giving the electorate "some insight into a candidate's potential conflicts of interest").

315. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); *see* Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967). *See also* Time, Inc. v. Firestone, 424 U.S. 448, 454-55 (1976) (discussing the nature of a "public" controversy).

316. *See* Time, Inc. v. Firestone, 424 U.S. 448, 452-55 (1976) (negligence, rather than recklessness, is required when a person seeks recovery for defamation from publication of a false statement which concerns only private matters rather than a public controversy); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (same).

317. *See, e.g.*, Industrial Foundation v. Texas Indus. Accident Bd., 540 S.W.2d 668, 684-85 (Tex. 1976), *cert. denied*, 45 U.S.L.W. 3634 (U.S. Mar. 22, 1977) (No. 76-840).

if the information is newsworthy. The limitation probably is available when information relates to a contemporary issue or controversy of public importance. Thus, private facts concerning public officials and public figures tend to be more newsworthy than facts concerning purely private individuals.

c. *Protection against Strict Liability*

Prior to 1964, states could impose strict liability for publication of a statement which was false and defamatory. In the 1964 decision of *New York Times Co. v. Sullivan*,[318] however, the United States Supreme Court held that a public official could not recover for a false and defamatory statement directed at his official conduct unless he proved actual malice, that is, that the publisher was at least reckless in failing to discover the statement was false.[319] The Court's rationale was that criticism of government is the very essence of the first amendment and it must be afforded sufficient "breathing space" by precluding defamation liability when the publisher innocently publishes a statement which he has no reason to believe is false.[320]

In 1967 the Court extended the actual malice requirement in *Curtis Publishing Co. v. Butts*[321] to defamation actions brought by "public figures." The rationale was that public figures also command public interest analogous to public officials, either because of their notoriety alone or because they have thrust themselves into the vortex of important public controversies.[322]

In 1971 the Court examined the extent of first amendment protections in a defamation action brought by a private individual who was neither a public official nor a public figure. In *Rosenbloom v. Metromedia, Inc.*,[323] a plurality of the Court held that the *New York Times* actual malice requirement also applies to a defamation action brought by a private individual if the defamation involves "an issue of public or general concern."[324] Three years later, however, the composition of the Court had changed and it reconsidered the sweeping "public concern" test set forth in *Rosenbloom*. Thus in the 1974 decision of *Gertz v. Robert Welch, Inc.*,[325] the Court found that the rule set forth in *Rosenbloom* was unworkable and that the states may constitutionally

318. 376 U.S. 254 (1964).
319. *Id.* at 279-80.
320. *Id.* at 270-72.
321. 388 U.S. 130 (1967). Although Justice Harlan's opinion states a standard of fault slightly different than actual malice, *id.* at 155, that standard did not receive the support of a majority of the justices.
322. *Id.* at 154-55.
323. 403 U.S. 29 (1971).
324. *Id.* at 44-45.
325. 418 U.S. 323 (1974).

impose liability for defamation of a private individual upon a showing of negligence rather than actual malice.[326] Actual malice is constitutionally required only in defamation actions brought by public officials or public figures, although damages recoverable by a private individual are limited to "actual injury" if only negligence is shown.[327]

These cases raise two issues concerning the first amendment requirements when a plaintiff seeks to recover for the publication of private facts. One issue is whether actual malice or negligence must be proven with regard to falsity, and the second issue involves a determination of the scope of the fault requirement.

If the publication of a private fact is false, it is arguable that a plaintiff cannot recover for an invasion of privacy unless he shows the publisher was at fault in failing to ascertain the statement's falsity. In 1967, the actual malice requirement made its way into a suit brought for such a publication, which has sometimes been referred to as a "false light" claim.[328] In *Time, Inc. v. Hill*,[329] defendant had published fictional exaggerations along with an accurate account of the desperation which the plaintiff's family underwent when escaped convicts entered his home and kept his family hostage. The plaintiff brought an action under a New York statute which imposes liability for "fictitious" publications concerning a newsworthy person.[330] The United States Supreme Court held that liability could not be imposed under the statute unless the defendant acted with actual malice.[331] Although the plaintiff in *Hill* did not have a public status like the plaintiffs in *New York Times* and *Butts*, the Court reasoned that the first amendment protects publications involving a matter of "public interest."[332]

Hill was decided before *Gertz*. Shortly after *Gertz*, the Court in *Cantrell v. Forest City Publishing Co.*[333] was confronted with an action similar to that in *Hill*. In *Cantrell* one of the issues was whether, in view of *Gertz*, a private plaintiff could recover for a "false light" invasion of privacy upon a showing of negligent failure to ascertain falsity rather

326. *Id.* at 347.

327. *See id.* at 348-50.

328. For a discussion of the "false light" theory of recovery, see notes 131-53 *supra* and accompanying text.

329. 385 U.S. 374 (1967).

330. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976) prohibits the unauthorized use of a person's name or likeness, but the statute has been judicially construed as allowing recovery for reports of newsworthy persons only if the report is false. *See* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 328, 221 N.E.2d 543, 545, 274 N.Y.S.2d 877, 879 (1966), *vacated per curiam*, 387 U.S. 239 (1967), *aff'd*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *prob. juris. noted*, 393 U.S. 818 (1968), *appeal dismissed per stipulation*, 393 U.S. 1046 (1969).

331. 385 U.S. at 387-88.

332. *Id.* at 388.

333. 419 U.S. 245 (1974).

than actual malice. The Court circumvented the issue, however, on the grounds that no objection was made to trial instructions requiring actual malice.[334]

Both *Hill* and *Cantrell* have a common element. In each case the falsity of the publication was a necessary element to the imposition of liability. In *Hill*, a privacy statute required falsity; in *Cantrell* the tort of "false light" required falsity. The relevance of these cases is therefore drastically reduced if state privacy law does not require falsity as a condition to liability. The tort of unauthorized disclosure of private information proposed by this Note makes falsity irrelevant in ascertaining liability.[335] The crux of a privacy action is that a private aspect of one's life has been revealed to others. The accuracy of the revelation is not important. Upon these premises, it is submitted that the constitutional requirement of proving fault with regard to falsity should not be applied to a privacy claim which does not even require falsity as a condition to actionability.

The second first amendment issue is whether the *New York Times, Butts,* and *Gertz* requirements of recklessness or negligence extend beyond the context of falsity into the other elements of an actionable publication. The Court in *Gertz* held that states could not impose strict liability for defamation and that some "fault" must be proven by the plaintiff.[336] Although the Court was undoubtedly referring to fault in the context of falsity,[337] most authorities have concluded that the spirit of *Gertz* requires fault in all the elements of an action for defamation.[338] By analogy, therefore, a plaintiff could not recover for the publication of private facts if the publisher accidentally and nonnegligently published the statement, referred to the plaintiff, or failed to realize that the publication contained private facts.[339] This analogy seems appropriate because the press would be afforded the "breathing space" which underlies the Court's analysis in *New York Times, Butts,* and *Gertz.*

Furthermore, if a court applies a standard of recklessness to the common law elements of a privacy action, there are no constitutional limitations on damages. If a common law standard of negligence is selected,

334. *Id.* at 249-51.

335. *See* text at 206 *supra.*

336. 418 U.S. at 347.

337. *Id.* at 325-32 (certiorari granted to reconsider the issue of whether plaintiff had to prove defendant's knowledge of falsity or reckless disregard of the truth).

338. *See* RESTATEMENT (SECOND) OF TORTS § 580B, Comment c (1977); Anderson, *Libel and Press Self-Censorship,* 53 TEX. L. REV. 422, 463-64 (1975); Robertson, *Defamation and the First Amendments: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 244 (1976).

339. *See also* Smith v. California, 361 U.S. 147 (1959) (first amendment prohibits imposition of strict liability for the possession of obscene books; defendant must know the content of the book).

however, the holding in *Gertz* indicates that recovery is limited to "actual injury"; neither punitive nor presumed damages can be recovered.[340] By analogy to *Gertz*, a plaintiff who can show only a negligent invasion of privacy could be awarded damages for "impairment of . . . [privacy], personal humiliation, and mental anguish and suffering" only if there was evidence to support the award.[341]

These first amendment protections against strict liability do not, however, impose a significant limitation on the tort proposed by this Note. This Note has concluded that common law liability should be imposed only if the defendant could reasonably foresee the injury to privacy[342] and negligently or intentionally accomplished the invading act.[343] The proposed tort avoids strict liability by requiring negligence; it therefore complies with the requirement of fault implicitly applicable to privacy actions on the basis of *Gertz*. Recovery of damages, however, will be limited to "actual injury" if the plaintiff cannot show the defendant intentionally or recklessly invaded his privacy.

B. Common Law Defenses

Common law defenses to tort actions are justified on the basis of exceptional circumstances distorting the usual balance between the conflicting interests of the plaintiff, the defendant, and the public. There are three factors which have particular relevance in providing a common law defense to tortious invasion of privacy. One factor is the plaintiff's fault, a second factor is newsworthiness, and a third factor is privilege.

1. The Plaintiff's Fault

Courts have indicated that a person must have a reasonable expectation of privacy as a condition to its legal protection. This position has been accepted by this Note.[344] It seems clear, therefore, that the plaintiff's contributory fault in allowing his privacy to be invaded will weigh in favor of a finding that his expectation of privacy was not objectively reasonable.

The clearest instance in which the plaintiff's fault should bar recovery is where express consent is given to invade privacy.[345] Implied consent

340. 348 U.S. at 348-50. For a discussion of the effect of *Gertz* on the recovery of damages in a defamation action, see Note, *supra* note 139, at 110-12.

341. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

342. *See* text at 206 *supra*.

343. *See id.*

344. *Compare* text at notes 193-200 *supra with* text at 206 *supra*.

345. *See, e.g.*, Sharman v. C. Schmidt & Sons, 216 F. Supp. 401, 405-07 (E.D. Pa. 1963); Tanner-Brice Co. v. Sims, 174 Ga. 13, 21, 161 S.E. 819, 823 (1931); Dabbs v. Robert S. Abbott Pub. Co., 44 Ill. App. 2d 438, 193 N.E.2d 876 (1963); Warren & Brandeis, *supra* note 28, at 218.

should also bar recovery.[346] If the consent is exceeded, however, the invasion should be actionable and the consent used to mitigate damages.[347] For example, consent might be exceeded if the invasion occurs after a considerable period of time has passed since the consent was given.[348]

A related question is whether public officials or public figures should be precluded from recovery because they have thrust their lives into the public domain. Although a few decisions suggest that such persons entirely forfeit their right of privacy,[349] the better-reasoned decisions state that such persons lose their right of privacy only to the extent they have made their lives public.[350]

2. *Newsworthiness*

Although not stated in terms of first amendment protection, the language of early cases reflects a concern for the tremendous public interest in the free flow of information having social and political significance. To protect this interest, it is generally recognized that newsworthiness will provide a common law defense to an action for the publication of private information.[351]

The viability of this common law defense is questionable, however; it now might be an aspect of the plaintiff's case. Because the very essence of the first amendment is the discussion of public controversies, the common law defense of newsworthiness might be replaced by a first amendment requirement that the plaintiff prove lack of newsworthiness as a condition to recovery for publication of private information.[352] This conclusion parallels recent developments in defamation law, where the defendant's common law defense of truth has been transposed into a first amendment requirement that the plaintiff prove falsity.[353]

346. *See, e.g.*, Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 230, 253 P.2d 441, 444 (1953) (in bank); Johnson v. Boeing Airplane Co., 175 Kan. 275, 282, 262 P.2d 808, 813-14 (1953); Thayer v. Worcester Post Co., 284 Mass. 160, 163-64, 187 N.E. 292, 293-94 (1933).

347. *See, e.g.*, Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6, 13 (10th Cir. 1952); Canessa v. J.I. Kislak, Inc., 97 N.J. Super. 327, 358-59, 235 A.2d 62, 79-80 (L. Div. 1967).

348. *See* McAndrews v. Roy, 131 So. 2d 256, 258-59 (La. Ct. App. 1961). *But see* Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

349. *See* Travers v. Paton, 261 F. Supp. 110, 117 (D. Conn. 1966); Smith v. Surat, 7 Alas. 416, 424-25 (1926).

350. *See, e.g.*, Bell v. Birmingham Broadcasting Co., 266 Ala. 266, 96 So. 2d 263, 265-66 (1957); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 199-200, 50 S.E. 68, 79-80 (1905) (dictum); Munden v. Harris, 153 Mo. App. 652, 660, 134 S.W. 1076, 1079 (1911) (dictum).

351. *E.g.*, Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940); Hurley v. Northwest Pubs., Inc., 273 F. Supp. 967, 976 (D. Minn. 1967), *aff'd per curiam*, 398 F.2d 346 (8th Cir. 1968); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 961 (D. Minn. 1948); Warren & Brandeis, *supra* note 28, at 214.

352. *See* notes 305-17 *supra* and accompanying text.

353. *E.g.*, Beatty v. Ellings, 285 Minn. 293, 301-02, 173 N.W.2d 12, 17-18 (1969), *cert.*

3. *Privilege*

The common law recognizes special situations in which a defamatory statement can be made without liability. The common law recognizes an absolute privilege to communicate a defamatory statement, for example, in the course of legislative and judicial proceedings.[354] The common law also recognizes a qualified privilege to communicate a defamatory statement to protect a legitimate interest of the defendant, a third party, or the general public.[355] Unlike an absolute privilege which cannot be defeated, a qualified privilege is defeated if the defamatory statement is communicated with common law malice such as ill will, spite, or bad faith.[356]

Most authorities agree that these privileges also should provide a defense to an action for tortious invasion of privacy.[357] These defamation defenses are well-suited to a privacy action when it is based on the publication of private information. The analogy to the defamation defense is not as clear, however, when the privacy action is not based on publication but rather based on intrusion or the unauthorized acquisition of private information. At least one court has refused to apply the defamation privileges to an action for the unauthorized acquisition of private information.[358]

It is arguable, however, that the defamation privileges simply prescribe situations in which the defendant or the general public has an unusually great interest at stake, thereby defining situations in which liability should not be imposed for otherwise tortious conduct.[359] Thus, for example, an employer's qualified defamation privilege to protect his business by falsely accusing an employee of theft in the presence of other

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denied, 398 U.S. 904 (1970); Note, *supra* note 139, at 113 & nn.268-73.

354. *E.g.*, Jenson v. Olson, 273 Minn. 390, 393, 141 N.W.2d 488, 490 (1966); Rolfe v. Noyes Bros. & Cutler, Inc., 157 Minn. 443, 196 N.W. 481 (1923); Peterson v. Steenerson, 113 Minn. 87, 89, 129 N.W. 147, 147 (1910) (dictum).

355. *See, e.g.*, McBride v. Sears, Roebuck & Co., ___ Minn. ___, ___, 235 N.W.2d 371, 374 (1975); Clancy v. Daily News Corp., 202 Minn. 1, 8, 277 N.W. 264, 268 (1938); Burch v. Bernard, 107 Minn. 210, 211-12, 120 N.W. 33, 34 (1909). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 593-612 (1977).

356. *E.g.*, Hammersten v. Reiling, 262 Minn. 200, 207-08, 115 N.W.2d 259, 264-65, *cert. denied*, 371 U.S. 862 (1962); Friedell v. Blakely Printing Co., 163 Minn. 226, 231, 203 N.W. 974, 976 (1925); McKenzie v. William J. Burns Int'l Detective Agency, Inc., 149 Minn. 311, 312, 183 N.W. 516, 517 (1921).

357. *See* Dennis v. Adcock, 138 Ga. App. 425, 429-30, 226 S.E.2d 292, 295 (1975); Munsell v. Ideal Food Stores, 208 Kan. 909, 924, 494 P.2d 1063, 1075 (1972); Brents v. Morgan, 221 Ky. 765, 770, 299 S.W. 967, 970 (1927); RESTATEMENT (SECOND) OF TORTS §§ 652F-652G (1977); Warren & Brandeis, *supra* note 28, at 216.

358. Froelich v. Adair, 213 Kan. 357, 359-60, 516 P.2d 993, 996-97 (1973).

359. Smith, *Conditional Privilege for Mercantile Agencies—Macintosh* v. *Dun*, 14 COLUM. L. REV. 187, 189-90 (1914); Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 413-14 (1910). *See generally* Harper, *Privileged Defamation*, 22 VA. L. REV. 642, 642-55 (1936); Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

employees could be transposed into an employer's qualified privacy privilege to tap an employee's business telephone for the recovery of stolen goods.[360] This approach seems preferable to a general rejection of the analogy to defamation privileges in cases involving intrusion or the unauthorized acquisition of private information.

V. CONCLUSION

The achievement of justice requires the court's understanding of the interests locked in dispute. The scales of justice are ill-used if the wrong interests are placed on one side of the balance. In determining injury to privacy, it is therefore critical that a court consider privacy interests; Prosser distorts the balance by adding interests of reputation and property. The tort proposed by this Note is an attempt to afford greater justice by defining conduct which primarily injures privacy, not reputation or property.

Social scientists envision privacy as dialectic: a person's control over both one, when he receives social stimuli from others and two, when he gives social stimuli to others. The proposed tort is likewise characterized by two types of invasion: intrusion, to afford redress when unwanted social stimuli is received from others; and the unauthorized use of private information, to afford redress when social stimuli is coerced from the plaintiff without his consent. It was concluded that an invasion could not be actionable unless it was at least negligently accomplished, highly offensive, and unreasonable according to community mores.

Finally, the constitutional and common law limitations on the proposed tort were examined. The most significant constitutional limitation is on recovery for the unauthorized disclosure of a private, newsworthy fact. A plaintiff cannot recover for such disclosures. Also, the common law might afford a significant defense on the basis of consent or privilege.

Prosser himself challenged the legal profession to analyze precisely the tort of invasion of privacy and to "realize what we are doing and give some consideration to the question of where, if anywhere, we are to call a halt."[361] This Note has accepted his challenge and is an attempt to improve his accomplishments.

360. *See* People v. Appelbaum, 277 App. Div. 43, 45, 97 N.Y.S.2d 807, *aff'd*, 301 N.Y. 738, 95 N.E.2d 410 (1950); Schmukler v. Ohio-Bell Tel. Co., 66 Ohio Law Abs. 213, 224, 116 N.E.2d 819, 826 (C.P. 1953).

361. Prosser, *supra* note 28, at 423.