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The Right to Privacy in Nebraska: A Reexamination

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THE RIGHT TO PRIVACY IN NEBRASKA: A RE-EXAMINATION

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I. INTRODUCTION

No article on the right to privacy can begin without a recognition of the famous article by Warren and Brandeis upon which the "right to be let alone" is predicated.[1] From this article, either through precedent or fiction, the right to privacy found substance in the law of this country. Its bounds remained ill defined, and it was soon to become the protector of numerous personal interests, each in some vague way related to the privacy of individuals.[2] Its adoption as a rule of law has been gradual, fragmentary, and certainly not unanimous. It was rejected in New York in its first judicial test in 1902.[3] Three years later the Georgia Supreme Court for the first time in this country recognized the right as derived from the common law.[4] Since then thirty-two states have compensated invasions of privacy by judicial decree, and four states have enacted legislation protecting certain aspects of individual privacy.[5] Only five states, including New York, have expressly refused to protect the privacy of its inhabitants as a matter of common law. Nebraska is included in the latter five. In 1955 the Nebraska Supreme Court in *Brunson v. Ranks Army Store*,[6]

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1 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Judicial activists may claim that the article merely defined the interest in need of protection which the common law evolved to protect, whereas those courts committed to judicial self-restraint can find ample juristic precedent in the article upon which to base the adoption of the doctrine. The fact remains that whatever interest was being protected under whatever label, the term "right to privacy" had its inception in this article.

2 "It [right to privacy] became, in a sense, a catchall for a great number of cases in which mental suffering or other emotional distress was the primary injury sustained and for which no other substantive theory for relief was available." 1 HARPER & JAMES, TORTS § 9.6 at 683-84 (1956).

3 Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

4 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

5 See PROSSER, TORTS § 112 at 831-32 (3d ed. 1964).

6 161 Neb. 519, 73 N.W.2d 803 (1955).

unceremoniously rejected the right to privacy in the following manner:

> The doctrine of the right of privacy was not recognized or enforced 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. . . . We submit that if such a right is deemed necessary or desirable, such right should be provided for by action of our Legislature and not by judicial legislation on the part of our courts. This is especially true in view of the nature of the right under discussion, under which right not even the truth of the allegations is a defense.[7]

The court rejected the doctrine on two grounds: First, that neither the common law of England nor of Nebraska has ever expressly recognized the "right of privacy" and second, that in the absence of such prior recognition the court is unwilling or unable to act.

Thus, in less than two hundred words the privacy of individuals was laid bare, without protection. And this resulted not from a finding of lack of need, but because of a self-proclaimed judicial inadequacy to so provide. That the court would take such an approach to this problem strikes hard at the fundamental precepts of the common law. If this approach is logically extended, the development of the common law in Nebraska will have been relegated to a mechanical search through the musty pages of the Nebraska Reports and the English Year Books for some oblique reference to magic language, *i.e.* "right to privacy."

It is suggested that the traditional method of judicial decision-making has been through analysis of the relative merits of the respective interests of the parties. This has particular impact in the privacy area once it is recognized that the right to privacy merely describes an aggregation of personal interests, which have already received varying degrees of protection in Nebraska prior to the *Brunson* case. The major part of this article will be devoted to illustrating the similarities between the interests thus protected and those constituting the right to privacy.

Other developments since 1955 also tend to indicate that the *Brunson* case is ripe for review. The impact of scholastic commentary did not cease in 1890 with Warren and Brandeis, and several attempts have since been made to categorize and thus clarify the nature of the interests protected. Judicial activity in those states recognizing the right to privacy has wrestled with and solved many of the problems inherent in such an area. Although privacy protection has not been expanded to its outermost limits, the direc-

[7] *Id.* at 525, 73 N.W.2d at 806.

tion and scope of the tort are now fairly well defined. Thus, the Nebraska court would not now be called upon to adopt a totally untested doctrine. One must also note that since 1955 the United States Supreme Court has found constitutional foundations for privacy protection.

The most significant change since 1955 for purposes of the development of the common law in Nebraska, and specifically the right to privacy, has been a notable departure from the philosophy of judicial self-restraint on the part of the Nebraska court. There is a noticeable movement within the court to recognize stare decisis as a guiding principle rather than an inflexible command. This change in attitude certainly casts doubt on the importance of the *Brunson* case as precedent and gives some indication that the court should again be called upon to give protection to those interests comprising the right to privacy.

II. THE SEARCH FOR MAGIC LANGUAGE

It is true, as the Nebraska Supreme Court points out in *Brunson*, that no case in Nebraska has expressly imposed liability on a defendant under the doctrine of right to privacy. It is not true that the Nebraska Supreme Court has never recognized the doctrine as such. If the court today would still insist on being presented language from prior decisions recognizing the right, such decisions are available. These past references to privacy doctrine can only be considered dicta, and admittedly not very conclusive dicta, but they do indicate that the interest sought to be protected has received some judicial recognition.

Three Nebraska cases dealing with the elements of damage in eminent domain cases include language from the following quotation from *American Jurisprudence*:

> The creation of noise and dust, the *invasion of privacy*, the deprivation of light . . . and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property.[8]

The following factors limit the relevance of the above quotation to the establishment of the tort of invasion of the right to privacy: (1) there has not been a case in Nebraska where the privacy item of damage was directly at issue, (2) the compensation suggested was not for invasion of privacy per se but only as it affected the

[8] Balog v. State, 177 Neb. 826, 834, 131 N.W.2d 402, 408 (1964); Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 476, 106 N.W.2d 727, 739 (1960); Crawford v. Central Neb. Pub. Power & Irr. Dist., 154 Neb. 832, 836, 49 N.W.2d 682, 686 (1951). (Emphasis added.)

market value of the property, and (3) eminent domain involves invasions by governmental authorities and not by private individuals. There is, however, within the quotation a recognition that the individual's interest in privacy has some legal ramifications.[9]

A more direct reference to the doctrine of right to privacy can be found in the older Nebraska case law. Warren and Brandeis based part of their article on the English case of *Pollard v. Photographic Co.*,[10] where an injunction was issued restraining the unauthorized use of the plaintiff's photograph. In 1906, in *State v. State Journal Co.*,[11] the *Pollard* case was argued to support a common law copyright. In distinguishing the *Pollard* case, the Nebraska Supreme Court commented:

> The photograph in [*Pollard*] was a private matter, it never had been published, and the attempt to publish it on the part of the defendant was the injury complained of. *The case* [*Pollard*] *illustrates the doctrine of the right of privacy.* This right of the plaintiff to prevent her photograph being made public against her wish was *so well established in English law that it was unnecessary to discuss that right.*[12]

Thus, the Nebraska court has expressly recognized, if not adopted, the doctrine of right to privacy.

This approach should still not be conclusive, however. The court has not yet analyzed the interests sought to be protected, and off-hand references to the right of privacy are certainly no substitute for a full-fledged discussion of the issue.

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[9] Tracing the original use of privacy terminology in these eminent domain cases provides an excellent example of how the law develops. The first reference to privacy in such cases was in 1895 in Comstock v. Clearfield & M. Ry. Co., 169 Pa. St. 582, 32 Atl. 431 (1895), which allowed the jury to consider the diminution of property value because of a railroad which ran next to the plaintiff's residence, shaking his house. The *Comstock* case was cited with approval in Shano v. Fifth Ave. & H. St. Bridge Co., 189 Pa. 245, 42 Atl. 128 (1899), which directly held that invasion of privacy was one of the elements of damage. The *Shano* decision was reported in 10 R.C.L., *Eminent Domain* § 152 (1929) and subsequently the rule was included in 18 AM. JUR., *Eminent Domain* § 282 (1938). The three Nebraska cases cited in footnote 8, *supra*, picked up the quotation from *American Jurisprudence*. The second series of *American Jurisprudence* uses the quotation as a rule of law and cites to two of the three Nebraska cases. 27 AM. JUR. 2d, *Eminent Domain* § 327 (1966). Thus the quotation has become a clear rule of law although only one court, back in 1899, actually provides a direct holding to that effect.

[10] 40 Ch. Div. 345 (1888).

[11] 77 Neb. 752, 110 N.W. 763 (1906).

[12] *Id.* at 758, 110 N.W. at 765-66. (Emphasis added.)

III. THE CHANGE IN JUDICIAL PHILOSOPHY

In the *Brunson* case, the Nebraska Supreme Court rejects the philosophy that the common law is a growing body of law constantly adapting to meet changing circumstances.[13] Instead the court relies on a strict application of stare decisis.

This is not the place for a lengthy discussion of the principles behind stare decisis or the advantages and disadvantages of adhering to precedent.[14] It would seem, however, that a respect for the past would include not only respect for past decisions on substantive law but also past pronouncements of judicial policy. In this light it should be noted that the Nebraska court stated ten years before the *Brunson* case:

> One of its [the common law's] oldest maxims was that where the reason of a rule ceased, the rule ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and *perhaps another sprang up in its place which was based upon reason and justice as then conceived.*[15]

The development of the right to privacy and its subsequent protection by the common law did not come about during the twentieth century by mere coincidence. Nor was it absent in centuries past because of judicial reluctance. Although the same interests were present, the importance of their protection and the ability to

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[13] Of the innumerable quotations available for the above proposition the following three must be mentioned: "Our system is founded on precedent and respect for authorities. But this just and necessary respect, if not informed by a due measure of intelligent criticism, tends to degenerate into mechanical slavery." POLLOCK, THE GENIUS OF THE COMMON LAW 113-14 (1912).

"[W]hen the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have some impartial arbiter declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142-43 (1922).

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." HOLMES, THE COMMON LAW 1 (1881).

[14] See Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law 587-88 (1958) (mimeograph).

[15] State *ex rel.* Johnson v. Tautges, Rerat & Welch, 146 Neb. 439, 444, 20 N.W.2d 232, 234 (1945). (Emphasis added.)

invade them were minimal. In early English history an individual was much more in need of protection for his body than for his intangible personality.[16] Moreover, the environment was not yet such as to breed invasions or intrusions.[17] If one had a strong lock on his door and shutters on his windows most intrusions could be thwarted. It takes little imagination to discern why in the twentieth century the courts adapted the common law to protect the right to privacy.[18] Some have given as reasons the rise of yellow journalism and commercial advertising.[19] This is undoubtedly what inspired the creation of Warren and Brandeis' article. It has also been said that

> the inception of the doctrine was the almost inevitable development of the law under the pressure of great social need, produced by the technological developments and the vast extension of business which transformed American society into mass urbanization thus creating many new sensitivities.[20]

At the very least the right to privacy is a "product of its time."[21]

As a constitutional principle also, privacy is an idea whose time has come. In *Mapp v. Ohio*,[22] the United States Supreme Court viewed the fourth amendment as creating a "right to privacy, no less important than any other right carefully and particu-

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[16] Life in England in the 14th century was described as follows: "The woods were full of outlaws who robbed all who came their way, and even, on occasion, seized the King's judges and held them for ransom. Some were even bold enough to force their way into the law courts and overawe the justices." CROSS, A SHORTER HISTORY OF ENGLAND AND GREAT BRITAIN 142 (3d ed. 1939).

[17] During the 17th century London had a population of around half a million but there were only four towns with more than ten thousand inhabitants. On top of that the newspapers were in their embryonic stages, and the major news circulation was carried on by coffee houses and newsletters. *Id.* at 409-12. With these conditions it would seem unlikely that invasions of privacy would be serious or frequent enough to warrant protection at common law.

[18] "The early Americans were so secure in their sense of privacy that they seldom gave it a thought—the Constitution does not contain the term. If anything, most felt they had more privacy than they needed in their scattered farms, and made up for it by frequent gatherings at taverns and hostels, where their gregariousness shocked visiting Europeans. Today, just when the affluent society should be on the verge of providing every American with as much or as little privacy as he chooses, there is more justified alarm over the state of privacy than at any time in U.S. history." Time, July 15, 1966, p. 38.

[19] HALE, THE LAW OF THE PRESS, 299 (3d ed. 1948).

[20] 1 HARPER & JAMES, TORTS § 9.6 at 683 (1956).

[21] Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941).

[22] 367 U.S. 643 (1961).

larly reserved to the people."[23] And *Griswold v. Connecticut*,[24] which struck down the Connecticut anti-birth control legislation, draws a right to privacy from a penumbra of constitutional provisions. This article is confined to the common law doctrine prohibiting invasions by private individuals but as the New York Supreme Court noted:

> The concept of a right of privacy as a constitutional right safeguarding the individual against unreasonable governmental action must be distinguished from the individual's private law right of privacy against infringement by another individual. Nevertheless, it cannot be doubted that the stature and scope of the private law right have been greatly enhanced by the recent development of its constitutional law counterpart.[25]

Yet, in Nebraska, the *Brunson* decision remains as an obstacle to privacy protection. The court has not since been called upon to reject that decision. However, the court has dramatically rejected the philosophy underlying that decision. In *Myers v. Drozda*,[26] a 1966 Nebraska case, the court held that charities were no longer immune from tort liability. In doing so it overruled a long line of cases, the latest being decided the same year as *Brunson*.[27] The court in *Myers* said:

> Stare decisis "was intended, not to effect a 'petrifying rigidity,' but to assure the justice that flows from certainty and stability. . . . [W]e would be abdicating 'our own function, in a field peculiarly nonstatutory,' were we to insist on legislation and 'refuse to reconsider an old and unsatisfactory court-made rule.'[28]

With this statement and the actual holding of the court in *Myers*, the underpinnings of the *Brunson* decision can no longer be considered conclusive. The *Myers* case heralds the opportunity for a re-examination of the right to privacy and its applicability to Nebraska.

A comparison of the facets of the *Myers* approach with those of *Brunson* indicates how far the court has gone in reversing its past attitude toward the common law. It also underlines the demise of the *Brunson* case as precedent against the establishment of the right to privacy.

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[23] *Id.* at 656.

[24] 381 U.S. 479 (1965).

[25] Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 223, 250 N.Y.S.2d 529, 534 (Sup. Ct. 1964).

[26] 180 Neb. 183, 141 N.W.2d 852 (1966).

[27] Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 70 N.W.2d 86 (1955).

[28] Myers v. Drozda, 180 Neb. 183, 186, 141 N.W.2d 852, 854 (1966), citing Bing v. Thunig, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9 (1957).

A. Overruling vs. Nonrecognition

In *Myers*, the court was forced to overrule a long line of precedent expressly exempting charities from tort liability. The last case granting immunity, *Muller v. Nebraska Methodist Hosp.*,[29] was not a mechanical application of earlier precedent. The opinion was a thorough analysis of the existing law and social policy, and determined that charitable immunity still had a logical basis in fact and policy. Whatever one might think of the result, the fact remains that it was a reasoned opinion on the merits. The court in *Myers* was thus forced to find that the conditions had changed so as not to warrant immunity for charitable institutions. It had to directly overrule the *Muller* decision.

In *Brunson* the court did not have to overrule any prior decision. It was asked to analyze the merits of the conflicting interests. This it did not do. It would seem that the impact of stare decisis would be considerably stronger where there are contrary decisions than where there are no prior precedents, either for or against.

An examination of the effect of these decisions is also relevant. In *Myers*, if the court had decided to retain charitable immunity by adopting the *Brunson* philosophy of rigid adherence to precedent, the law of charitable immunity would have still found its basis in rational analysis, *i.e.* the reasoning of the court in *Muller*. The court failed to realize in *Brunson*, that in claiming an inadequacy to decide the question presented, they in fact did decide the issue—decided it against privacy protection. Thus, at present the law of privacy in Nebraska has never been thoroughly discussed or analyzed—yet it has been rejected.

Hope remains for a judicial re-examination of the question. Any subsequent attack on the *Brunson* case need not hurdle an adverse decision on the merits, but only an adverse judicial philosophy—a philosophy that the Nebraska court has already rejected.[30]

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[29] 160 Neb. 279, 70 N.W.2d 86 (1955).

[30] Another case of some interest here is Schmieding v. American Farmers Mutual Ins. Co., 138 F. Supp. 167 (D. Neb. 1955), which was decided after the *Muller* decision but before *Brunson*. Judge Delehant noted that the right to privacy had not been ruled on in Nebraska and then held: "This court is of the opinion that if and when the issue is presented to that [Nebraska] court it will not recognize the existence of a right of privacy whose violation shall give rise to a civil liability in the absence of a then controlling statute. That court has been disposed to leave to legislative action the creation of new, or the alteration of existing, bases of civil actions. Muller v. Nebraska Methodist Hospital

B. COURTS IN OTHER JURISDICTIONS

The *Muller* case, which was overruled by *Myers*, relied heavily on case law from other jurisdictions in forming the basis of charitable immunity. Likewise, in *Myers*, the court noted since *Muller*, other states had overruled immunity decisions. The judicial trend was "unmistakable."[31]

In *Brunson*, the court did not rely on a count of jurisdictions. In support of their position the court cites four cases which rejected privacy protection as a matter of common law. These four cases represent but three jurisdictions. Totally ignored were the twenty odd jurisdictions which by that time had recognized the right to privacy under common law principles. It might be said that in privacy, as in charitable immunity, the judicial trend was unmistakable. Of course a head count of jurisdictions is not conclusive in deciding questions of law. However, the split in jurisdictions especially where those opposed to the Nebraska position were in the large majority, suggests that the issue was not as easily disposed of as the court indicated in *Brunson*.

C. THE NEBRASKA CONSTITUTION

The court uses as an important foundation to its decision in *Brunson*, a Nebraska statute which provides:

> So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska.[32]

It is puzzling how this statute could be interpreted to preclude the development of common law doctrine not expressly found in the English law. The statute was obviously passed to insure a foundation for Nebraska law, not a restriction on its development. It could be argued also that to interpret the statute as a restriction would make it contrary to Article I, Section 13 of the Constitution of the State of Nebraska which reads: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." The exact interpretation of this constitutional provision is not free from doubt. In

. . . ." *Id.* at 183. Judge Delehant's prophecy was obviously correct, but was based on the philosophy of *Muller* which has been subsequently rejected in *Myers*.

[31] Myers v. Drozda, 180 Neb. 183, 186, 141 N.W.2d 852, 854 (1966).

[32] NEB. REV. STAT. § 49-101 (Reissue 1960).

the *Muller* case, the court held that the provision "does not create any new rights but is merely a declaration of a general fundamental principle."[33] Such an interpretation can be readily accepted were it not for its citation in the *Myers* decision. In *Myers*, the defendant argued that a change in the charitable immunity doctrine should be made only by the legislature. The court in rejecting that argument stated: "If we endorsed legislation by silence, [in *Muller*] we erred. See Art. I, § 13, Constitution of Nebraska . . . ."[34] The use of the citation is far from clear, especially in light of the decision in *Muller* that the provision did not create any new right. The most justified conclusion would be that although the constitutional provision does not create new rights, it does indeed give the court power to so create them or to modify or expand them. This interpretation would raise serious doubts on the validity of the *Brunson* philosophy.

D. "Field Peculiarly Nonstatutory"

Using a New York case for authority the court in *Myers* indicates that the field of charitable immunity or liability is of a peculiarly nonstatutory nature. It is interesting to trace the origin of that language. The Nebraska court quoted it from *Bing v. Thunig*,[35] a New York case dealing with charitable immunity. But the court in *Bing* acquired the language from another New York case, *Woods v. Lancet*.[36] The *Woods* case involved the question of whether New York would recognize tort liability for injury inflicted upon an unborn fetus. One prior decision had refused to recognize liability.[37] The *Woods* case overruled the adverse precedent and created a cause of action for such injuries. The *Woods* doctrine is not unlike establishing the right to privacy. Neither had been recognized either in the common law of the state or in English law. The "field" which was termed "peculiarly nonstatutory" involved the creation of tort liability where it had not existed before.

E. The Nature of the Rule Announced

In *Myers*, the court not only repudiated charitable immunity, but held that causes of action arising before the date of the filing

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33 Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 288, 70 N.W.2d 86, 91 (1955).

34 Myers v. Drozda, 180 Neb. 183, 186, 141 N.W.2d 852, 854 (1966).

35 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9 (1957).

36 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951).

37 Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

of the court's opinion, would be valid only to the extent of the charity's liability insurance coverage. The significance attributed to insurance coverage runs contrary to the court's known position on the relevance of insurance in personal injury law suits.[38]

One would like to comment that the *Myers* rule is more susceptible to a charge of judicial legislation than the adoption of the principle of right to privacy. But to one who seriously questions the importance of the "judicial legislation" concept, it is difficult to express such a comparison. One certainly has the feeling that the *Myers* decision comes closer to a legislative type pronouncement. However, if it is considered the duty of judicial bodies to develop the law, particularly in the private law area and to consider all of the underlying social policies and ramifications, then the result in *Myers* does not come as any radical judicial action unless it is compared to the "reasoning" in the *Brunson* case.

IV. INTEREST ANALYSIS UNDER NEBRASKA LAW

The development of no other area of law owes as much to the law reviews as does the right to privacy. Its inception resulted from the Warren and Brandeis article. But, as important, its clarification has come about, its boundaries established, and its fringes explored as much by writers as by judges. It was soon discovered that the "right to privacy" concept embraced several distinct interests, and several authors have attempted to define and separate these interests and thereby facilitate the development of the case law. Everyone seems to agree that all of the interests included have something to do with the intangible personality of the individual. Four separate interests have been suggested as the most important: (1) the interest in seclusion, (2) the interest in personal dignity and self-respect, (3) the interest in privacy of name, likeness, and life history, and (4) the interest in sentimental associations.[39] One author proposed dividing the tort itself into three classifications: (1) intrusion, (2) disclosure of private facts, and (3) appropriation of name or likeness.[40] This process of delineation has thus far culminated in the work of Dean Prosser who classifies the right to privacy into four separate torts: (1) intru-

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[38] See Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N.W. 726 (1936); Bergendahl v. Rabeler, 131 Neb. 538, 268 N.W. 459 (1936).

[39] Harper & McNeely, *A Re-examination of the Basis for Liability for Emotional Distress* [1938] WIS. L. REV. 426. See also Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932) where the author lists seven aspects of personality protected.

[40] Dickler, *The Right of Privacy, A Proposed Redefinition*, 70 U.S. L. REV. 435 (1936).

sion upon plaintiff's physical and mental solitude and seclusion, (2) public disclosure of private facts about plaintiff, (3) placing plaintiff in a false light in the public eye, and (4) appropriation of plaintiff's name or likeness for defendant's benefit.[41] Prosser's classification is of particular importance in light of its judicial adoption by several recent cases which may in turn signal the beginning of wide-spread judicial acceptance.[42]

There is one drawback to this process of classification which should be mentioned. Segregating the tort of right to privacy into four separate torts as Prosser has done should not eliminate the necessity for evaluating interests which may not neatly fit the four tort blueprint. If these four torts are now considered conclusive of the interests needing protection, and additional interests are left unprotected merely because they have not yet been included then the common law will have again returned to the philosophy represented by *Brunson.*

The remainder of this article will discuss the four torts named by Prosser. It should be remembered that they are attempts to define interests and the scope of their protection. It is suggested that the four interests thus defined have received at least limited protection in Nebraska without using privacy terminology, and thus the adoption of privacy principles will not be a radical departure from precedent.[43] Adoption of the right to privacy would on the other hand clarify the interests and insure complete rather than fragmentary protection.

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41 Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); PROSSER, TORTS § 112 (3d ed. 1964).

42 See, *e.g.*, Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 201 N.E.2d 533 (1963).

43 "Examination of the cases leads me to the conclusion that for some 200 or more years relief has been given against certain invasions of one's right of privacy. It is matter of small moment that the juristic mind, cautious and conservative, ever groping for precedent in granting relief, based its reason on some then recognized legal ground, no matter how far-fetched the *fiction* might be on which it was supported. Hence cases may be grouped into those which found in it some *property* right . . . . Others bolstered up their jurisdiction on the fiction of 'breach of trust' . . . . Still others were able to grant relief at law under fact, or fiction, of 'breach of contract.' Stripped of all legal fiction, it was essentially *right of privacy* which was being protected. Called by any other name, it proved just as sacred. Why the necessity for so much artifice?" Graham v. Baltimore Post Co., reported in 22 KY. L.J. 108, 120 (1933).

A. INTRUSION

The tort of intrusion is designed to protect the physical and mental solitude and seclusion of the plaintiff. The requirements for the tort are: (1) there is an intrusion, (2) the intrusion is objectionable and offensive to a reasonable man, and (3) that intruded upon is entitled to privacy.[44] Publicity is not required.[45] The advance of electronics and technology alone provides adequate reason for the protection of these interests, especially since electronic devices are becoming more readily accessible to the general public.[46] A cursory glance at a few of the cases already decided in this area point up the need for protection of this interest. Two cases involved a landlord who "bugged" his tenants' rooms and listened to their personal conversations.[47] Photography also of-

[44] PROSSER, TORTS § 112 at 833-34 (3d ed. 1964). See also Dickler, *supra* note 40 at 438 where the author described the interest as follows: "An Englishman's home is his castle; he should be able to pursue a secluded existence free from prying eyes and curious ears." Harper and James suggest that there are two aspects of seclusion, the interest in not being seen or heard and the interest in not seeing or hearing others. 1 HARPER & JAMES, *op. cit. supra* note 2 at 681.

[45] Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964).

[46] Vance Packard claims that "in the course of a year literally millions of Americans are watched or overheard electronically without their awareness at some time during any single week." The author also comments that a "Be a Spy" kit with instructions in bugging was advertised in a leading electronics magazine for $22.50. Microphones can bring in conversations from 500 feet in ideal conditions. There is also the publicized case of the United States military attache in Moscow who discovered that the olive in his martini was actually a transmitter and the toothpick an antenna. PACKARD, THE NAKED SOCIETY 30-37 (1964). See also, DASH, THE EAVESDROPPERS 336 (1959) where prices of microphones are listed costing as low as $1.50. Also, a parabolic set which would extend a microphone's hearing distance over five times its normal range can be built for around $50 using military surplus parts. *Id.* at 351. See also a discussion on infra-red cameras capable of taking pictures in near darkness without the subject being alerted. *Id.* at 373-74. Senator Edward Long recently noted that one private detective agency provides a "ten day blitz service" which amounts to a "do-it-yourself system for seeing and hearing what is happening around the house while you are away." It consists of a telephone bug, a hidden movie camera, and a microphone for the family car. The rental charge for the outfit is around $400. Long, *We Must Control Private Eyes*, Parade, Oct. 30, 1966, p. 6.

[47] Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958). In the latter case the court said: "[T]he right to privacy is an individual right that should be held inviolate. To hold otherwise, under modern means of communication, hearing devices, photography, and other technological advancements, would effectively deny valuable rights and freedoms to the individual." *Id.* at 876, 105 S.E.2d at 568. For other electronic in-

fers a fertile means for invasion of privacy. Probably the most shocking case denying plaintiff relief on privacy grounds occurred in Wisconsin where a tavern owner had a hobby of taking pictures of his feminine patrons while they were in the rest room of his establishment and then passing the pictures around for his other guests' entertainment. The Wisconsin Supreme Court refused to recognize the doctrine of right to privacy on grounds similar to those of the Nebraska court.[48] Intrusions into the physical and mental seclusion of others may take many forms. Richard Nixon relied on the right to privacy to keep his name off the presidential ballot in Florida.[49] A number of cases have arisen through the overzealous actions of creditors attempting to collect a debt.[50]

The true interest protected under the tort law of intrusion is a mental interest and the similarity between this and the tort of intentional infliction of mental distress can hardly go unnoticed. Most writers can draw only minor distinctions between the two.[51] An examination of the Nebraska cases illustrates that, although not expressing the results on the basis of right to privacy, the court has recognized the interest and protected it far beyond the bounds required by the tort of intentional infliction of mental distress.

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trusions see McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939) (receiving set in plaintiff's hospital room); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931) (telephone tap). Nebraska makes tapping of telephone or telegraph lines a criminal offense. NEB. REV. STAT. § 86-328 (Reissue 1958).

48 Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956). For another recent case of photographic intrusion on the feminine modesty see Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964). In that case the plaintiff while leaving a fun house passed over air jets which blew her skirt up exposing her "from the waist down, with the exception of that portion covered by her 'panties.'" *Id.* at 381, 162 So. 2d at 476. At that moment the defendant took her picture and published it on the front page of his newspaper with 5,000 circulation. The Alabama court in a flair of southern chivalry affirmed a jury verdict of $4,166 for invasion of privacy. See also, Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942) (picture of plaintiff in hospital bed).

49 Battaglia v. Adams, 164 So. 2d 195 (Fla. 1964).

50 Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892 (Mo. 1959) (unreasonable and oppressive methods to collect a debt); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

51 Prosser, *Privacy*, 48 CALIF. L. REV. 383, 422 (1960) (privacy does not require as extreme an intrusion); Ezer, *Intrusion on Solitude: Herein of Civil Rights and Civil Wrongs*, 21 LAW IN TRANSITION 63, 70 (1961): "In a mental distress case . . . recovery of substantial damages is unlikely because the plaintiff must demonstrate . . . trauma, neuroses or the like, and sometimes a physical manifestation of the injury as well. Intrusion on the other hand allows recovery of sizeable monetary awards after mere injured feelings, humiliation, or embarrassment are shown."

In *Kurpgeweit v. Kirby*,[52] the defendant, by falsely claiming that a Mrs. Stubbert was ill and required assistance, induced the plaintiff, a young married woman, to come with him in his wagon. As the defendant drove past Mrs. Stubbert's house, the plaintiff, realizing the deceit, jumped from the wagon and ran into Mrs. Stubbert's house. The defendant subsequently entered the house and used language implying plaintiff was a lewd woman. Plaintiff became agitated and feared neighborhood gossip. She sought damages for her mental distress, nervousness and damaged reputation suffered by the acts of the defendant. The case was tried as an assault rather than as a defamation action and resulted in a plaintiff's verdict for 3,000 dollars. There was no evidence of any direct or indirect physical injury. On appeal the Nebraska Supreme Court rejected defendant's contention that damages were not allowable for mental pain and suffering in the absence of physical injury and said:

> We consider the peculiar circumstances of this case to place it within the reason of another class of cases, where by an active and wilful or wanton act one has been injured in his personal rights and privileges, has been deprived of his liberty, or damaged in reputation, or *outraged and humiliated in his personal self-respect or in the finer sentiments of his nature.* [53]

This is nothing more nor less than protection of the plaintiff's right to privacy. It is true that the court felt obligated to find some other basis upon which to rest liability and thus held that the action was based on

> an action for a trespass upon the person of plaintiff, a direct invasion of her personal rights, and the accompanying circumstances of mental suffering, humiliation, and injury to her social standing and reputation in the neighborhood constituted matter in aggravation.[54]

The trespass found in this case was the defendant's putting his hand on the plaintiff's arm during the wagon ride. Although this case was based on a trespass theory it was nothing more than an intrusion, and the interest protected was the mental and physical seclusion and solitude of the plaintiff.

In *Bush v. Mockett*,[55] plaintiff, being angry at her neighbor, built an unsightly fence between their two lots. The defendant tore it down; plaintiff rebuilt it and sued to enjoin the defendant from interfering again. Defendant sought an injunction to stop

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[52] 88 Neb. 72, 129 N.W. 177 (1910).

[53] *Id.* at 76, 129 N.W. at 179. (Emphasis added.)

[54] *Id.* at 78, 129 N.W. at 180.

[55] 95 Neb. 552, 145 N.W. 1001 (1914).

plaintiff from maintaining the fence alleging that it was built "for the express purpose of harassing defendants and their family, and for the purpose of annoying them and disturbing their peace of mind, and for the purpose of decreasing the value of their said property. . . ." The Nebraska Supreme Court held that plaintiff's fence was built solely to annoy and punish the defendants and that the fence affected the defendant's property to the extent of 500 dollars. In granting defendant's injunction the court held:

> Courts of equity would fail in the service that history shows they were intended to render to society if they are unable to protect those common rights which more clearly appear, and become more valuable, as civilization advances and the relations of social life become more intricate and more enjoyable.[56]

Although again the right to privacy was not the expressed basis for granting relief, the interest protected was the interest of seclusion.

In *LaSalle Extension Univ. v. Fogarty*,[57] the plaintiff sued defendant on a promissory note given for tuition to plaintiff's correspondence school. Defendant filed a cross petition seeking damages for mental suffering and harassment caused by: (1) threatening letters sent by plaintiff to defendant in an attempt to collect the debt, (2) letters sent to defendant's employer, and (3) letters sent to defendant's neighbors. Many of the letters sent to plaintiff contained accusations of dishonesty and moral turpitude. The letters to defendant's employer threatened garnishment of his wages, and the letters to his neighbors resulted in their chiding him. The defendant claimed no physical injuries but sought damages solely for mental pain, anguish and humiliation, causing nervousness and insomnia. The supreme court in affirming a judgment of 500 dollars for the defendant stated the rule to be:

> "In cases of wilful and wanton wrongs and those committed with malice and an intention to cause mental distress, damages are, as a general rule, recoverable for mental suffering even without bodily injury, and though no pecuniary damage is alleged or proved."
>
> The distinction seems to be in all of the cases as between an act or series of acts done wilfully and purposely or maliciously and acts which are merely the result of negligence.[58]

The rule enunciated in the *LaSalle* case is based solely on the intent of the defendant.[59] The severity of distress was not material, although this is usually a major factor in intentional infliction of

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[56] *Id.* at 556, 145 N.W. at 1002.

[57] 126 Neb. 457, 253 N.W. 424 (1934).

[58] *Id.* at 462, 253 N.W. at 426.

[59] "The intent is the essence of the tort." Dickler, *supra* note 40 at 438.

mental distress cases.[60] The interest protected in the *LaSalle* case was mental seclusion and comes close to adoption of an unexpressed right to privacy at least in the intrusion area.[61]

B. DISCLOSURE

The prevention of public disclosure of private facts is designed to protect the interests of personal dignity, self-respect, and privacy of name, likeness, or history.[62] The facts disclosed must be entitled to privacy and publicity to third parties must be shown. The disclosure must also be such that it would be offensive and objectionable to a reasonable man. Truth is not a defense to this action nor need there be a showing of advantage or benefit on the part of the defendant.[63] An exception has developed in that public figures in certain situations are deemed to have waived their right to privacy.[64] There is also an exception for publication of material of a "public interest" which has been the major defense for newspapers in suits based on the right to privacy.[65] Perhaps the leading case in this area involved the production of a movie which told the life story of the plaintiff who had once been a prostitute but who for the past eight years had been reformed and led a normal life. The picture subjected the plaintiff to severe humiliation and distress.[66] Creditors have also been responsible

[60] Most courts speak of "severe" emotional distress. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952). See also PROSSER, TORTS § 11 at 47-52 (3d ed. 1964); 1 HARPER & JAMES, TORTS § 9.1 (1956).

[61] For a case based on the right to privacy with almost identical facts as the *LaSalle* case, see Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[62] See 1 HARPER & JAMES, TORTS § 9.6 (1956). It is sometimes very difficult to place a given case into any one of the four categories because many cases involve more than one of these torts. The distinction between appropriation and disclosure is superficial in some cases. It may be the difference between plaintiff's picture or history being printed in a news story vs. an advertisement. Dickler drew the distinctions as follows: "In the cases relating to 'disclosures', the profit motive is often wanting, and, when present, does not dominate the defendant's acts; in the 'appropriations' group, it 'sicklies o'er' the entire scene." Dickler, *supra* note 40 at 440.

[63] PROSSER, TORTS § 112 at 834-37 (3d ed. 1964).

[64] Three reasons are given for this exception: (1) consent, (2) waiver of the right, and (3) press' right to inform the public of a legitimate public interest. *Id.* at 845.

[65] *E.g.*, Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956) (publication of picture of the decomposed body of plaintiff's son held newsworthy).

[66] Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (Dist. Ct. App. 1931).

for numerous cases in this area. Publication either to the debtor's friends, his employer, or to the public in general of the debt owed has been a fruitful source of litigation.[67] Also the publishing of photographs without the subject's permission is a disclosure as well as an intrusion.[68] If the picture was taken with permission but published without it, the tort would be that of disclosure only.[69] The justification for recognition of this branch of the tort of right to privacy can be found also in the ever increasing amount of investigations into private lives.[70]

The disclosure area is closely related to defamation, the major distinction being that in defamation truth is usually a defense.[71] In Nebraska, however, truth alone is not a defense to a libel or slander suit, for the defendant must also show that he acted with good motives and for justifiable ends.[72] Thus, in Nebraska the public disclosure of private facts may be actionable under the label of defamation without the necessity of adopting the "right to privacy" nomenclature.

In *Wertz v. Sprecher*,[73] the defendant published in his newspaper that the plaintiff while acting as county attorney, also represented a client in defending a claim by the county. The Nebraska Supreme Court held that the publication was libelous per

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67 Brents v. Morgan, 221 Ky. 765, 299 S.W. 67 (1927) (debt advertised in show-window); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (debtor's landlord told of debt).

68 See authorities cited note 48 *supra*.

69 See Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912), where defendant had permission to photograph plaintiff's dead siamese twins but published the photographs without permission. See also, Myers v. United States Camera Publishing Corp., 9 Misc. 2d 765, 167 N.Y.S.2d 771 (N.Y. City Ct. 1957) (published full body photograph of nude woman without written consent).

70 Vance Packard estimates that the "nation's 2000-odd credit bureaus send one another more than 4,000,000 reports on individuals every year." Packard also reports that the Credit Bureau of Greater New York adds 1,000,000 "derogatory" reports to its files each year. PACKARD, THE NAKED SOCIETY, 168-69 (1964). It takes little imagination and only a reasonably efficient memory to recall how much private information could be accumulated from an individual through forms, which are required to be filled out for various reasons. See generally, PACKARD, THE NAKED SOCIETY (1964).

71 Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1110 (1962). Professor Wade lists other distinctions between the two torts which will be discussed under the tort of false light where the elements of similarity are more striking.

72 NEB. CONST. Art. 1, § 5.

73 82 Neb. 834, 118 N.W. 1071 (1908).

se and that truth alone without good motives was not a defense. The court justified its holding in the following language:

> It is a further fact that individuals guilty of improprieties, indiscretions, or crimes, it may be, can, by subsequent observance of the laws of man and of God, win for themselves the respect and confidence of their associates and of the community. *It is repugnant to the crudest ideas of justice to say that, under such circumstances, the truth of a recital of past history ought to entitle a defendant to a verdict in a civil action.* If the truth of the article is alleged, it should be received in mitigation of damages without regard to the motives of defendant or the end sought by the publication, but the truth alone ought not to be an absolute bar to recovery.[74]

In this way the court recognized the interest sought to be protected by the tort of disclosure and the court's duty to protect it. If the *Wertz* case does not establish the disclosure doctrine as such, it certainly provides a stable foundation for acceptance and development of the doctrine today. Earlier Nebraska cases provide for the "public interest" exception[75] as well as the "celebrity" exception[76] to the general rule preventing disclosure. Further support for this branch of the right to privacy outside the defamation cases may be found in *LaSalle Extension Univ. v. Fogarty*,[77] where one of the acts complained of was the sending of letters to the defendant's neighbors, an act falling clearly within the disclosure doctrine.

C. False Light

The third aspect of the tort protects the plaintiff from being put in a false light in the public eye. Here again the sanctity of name and identity are reaffirmed. The publication of facts need not be defamatory, but they must be false and objectionable to a reasonable man. No invasion of privacy is required.[78] The only

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[74] *Id.* at 838, 118 N.W. at 1072. (Emphasis added.)

[75] Citizens of a town circulated petition asking plaintiff to leave within ten days because of his whore house operation. The court held that the public interest provided the good motives necessary for the defense. Deupree v. Thornton, 98 Neb. 804, 154 N.W. 557 (1915).

[76] Defendant published article concerning plaintiff's trip to London, the death of his wife, and the subsequent secret marriage to a friend. Plaintiff was a bishop and internationally known churchman and social welfare leader. The federal court held that his prominence subjected him to the limelight and that he "must expect his words and personal acts to be freely published." Cannon v. Bee News Publishing Co., 8 F. Supp. 154 (D. Neb. 1933).

[77] 126 Neb. 457, 253 N.W. 424 (1934). The facts of this case are examined with relation to the tort of intrusion. See text accompanying note 57 *supra*.

[78] Prosser, Torts § 112 at 837-39 (3d ed. 1964).

difference between the false light doctrine and that of disclosure is that the former deals with false statements, the latter with true statements.[79] Both bear a close resemblance to defamation. Whether false light is in reality, though not in name, accepted in Nebraska will be determined by the distinctions between the two torts, the importance of the distinctions, and the extent of protection given by the Nebraska law of defamation.

Confusion in right to privacy cases resulting from amalgamation of all four torts under the same terminology has caused a like confusion in contrasting defamation and false light. The most often cited difference is that truth is not a defense to a right to privacy action.[80] In fact, truth *alone* is a defense by definition to an action predicated on the false light doctrine. Professor Wade in the leading comparison of defamation and privacy[81] lists several other distinctions between the two torts without recognizing disclosure and false light as separate torts. According to Wade, defamation draws the distinction between oral and written statements which is not drawn in privacy cases.[82] The right of privacy is not burdened with the distinction between slander per se and slander with special damages, the rules of technical malice, or the rules of pleading requiring innuendos. The basis for a defamation action is the effect on other persons whereas the basis of a privacy action is the effect on the plaintiff himself.[83] Wade also noted several similarities. Both actions require publication and both are in-

79 One good example of the false light doctrine is where the plaintiff's finger prints and photograph are kept in the "Rogues' Gallary" even after he is acquitted. State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946). See also, Brink v. Griffith, 65 Wash. 2d 253, 396 P.2d 793 (1964) where defendant as mayor of the town placed the plaintiff, a municipal police officer, in a false light in order to explain his discharge. The Washington Supreme Court avoided the privacy issue.

80 See Yankwich, *The Right of Privacy: Its Development, Scope and Limitations*, 27 NOTRE DAME LAW. 499, 520 (1952); Wade, *supra* note 71 at 1109. See also, Brunson v. Ranks Army Store, 161 Neb. 519, 525, 73 N.W.2d 803, 806 (1955) where the Nebraska court gives as one of its reasons for rejecting privacy the fact that "not even the truth of the allegations is a defense."

81 Wade, *supra* note 71 at 1109-25.

82 Although recent privacy cases have not drawn any distinction between oral and written statements, Warren and Brandeis stated in their article "the law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damages." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890). There has been some judicial authority limiting actions to written publications. See Pangallo v. Murphy, 243 S.W.2d 496 (Ky. 1951).

83 See also, Yankwich, *supra* note 80 at 506.

tentional torts, although defamation has developed a strict liability area which may or may not apply to privacy actions, and the measure of damages for both are identical.[84] Other than technical requirements there is little difference in substance or in the interest protected. However, Prosser contends that the false light doctrine is considerably broader and may provide a "needed remedy in a good many instances not covered by the other tort."[85] The line between protection of reputation and protection of feelings is a fine one. This difference was recognized in a recent Washington decision but the court noted:

> A problem arises, however, from the fact that for either defamation or invasion of privacy the damages recoverable are not limited to the theoretical bases of the respective torts. In defamation actions, the injured party is allowed to recover for emotional distress as well as injury to reputation, and vice versa in some actions for invasion of privacy.[86]

The Nebraska test for libelous per se is whether the language imputes to the plaintiff a commission of a crime, or subjects him to ridicule, ignominy, or disgrace.[87] Since injury is presumed and actual damage to the reputation need not be shown in a libel per se situation,[88] the torts of false light and libel per se appear identical.[89] Regardless of the phraseology the interest protected is a mental interest and whether the cause (damage to reputation) or the effect (mental distress) is the basis of the language, either rule will protect the interest. It is true that the false light doctrine is potentially broader but its expansion will depend on where the courts draw the line as to what would offend an ordinary man. It cannot be said that the idea behind the false light doctrine is completely foreign to Nebraska common law and precedent did not justify a total repudiation of the doctrine. The Nebraska court recognized the importance of the interest protected by this doctrine by quoting from Othello, Act III, Scene 3:

> Who steals my purse, steals trash; 'tis something,
> nothing.
> 'Twas mine, 'tis his, and has been slave to thousands;

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84 Wade, *supra* note 71 at 1110-11.

85 PROSSER, TORTS § 112 at 839 (3d ed. 1964).

86 Brink v. Griffith, 65 Wash. 2d 253, 258, 396 P.2d 793, 796-97 (1964).

87 Heckes v. Fremont Newspapers, Inc., 144 Neb. 267, 13 N.W.2d 110 (1944).

88 Sheibley v. Nelson, 84 Neb. 393, 121 N.W. 458 (1909).

89 "Despite the different way of stating the two tests, in the case of a false statement they seem quite likely to reach the same result. Certainly it would appear that a statement which holds him [plaintiff] up to hatred, ridicule, or contempt would offend the sensibilities of an ordinary, reasonable person." Wade, *supra* note 71 at 1111.

> But he that filches from me my good name,
> Robs me of that which not enriches him,
> And makes me poor indeed.[90]

The precedents of Nebraska do not show conclusively that the doctrine of false light has been accepted in Nebraska under another label, but the cases on defamation allow a foundation upon which to build ample protection for the mental interest involved without "judicial legislation." In certain respects Nebraska defamation law may be even broader than the false light doctrine since truth alone is a defense to the latter whereas good motives must also be shown in the former.

D. APPROPRIATION

> [T]he effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness.[91]

The essence of the tort is the appropriation of the plaintiff's name, likeness, personality or history for the advantage of the defendant.[92] There need be no showing of an intrusion but publicity is necessary.[93] A study of the history of the tort of appropriation demonstrates that Nebraska has expressly recognized this aspect of the right to privacy as a part of the common law, although no direct holding has been found.

In 1888 the English Chancery Division in *Pollard v. Photographic Co.*,[94] granted an injunction restraining the defendant

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[90] Pokrok Zapadu Publishing Co. v. Zizkovsky, 42 Neb. 64, 80, 60 N.W. 358, 362 (1894).

[91] PROSSER, TORTS § 112 at 842 (3d ed. 1964). The appropriation doctrine has also been the basis for creation of a new tort, "the right to publicity." Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953) *cert. denied* 346 U.S. 816 (1954). See also, Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954). However there seems to be no distinction between appropriation and right to publicity.

[92] Examples of the tort of appropriation may not give rise to the degree of outrage that the other torts do but nevertheless the growth of mass communications and "testimonial" advertising require protection for the unwilling testifier. See Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194 (Dist. Ct. App. 1955) where defendant, a manufacturer of photocopying machines, circulated among members of the legal profession a circular indicating that plaintiff, an attorney, was a satisfied user. In fact, he had returned a machine as unsatisfactory. See also, Korn v. Rennison, 21 Conn. Supp. 400, 156 A.2d 476 (Super. Ct. 1959) (minor girl's picture used for advertisement without her consent.)

[93] PROSSER, TORTS § 112 at 839-44 (3d ed. 1964).

[94] 40 Ch. Div. 345 (1888).

from exhibiting Christmas cards displaying the plaintiff's photograph which was taken by request but subsequently used by the defendant without plaintiff's permission. The court said:

> The question, therefore, is whether a photographer who has been employed by a customer to take his or her photograph for his own use, and selling and disposing of them, or publically exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. . . . To the question thus put, my answer is in the negative, that a photographer is not justified in so doing.[95]

The court then based its reasoning on the breach of an implied contract not to use the photograph and on a property concept.

In 1890 Warren and Brandeis wrote their famous article and commenting on the *Pollard* case said:

> This process of implying a term in a contract . . . is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse.[96]

The authors then expanded upon the case, stating that as long as there were facts to which a contract could be implied courts would continue to rest their decisions on such grounds but actually this was all a part of the underlying concept of right to privacy.

The first attempt to establish the right to privacy in the United States occurred in New York in 1902. In *Roberson v. Rochester Folding Box Co.*,[97] the defendant took the plaintiff's photograph and then without her consent used it on sacks of flour which he sold. The plaintiff sued for damages for mental distress. On facts almost identical with that of the *Pollard* case, the Court of Appeals of New York distinguished the cases because of the implied contract in the English decision and expressly rejected Warren and Brandeis' article on the grounds that the right to privacy did not exist at common law.

Three years later in 1905 the Georgia Supreme Court on facts identical to both *Pollard* and *Roberson*, accepted the doctrine of right to privacy as a distinct right susceptible to protection at common law.[98] Thus as of 1905, two lines of authority were available on whether the right to privacy was in fact a common law right.

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[95] *Id.* at 349.

[96] Warren & Brandeis, *supra* note 82 at 210.

[97] 171 N.Y. 538, 64 N.E. 442 (1902).

[98] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

On December 20, 1905, an action was filed in the Nebraska Supreme Court by the State of Nebraska against the State Journal Company, asking damages for breach of contract.[99] The defendant was under contract with the state to publish the Supreme Court Reports, which were in turn sold to the public by the state. The defendant made extra copies and sold them for his own profit. The court in sustaining defendant's demurrer held that once a work is published the author's rights in that work can be protected only by the copyright laws and not at common law.

One year later in 1906 the Supreme Court ruled on a motion for rehearing on behalf of the state.[100] That motion was based on the proposition that when one employs another to manufacture pictures or books for him the person has no right to make any other copies for his own benefit. For the proposition the state cited the *Pollard* decision. The Nebraska Supreme Court distinguished the *Pollard* case because the Supreme Court Reports were public documents which had already been published and could thus be protected only by the copyright laws. Commenting on *Pollard* the Nebraska court said the right to privacy "was so well established in English law that it was unnecessary to discuss that right."[101] Thus, the Nebraska Supreme Court expressly recognized the right to privacy as a common law doctrine. It adopted the *Pavesich* rather than the *Roberson* line of decisions. In fact, Nebraska is in all likelihood one of the first states to do so.

In the *Brunson* case the court cited four cases for the proposition that the right to privacy is not recognized at common law.[102] All of these are based on the foundation of the *Roberson* decision. No mention of the *State Journal* decision can be found either in the opinion or the briefs of the *Brunson* case.

V. BRUNSON V. RANKS ARMY STORE

It is appropriate now to examine the *Brunson*[103] case in light of the four-prong analysis of the right to privacy. There is some question as to whether the facts of the case fall within any of the four categories.

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99 State v. State Journal Co., 75 Neb. 275, 106 N.W. 434 (1905).

100 State v. State Journal Co., 77 Neb. 752, 110 N.W. 763 (1906).

101 *Id.* at 758, 110 N.W. at 765-66. For full quotation see text accompanying note 12, *supra.*

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

103 *Ibid.*

A. Facts of the Brunson Case

The defendant, who operated a general department store, hired the plaintiff, an actor, to lead other employees of the defendant in a portrayal of the famous Brinks robbery, as an advertising gimmick for defendant's business. Plaintiff agreed on the express understanding that defendant would notify and obtain permission from the Omaha Police Department. As a result of defendant's failure to inform the police, plaintiff and other "robbers" were arrested, held for about an hour, and then released on bond. Newspapers picked up the story, and it received nation-wide news coverage. Subsequently defendant, without plaintiff's permission, ran an advertisement in the local newspaper as follows: "Jim Brunson, professional stunt man of 38 years, put on such a sensational stunt that the whole crew were thrown in the clink." That afternoon a second advertisement was circulated which read: "Ranks Gang Captured. The public can sigh in relief now because the Ranks gang led by Omaha's leading desperado, Jim Brunson, was captured Saturday." Plaintiff alleged that the episode with the police and subsequent publicity caused him abuse, ridicule, and damage to his reputation and standing in the community. His claim was an invasion of his right to privacy.

B. Application of the Right to Privacy

There are serious questions whether the plaintiff in the *Brunson* case could have recovered in a jurisdiction recognizing all four categories of privacy protection. No intrusion can be found, since the plaintiff voluntarily assumed the role he portrayed. There was also no disclosure of private facts. The doctrine of false light seems to hold the best chance of recovery if the effect of the news coverage and subsequent advertisements made no reference to the theatrical aspect of the plaintiff's activities, but merely reported those activities as though they were an actual robbery attempt. The court gives no indication as to which was the case. It could also be argued that the plaintiff became a "public figure" and thus should have expected and could have been deemed to have consented to the publicity. The tort of appropriation also does not conclusively establish a cause of action. Plaintiff sold his acting talents for the benefit of defendant's business, and this was how they were used. It is possible that the Nebraska court in *Brunson* did not have a right to privacy case at all.

VI. CONCLUSION

Where recognized as a child of the common law, the right to privacy with all of its facets is and should remain a flexible con-

cept. It was devised as a result of the increasing pressures which society places on the individual, and it may need to grow in breadth as those pressures continue to increase. Any right or interest which may potentially be threatened by technological advancement or the fertile imagination of man must be protected by laws easily adaptible to situations at present incapable of comprehension.[104] Such is the common law. The Nebraska Supreme Court in *Brunson* placed the duty of enforcing these rights on the legislature. In *Myers*, the court has seemed to reassume this duty for itself. If the court refuses to review the *Brunson* case in light of precedent or is not soon asked to review that decision the legislature should act. But, in this area, judicial action is to be preferred,[105] and it would seem that the way is still open for such action in Nebraska.

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[104] "Only those who have felt the whip of invasion know the effect of its sting, but let others beware lest the whip find its mark in places hitherto considered beyond the bounds of imagination." ZELERMYER, INVASIONS OF PRIVACY 40 (1959).

[105] "Whenever the right of privacy has been legislated into existence its development has been restricted by the rigidity of the statute. In those states which have worked the right of privacy into the fabric of their common law, however, it has grown and altered to fit the changing conditions of modern times." Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 539 (1941).