



1-1-1967

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Anthony C. Fague

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Recommended Citation

Anthony C. Fague, Comment, *The Right of Privacy in California*, 7 SANTA CLARA LAWYER 242 (1967).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol7/iss2/5>

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THE RIGHT OF PRIVACY IN CALIFORNIA

INTRODUCTION

In 1890, Samuel D. Warren collaborated with Louis D. Brandeis to write a law review article destined to have a significant effect on the development of law in American and English courts.¹ Their article pleaded for the recognition of an independent "right to privacy,"² and is probably the most outstanding example of the influence of legal periodicals upon the courts. Prior to 1890, there had been no relief granted by English or American courts on the basis of an invasion of such a right, although a few cases had reached the same result through different means.³ Warren and Brandeis examined these cases, and found that relief had been ostensibly granted on the basis of defamation, invasion of some property right,⁴ or breach of confidence or of an implied contract,⁵ but that the decisions had actually been based on a much broader principle. This principle, which they termed the "right to privacy," deserved separate recognition, they reasoned, and they went on to outline the circumstances under which it would apply.

Their first rule was that the right of privacy does not prohibit any publication of matter which is of public or general interest.⁶ The explanation of this rule indicated that the general object of their theory was to protect the privacy of private life, "and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent, the protection is to be withdrawn."⁷ The second rule

¹ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

² The term is difficult to define. See Davis, *What Do We Mean by "Right to Privacy,"* 4 S. DAK. L. REV. 1 (1959).

³ *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881) (intrusion upon child-birth); *Lord Byron v. Johnston*, 2 Mer. 29, 35 Eng. Rep. 851 (1816) (authorship of spurious poem attributed to Lord Byron).

⁴ *Woolsey v. Judd*, 4 Duer 379, 11 How. Pr. 49 (N.Y. 1855) (publication of private letters); *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (1811) (same); *Prince Albert v. Strange*, 1 Mach. & G. 25, 41 Eng. Rep. 1171 (1849), *affirmed*, 2 De G. & Sm. 652, 64 Eng. Rep. 293 (1849) (exhibition of private etchings and publication of catalogue).

⁵ *Yovatt v. Winyard*, 1 Jac. & W. 394, 37 Eng. Rep. 425 (1820) (publication of recipes obtained surreptitiously by employee); *Abernathy v. Hutchinson*, 3 L.J. Ch. 209 (1825) (publication of lectures delivered to class of which defendant was a member); *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888) (publication of plaintiff's picture made by defendant).

⁶ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

⁷ *Ibid.*: "Some things all men alike are entitled to keep from public curiosity, whether in public life or not, while others are only private because persons concerned have not assumed a position which makes their doings legitimate matters of public investigation."

of application stated by Warren and Brandeis was that the right of privacy does not prohibit communication of any private matter, when publication occurs under circumstances which would render it privileged communication according to the law of slander and libel. They further stated that the law would probably grant no redress for oral publication of private matter, unless some special damage could be proven, and that the right of privacy ceases upon publication of the facts by the individual, or with his consent. Truth of the matter is no defense, nor is absence of malice a defense to an action for invasion of privacy. The authors recommended that invasion of privacy be recognized as an action in tort for damages, or, in special instances, as an equitable action for an injunction.⁸

Today, the courts of thirty states and the District of Columbia recognize a right of privacy.⁹ The only states which still reject such a cause of action are Rhode Island,¹⁰ Texas,¹¹ Nebraska,¹² and Wisconsin,¹³ and the ground for rejection in these states is a reluctance to alter the common law without specific legislation.

⁸ *Id.* at 215. The first case to allow recovery on the independent basis of a right of privacy was an unreported decision of a New York trial judge. An actress had appeared on stage in a pair of tights, and defendant snapped her picture. Defendant was enjoined from publishing the picture. *Manola v. Stevens*, N.Y. Super. Ct., reported in *New York Times*, June 15, 18, 21, 1890. Other decisions followed. *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895); *Marks v. Jaffa*, 68 Misc. 290, 26 N.Y.S. 908 (Super. Ct. 1893); *MacKenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 18 N.Y.S. 240 (Sup. Ct. Spec. 1891). However, in *Roberson v. Rochester Folding-Box Company*, 171 N.Y. 538, 64 N.E. 442 (1902), a New York appellate court denied recovery on the basis of a right of privacy because of lack of precedent, the mental character of the claimed injury, fear of the flood of litigation which could result, the difficulty of drawing a distinction between public figures and private persons, and a fear of unduly restricting freedom of speech and of the press. Immediate public disapproval of the decision led one of the concurring judges to write a law review article defending his opinion. O'Brien, *The Right of Privacy*, 2 COL. L. REV. 437 (1902). Shortly thereafter, New York enacted a statute, which remains the law of the state today, making it both a tort and a misdemeanor to use the name or picture of any person for "advertising purposes" without their consent. N.Y. SESS. LAWS 1903, ch. 132, §§ 1-2. Now, as amended in 1921, N.Y. CIVIL RIGHTS LAW, §§ 50-51. This statute has been used as a model for the similar statutes of Oklahoma, Utah, and Virginia.

Georgia was the next state to recognize an independent right of privacy. *Pavesich v. New England Life Insurance Company*, 122 Ga. 190, 50 S.E. 68 (1905). But the decisions in most of the other states remained split between the view of the New York court in the *Roberson* case, and the views of Warren and Brandeis, and the Georgia court. However, when the *Restatement of Torts* devoted a section to the invasion of privacy, RESTATEMENT, TORTS, § 687 (1939), other states began to recognize this tort, overruling previous decisions.

⁹ PROSSER, TORTS 831 (3d ed. 1964).

¹⁰ *Henry v. Cherry & Webb*, 30 R.I. 13, 73 Atl. 97 (1909).

¹¹ *Milner v. Red River Valley Pub. Co.*, — Tex Civ. App. —, 249 S.W.2d 227 (Civ. App. 1952).

¹² *Brunson v. Ranks Army Stores*, 161 Neb. 519, 73 N.W.2d 803 (1955).

¹³ *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956).

The right of privacy, as developed in about four hundred cases to date, has been used as a basis for tort liability in four distinct areas.¹⁴ They consist of:

1. intrusion on the plaintiff's solitude or seclusion¹⁵
2. public disclosure of private facts¹⁶
3. publicity which places the plaintiff in a false light in the public eye¹⁷
4. appropriation of the plaintiff's name or likeness for defendant's benefit.¹⁸

THE RIGHT OF PRIVACY IN CALIFORNIA

The development of an independent right of privacy in California has been rapid and enlightened in most respects. The only remaining problem areas are in the development of realistic tests for distinguishing between public figures and private persons, and

¹⁴ See Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). See generally *id.* at 398.

¹⁵ *Young v. Western & A.R. Co.*, Ga. App. 761, 148 S.E. 414 (1929) (search without a warrant); *Newcomb Hotel Co. v. Corbett*, 27 Ga. App. 365, 108 S.E. 309 (1921) (intrusion into hotel room); *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959) (illegal search of shopping bag in store); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931) (wire tapping private conversation); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958) (recording private conversation with hidden microphones); *Moore v. New York Elevated R.R.*, 130 N.Y. 523, 29 N.E. 997 (1892) (peering into windows of home); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), *aff'g*, 99 Ohio App. 485, 135 N.E.2d 440 (1955) (persistent and unwanted telephone calls); *Brex v. Smith*, 104 N.J. Eq. 386, 146 Atl. 34 (1929) (unauthorized prying into bank account).

¹⁶ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 867 (1927) (sign in window proclaiming debt, owed by plaintiff, to the public eye); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931) (motion picture revealed past history and name of prostitute who was reformed and now a respectable member of society); *Feeney v. Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920) (public exhibition of films of caesarian operation).

¹⁷ *Lord Byron v. Johnston*, 2 Mer. 29, 35 Eng. Rep. 851 (1816) (circulation of a bad poem attributed to plaintiff's authorship); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (fictitious testimonial used in advertising); *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924) (unauthorized use of name as candidate for office); *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y.S. 908 (Super. Ct. 1893) (entry of an actor, without his consent, in an embarrassing popularity contest); *Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952) (use of plaintiff's picture to illustrate article on profane love).

¹⁸ *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942) (name used without consent to advertise defendant's product); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952) (plaintiff's picture used in advertisement without consent); *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 Atl. 392 (1907) (name and picture used on product to add luster to name of corporation); *Lane v. F. W. Woolworth Co.*, 171 Misc. 66, 11 N.Y.S.2d 199 (Sup. Ct. 1939), *aff'd mem.*, 256 App. Div. 1065, 12 N.Y.S.2d 352 (1939) (plaintiff's picture used to accompany an article sold).

between the public and private lives of a public figure. It is ironic that this inadequacy in the law continues today, over seventy-five years after Warren and Brandeis wrote their celebrated article, inspired by just such an invasion of the private life of a public figure.¹⁹ In the face of modern technological advances in news reporting and communications, it is becoming obvious that the courts need to refine their techniques for deciding right of privacy cases involving public figures. Two major refinements will be suggested in this comment: first, that the courts explicitly recognize a distinction between voluntary and involuntary public figures, and second, that the courts more clearly distinguish between the public and private life of a public figure on the basis of the degree of notability possessed by the individual. Both of these suggestions have received the implicit approval of the California courts in a number of cases. Explicit approval of these concepts is now required if judicial treatment of privacy cases is to attain that degree of sophistication which will allow equitable results in our modern society.

The landmark California case on the right of privacy, *Melvin v. Reid*,²⁰ was decided in 1931. At that time the right of privacy was recognized as a distinct right in only a handful of other jurisdictions in the United States. The section of the *Restatement of Torts*,²¹ which recognizes a right of privacy as an actionable right, had not yet been written, and a majority of the cases decided in the United States were based on statutory law similar to the New York Civil Rights Laws.²² Thus, the California Supreme Court had very little precedent to examine in deciding this case.

The facts of *Melvin* present a classic instance of the public disclosure of facts about the plaintiff's past life which caused her extreme embarrassment and mental anguish.²³ The defendant had produced a motion picture, entitled *The Red Kimono*, which revealed details of the plaintiff's life as a prostitute, and revealed her true identity. At the time of the events portrayed in the motion picture,

¹⁹ Mrs. Warren was a member of the socially elite in Boston (daughter of Senator Bayard of Delaware), and her husband was a prominent lawyer and merchant. Shortly before the article was written, several Boston newspapers had printed embarrassingly detailed accounts of a few parties which Mrs. Warren had given. Of course, Boston high society frowned upon the names of ladies and gentlemen appearing in the newspapers at all, but to make matters worse, these newspaper accounts were full of personal details which made them all the more shocking and embarrassing. After the newspapers added insult to injury by printing even more perplexing accounts of their daughter's wedding, Mr. Warren resolved to do something about it. See Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

²⁰ 112 Cal. App. 285, 297 Pac. 91 (1931).

²¹ RESTATEMENT, TORTS, § 687 (1939).

²² N.Y. CIVIL RIGHTS LAW, §§ 50-51.

²³ 112 Cal. App. 285, 297 Pac. 91 (1931).

the plaintiff was a witness at a murder trial. Since that time, however, the plaintiff had reformed her life, married, and found a place for herself in respectable society. The facts revealed in the motion picture caused her to be ostracized from the community in which she lived and otherwise excluded from the society of which she was a member.

In laying the foundations for its decision, the court postulated some general principles which still provide a good definition of the right of privacy in California. The court distilled those principles from concepts which "seem to run through most of the better considered decisions from jurisdictions which recognize the doctrine, as well as those which do not."²⁴ Briefly, the precepts enunciated by the court were as follows. First, the right of privacy is a personal right and not a property right. As such, it does not survive, but dies with the person. Second, the right of privacy does not exist where the person has published the matter complained of himself, or consented to publication of the matter by others. Third, the right of privacy does not exist "where a person has become so prominent that by his very prominence, he has dedicated his life to the public, and thereby waived his right to privacy."²⁵ Fourth, no right of privacy exists "in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit, as in the case of a candidate for public office."²⁶ Fifth, the right of privacy is violated only by "printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth."²⁷ Finally, the right of action accrues when the publication is made for gain or profit.

Recognizing that many of the above principles had been derived from statutory law in the various jurisdictions, the court declined to recognize the right of privacy as the basis for an action in tort in California. Instead, the court based its decision on an "inalienable right, guaranteed . . . by our Constitution, to pursue and obtain happiness."²⁸ The court went on to say, "Whether we call this a right of privacy or give it any other name is immaterial, because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others."²⁹

Since *Melvin v. Reid*, approximately twenty-five cases have

²⁴ *Id.* at 290, 297 Pac. at 92.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Id.* at 292, 297 Pac. at 93-94.

²⁹ *Ibid.*

reached the California appellate courts involving the right of privacy. The right of privacy has been distinguished from the right of freedom from defamation on the basis that the cause of action in a privacy case is not for an injury to the character or reputation, but for a direct wrong to the person, resulting in injured feelings or other mental distress, but without regard to any effect on property, business, pecuniary interest, or standing.³⁰ A lack of malice has been held to be no defense to an action for invasion of privacy.³¹ Liability for invasion of privacy has been limited to the instances where defendant's conduct was such that the defendant should have realized that it would offend persons of ordinary sensibilities.³² The facts concerning arrest and prosecution of those charged with violation of the law have been held matters of public interest, and publication of such facts has been held not to constitute an invasion of privacy.³³ Wire-tapping has been held to constitute an invasion of privacy, except in cases where it is legally authorized and the information obtained is beneficial to the public.³⁴

Probably the most difficult problem which the California courts, as well as the other American courts, have had to deal with throughout the development of a legally recognized right of privacy has been the problem of distinguishing between private persons and public figures. In order to prove that he has been injured by an alleged invasion of his privacy, a claimant must first show that he has a private life. In the case of a public figure, this may be very difficult. The distinction is clear in theory, but often quite difficult to apply in individual cases. Warren and Brandeis foresaw a problem in the application of the law of privacy to public figures when they observed, "Some things all men alike are entitled to keep from public curiosity, whether in public life or not, while others are only private because persons concerned have not assumed a position which makes their doings legitimate matters of public investigation."³⁵

Most of the American courts have been loathe to recognize the proposition that a public figure may also have a private life, in addition to his public life. Upon reading some of the opinions, many of which have dealt with actors and actresses, one is left with the distinct impression that judicial disapproval of the theatrical profession has at least been a factor in such decisions.³⁶ Aside from this however,

³⁰ *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

³¹ *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

³² *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952).

³³ *Coverstone v. Davis*, 38 Cal. 2d 315, 239 P.2d 876 (1952).

³⁴ *People v. Trieber*, 28 Cal. 2d 657, 171 P.2d 1 (1946).

³⁵ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

³⁶ "Actresses and actors seek publicity and often adopt various and sundry ways

a number of more valid reasons continue to appear in decisions which hold that public persons have lost their right of privacy. First, it is argued that they have sought publicity and consented to it, and therefore cannot complain when they receive it. The second reason commonly given is that their personalities and their affairs already have become public, and can no longer be regarded as their private business. Finally, and perhaps most legitimately, it is argued that the press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest. Regardless of the reasons given, the rule of law is mechanically and almost universally applied in cases involving public figures that a public person has no right of privacy.

In addition to their disregard for the distinction between the public and private life of a public figure, the American courts display another attitude which is a terrific handicap to invasion of privacy claimants. The American courts, always sensitive to arguments based upon the constitutionally-guaranteed rights of freedom of speech and freedom of the press, consistently place participants in news events in the category of public persons with respect to the event under consideration. And once these otherwise private citizens have been classified as public figures related to a particular news event, very few additional facts are required to strip an individual of his right of privacy if the rule that a public figure has no right of privacy is applied mechanically.

The California court in *Melvin v. Reid* showed an enlightened regard for the private life of the plaintiff who had undoubtedly been a public figure while she was a witness at a murder trial. The court considered the lapse of time (fifteen years) between the events surrounding the trial and the time of the publication of the motion picture sufficient to restore the plaintiff to the status of a private person. Note that in this case the plaintiff had become a public figure only because she was a participant in a news event, *i.e.*, the murder trial. And the involuntary nature of the plaintiff's participation in this event was definitely, although impliedly, a factor in the court's decision.³⁷

of securing such notoriety as will attract attention to them. They cannot expect to lead quiet secluded lives. They will be criticized, justly or otherwise for their performances. This court is of the opinion that any person following the theatrical business for a life's work has no such right of privacy as the plaintiff attempts to assert in her complaint. Her embarkation on this vocation in life has estopped her from a right to be heard to complain that her personal right of privacy has been invaded." *Martin v. F. I. Y. Theatre Co.*, 10 Ohio Op. 338, 340 (C. P. Duyahoga County 1938). Also: "[C]ommon observation teaches us that the greatest asset to a star is constant publicity." *Paramount Pictures v. Leader Press Co.*, 24 F. Supp. 1004, 1007 (D. Okla. 1938), *rev'd*, 106 F.2d 229 (10th Cir. 1939).

³⁷ 112 Cal. App. at 287, 297 Pac. at 93.

In a later case, *Cohen v. Marx*,³⁸ "Canvasback" Cohen, a retired prizefighter sued Groucho Marx for the invasion of his privacy occasioned by some remarks the defendant had made on a radio program. Groucho named "Canvasback" as a fighter he had managed, and said that he had made him walk back to Cleveland after he was knocked out in a fight in Los Angeles. "Canvasback" had been a prizefighter of some repute at the time, but had retired from the ring about ten years prior to the radio program. The court gave this definition of a public figure:

A person who by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a *part* of his right of privacy.³⁹

The court found "Canvasback" to be a public figure under this definition during his ring career, and they would not allow him to retreat into seclusion and hold others liable for commenting on acts which had taken place at a time when he was voluntarily exposing himself to the public eye. But even in deciding for the defendant, the court implicitly recognized the distinction between the public and private life of the plaintiff: "It is evident that when plaintiff sought publicity and the adulation of the public, he relinquished his right to privacy *on matters pertaining to his professional activity*."⁴⁰ In comparing this case to *Melvin v. Reid*, note that "Canvasback" was a voluntary public figure, and not just a participant in a news event, which accounts to a large degree for the court's refusal to allow him to hide his past acts from the public eye.

In *Stryker v. Republic Pictures Corp.*,⁴¹ the plaintiff was suing the producers of the motion picture, *Sands of Iwo Jima*, on the grounds that they had publicized certain aspects of his life (as Sergeant Stryker) and fictionalized other portions, without his consent. The court found that the plaintiff was a public figure, but that the general public had a legitimate concern only in the record of a war hero's military service, and no more. In other words, the court found that Sergeant Stryker was a public figure, but that the plaintiff had a tenable private life as well. However, the court went on to say that, "A politician, running for public office, in effect, offers his public and private life for perusal so far as it affects his bid for office."⁴² The point to recognize here is that the court was willing to recognize degrees of "notability," and to draw the line between a

³⁸ 94 Cal. App. 2d 704, 211 P.2d 320 (1949).

³⁹ *Id.* at 705, 211 P.2d at 321. (Emphasis added.)

⁴⁰ *Ibid.* (Emphasis added.)

⁴¹ 108 Cal. App. 2d 191, 238 P.2d 670 (1951).

⁴² *Id.* at 194, 238 P.2d at 672.

person's public life and his private life dependent upon the degree of notability which he possessed. This view is in accord with the original view of Warren and Brandeis that the more "public" a person becomes, the more limited is his private life.

In an unreported case, *Douglas v. Disney Productions*,⁴³ a California court indicated that even a public figure as notable as Kirk Douglas possesses some right to a private life. Kirk Douglas had engaged in some horseplay before a friend's home movie camera. Later, when the defendant obtained the film and incorporated it into one of its productions for public showing, Douglas was held to have a cause of action for invasion of his privacy.

The cases cited above indicate that the California courts have at least been sympathetic to the distinction with which Warren and Brandeis were concerned—the distinction between the private and public life of a public figure. And the courts have considered this distinction, as well as the distinction between voluntary and involuntary public figures in arriving at their decisions. But the courts have not really formulated these distinctions. Furthermore, there have been several California cases which indicate a reluctance by courts to recognize any right of privacy in those it labels as public figures.

In *Werner v. Times Mirror*,⁴⁴ a case with facts very similar to *Melvin v. Reid*, the plaintiff was a former city attorney. Werner had resigned from the office of city attorney after a scandal which led to his disbarment and his first wife's conviction for grand theft. About thirty years later, after the plaintiff had reformed his life and been re-admitted to the bar on the basis of his moral rehabilitation, he applied for a wedding license to marry his second wife. The defendant newspaper, upon learning of his application, published an article entitled, "Former City Attorney Werner to Wed Again" which recounted all of the events leading to his disbarment and resignation. Werner brought suit for an invasion of privacy, and despite an eloquent dissent based on *Melvin v. Reid*,⁴⁵ dismissal of the suit was affirmed. The court stated that, "mere passage of time does not preclude the publication of such incidents from the life of one formerly in the public eye, which are already public property."⁴⁶ But this case can be reconciled with *Melvin v. Reid* if the nature of the public figure involved is considered. In *Melvin*, the plaintiff was an involuntary public figure, and the passage of fifteen years was

⁴³ Civil No. C-664346, Super. Ct., Los Angeles County, Calif., reported in Los Angeles Daily Journal Reporter, December 31, 1956, at 27, col. 3.

⁴⁴ 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

⁴⁵ *Id.* at 123, 14 Cal. Rptr. at 220.

⁴⁶ *Id.* at 118, 14 Cal. Rptr. at 215.

held to be sufficient to restore her to the status of a private person. However, in *Werner*, the plaintiff was a voluntary public figure who possessed a high degree of notability during his public life. The court, in effect, held that for such a person even the passage of thirty years was insufficient to restore him to the status of a private person.

In *Carlisle v. Fawcett Publications*,⁴⁷ a scandal magazine, in an article entitled "Janet Leigh's Own Story—I Was a Child Bride at 14!" implicated the plaintiff as the one who lured the innocent Miss Leigh into this premature marriage. He claimed public disclosure of private facts and publicity which placed him in a false light in the public eye. The court paid lip service to a "nice discrimination between the private 'right to be let alone' and the public right to news and information,"⁴⁸ but went on to hold that "people closely related to . . . public figures in their activities must also to some extent lose their right of privacy that one unconnected with the famous or notorious would have."⁴⁹ Thus, in this case, the court reasoned that since Miss Leigh was a voluntary public figure with a high degree of notability, the public had a right to information concerning her past life. Since the plaintiff was a part of her past life, he was essentially a participant in a news event, and therefore also a public figure to the extent of his participation in that event. The fact that the marriage itself was a matter of public record lent weight to the court's classification of the incident as a news event.

*Smith v. National Broadcasting Company*⁵⁰ was a case involving a private citizen who became the principal character in a rather humiliating news item. The plaintiff had reported to the police that a black panther had escaped from his truck while in transit through the city of Los Angeles. The report was made in good faith, but a police investigation disclosed that the panther reached its destination without incident. However, between the time the plaintiff made the report and the time of the completion of the investigation, the information reached the news media, and many residents of the area became badly frightened. The police arrested the plaintiff for filing a false report, subjected him to a psychiatric examination, and detained him until the results proved him mentally sound. The plaintiff suffered much mental anguish, was subjected to public ridicule and scorn, and lost his job after the newspapers published a story explaining the entire incident. Three months later, the defendant produced a radio dramatization of the news story, and the plaintiff sought an injunction to prevent the telecast of a similar dramatiza-

⁴⁷ 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962).

⁴⁸ *Id.* at 745, 20 Cal. Rptr. at 418.

⁴⁹ *Id.* at 747, 20 Cal. Rptr. at 420.

⁵⁰ 138 Cal. App. 2d 807, 292 P.2d 600 (1956).

tion. The court held that the plaintiff had no cause of action for invasion of privacy because he had become a public figure by his actions and had "renounced his right of privacy insofar as this particular incident was concerned."⁵¹ The court mechanically applied the rule that participants in news events are public figures and therefore have no right of privacy.

These cases illustrate the ease with which a court can classify an apparently private individual as a public figure, and thus strip him of his right of privacy.

ANALYSIS

It is common knowledge in this day and age that the newspapers and other news media, besides having far more effective means for gathering news at their disposal, probe deeper into the people and events which make up these news items. A mother just informed of her son's death has a microphone thrust at her so that she may describe her feelings of the moment to a nation-wide radio and television audience. The private lives of actors and actresses, who normally appear to the general public only on the motion picture or television screen, appear across the front pages of scores of newspapers across the country. An astronaut's wife is quizzed mercilessly before the television cameras about her feelings as her husband carries out an extremely hazardous mission in space. All of these people could be classified as public figures—have they *no* right to privacy?

The old arguments of the California and other American courts that such people have either sought and consented to this publicity, or that their affairs have already become public, require closer examination in light of today's more effective information-gathering technology. Have these people sought publicity? Or have their lives suddenly become public simply because of the advent of telephoto lenses, portable television cameras, and directional microphones which can record their every act and word from a distance?

There is no argument, in theory, with the privilege of the press to inform the public on legitimate matters of public interest. But there is much disagreement on the extent of that privilege. News is difficult to define, and can perhaps only be described as including all events and items of information outside of the normal everyday routine, and which have "that indefinable quality of information which arouses public attention."⁵² The pages of the daily paper are

⁵¹ *Id.* at 812, 292 P.2d at 604.

⁵² *Sweenek v. Pathe News*, 16 F. Supp. 746, 747 (E.D.N.Y. 1936).

probably more illustrative. A typical sampling will include murders, suicides, divorces, marriages, accidents, crimes of all varieties, and many other matters of popular appeal. The material which a newspaper may print is not limited to current events, but may include educational, historical, and geographical information, as well as entertainment and amusement.

Obviously, there must be some limit to this privilege. Those courts which recognize a limit to the extent to which a public person is public, seem also to recognize a limit to the privilege of the press,⁵³ and usually reach their decision by balancing one against the other. But further refinement of this equitable approach is necessary if the rights of privacy of both public and private individuals are to be adequately protected in our modern society.

The major refinements required in the courts' equitable treatment of public figures in right of privacy cases are twofold. First, the courts must clearly formulate a distinction between voluntary and involuntary public figures. Second, the courts should clearly distinguish between the public and private life of a public figure on the basis of the degree of notability possessed by the individual.

The first distinction suggested above appears, at least implicitly, in a number of California cases.⁵⁴ A person who voluntarily becomes a public figure, within the definition given in *Cohen v. Marx*,⁵⁵ obviously warrants a more limited protection of his right of privacy than an otherwise private individual who becomes an involuntary participant in a news event. Thus, if a person voluntarily seeks publicity, either by actively seeking public attention or by embarking upon a profession or career which necessarily thrusts him into the limelight, he should be classified as a voluntary public figure and his right of privacy limited accordingly. But if the individual was a private person up to the time of a particular newsworthy event, and then was thrust into the public eye simply because of his participation in this event, without any voluntary publicity-seeking acts on his part, he should be classified as an involuntary public figure with a much broader right of privacy than that possessed by the voluntary public figure.

⁵³ *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951); *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951); and see *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

⁵⁴ *Werner v. Times Mirror*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961); *Cohen v. Marx*, 94 Cal. App. 2d 704, 211 P.2d 320 (1949); *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

⁵⁵ "A person who by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy." 94 Cal. App. 2d at 705, 211 P.2d at 321.

Explicit recognition of this first distinction would still be somewhat meaningless in certain cases unless the court is willing to make the second distinction suggested above. In every case involving a voluntary or involuntary public figure, the court should determine the extent to which the public figure has effectively waived his right to privacy. It is suggested that this determination can most equitably be made on the basis of the degree of notability possessed by the individual. Those public figures extremely well known by the public possess a high degree of notability and a correspondingly limited right to privacy. An example of such an extremely notable public figure is the President of the United States. At the other end of the scale is a participant in a minor news event. Such a person falls into the classification of an involuntary public figure with a very low degree of notability, and thus one who waives only a very small portion of his right to privacy.

A California case already discussed in which the court considered the degree of notability of a plaintiff and drew the line between his private life and his public life on this basis was *Stryker v. Republic Pictures Corp.*⁵⁶ In *Stryker*, the plaintiff was a war hero; the court held that his public life was limited to those facts which appeared in his war record, but they added that if the person involved was a candidate for public office or a public official, his public life may include all those facts which affect his bid for office or administration of that office.

When considering the degree of notability of a voluntary public figure, the court should consider the previous fame of the person and the field in which he has been famous. Some fields, such as show business, sports, and politics, involve greater exposure than others, such as literature, science, and law. Consequently, persons who have gained their fame as entertainers possess a higher degree of notability than those who are renowned scientists.⁵⁷ In the case of involuntary public figures, these considerations do not apply because the involuntary public figure has no previous fame by definition.

⁵⁶ 108 Cal. App. 2d 191, 238 P.2d 670 (1951).

⁵⁷ In cases involving the appropriation of an individual's name or likeness for defendant's benefit, wherein plaintiff could be classified as a voluntary public figure, the novel approach of a recent case in a federal court is interesting. In *Haelan Laboratories v. Topps Chewing Gum Co.*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953), the court stated that in addition to a right of privacy, a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture. A famous person may wish to prevent appropriation of the public appeal of his personality by telecast reproduction of his performance, a biography, or by the use of his photograph for illustrating newspapers or magazines. The right of privacy, as we have seen, may not be upheld due to the fact that he has past exposure to the public limelight. But the right of publicity could not be denied on this basis.

In addition to the two major distinctions which have just been described, several other factors should be considered by the courts in right of privacy cases involving public figures. The occasion for public interest in the individual, the nature of the private facts revealed, the possibility of an implied consent to publication, and the nature of the actual damages claimed must all be taken into consideration by the court.

The courts should examine in depth the occasion for the public interest in an individual regardless of whether he is a voluntary or involuntary public figure. In the case of a truly newsworthy event, involving either a voluntary or involuntary public figure, the individual's right of privacy must almost invariably be subordinated to the freedom of the press. But in cases of questionably newsworthy items, such as articles in scandal magazines and gossip columns, where the primary aim is to increase circulation, the court must probe more deeply. The overall tenor of the publication, as well as the time and circumstances of the publication, should be considered to determine whether the primary function of the publisher is the dissemination of news and information as a service to the public, or whether his only goals are commercial and his only motives profit-seeking.

The nature of the private facts revealed should be examined in light of all the circumstances attendant upon publication. In the case of a voluntary public figure, the dividing line between private and public facts is drawn strictly upon the basis of his degree of notability; the only question here is whether the facts revealed in the publication fall within the confines of his private life as previously outlined by the court. In the case of an involuntary public figure the considerations are slightly more involved. Since the public life of the involuntary public figure is usually restricted to a single news event or story, the facts revealed must be examined closely to determine their relevance to the event. Only those facts which are truly relevant to the news event should be revealed. Another important consideration in the case of an involuntary public figure is the accuracy of the facts revealed. Involuntary public figures should be protected more fully against irresponsible reporting than voluntary public figures because such reporting creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it. In fact, it has been suggested that the press be held to a duty of reasonable care when reporting news events involving such involuntary celebrities.⁵⁸

Finally, note that all of the above discussion is valid only if the plaintiff can prove that the invasion of his privacy was without his

⁵⁸ *Time, Inc. v. Hill*, — U.S. —, 87 Sup. Ct. 534, 553 (1967) (separate opinion).

consent, express or implied, and that he actually suffered damage thereby. The plaintiff cannot recover without proof of these two elements.⁵⁹

CONCLUSION

The law of privacy in California is replete with decisions implying a limited right of privacy for public figures. Unless this limited right is formulated more clearly, there is danger that it will vanish.⁶⁰ Also, in the light of modern technological advances in news reporting and communications, the classification of news event participants as public figures is becoming increasingly inequitable. Unless a more realistic classification for such news event participants is devised, these individuals are also in danger of losing their right of privacy.⁶¹

The California courts are strongly urged to consider the recommendations described herein as possible safeguards for the privacy rights of public figures. Although adoption of these refinements will not always assure the complete protection of an individual's right of privacy, it is certain that the results of such an approach will be more in accord with Warren and Brandeis's original views. And, more significantly, such an approach will prevent the mechanical application of the law of privacy to public figures.

Anthony C. Fague

⁵⁹ Melvin v. Reid, 112 Cal. App. 285, 290, 297 Pac. 91, 92 (1931).

⁶⁰ In a recent decision, *Time, Inc. v. Hill*, — U.S. —, 87 Sup. Ct. 534 (1967), the Supreme Court reviewed an action brought by an involuntary public figure under the New York Civil Rights Law, sections 50-51. This statute clearly defines a right of privacy. However the Court reviewed New York decisions construing the statute and concluded that in cases involving public figures, the New York courts had interpreted this statute so that "fictionalization" was required to state a cause of action, and truth was a complete defense. *Spahn v. Julian Messner, Inc.*, — N.Y. —, 221 N.E.2d 543, 274 N.Y.S.2d 877 (Ct. App. 1966). Based on this interpretation of New York law, the Supreme Court held that the constitutional protections of speech and press preclude the application of the New York statute to redress *false* reports of matters of public interest in absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. Thus, New York by construing their statute as including traditional defamation and libel requirements severely restricted its usefulness as a protection of the right of privacy.

⁶¹ "The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).