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Tort Recovery for Invasion of Privacy: L.B. 394 (Neb. Rev. Stat. §§ 20-201 to -211, 25-804.01 (Supp. 1979))

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Note

Tort Recovery for Invasion of Privacy

L.B. 394 (Neb. Rev. Stat. §§ 20-201 to -211, 25-804.01 (Supp. 1979)).

> The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy, or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity.[1]

I. INTRODUCTION

In 1890, Samuel D. Warren and Louis D. Brandeis predicted the recognition of a cause of action based on the tortious invasion of the right of privacy.[2] After initial rejection by the New York Court of Appeals[3] the right of privacy as the basis for a tort action was accepted by the courts of most states[4] and was recognized by statute in several others.[5]

Causes of action were allowed for invasion of privacy in four situations: 1) where the defendant made an unauthorized appro-

1. Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964).
2. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For an account of the events which inspired Warren and Brandeis to write their article, see Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
3. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The court noted that there was a lack of precedent for this type of action, that recognition of such an action would produce voluminous litigation, and that freedom of the press would be inhibited as reasons for its decision.
4. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS 802, 804 (4th ed. 1971), in which Professor Prosser indicates that as of 1971 only four states did not recognize the right of privacy: Rhode Island, Nebraska, Texas, and Wisconsin. Since that time Wisconsin has legislatively adopted the right; WIS. STAT. ANN. § 895.50 (West Supp. 1979), and Texas judicially recognized it; Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).
5. These include New York, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976, & Supp. 1979); Oklahoma, OKLA. STAT. ANN. tit. 21, §§ 839.1 to .3 (West Supp. 1979); Utah, UTAH CODE ANN. §§ 76-9-401 to -406 (1978); Virginia, VA. CODE §§ 2.1-377 to -386 (1979); Wisconsin, WIS. STAT. ANN. § 895.50 (West Supp. 1979).

priation of the plaintiff's name or likeness for commercial or advertising purposes; 2) where the defendant made a public disclosure of private facts concerning the plaintiff; 3) where the defendant published material which placed plaintiff in a "false light"; and 4) where the defendant intruded upon the plaintiff's solitude or seclusion.[6] By 1979, only two states did not recognize a cause of action for violation of any one of the four recognized categories of privacy—Rhode Island[7] and Nebraska.[8]

In *Brunson v. Ranks Army Store*[9] the Nebraska Supreme Court first stated that state law did not recognize a common law right of privacy. In *Brunson* the defendant store owner hired the plaintiff, an actor, for the purpose of staging a re-enactment of the famous Brink's robbery as an advertising ploy for the defendant's store. The defendant inadvertently failed to inform the Omaha police of the plan, and as a result, the plaintiff and his associates were arrested. Newspapers around the country printed accounts of the incident and the defendant ran several newspaper advertisements concerning the affair without the plaintiff's permission. The plaintiff brought an action based on invasion of privacy claiming that the defendant's actions had humiliated him.

One might argue that the defendant's action in *Brunson* did not fall within any of the four recognized categories of the privacy tort. There was no intrusion upon the plaintiff's solitude nor had defendant published any highly private facts about the plaintiff. The false light theory would not seem to be applicable, for it requires an allegation of falsity which the plaintiff was unable to make. The plaintiff had a possible cause of action for appropriation of his name or likeness for advertising purposes, but since the plaintiff had originally taken the job with the defendant in order to advertise the defendant's store, the defendant would have had a fairly strong defense based on consent.

Rather than holding that the plaintiff had not made out a prima facie case for any of the four privacy actions, the court simply held

6. This categorization was first espoused by Prosser, *supra* note 2. The right of privacy discussed here should be distinguished from the constitutional right of privacy first announced in Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Supreme Court extrapolated from the first, third, fourth, fifth and ninth amendments of the Constitution to find zones or penumbras of privacy which it found sufficient to reverse appellant's conviction for disseminating contraceptives to married couples. Future expansion of the constitutional right of privacy remains unclear. *See* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971) (constitutional right of privacy does not preclude a state statutory prohibition of two persons of the same sex from marrying).
7. Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909).
8. *See* note 4 *supra*.
9. 161 Neb. 519, 73 N.W.2d 803 (1955).

that a cause of action for invasion of privacy did not exist in Nebraska and would not be judicially created:

> The doctrine of the right of privacy was not recognized in the ancient English common law. . . .
>
> Our research develops no Nebraska case holding that this court has in any form or manner adopted the doctrine of the right of privacy, and there is no precedent in this state establishing the doctrine. Nor has the Legislature of this state conferred such a right of action by statute. We submit that if such a right is deemed necessary or desirable, *such a right should be provided for by action of our Legislature* and not by judicial legislation on the part of our courts.[10]

The supreme court has since not re-evaluated its position. The only two privacy actions decided under Nebraska law since *Brunson* were brought in federal court.[11] Both cited *Brunson* and held that a cause of action for invasion of privacy could not be maintained.

It therefore fell to the Nebraska Legislature to provide a cause of action for the invasion of privacy. L.B. 394,[12] which was signed by Governor Thone on May 1, 1979, nearly a quarter of a century after *Brunson*, establishes such a cause of action. Unlike statutes which provide more limited causes of action,[13] L.B. 394 is a comprehensive piece of legislation. It creates the causes of action for invasion of privacy as well as the defenses to and limitations of those causes of action. The purpose of this note is to explore the protection of privacy provided by L.B. 394 in light of the bill's legislative

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10. *Id.* at 525, 73 N.W.2d at 806 (citations omitted) (emphasis added).
11. Carson v. National Bank of Commerce Trust and Savings, 356 F. Supp. 811 (D. Neb. 1973), *aff'd per curiam*, 501 F.2d 1082 (8th Cir. 1974); Schmieding v. American Farmers Mut. Ins. Co., 138 F. Supp. 167 (D. Neb. 1955).
12. NEB. REV. STAT. §§ 20-201 to -211, 25-840.01 (Supp. 1979).
13. For example, New York's statute provides only that:

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

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); and also that:

> Any person whose name, portrait, or picture is used within this state for advertising purposes or for the purpose of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Id. § 51 (McKinney Supp. 1979). Therefore, no protection is provided against intrusion upon seclusion, publication of private facts, nor for publications which place the plaintiff in a false light.

history, common law origins, and current constitutional limitations.

II. THE PROTECTION OF PRIVACY UNDER L.B. 394

A. The Original Goal

The original intention of the bill's author[14] was to codify the causes of action for invasion of privacy in substantially the same form as found in the common law, and thus eviscerate the holding of *Brunson*.[15] That goal, however, does not appear to have been fully realized in the language of L.B. 394. As the bill advanced through the legislative process, changes were made to various provisions. The final form of the bill was apparently influenced by in-

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14. Senator David Landis (46th District).

15. Senator Landis stated:

> The purpose of LB 394 is to respond to the Nebraska Supreme Court which in *Brunson v. Branks* [*sic*] *Army Store* held that any right of action for violation of the right of privacy should be created by the Legislature and not by the Supreme Court. LB 394 would place Nebraska in the mainstream of American law which gives to citizens a remedy whenever there has been an unreasonable violation of their privacy.
>
> LB 394 incorporates the accepted legal definitions of the right of privacy which safeguard an individual's right against (1) intrusion upon the plaintiff's physical and mental solitude or seclusion, (2) public disclosure of private facts, (3) publicity which places the plaintiff in a false light in the public eye, and (4) appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness for commercial or advertising purposes. The language of the four components of the right of privacy has been interpreted in hundreds of lawsuits.

Introducer's Statement of Intent, L.B. 394, Neb. Leg., 86th Sess. 29 (Feb. 5, 1979). Remarks of the senator before the Judiciary Committee lend further support to this proposition:

> The first section is merely a statement of intention as to what we intend to do with this bill: a recognition of the right of privacy and the desire by the Legislture [*sic*] to protect that right and to create a cause of action. The statement of the right exists in Section two, three and four. This is as best as can be done a statement of a fairly elusive concept, the right of privacy. . . . [T]hose are three sections in which language based on history of court cases going back roughly 60 years is utilized to define as best as possible the rights that are being protected.

Committee on the Judiciary, Minutes, L.B. 394, Neb. Leg., 86th Sess. 11 (Feb. 6, 1979) (remarks of Senator David Landis). And later:

> There is no way that I can outline for you every way in which your right of privacy can be infringed upon. The language in this bill is vague and it's vague for a reason. The reason is because it contains concepts which cannot be drawn anymore [*sic*] particularly than they are drawn here. It's a matter of giving those to the courts to enforce and to juries to decide. It's being done in 48 other states and I think it can be done here.

Id. at 18.

put from several sources including the media, financial institutions, and those concerned with the impact of the bill on the availability of credit information.[16]

The principal casualty of the legislative process was the cause of action for public disclosure of highly private facts. The original draft of L.B. 394 provided for this cause of action,[17] but it was eliminated from the final version. The "highly private facts" action was permitted at common law where the plaintiff could establish that the defendant published facts about the plaintiff that were of a highly personal and sensitive nature, where such publication would be highly objectionable to a person of normal sensibilities.[18] The plaintiff need not show that the information made public was untrue, but only that it was of such a private nature that its publication was extremely offensive to a reasonable person.[19] This cause of action did not provide any protection to a hypersensitive individual, however,[20] nor would an action lie if the facts were laudatory.[21] In order to violate the plaintiff's right of privacy the defendant must have done more that disclose the private facts to a few individuals: a public disclosure must have been made.[22]

Since an action for public disclosure of private facts does not depend on a false statement of fact, this cause of action provides

16. If you will remember we had an [*sic*] LB 316, the abortion bill, a statement to [*sic*] the right of privacy was recognized in this state. On Select File, by agreement, that was taken out of LB 316. At that time negotiation was completed between the press, people who are involved in credit information and banks as to this particular LB. The decision was made that LB 394 could arrive at [*sic*] a fair compromise and that all opposition to the bill would be dropped. . . . It represents a compromise.

Floor Debates, L.B. 394, Neb. Leg., 86th Sess. 2369-70 (Mar. 29, 1979) (Senator Landis, introducer).

17. The original version of L.B. 394 stated that "[p]ublication or public disclosure by a person, firm, or corporation of private information about another person which a reasonable person of ordinary sensibilities would object to having made public shall violate such a person's right of privacy."

18. *E.g.*, Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (defendant store owner placed a sign in his store window announcing to all who passed by that the plaintiff refused to pay a debt). *See also* Banks v. King Features Syndicate, 30 F. Supp. 352 (S.D.N.Y. 1939) (x-rays of plaintiff's anatomy); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (motion picture based on former life of a reformed prostitute); Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941) (announcement of debt). *But see* Timperly v. Chase Collection Service, 272 Cal. App. 2d 697, 77 Cal. Rptr. 782 (1969) (disclosure of plaintiff's overdue debt to his employer was not an invasion of privacy).

19. *E.g.*, Garner v. Triangle Publications, Inc., 97 F. Supp. 546 (S.D.N.Y. 1951); Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944), *rev'd on other grounds on second appeal*, 159 Fla. 31, 30 So. 2d 635 (1947).

20. Sidis v. F-R Pub. Corp., 34 F. Supp. 19 (S.D.N.Y. 1938).

21. Samuel v. Curtis Pub. Co., 122 F. Supp. 327 (N.D. Cal. 1954).

22. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962).

protection beyond and different from the causes of action for defamation and for false light invasion of privacy. Therefore, it would seem unlikely that the language in L.B. 394 creating the false light tort[23] also creates a cause of action for public disclosure of private facts since the two actions have different elements. However, L.B. 394 does provide causes of action for the other three recognized privacy interests.[24] The remainder of this note will be devoted to a discussion of those provisions.

B. Protection Against Appropriation of Name or Likeness

The common law origins of the cause of action for wrongful appropriation of name or likeness can be traced to *Pollard v. Photographic Co.*[25] The court there enjoined a photographer from selling copies of a portrait made for the plaintiff to others on the ground that such a sale would breach an implied contract between the photographer and the plaintiff. Justices Warren and Brandeis noted this case favorably[26] and used it as an illustration of a holding which protected an individual's right of property "to an inviolate personality . . . ."[27] This cause of action was first clearly recognized as an invasion of privacy by the Supreme Court of Georgia which held in *Pavesich v. New England Life Ins. Co.*[28] that the plaintiff could recover from an insurance company which used plaintiff's name and photograph along with a false testimonial in an advertisement campaign.[29]

Pavesich indicates that the plaintiff must allege and prove that the defendant used the plaintiff's name or likeness to advertise the defendant's business or otherwise promote the defendant's commercial interest without plaintiff's expressed or implied consent.[30]

There are more subtle ways of exploiting a person's name or likeness for business or commercial purposes than to use his or her name or photograph in advertising. An illustration is found in *Hinish v. Meier & Frank Co.*,[31] where the defendant signed the

23. NEB. REV. STAT. § 20-204 (Supp. 1979).
24. *Id.* §§ 20-202 to -204.
25. 40 Ch. 345 (1888).
26. Warren & Brandeis, *supra* note 2, at 208-11.
27. *Id.* at 211.
28. 122 Ga. 190, 50 S.E. 68 (1905).
29. The court held that "[t]he right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being witness that can be called to establish it's existence." *Id.* at 194, 50 S.E. at 69.
30. *Id.*
31. 166 Or. 482, 113 P.2d 438 (1941). Although the decision seemed to be based on unauthorized appropriation of one's name, the case may also be an illustration of the cause of action for publication which places plaintiff in a false light. *See* § II-D of text *infra*.

plaintiff's name to a telegram sent to the governor urging him to veto a certain piece of legislation. The court found that the plaintiff had stated a valid cause of action based on wrongful appropriation even though there was no statutory basis for recovery in Oregon.[32] The use of plaintiff's name in this case would appear to be more political than commercial until one considers that the bill the defendants sought to have vetoed would have caused the defendants to discontinue their business of fitting eyeglasses. The lesson is that recovery may be possible even though the defendant's activity appears to be non-commercial on the surface.

Certain individuals may have a privacy interest in distinctive personal traits other than their names or likenesses which may be vulnerable to commercial exploitation. For instance, the plaintiff in *Geisel v. Poynter Products, Inc.*[33] brought suit against a doll manufacturer who was marketing dolls based on the characters of "Dr. Suess," the plaintiff's pen name. The action was brought pursuant to the New York privacy statute which protects an individual's "name, portrait or picture"[34] from unauthorized commercial exploitation. The court refused to allow the cause of action, stating that "it cannot be doubted that the name 'Dr. Suess' 'was . . . used . . . for advertising purposes or for the purposes of trade . . .' within the meaning of Section 51. However, plaintiff cannot succeed under the right of privacy statute because that statute does not protect an assumed or trade name."[35]

Likewise, the court in *Lahr v. Adell Chemical Co.*[36] denied recovery where the question presented was whether the New York statute protected a person's distinctive physical characteristics such as voice or manner of speaking. The plaintiff sought recovery for the wrongful appropriation of his " 'style of vocal delivery which, by reason of its distinctive and original combination of

32. 166 Or. at 503, 113 P.2d at 447.
33. 295 F. Supp. 331 (S.D.N.Y. 1968).
34. *See* note 13 *supra*.
35. 295 F. Supp. at 355 (citations omitted). *But see* Gardella v. Log Cabin Products Co., 89 F.2d 891 (2d Cir. 1937), where the court suggested in dictum that the New York statute does protect stage names. That case is interesting because it suggests a possible overlap between the right of privacy and the law of unfair competition. The plaintiff there brought an action based on invasion of privacy and a second action for unfair competition for using her stage name "Aunt Jemima." The privacy action was not allowed because defendant held a copyright on that name. However, the court recognized that plaintiff had given a secondary meaning to the name Aunt Jemima which defendant had no right to pass off as its own. Still, no recovery was granted on this cause of action because plaintiff could not show actual deception of the public by the defendant's use of the name Aunt Jemima in its radio advertisements.
36. 300 F.2d 256 (1st Cir. 1962).

pitch, inflection, accent and comic sounds,' has caused him to become 'widely known and readily recognized . . . as a unique and extraordinary comic character.' "[37] The plaintiff's voice was that of a well known cartoon duck. The defendant had produced a television advertisement using an animated duck with a voice very similar to plaintiff's. The court found for the defendant, basing its opinion on its belief that "[t]he statute is very specific. If the legislature intended that whenever an anonymous speaker extolled a commercial product a cause of action arose . . . if anyone could claim the voice was mistaken as his, it should have used a phrase of more general import."[38]

Denial of recovery in these two cases seems especially onerous because a person with a well known pen name or distinctive personal characteristic seems to not only have a more valuable interest to protect than the ordinary person has in their name or picture, but also there would be a greater likelihood of someone actually misappropriating the identity of a more famous individual. Under these holdings, "Samuel L. Clemens would have a cause of action, but Mark Twain would not."[39]

Fortunately, different results should be generated by L.B. 394 for at least two reasons. First, the decisions of the New York courts concerning the scope of protection provided by that state's privacy statute have been historically restrictive.[40] One reason for that attitude may be that the New York statute[41] provides criminal as well as civil sanctions against the wrongful appropriation of name or likeness.[42] The due process clause of the Constitution[43] requires that criminal statutes not be so vague as to deprive the citizenry of a fair appraisal of which behavior the state deems illegal.[44] This restriction on vagueness may be violated if the New York courts were to expand the protection of privacy beyond the literal terms of the statute. The policy reason for strict interpretation of the New York statute has no application to the interpreta-

37. *Id.* at 257.
38. *Id.* at 258.
39. W. PROSSER, *supra* note 4, at 805 n.24.
40. *See* Cardy v. Maxwell, 9 Misc. 2d 329, 169 N.Y.S.2d 547 (1957), where the court held that the statutory right of privacy would be strictly construed since, according to the court, the New York Legislature did not intend to create a general right of privacy.
41. *See* note 13 *supra.*
42. *Id.*
43. U.S. CONST. amend. V, XIV.
44. *See* Raley v. Ohio, 360 U.S. 423 (1959) where the Court said that "[a] State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might trangress them." 360 U.S. at 438. *See also* Wright v. Georgia, 373 U.S. 284 (1963); United States v. Harriss, 347 U.S. 612 (1954).

tion of the Nebraska right of privacy because L.B. 394 creates no criminal liability for invasions of privacy.

More significant is the fact that L.B. 394 specifically provides protection against the unauthorized appropriation of "personality."[45] The argument could be made that by including this term in L.B. 394 the legislature has provided the type of "phrase of more general import"[46] of which *Lahr* spoke. Therefore a cause of action would lie under L.B. 394 for plaintiffs in cases such as *Geisel* and *Lahr*.

L.B. 394 places three limitations on the cause of action for wrongful appropriation of name or likeness. No cause of action will lie for the use of the plaintiff's name or likeness to advertise the sale of artistic productions or other merchandise if the plaintiff has consented to that use and the use remains within the scope of that consent.[47] Second, a cause of action will not arise where the plaintiff's name was used as part of a bona fide news report.[48] The concern here grows from the fact that newspapers and broadcasters are generally profit-seeking commercial enterprises and thus a plaintiff whose name or likeness appeared in a news story could argue that the defendant appropriated his name or likeness for a commercial purpose—writing and selling a newspaper. This section precludes a cause of action in such a situation, and indeed, such a limitation would appear to be mandated by the first amendment.[49]

Finally, no cause of action will accrue where the plaintiff was photographed solely as a member of the public.[50] This limitation would deny a cause of action where the defendant used a photograph of a public scene in an advertisement in which the plaintiff happened to be incidentally captured.[51] For example, if the de-

45. NEB. REV. STAT. § 20-202 (Supp. 1979).
46. 300 F.2d at 258.
47. NEB. REV. STAT. § 20-202(2) (Supp. 1979).
48. *Id.* § 20-202(1).
49. *See* Sidis v. F-R Pub. Corp., 34 F. Supp. 19 (S.D.N.Y. 1938); Williams v. KCMO Broadcasting Div.—Meredith Corp., 472 S.W.2d 1 (Mo. App. 1971); Colyer v. Richard K. Fox Pub. Co., 162 App. Div. 297, 146 N.Y.S. 999 (1914); Donahue v. Warner Bros. Pictures Distributing Corp., 2 Utah 2d 256, 272 P.2d 177 (1954).
50. NEB. REV. STAT. § 20-202(3) (Supp. 1979).
51. Senator Landis illustrated the limitation as follows:

> For example, you go to a basketball game. . . . The sports photographer for the Lincoln Journal turns around, snaps a picture of a piece of action on the floor and even though they capture the action on the court they also capture some background people. Well you do not have a cause of action if you get caught in part of a picture as a part of the public when you are at a sporting event.

Floor Debates, L.B. 394, Neb. Leg., 86th Sess. 2368 (Mar. 29, 1979). This limitation on the cause of action for wrongful appropriation would also apply where the photographer was not a journalist. Indeed, the example given by the sen-

fendant took a photograph of his place of business during a normal business day for use in an advertisement and the picture happened to include some passersby in the area, no cause of action would seem to lie for these individuals, since their presence in the photograph was merely incidental.

However, this limitation on the cause of action for wrongful appropriation does not seem to indicate that a person is to be denied a cause of action simply because he or she happened to be in public at the time a photograph was taken. Indeed, if the defendant singles out a limited number of individuals in a crowd, a cause of action may lie if the photograph is eventually used for advertising purposes.[52] If the photograph used in the advertisement was of one or very few people, those persons would seem to have a cause of action for appropriation even though they were in public at the time the photograph was taken. The bill provides only that no cause of action will exist where the plaintiff was photographed as a "member of the public", a concept distinct from being photographed in a public place. At what point the plaintiff becomes a member of the public—an anonymous face in the crowd—would be a question of fact in each case.

C. Protection of Solitude and Seclusion

L.B. 394 also provides protection against unreasonable intru-

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ator would be better understood under the section of the bill which denies a cause of action for appropriation when the photograph is taken as part of a bona fide news report.

52. Discussion of this limitation of the cause of action for wrongful appropriation before the Unicameral suggests that because one was in public when his photograph was taken would not necessarily bar a cause of action.

> Now another portion of the amendment provides that if a commercial use is made of a photograph taken of an unnamed individual as a member of the public, then that is not an invasion of that person's privacy. What do you mean by a member of the public? Let me give you an example. If Schlitz Beer Company goes to a Nebraska football game and takes a photograph of five cheering members in the crowd and then uses that photograph to advertise its own wares, is Schlitz beer exempt from an invasion of privacy or is it not?

Floor Debates, L.B. 394, Neb. Leg., 86th Sess. 2371 (remarks of Senator Johnson).

Senator Landis answered:

> I believe in that instance you are talking about a jury question as to what would be a member of the public and therefore would be decided in a court of law, however, distinguish between a situation in which there is a shot of a crowd when you can barely make you own face and impression out and the place where there are three or four people only, I think that when you are talking about the public you are talking about a large number of people and when there are only two or three people that is really not a member of the public.

Id.

sions of solitude and seclusion. "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy."[53] Recovery for this cause of action has been allowed for invasion of the home or private quarters,[54] wiretapping,[55] surveillance activities,[56] and eavesdropping.[57] It is interesting to compare the language of L.B. 394 with the statement of the tort found in the Restatement of Torts[58] which reads, "[o]ne 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."[59] These statements, while generally similiar, contain some important differences. Perhaps most significant is that L.B. 394 only allows a cause of action if the defendant has intruded upon a person in his or her *place* of solitude or seclusion,[60] whereas the Restatement does not limit the tort in such a manner. The original version of L.B. 394 did not con-

53. NEB. REV. STAT. § 20-203 (Supp. 1979).

54. Byfield v. Chandler, 33 Ga. App. 275, 125 S.E. 905 (1924); Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365, 108 S.E. 309 (1921); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952). *But see* Yoeckel v. Samoning, 272 Wis. 430, 75 N.W.2d 925 (1956) where the defendant tavern owner carved out a hole in the womens' restroom which he used to take photographs of women using the restroom. He then passed the photographs around to his male customers: held, no liability.

55. Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Le Crone v. Ohio Bell Tel. Co. 114 Ohio App. 299, 182 N.E.2d 15 (1961).

56. Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913).

57. Souder v. Pendleton Detectives, Inc., 88 So. 2d 716 (La. App. 1956).

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

59. *Id.*

60. The limitation to places was explained by Senator Landis during floor debate:

> Section three of the bill creates a cause of action for physical intrusion. It says that where a person's solitude, where a person's *place* of solitude and seculsion is intruded upon, then there can be a cause of action. Well in this kind of a situation cases in other jurisdictions indicate, for example, the use of long range cameras and infared cameras to shoot into your home, for example, or the use of bugging devices or the carving of holes and then the taking of pictures in such places as telephone booths or restrooms and the like. This section is premised upon a place or a physical location to which one is reasonably entitled to a sense of privacy, a home, an office, a restroom, a telephone booth that you are occupying or the like and it says that where there is a physical intrusion into your solitude and seclusion you may sue for damages.

Floor Debates, L.B. 394, Neb. Leg., 86th Sess. 2368 (Mar. 29, 1979) (emphasis added).

tain the limitation to places of solitude.[61] Transcripts of the hearings on L.B. 394 before the Judiciary Committee indicate that the addition of this limitation was suggested primarily by lobbyists representing the Nebraska Wholesale Suppliers Association and Media of Nebraska.[62] The concern of the Wholesale Suppliers centered on the possible adverse effect of L.B. 394 on credit investigations.[63]

Although the language of the bill might have suggested that a cause of action would have arisen during a routine credit check, the case law does not seem to support such a proposition. The courts have consistently denied causes of action where private detectives have made investigations of individuals, so long as such investigations were carried out in a reasonable and unobtrusive manner.[64] Likewise, the rule at common law seems to be that routine investigations of a person's financial affairs for credit purposes are not actionable if they are reasonably conducted.[65] For instance, in *Shorter v. Retail Credit Co.*[66] the plaintiff brought suit based, *inter alia*, on intrusion against a credit company which had

61. The original draft of L.B. 394 stated that "[a]ny person, firm, or corporation that unreasonably intrudes upon any person's private activities with which the public has no legitimate concern, in such a manner as to cause mental suffering, outrage, shame, or humiliation to a person of ordinary sensibilities, shall be liable for invasion of privacy."

62. *Committee on the Judiciary, Minutes*, L.B. 394, Neb. Leg., 86th Sess. 23, 30-31 (Feb. 6, 1979). *See also* note 16 *supra*.

63. The concern of the Wholesale Suppliers was explained to the Judiciary Committee:

> The new bill or the amendment to LB 394 still has one concern to us in it and that's Section three. I would like to address that if I could. I might say this, that . . . Section three does raise a problem for us. It talks about any person, firm or corporation that trespasses or intrudes upon a person's solitude or seclusion. The problem we see is that it isn't limited to a place such as we discussed earlier, but it could go further and to encompass the concept of a credit inquiry. This is a problem for the Wholesale Suppliers because as a group they depend very much on credit bureau information about people who they have to extend credit to. The Wholesale Suppliers and the business community in general works from credit bureau reports as you all know and that's an important part of their making a wise business decision as to who to give credit to. We're concerned that the breadth of Section three would give rise to a cause of action for the use of credit information that has been obtained either before the effective date of this act or afterwards.

Committee on the Judiciary, Minutes, L.B. 394, Neb. Leg., 86th Sess. 30-31 (Feb. 6, 1979) (remarks of Mr. Larry Ruth).

64. Ellenberg v. Pinkertons, Inc., 130 Ga. App. 254, 202 S.E.2d 701 (1973). *But see* Alabama Elec. Coop., Inc. v. Partridge, 284 Ala. 442, 225 So. 2d 848 (1969); McLain v. Boise Cascade Corp., 271 Or. 549, 533 P.2d 343 (1975).

65. Herring v. Retail Credit Co., 266 S.C. 445, 224 S.E.2d 663 (1976). *See also* J. SHARP, CREDIT REPORTING AND PRIVACY 52-59 (1970).

66. 251 F. Supp. 329 (D.S.C. 1966).

sent an agent to the plaintiff's residence and questioned his wife in the course of a credit investigation.[67] The court held that no invasion of privacy occurred in that instance and noted that in order for any plaintiff to recover for intrusion "it is incumbent upon him to show a blatant and shocking disregard of his rights by the defendant, and serious mental or physical injury or humiliation to himself resulting therefrom."[68]

The Court in *Molton v. Commercial Credit Corp.*[69] held that when a person applied for a loan and authorized the prospective lender to secure credit information on him, there was an expressed or implied authorization for the lender to obtain a report from a credit bureau concerning the plaintiff's financial status and credit history. Since loan applicants should expect the lender to investigate their credit reputations, the plaintiffs' privacy had not been invaded by the act of obtaining credit information. Although there does not seem to be any strong case law support for the notion that routine credit checks may invade a person's privacy, the legislature was apparently persuaded that the particular language in L.B. 394 would possibly be interpreted to provide such a cause of action. Therefore, the legislature limited the cause of action to "place" in order to preclude that possibility.

The media also sought to have the language of section three amended to limit protection from intrusion to places of solitude. The concern raised by the media centered around the effect of L.B. 394 on the ability of the press to gather the news. These concerns were outlined before the Judiciary Committee by a spokesperson for the media:

> Section 3 in the white copy says, "any person, firm or corporation that trespasses or intrudes upon a natural person's solitude or seculsion". Okay. That's pretty general language, pretty broad language. It is our view and our suggestion to the Legislature that it would be appropriate to insert the words "place of solitude of [*sic*] seclusion."[70]
>
> . . . .
>
> I don't think there's any intention to specify any particular place. I think any place of solitude or seclusion, any room, any place where you could expect to have privacy, including your office, would certainly be included. I'm only suggesting that the term place be included to suggest that we're not saying that somebody walking down a public street or in the public building can have his privacy intruded upon by say somebody that says hello, I'd like to talk such and such.[71]

As this comment points out, the basic policy behind the cause of

67. *Id.* at 329-30.
68. *Id.* at 332.
69. 127 Ga. App. 390, 193 S.E.2d 629 (1972).
70. *Committee on the Judiciary, Minutes*, L.B. 394 Neb. Leg., 86th Sess. 23 (remarks of Mr. Alan Peterson).
71. *Id.* at 23-24.

action for intrusion is to protect the expectations of privacy of a reasonable individual. The concern of the media, on the other hand, seems to lie in not allowing a cause of action where a perhaps overly-persistent reporter seeks an interview from an unwilling person in a public place. Since the United States Supreme Court's decision in *Branzburg v. Hayes*,[72] many courts have recognized a qualified right to gather news which is protected by the first amendment.[73]

In *Dietemann v. Time, Inc.*,[74] the question before the court was whether the constitutional guarantee of freedom of the press and the obligation of the news media to inform the public superseded an individual's claim of privacy. In that case the plaintiff was engaged in the practice of healing with clay, minerals and herbs. Two employees of defendant, in the course of investigating an article entitled "Crackdown on Quackery," approached plaintiff at his home under the pretext of seeking medical treatment. The reporters were admitted into the plaintiff's home and during the course of treatment of one of the reporters, the other secretly photographed the plaintiff with a concealed camera and transmitted the conversation with a hidden transmitter to a third associate in a car outside who was recording it. These photographs along with material taken from the recording were published by the defendant in a newsmagazine article depicting the plaintiff as a quack.[75]

The plaintiff brought an action for intrusion and was awarded a judgment for injury to his feelings and peace of mind from which the defendants appealed. The court of appeals affirmed, stating that

> [a]lthough the issue has not been squarely decided in California, we have little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy in California.[76]

The court then dealt with the defendants' claim that the first amendment immunized them from liability for invading plaintiff's den with a concealed camera and microphone because its employees were gathering news. The court rejected this contention;

72. 408 U.S. 665 (1972).

73. The Court stated in dictum that "[w]e do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. *See* CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Borreca v. Fasi, 369 F. Supp. 906 (D. Haw. 1974). *But see* Gannent Co. v. DePasquale, 99 S. Ct. 2898 (1979); Houchins v. KQED, Inc., 438 U.S. 1 (1978).

74. 449 F.2d 245 (9th Cir. 1971).

75. *Id.* at 247.

76. *Id.* at 248.

"[t]he First Amendment has never been construed to accord newsmen immunity from torts and crimes committed during the course of 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."[77]

The defendants contended, however, that their actions were privileged under the Supreme Court's ruling in *New York Times Co. v. Sullivan*,[78] which held that in an action for defamation involving a public official the plaintiff must allege and prove that the defendant knew of the falsity of the published material or acted in reckless disregard as to whether it was true or not,[79] and *Rosenbloom v. Metromedia, Inc.*,[80] which held that this same standard of "actual malice" also applies in actions brought by any person connected with an event of public interest. The defendants contended that since plaintiff was engaged in activity in which the public had a legitimate interest, they were protected since the plaintiff had not proven actual malice. The court in *Dietemann* held that since publication is not an element of the cause of action based on intrusion, the privilege concepts developed in defamation cases were not applicable.[81]

While the right of privacy prevailed in *Dietemann*, the court in *Pearson v. Dodd*[82] dealt with a fact pattern in which the need to gather news seemingly outweighed the claim of privacy. In *Pearson* the plaintiff, a United States Senator, brought suit against two newspaper columnists, alleging that the manner in which they had collected the information used in certain articles was an invasion of his privacy. The plaintiff proved that on several occasions two former employees of the plaintiff had entered the plaintiff's office without authority and unbeknown to the plaintiff removed certain documents from his files, made photocopies of them, replaced the originals, and turned the copies over to the defendants who were aware of the manner in which they had been obtained.[83] The defendants read through these private files and published their contents. The plaintiff contended that receiving and viewing documents from his personal files constituted an intrusion upon his privacy.

The court held that the right of privacy for intrusion was recognized in the District of Columbia and pointed out that the action

77. *Id.* at 249.
78. 376 U.S. 254 (1964).
79. *Id.* at 279-80.
80. 403 U.S. 29 (1971).
81. 449 F.2d at 249-50.
82. 410 F.2d 701 (D.C. Cir. 1969).
83. *Id.* at 703.

for intrusion does not depend on publication as do the other three categories of the privacy tort, saying, "[t]he tort is completed with the obtaining of the information by improperly intrusive means."[84] The court was unwilling, however, to hold that liability attached for merely receiving and reading copies of documents with the knowledge that they had been removed without authorization:

> If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far. A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.[85]

The court in *Pearson* seemed to give deference to the reporter's right to receive information as long as the reporter was not the one actually intruding into a place of solitude.

As *Deitemann* and *Pearson* illustrate, there is a basic inconsistency in the attempt of the law to afford individuals the right to protect private aspects of their lives from the scrutiny of others, including the press, while simultaneously insuring that the ability to gather news is not unduly hampered by privacy lawsuits. The solution to this dilemma lies in striking some acceptable balance between the two interests. Under L.B. 394, that balance would appear to be struck by restricting the cause of action to intrusions of places. The solution under L.B. 394 would likely be the same as reached by the courts in the two cases discussed above. In a situation like *Deitemann*, a cause of action would lie under L.B. 394 since the plaintiff's home was physically intruded upon by the defendants in the course of their newsgathering activity. However, in the situation suggested by *Pearson*, no action would be allowed because, even though the defendants read through the plaintiff's secret files, and actually pried into matters in which the plaintiff had an expectation of privacy, they had not personally physically intruded into a *place* in which the plaintiff could expect solitude. The design of L.B. 394 strikes the balance in favor of news gathering in such a situation. The legislature apparently felt that permitting a plaintiff to recover for invasion of privacy in this type of case would present a threat to a journalist's ability to gather newsworthy information.

On the other hand, the drawback of using the word "place" as the line of demarcation between the policies favoring the media's

84. *Id.* at 704.
85. *Id.* at 705.

ability to gather news and those favoring rights of privacy is graphically illustrated by *Galella v. Onassis*.[86] That case arose with a personal injury action brought by a newsphotographer against the defendant and her bodyguards. The defendant filed a counterclaim seeking to enjoin the plaintiff from constantly and closely following her for the purpose of photographing her. The district court granted the injunctive relief:

> First let us reconsider plaintiff's close-shadowing of defendant. Continuously he has her under surveillance to the point where he is notified of her every movement. He waits outside her residence at all hours. . . . He follows her about irrespective of what she is doing: trailing her up and down the streets of New York, chasing her out of the city to neighboring places and foreign countries . . . , haunting her at restaurants (recording what she eats), theatres, the opera and other places of entertainment, and pursuing her when she goes shopping, getting close to her at the counter and inquiring of personnel as to her clothing purchases. . . .
>
> . . . .
>
> As we see it, Galella's conduct falls within the formulation of the right of privacy . . . .[87]

The Second Circuit Court of Appeals, while limiting the scope of the injunction imposed by the district court, affirmed:

> Of course legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. . . . Nonetheless, Galella's action went far beyond the reasonable bounds of newsgathering. . . .
>
> Galella does not seriously dispute the court's finding of tortious conduct. Rather, he sets up the First Amendment as a wall of immunity protecting newsmen from any liability for their conduct while gathering news. There is no such scope to the First Amendment right. Crimes and torts committed in news gathering are not protected. . . . There is no threat to a free press in requiring its agents to act within the law.[88]

Under L.B. 394 it is doubtful that a plaintiff faced with a situation such as found in *Galella* would have a cause of action because the affronts on the plaintiff there were all made in public places. In-

86. 487 F.2d 986 (2d Cir. 1973), *aff'g*, 353 F. Supp. 196 (S.D.N.Y. 1972). This case is interesting because it was supposedly decided under New York law which only recognizes a cause of action for the unauthorized appropriation of a person's name or likeness for commercial or advertising purposes, and according to Cardy v. Maxwell, 9 Misc. 2d 329, 169 N.Y.S.2d 547 (1957), the New York statute is to be strictly construed. The *Galella* court did not discuss *Cardy* but based its holding on its feeling that the New York courts would no longer follow the holding in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). This reasoning is suspect because *Roberson* was an unauthorized appropriation case. It did not discuss the other right to privacy causes of action. Moreover, *Roberson* was legislatively overruled. The New York statutes do not provide a cause of action for intrusion. For the court to decide that New York would hold that a cause of action for intrusion would be recognized seems a bit wishful.

87. Galella v. Onassis, 353 F. Supp. 196, 227-28 (S.D.N.Y. 1972).

88. 487 F.2d at 995-96 (citations omitted).

deed, a statement by the spokesperson for the media at the Judiciary Committee hearings indicated that such a result was contemplated by the inclusion of the word place: "I'm thinking of the Onassis case which was pretty close when the photographer kept taking photos of Jackie Onassis. . . . I think there are other remedies rather than calling that a breach of privacy."[89] By limiting the cause of action for intrusion to places of solitude or seclusion the legislature appears to have weighted the balance in favor of the press's ability to gather news, even in situations such as *Galella* in which that ability is abused, at the expense of individual privacy.

D. False Light

The final protection of privacy provided by L.B. 394 prevents the publication of material which places the plaintiff in a false light in the public eye.[90] This cause of action will lie when the defendant publishes information which creates a misleading impression about the plaintiff in the mind of the public of the type which a normal person would find highly objectionable. Recovery has been allowed where the defendant used the picture of an honest taxi driver to illustrate an article on the practices employed by taxi drivers to cheat their customers,[91] or where the plaintiff was depicted as a "man hungry" woman,[92] or by attributing to the plaintiff a statement which he did not make.[93]

This right of recovery appears to have more in common with the tort of defamation than with the other privacy torts. The quintessence of the false light action is the protection of the plaintiff's reputation rather than his or her right to be free from the public's scrutiny. If this cause of action were truly directed towards protecting that which the plaintiff seeks to keep private, one must wonder why the tort requires that the information published create a false impression? Would not the publication of a highly personal but completely true fact be more injurious to a person's sense of privacy than the publication of erroneous information?[94] Recovery for false light invasion of privacy seems to be allowed in those cases where the false statement about the defendant did not quite rise to the level of defamation, unless one were to take a very

89. *Committee on the Judiciary, Minutes*, L.B. 394, Neb. Leg., 86th Sess. 25 (Feb. 6, 1979) (statement of Mr. Alan Peterson).
90. NEB. REV. STAT. § 20-204 (Supp. 1979).
91. Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948). *See also* Valerni v. Hearst Magazines, Inc., 99 N.Y.S.2d 866 (Sup. Ct. 1949).
92. Martin v. Johnson Pub. Co., 157 N.Y.S.2d 409 (Sup. Ct. 1956).
93. Goldberg v. Ideal Publishing Corp., 210 N.Y.S. 928 (Sup. Ct. 1960).
94. This is the very protection which the legislature eliminated from L.B. 394. *See* § II-A of text *supra*.

broad view of reputational harm.[95] However, articulating the distinction between defamation and false light privacy actions is extremely difficult. Both torts require publication.[96] Defamation requires the publication of a false statement of fact that the trier of fact believes is injurious to the plaintiff's reputation,[97] while false light requires the publication of information which creates a false impression about the plaintiff. Arguably, however, it will be rather unusual for a false impression to be created without some false statement of fact. Indeed, it seems that in most cases of defamation the plaintiff would be able to bring an alternative cause of action for creation of a false light. This fact suggests that there is no logical reason for maintaining the distinction between these causes of action.

The similarity between the two torts suggests that they present similiar dangers to first amendment rights, and therefore, they are both subject to similiar limitations.[98] L.B. 394 restricts recovery for false light to those cases where: (1) the false light is highly objectionable to a reasonable person[99] and; (2) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.[100] This second limitation adopts the holding of the United States Supreme Court in *Time, Inc. v. Hill*.[101] That case grew out of a story in the defendant's magazine concerning a Broadway play which was loosely based on an incident where the plaintiff and his family had been held hostage in their home by three escaped convicts. The play contained scenes of violence which were clear departures from the actual happenings. However, the plaintiff contended that the story in the magazine implied that the play was factually correct and that this implication was reinforced by publishing photographs of some of the actors recreating scenes from the play at the actual house in which the plaintiff's family had been held. The plaintiff sued, claiming that the article placed him and his family in a false light. The Court denied the action:

> In *New York Times v. Sullivan*, . . . we held that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Factual error, content defamatory of official reputation, or both, are insufficient for an award of damages for false statements unless actual malice—knowledge that the statements are false or in reckless disregard of the truth—is alleged and proved . . . .

95. *See* notes 91-93 *supra*.
96. Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).
97. Grant v. Reader's Digest Ass'n, Inc., 151 F.2d 733 (2d Cir. 1945).
98. Time, Inc. v. Hill, 385 U.S. 374 (1967).
99. NEB. REV. STAT. § 20-204(1) (Supp. 1979).
100. *Id.* § 20-204(2).
101. 385 U.S. 374 (1967). The attorney for the appellee was Richard M. Nixon.

> We hold that the constitutional protections for speech and press preclude the application of the New York [privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.[102]

Since the plaintiff was unable to show that the defendant had acted with knowledge of the falsity created by the article, or in reckless disregard of the truth, recovery was denied.

In defamation cases the holding in *New York Times Co. v. Sullivan*[103] that actual malice is required to be proven by the plaintiff has been limited to the context of an action brought by a public offical or figure. This position was espoused by the Supreme Court in *Gertz v. Robert Welch, Inc.*,[104] where the defendant published an article which implied that the plaintiff, an attorney representing the family of a youth killed by a policeman, was a communist sympathizer and involved in a nation-wide plot to discredit police. The Court felt that the plaintiff's connection with a public event was too tenuous to apply the actual malice standard to his action for libel. Private individuals would not be required to allege and prove actual malice. The Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[105] *Gertz* held that the allegation of actual malice was not constitutionally required in a defamation action brought by a private individual. However, the Court did not indicate if the same was true for an action for false light. Indeed, during the same term the Court stated in *Cantrell v. Forest City Publishing Co.*[106] that the question remained open.[107]

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102. *Id.* at 387-88 (citations omitted).
103. 376 U.S. 254 (1964).
104. 418 U.S. 323 (1974).
105. *Id.* at 347. *See also* Time, Inc. v. Firestone, 424 U.S. 448 (1976), where the Court described a public figure for purposes of the first amendment as follows:

> For the most part those who obtain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

448 U.S. at 453 (quoting Gertz v. Robert Welsh, Inc., 418 U.S. 323, 345 (1974)).
106. 419 U.S. 245 (1974).
107. The Court stated that since the judge below instructed the jury that they must find actual malice before it could find in favor of the plaintiff, the case offered no opportunity to decide the question of whether the actual malice standard is constitutionally mandated for false light actions brought by private individuals. *See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 498

L.B. 394 draws no distinction between privacy actions initiated by public officals and those brought by private individuals. The requirement of alleging and proving actual malice apply to both classes of plaintiffs. Additionally, the knowledge which plaintiffs must prove is not only that the defendant knew or acted in reckless disregard of the untruth of the publication, but that he also knew or acted in reckless disregard of the false light in which the plaintiff would be placed.[108] This would seem to be an even stricter standard than the Supreme Court imposed in *Time, Inc. v. Hill.*

L.B. 394 also makes section 25-840.01 applicable to false light actions.[109] Under that section the plaintiff is limited to recovery of special damages unless he has requested the defendant to retract the offending publication. It is interesting to note that subsection 2 of section 25-840.01 states that the limitation of that section does not apply if the plaintiff alleges and proves "actual malice." Since recovery for false light can only be had when the plaintiff shows that the defendant acted with what the Supreme Court called "actual malice," the retraction statute would not seem to apply to any case of false-light invasion of privacy if the term "actual malice" was interpreted consistently throughout. It seems more likely that this was simply an oversight by the legislature since the words "actual malice" in the retraction provision first appeared long before the Supreme Court defined them to mean knowledge of or reckless disregard towards falsity.[110] To interpret the statute otherwise would be to say that in one section the legislature made the retraction provision applicable to false light torts but in a later section it used language which effectively made the retraction provision inapplicable to false light actions.

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n.2 (1975) (Powell, J., concurring) ("[i]n neither *Gertz* nor our more recent decision in *Cantrell v. Forest City Publishing Co.* . . . however, have we been called upon to determine whether a State may constitutionally apply a more relaxed standard of liability under a false-light theory of invasion of privacy.").

108. NEB. REV. STAT. § 20-204(2) (Supp. 1979).

109. 1979 Neb. Laws, L.B. 394, § 12.

110. The retraction statute was originally enacted in 1957, and the term "actual malice" first appeared at that time. 1957 Neb. Laws, L.B. 318, § 2(2). Malice in defamation cases had been variously defined, but it generally denoted that the defendant was motivated by ill will, personal spite, wrongful motive, or wanton disregard of the plaintiff's rights. *See* Hassett v. Carroll, 85 Conn. 23, 81 A. 1013 (1911); Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901). The Nebraska Supreme Court defined malice as "bad intent in the publisher; i.e., an intent to injure the person whom or whose affairs the language concerns." Peterson v. Cleaver, 105 Neb. 438, 442, 181 N.W. 187, 189 (1920). The United States Supreme Court did not give the term "actual malice" the definition of knowledge of the falsity or reckless disregard of the truth until it decided New York Times v. Sullivan, 376 U.S. 254 (1964).

E. Defenses and Limitations

As mentioned previously, L.B. 394 also provides several defenses and limitations on the right to recover for an invasion of privacy. Under the bill no cause of action will lie if the plaintiff has consented to the alleged invasion of privacy, as long as the defendant's actions were within the scope of that consent.[111] The cause of action is not assignable[112] nor does it survive the death of the injured party, except in cases of appropriation of name or likeness for business or advertising purposes.[113] A plaintiff is limited to one cause of action for libel, slander or invasion of privacy arising out of a single publication,[114] and a judgment in any jurisdiction for or against the plaintiff upon the merits of his action founded upon a single publication will bar any future action based upon the same publication.[115] The bill also imposes a limitations period of one year on all causes of action for invasion of privacy.[116] In an apparent attempt to insure that no stone was left unturned, the legislature added a provision which purports to adopt all applicable state and federal statutory or constitutional defenses, all qualified and absolute privileges to defamation, and all other privileges and defenses to privacy actions found in the common law of any state.[117]

III. CONCLUSION

Tort recovery for invasion of privacy rights was long overdue in Nebraska and the legislature should be applauded for finally providing for it. The provisions of L.B. 394 were designed to reflect the protection of privacy developed at common law, although certain aspects of that protection seem to have been modified or limited during the legislative process. Particular deference seems to have been given to the desire of the media that the new right of privacy not interfer with its ability to gather and disseminate the news. The elimination of the cause of action for publication of private facts, the restriction of the intrusion tort to invasions of places, and the requirement in false light actions that actual malice be alleged and proven for all classes of plaintiffs, all seem to have the media's interest at heart.

The task now falls on the judiciary to define and apply the protection of L.B. 394. This should be made somewhat easier by the common law history of the right of privacy, since it was from

111. NEB. REV. STAT. § 20-205 (Supp. 1979).
112. *Id.* § 20-207.
113. *Id.* § 20-208.
114. *Id.* § 20-209.
115. *Id.* § 20-210.
116. *Id.* § 20-211.
117. *Id.* § 20-206.

this background that L.B. 394 emerged. Nebraska's right of privacy was not created in a vacuum. It is the child of the common law right of privacy, and therefore, its protections should always be viewed with that legacy in mind.

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