

Television and the Right of Privacy

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COMMENTS

TELEVISION AND THE RIGHT OF PRIVACY

Television, the newest media of mass communication, is now an integral part of our way of life. A few short years ago it was just a novel experiment. Today, the television receiving set is the focal point of attention in millions of American living rooms.¹ Whenever man perfects a new means of communication, there arise new and complicated legal problems. One of the most interesting of these is the effect of television on the individual's right of privacy.

The right of privacy was initially outlined in an article in the Harvard Law Review by Samuel D. Warren and Louis D. Brandeis which appeared in 1890.² They defined the interest protected by this right as, "The right to be let alone," or "the right of inviolate personality."³ The phraseology was credited to Judge Thomas Cooley in his work on torts.⁴ The Restatement of Torts describes it as an interest which one possesses in order to maintain his privacy and to live an individual life.⁵ It is similar to both the more strongly protected interest to have one's person free from unwanted intentional physical contacts by others and to the interest in reputation. Both reputation and privacy have a relation to the opinion of third persons. This protected interest of privacy is found only in a comparatively highly developed state of society. Two reasons for its only recent recognition are that it normally involves nothing more than mental distress and there is no clear line of demarcation as to what should be protected and what should not.

There were decisions which protected an interest in privacy prior to the Warren and Brandeis article.⁶ They did not speak of a right of privacy per se but based their protection on a property or contract approach. The English court in 1848 enjoined the unauthorized publication of etchings made by the Queen and the Prince Consort on the theory of implied contract and stated that:

"The common law . . . shelters the privacy and seclusion of

¹ Estimated sets in use, 18,697,133, according to Weekly Television Summary in Broadcasting Telecasting, p. 77, Oct. 6, 1952; Total television income for 1951 first reported at \$43,600,000 which compares with a loss of \$9,200,000 in 1950 according to 1951 Television Financial Data issued Mar. 6, 1952 by Federal Communications Commission (Public Notice 73830); See Silverberg, *Televi-sing Old Films—Some New Legal Questions About Performers' and Proprietors Rights*, 38 VA. L. REV. 615 (1952).

² Brandeis and Warren, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

³ *Supra*, note 2 at 195.

⁴ COOLEY ON TORTS, 29 (2nd ed., 1888).

⁵ RESTATEMENT, TORTS, §867 (1939); see Notes 15 A.L.R. 2d (1951), 168 A.L.R. 456 (1947), 138 A.L.R. 22 (1942).

⁶ *Harrison v. Rutland*, 1 Q.B. 142, 12 Eng. Rul. Case. 582-CA (1893); *Pollard v. Photographic Co.* L.R. 40 Ch. Div. (1888).

thought and sentiment committed to writing The invasion (unauthorized publication) is of such kind and affects such property as to entitle the plaintiff to the preventive remedy . . . because it is an intrusion—an unbecoming and unseemly intrusion . . . offensive to that inbred sense of propriety natural to everyman."⁷

However, the courts still did not consider privacy an independent right.

From protection only against physical interference with life and property the law progressed to recovery for assault.⁸ Protection was subsequently extended to slander, nuisance and alienation of affections.⁹ The Declaration of Independence recognized the personal rights of an individual by describing them as "the right to life."¹⁰ Incorporeal rights as well as products and processes of the mind such as copyrights,¹¹ trade marks,¹² trade secrets,¹³ and good will¹⁴ became protected.

Brandeis and Warren in their famous article vividly described this development:

"The intense, intellectual and emotional life and the heightening of sensations which came with the advance of civilization made it clear to men that only a part of the pain, pleasure and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognitions and the beautiful capacity for growth which characterized the common law enabled the judges to afford the requisite protection without the interpolation of the legislature."¹⁵

The right of privacy is now recognized at common law in twenty states.¹⁶ The legal right to be left alone exists in three states by

⁷ *Prince Albert v. Strange*, 1 Mac. and G. 25, 41 Eng. Rep. 1171 (1848), *aff'd* 2 De G. and Sm. 652, 64 Eng. Rep. 293 (1849).

⁸ *Nizer, Right of Privacy*, 39 MICH. L. REV. 526, 527 (1941).

⁹ Warner, RADIO AND TELEVISION LAW, §221 (1949).

¹⁰ The Declaration of Independence (1776); *Supra*, note 2 at 193.

¹¹ *Supra*, note 9, §211b.

¹² *Hogg v. Kirby*, 8 Ves. 215 (1803).

¹³ *Supra*, note 2 at 195.

¹⁴ *Giblett v. Real*, 9 Mod. 459 (1743).

¹⁵ *Supra*, note 2.

¹⁶ Alabama—*Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948); Alaska—*Smith v. Suratt*, 7 Alaska 416 (1926); Arizona—*Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945); California—*Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942); District of Columbia—*Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.C. D.C. 1948); Florida—*Cason v. Baskin*, 159 Fla. 31, 30 So. 2d 635 (1947); Georgia—*Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101 (1905); Indiana—*Pritchett v. Board of Commissioners*, 42 Ind. App. 3, 85 N.E. 32 (1908); Kansas—*Kunz v. Allen*, 102 Kan. 883, 172 P. 532, L.R.A. 1918D, 1151 (1918); Kentucky—*Foster Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364, 34 L.R.A., N.S. 1137 (1909); Maryland—*Graham v. Baltimore Post Co.*, Super. Ct. Baltimore, Md. reported in 22 Ky. L. J. 108 (1932); Michigan—*Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W. 2d 911 (1948); Missouri—*Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911); Nevada—*Norman v. City of Las Vegas*, 64 Nev. 38, 177 P. 2d 442 (1947); New Jersey—*Vanderbilt v. Mitchell*, 72 N. J.

statute.¹⁷ Wisconsin recognizes neither a statutory nor common law right of privacy.¹⁸ There have been attempts to enact such legislation, but thus far they have been unsuccessful.¹⁹ Analogous cases may have differing results depending on whether the claim was based on a statutory or a common law right.²⁰ We should bear this in mind while analyzing some of these cases from other media of communication.

Limitations have been placed on the right of privacy. Generally, it is considered to be a personal right and a widow, for instance, may not bring an action based on an invasion of her deceased husband's privacy.²¹ Corporations are held not to have such a right.²² Public figures, such as holders of public office, have sacrificed their privacy and part of their lives to public scrutiny as the price of the prominence they attain.²³ This is not a complete sacrifice, however. As the court said in *Sidis v F. R. Publishing Corp.*, "Public figures were not to be stripped bare."²⁴

Closely related to the problem of public figures and individual privacy is another major limitation on the right of privacy. That limitation is the publication of matter which is of public or general interest.²⁵ The individual's interest in being left alone must give way to the public's right to secure full information on all matters of legitimate public interest. What constitutes a matter of legitimate public interest is not easily defined. It is not only limited to personalities who are in the public eye but extends also to news. News has been described as "that indefinable quality of interest which attracts attention" or more simply "the report of a recent occurrence."²⁶ Publication of informa-

Eq. 910, 67 A. 97, 14 L.R.A., N.S., 304 (1907); North Carolina—*Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); Ohio—*Friedman v. Cincinnati Local Joint & Executive Board*, Ohio Com. Pl., 6 Ohio Supp. 276 (1941); Oregon—*Hinich v. Meier & Frank Co.*, 166 Or. 482, 113 P. 2d 438, 138 A.L.R. 1 (1941); Pennsylvania—*Harlow v. Buno Co.*, 36 Pa. Dist. & Co. 101 (1939); South Carolina—*Holloman v. Life Insurance Co. of Va.*, 192 S.C. 454, 7 S.E. 2d 169, 127 A.L.R. 110 (1940).

¹⁷ NEW YORK CIVIL RIGHTS LAW, secs. 50, 51, MCKINNEY CONSOL. LAWS, c. 6; UTAH REV. STATS., secs. 103-4-7, 103-4-8, 104-4-9 (1933); VA. CODE, sec. 8-650 (1950).

¹⁸ *Preist v. Stein*, 220 Wis. 354, 265 N.W. 85 (1936).

¹⁹ For discussion of Wisconsin's position in regard to the right of privacy see Comment 1952 WIS. L. REV. 507.

²⁰ *Supra*, note 8.

²¹ *Lunceford v. Wilcox*, 88 N.Y.S. 2d 725, but see *Smith v. Doss* 251 Ala. 250, 37 So. 2d 118 (1948).

²² *Shubert v. Columbia Picture Corp.* 72 N.Y.S. 2d 851 (1947), *Aff'd*, 80 N.Y.S. 2d 724 (1947); *c. Maysville Transit v. Ort* 296 Ky. 524, 177 S.W. 2d 369 (1943).

²³ *Supra*, note 2 at 214; *Smith v. Suratt*, 7 Alaska 416 (1926).

²⁴ *Sidis v. F.R. Publishing Corp.* 113 F. 2d 806 (2nd Cir. 1940), cert. den. 311 U.S. 711, 85 L. Ed. 462, 61 S. Ct. 393 (1940).

²⁵ *Ibid.*; *Metter v. Los Angeles Examiner* 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Barber v. Time Inc.* 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Cason v. Baskin, et al.* 155 Fla. 198, 20 So. 2d 243 (1944); *Smith et al v. Doss* 251 Ala. 250, 37 So. 2d 118 (1948).

²⁶ *Sweenek v. Pathe News* 16 F. Supp. 746 (E. D. N. Y. 1936).

tional and educational items as well as news is held not to be an invasion of privacy.²⁷

In addition to these limitations placed on the right of privacy, the right may be waived either by express consent or by conduct implying consent.²⁸ An example of the latter is the holding in an unreported case that to snap a candid camera picture of a bubble dancer was not actionable because her course of conduct was tantamount to a waiver.²⁹ Both the common law and the statutory right of privacy may be waived.³⁰ Nizer in his "Right of Privacy" points out that statutory provisions that the consent must be in writing have created unnecessary difficulties.³¹

Under certain conditions implied consent may be said to be withdrawn. Under the common law recovery was allowed after retirement from the public scene for sixteen months and in another case, seven years.³² In New York, where the statutory right exists, a former child prodigy was denied recovery even though he had withdrawn from public life more than twenty-five years before the publication.³³ The court said that there may be "A limited scrutiny" of the past life of any person who has achieved or has had thrust upon him the status of a public figure. If the person has voluntarily sought limelight it would appear very difficult for him to regain the statutory right by retirement. The test is whether or not sufficient time has elapsed to deprive the topic of its newsworthy value.

Numerous cases have arisen involving the use of an individual's name or picture for trade and advertising purposes. Many courts will recognize the right of privacy and will permit recovery where the name and photograph are used without permission for commercial exploitation.³⁴ A person may, of course, consent to the use of his name or photograph for advertising purposes.³⁵ Under the New York right of privacy statute the decided cases seem to indicate that there are two tests to apply to determine whether an action lies for invasion of privacy:³⁶

(1) For newspapers, magazines and other periodicals, the court will require that the offensive material be incorporated within the physical confines of the advertisement before liability will be imposed.

²⁷ *Supra*, note 24.

²⁸ *Supra*, note 9, §223b.

²⁹ *Supra*, note 8 at 556; *Time Magazine*, Nov. 14, 1938 at p. 34.

³⁰ *Supra*, note 28.

³¹ *Supra*, note 8 at 558-559.

³² *Mau v. Rio Grande Oil Co.* 28 F. Supp. 845 (N. D. Cal. 1939); *Melvin v. Reid* 112 Cal. App. 285, 297 P. 91 (1931).

³³ *Supra*, note 24; Comment, 38 VA. L. Rev. 117 (1952).

³⁴ *Kirby v. Hal Roach Studios* 53 Cal. App. 2d 207, 127 P. 2d 577 (1942).

³⁵ *O'Brien v. Pabst Sales Co.* 124 F. 2d 167 (9th Cir. 1941), cert. den. 315 U.S. 823, 86 L. Ed. 1220, 62 S. Ct. 917 (1942).

³⁶ Comment, 16 ALBANY L. REV. 72 (1952).

(2) Regarding motion pictures, newsreels and television, the test to be applied is whether the event depicted is one in which the public has a legitimate public interest. The same rules would probably apply to television whether the program was sponsored or sustaining since radio sustaining programs have been held to be commercial in nature.³⁷ The use of the photographs must be more than incidental. There is no liability where the plaintiff's personality could make no real impression on the public.³⁸

Since television's potential audience is very great it will no doubt rank as one of the largest of the mass communication and entertainment industries. An individual's right of privacy is more directly invaded by the reproduction on the television program of a physical likeness and voice than by a newspaper or radio account.⁴⁰ All media of communication have common means of violating one's privacy. However, certain problems are distinct to television. The television camera can not be as discriminating as a movie camera. Live television broadcasts are viewed immediately and therefore there is no opportunity to edit and cut as is done with movies and newsreels.

Let us suppose the telecast of a recognized newsworthy event, a baseball game. The cameraman focuses the television camera for more than a passing or incidental view of a "rowdy" being ejected from the stands of the stadium after he had caused a disturbance. Has this "rowdy" waived all his privacy by purchasing a ticket to the game or by his subsequent conduct? Another problem could arise where the spectator caught by the camera is not involved in any disturbance, but for personal reasons the spectator suffers some distress by his likeness being seen on the television screen. For example, an employee reports that he is ill and unable to come in for work. However, while viewing the telecast of the afternoon baseball game the employer sees his indisposed employee in the crowd at the game. As a result the employee is discharged. Has the employee any cause of action based on an invasion of his privacy? The question that these examples appear to raise is, "Just how discriminating must the television camera be?"

Because of the newness of TV we must now analyze the litigated cases involving the right of privacy that have arisen in other media of communication in an attempt to reach our conclusions. In *Mau v Rio Grande Oil Co., et al*, the plaintiff had been held up by a robber and had been shot and had suffered serious injury. The defendant radio network and the commercial sponsor broadcast a dramatization of the event and used plaintiff's name without his consent. When the plaintiff

³⁷ *Supra*, note 9, §226.

³⁸ *Cook v. 20th Century-Fox Film Corp.*, 95 N.Y.L.J. 2207 (Dec. 15, 1936).

³⁹ *Supra*, note 9.

⁴⁰ *Ibid.*

heard the broadcast, he became mentally upset. He was further upset by phone calls from friends who had also heard the broadcast and wanted to discuss an experience which the plaintiff wished to forget. Plaintiff remained upset the following day and was unable to safely drive an automobile and as a result was discharged by his employer. The court applying California law granted plaintiff recovery on the ground that his constitutionally protected right to be let alone had been violated.⁴¹ The California right of privacy is based on court interpretation of the California Constitution.⁴² However, the Alabama court refused a claim under the following situation. Defendant radio station broadcast an incident which occurred in 1905. The plaintiffs were two sisters whose father disappeared in that year. A neighbor of his was accused of murdering the father but was acquitted because of insufficient evidence. Plaintiffs' father was not dead but actually in California. He died in 1930 and by his will named one of the plaintiffs as his principal beneficiary. The court held that this incident was a matter of legitimate public interest and therefore the broadcast was not an actionable invasion of the plaintiffs' privacy.⁴³

These two cases appear to have differing results. The California decision indicates that since the right of privacy in that jurisdiction is based on the state constitution, such a right takes preference over whatever legitimate public interest might be involved in the broadcast under consideration. Also, the right of privacy seems to be much more firmly established in California than it is in Alabama.

A leading motion picture case is *Melvin v. Reid*. The plaintiff had been a prostitute and was tried for murder and acquitted. Later she reformed, was married and was living a respectable life. She had made many friends who knew nothing of her former life. Seven years after the acquittal for murder, the defendants without her consent used her true maiden name and featured the unsavory incidents of her past life in a motion picture. The California court imposed liability on the following ground that:

"Publication of the unsavory incidents . . . was a direct invasion of her inalienable right guaranteed by our Constitution to pursue and obtain happiness Whether we call this right of privacy or call it any other is immaterial because it is a right guaranteed by our constitution that must not be ruthlessly and needlessly invaded by others."⁴⁴

⁴¹ *Mau v. Rio Grande Oil Co. et al*, 28 F. Supp. 845 (N. D. Cal. 1939).

⁴² Art. 2, sec. 1, "All men are by nature free and independent, and have certain inalienable rights, among which are those enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety."

⁴³ *Smith et al v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948).

⁴⁴ *Melvin v. Reid* 112 Cal. App. 285, 297 P. 91 (1931).

A motion picture of his store exhibited by a storekeeper for advertising purposes depicted plaintiff in the store. Plaintiff did not consent to the exhibition and the court found an invasion of privacy on the ground of use for a trade or advertising purpose.⁴⁵

A fictionalized portrayal of a person on the screen based on a newsworthy event constitutes a violation of the right of privacy.⁴⁶ Since the New York Civil Rights statute⁴⁷ recovery has been denied because the plaintiff was not represented in appearance, personality, character, manners or action.⁴⁸ Also if the portrayal is only incidental, the New York statute does not provide a recovery.⁴⁹

In *Sweenek v. Pathe News*, a newsreel of a group of corpulent women attempting to reduce with the aid of some rather novel and unique apparatus in a gym was held not actionable:

"Pictures of a group of corpulent women attempting to reduce . . . do not cross the borderline at least so long as so large a portion of the female sex continues its present concern about excess in poundage. The amusing comments which accompanied the pictures did not detract from their news value."⁵⁰

In trying to draw analogies between radio, movie and newsreel cases and television cases it must be pointed out that the majority of cases are from New York and California. New York, basing the right of privacy on a statute, has construed that statute rather strictly in most cases to favor the free flow of information. California, on the other hand, adhering to common law privacy, has been fairly liberal in recognizing and protecting the right of privacy even where it conflicts with a matter of legitimate public interest.⁵¹

Only a few cases have arisen thus far involving television and the right of privacy. The leading one appears to be *Gautier v. Pro Football Inc.*⁵² The action was commenced under the New York Civil Rights Act, Section 51. The plaintiff was a producer of trained animal acts

⁴⁵ *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918).

⁴⁶ *Binns v. Vitagraph Co. of America*, 201 N.Y. 51, 103 N.E. 1108 (1913).

⁴⁷ Sec. 51, NEW YORK CIVIL RIGHTS ACT requires a clear representation of a person, "at least approaching likeness."

⁴⁸ *Leavy v. Warner Bros. Pictures Inc.* 57 F. Supp. 40 (S. D. N. Y. 1944).

⁴⁹ *Freed v. Loew's Inc.* 175 Misc. 616, 24 N.Y.S. 2d 679 (1940); In *Merle v. Sociological Research Film Corp.* 116 App. Div. 376, 152 N.Y.S. 829 (1915), the defendant produced a motion picture entitled, "The Inside of the White Slave Traffic." One of the scenes showed a factory building upon which appeared the plaintiff's name and business. The court denied recovery: "Certainly where a man places his sign upon the outside of the building, he cannot claim that a person, who would otherwise have a right to photograph the building, is precluded from using the picture because the sign also appears on the picture."

⁵⁰ *Supra*, note 26.

⁵¹ *Supra*, note 9, §225c.

⁵² *Gautier v. Pro Football Inc.*, 278 App. Div. 431, 106 N.Y.S. 2d 553 (1951); *supra*, note 36; Note 26 ST. JOHN'S L. REV. 143 (1951); Note 3 SYRACUSE L. REV. 208 (1951).

and he and his acts performed between the halves of a professional football game, pursuant to a contract with the owner of the home team. The plaintiff formally objected to the inclusion of his act in the telecast, but the broadcasting company did telecast it. Plaintiff's name was in the description accompanying the telecast. The trial court found an invasion of plaintiff's privacy but the intermediate court reversed and maintained that the use of plaintiff's name and picture was not a use for trade or advertising purposes within the meaning of the statute. The statute is not intended to protect the value of one's business, but only to guard against injury to one's personality through unlawful invasion of the limited right of privacy according to this opinion. The court pointed out that:

"The extent of the impingement on plaintiff's privacy would in this case seem to be minimal. There was no substantial invasion of plaintiff's right to be let alone in telecasting an act voluntarily performed by plaintiff for pay before 35,000 spectators."⁵³

The opinion indicated that it was looking to precedents established in earlier privacy cases. This would appear to indicate that in New York at least, the previously announced precedents will be applied to television problems. However, at some points the language of the court might be interpreted as indicating a willingness to afford preferential treatment to television.⁵⁴ Such treatment could be justified on the ground that television is a new industry and needs encouragement.

Peterson v. KMTR Radio Corp., decided under California's common law right of privacy, arrived at the same result as the previous case. The plaintiffs, well-known aquatic stars performed at a charity benefit. Their contract with the promoter made no mention of television. Motion pictures of the performance were televised by the defendant. Plaintiffs alleged that this televising constituted an invasion of their privacy. The court, sustaining a demurrer without leave to amend, stated that:

"A performer or participant in a public, semi-public or private show or event where other persons attend, thereby waives his right of privacy so far as that performance or event is concerned."⁵⁵

Since the plaintiffs had contracted to perform before a "live" audience, they could not claim any "right to be let alone" as against a television broadcast of their performance.

In *Sharkey v. National Broadcasting Co.* a complaint by Jack Sharkey, former heavyweight boxing champion, was held to state a good cause of action under Section 51 of the New York Civil Rights

⁵³ *Ibid.*, 106 N.Y.S. 2d at p. 557 (1951).

⁵⁴ *Ibid.*

⁵⁵ *Peterson v. KMTR Radio Corp.*, 18 U.S.L. WEEK 2044 (Cal. July 7, 1949).

Act. Sharkey alleged that movies were taken of his boxing when he was champion nearly twenty years previous. These movies were televised recently by the defendant without Sharkey's permission. The court held that there was nothing in the complaint to show that the telecast was merely dissemination of news nor did it show on its face that plaintiff had so far restricted his right of privacy as to be without standing to challenge the unauthorized use of his name and picture for trade and advertising purposes.⁵⁶ Since the boxing match occurred about fifteen years prior to the broadcast, the court rejected the broadcasting company's contention that it was news. The *Sharkey* case, although having a different result, is not necessarily contrary to the *Gautier* and *Peterson* cases since the latter two cases involve the televising of a performer in a current action. The *Sharkey* case contains no discussion of the question of whether consent to the taking of motion pictures prior to the telecast operates as a consent to the televising of the motion pictures.

In another California case⁵⁷ the court denied an injunction to a professional boxer, where he alleged that his privacy would be invaded because the promoter was going to televise a match in which the boxer was to perform. The boxer was held to have waived his privacy even before he appeared by agreeing to participate in the match.

Some of the privacy problems that could arise appear easy of solution. Televising of participants in a public function is held to be permissible under a waiver of privacy theory. One who consents to appear in a televised audience participation show would appear to have clearly waived by implication any objection to being televised.⁵⁸ The televising of the entire audience at a public event does not give those in the audience any action because such an event is one in which there is a legitimate public interest. Also, from a practical viewpoint, it would be impossible to secure waivers from all those in attendance. If such waivers were required, these events could not be televised.⁵⁹

Television authorities can also protect themselves by: (1) Educating their cameramen to focus only on the primary subject matter to be telecast; (2) Making a discriminating choice of the subject matter to be telecast; (3) Securing written waivers wherever necessary, and (4) drafting contracts carefully so that all may know their rights as to privacy.⁶⁰

Since right of privacy problems are now appearing as a result of

⁵⁶ *Sharkey v. National Broadcasting Co. Inc.*, 93 F. Supp. 986 (S. D. N. Y. 1950); Note 23 A.L.R. 2d 294 (1952).

⁵⁷ *Chavez v. Hollywood Post No. 43, American Legion*, 16 U.S.L. WEEK 2362 (Cal. Feb. 3, 1948).

⁵⁸ Baylan, *Legal and Illegal Limitations on Television Programming*, 11 FED. COMM. B. J. 137 (1951).

⁵⁹ *Supra*, note 9, §226.

⁶⁰ *Ibid.*

television, the question may be asked, "What remedy, common law or statutory, appears best designed for all concerned?" Numerous legal commentators urge that the common law theory be extended to cover the right of privacy in all fields where this right might be infringed.⁶¹ They suggest that under the common law the approach may be more flexible and thus may be more readily adapted to individual fact situations. Where the statutory right exists, it has been strictly construed. The statutory right has for an advantage, however, a more standardized norm by which the public and the television industry both may be guided.

Due to the lack of litigation involving television, it is still questionable as to how far the precedents from analogous cases in other media will be applied to television by the courts although some courts have already done this.⁶² In applying these analogous cases it will be necessary to keep in mind the difference between television and other media as to scope, production methods and types of events depicted.⁶³ One commentator points out:

"As applied to television the nature of the cause of action (invasion of privacy) will be no different from what it has been in the past, but television broadcasters are in greater danger from such suits than the motion picture, radio, magazine or newspaper business because of the speed with which television films are used after production and the indiscriminating eye of the camera when broadcasts are live."⁶⁴

The right of privacy is based on public policy. This policy recognizes that, despite our complex society of today, each person still retains some of his individuality and privacy. Public policy also fosters and protects the free flow of news and information. It does so in order to encourage and aid the education and entertainment of our citizenry. Each case involving the right of privacy would seem to resolve itself into a clash between the private rights of the individual and the public rights to a free flow of news and information.

As we have seen, invasions of the right of privacy have created problems in other media of communication, similar to those now arising in television. Either through common law decisions or through legislative enactments, the solutions found to these problems in the majority of cases have been satisfactory to both the individual and the public. There is every reason to believe that similar solutions may be found also for current television problems.

J. JOSEPH CUMMINGS

⁶¹ *Supra*, note 9; Kacedan, *The Right of Privacy*, 12 BOSTON U. L. REV. 353 (1932); Note 43 HARV. L. REV. 297 (1929); Note 26 ILL. L. REV. 63 (1932).

⁶² *Supra*, notes 52, 55 and 56.

⁶³ *Supra*, note 37.

⁶⁴ *Supra*, note 58.