

IS INVASION OF PRIVACY A VIABLE CAUSE OF ACTION IN ARIZONA?: RETHINKING THE STANDARD

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INTRODUCTION

The recognition of a right to privacy protected by a separate cause of action is a recent development in tort law.¹ Although there has been considerable academic and judicial debate over whether there should be a right of privacy protected in tort,² most state jurisdictions recognize this tort in one form or another.³

The concept of invasion of privacy has received considerable attention by the courts in recent years, and the law in this area is still developing. With increasing encroachments on the right to privacy, such as electronic surveillance, drug and AIDS testing, and lie detector testing in employment situations, this tort is likely to receive even greater attention in the future.

Arizona recognizes invasion of privacy as a tort,⁴ but applies a stricter

1. See *infra* notes 7-26 and accompanying text for a discussion of the history of this tort. Although it will not be considered by this Note, in addition to a right of privacy grounded in tort, there is a constitutional right of privacy. This constitutional right is designed to protect individuals' privacy interests against improper actions of government officials, or in other words, where state action is involved. There is no right of privacy explicitly guaranteed by the Constitution, but in 1965 the Supreme Court held that a criminal law prohibiting or aiding the use of contraceptives violated a constitutional right of privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965). This "zone of privacy" encompasses not only the interests protected by the tort action discussed in this Note, but also protects the autonomy of the individual to make certain important personal decisions, generally relating to marriage, procreation, contraception, family relationships, child rearing, and education. See PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 866-67 (W. Keeton, 5th ed. 1984) [hereinafter PROSSER & KEETON].

Arizona also has a constitutional provision which guarantees a right of privacy. See A.R.S. CONST. art. II, § 8, which states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section does not give rise to a private cause of action. The provision was intended to have the same effect as the Fourth Amendment to the United States Constitution, which is to act as a prohibition on the state. *Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 563, 460 P.2d 666, 669 (1969). This provision has been applied mainly to searches and seizures by state officers. See, e.g., *State v. Ault*, 150 Ariz. 459, 724 P.2d 545 (1986); *State v. Bolt*, 142 Ariz. 260, 689 P.2d 543 (1984).

2. For a list of articles both pro and con see Harper, James & Gray, LAW OF TORTS § 9.5, 630 n.7 (2d ed. 1986). [hereinafter HARPER & JAMES].

3. See Libel Defense Resource Center, LDRC 50-STATE SURVEY 1987: CURRENT DEVELOPMENTS IN MEDIA LIBEL AND INVASION OF PRIVACY LAW (5th ed. 1987); and Kovner, *Recent Developments in Intrusion, Private Facts, False Light, and Commercialization Claims*, 2 COMMUNICATIONS LAW 1987, 281-439 (J. Goodale ed. 1987), for a state-by-state summary of privacy law.

4. *Reed v. Real Detective Publ. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945).

standard for recovery than most other jurisdictions that recognize this cause of action. Most jurisdictions apply the Restatement standard for recovery, which requires the plaintiff to prove that the defendant's conduct was "highly offensive to a reasonable person."⁵ Arizona requires that a plaintiff prove that the defendant's conduct was "extreme and outrageous."⁶

This Note will review the history and development of the invasion of privacy tort. After examining the Restatement treatment of the tort, the possible defenses to the tort will be discussed with particular attention focused on Arizona's adoption of the stricter standard of recovery mentioned previously. This Note will argue that the Restatement standard for recovery better serves Arizona tort law. After demonstrating that the Restatement standard and the existing defenses to privacy actions provide sufficient protection against frivolous lawsuits while also enabling plaintiffs to seek judicial redress for serious invasions of privacy, this Note concludes that the stricter standard currently required in Arizona should be discarded in favor of the Restatement standard.

HISTORY AND DEVELOPMENT OF THE TORT OF INVASION OF PRIVACY

The recognition of a "right to privacy" is a relatively new development in tort law. Although prior to 1890 there was no express recognition of the right, either in England or America, a few decisions suggested affording protection to a right of privacy.⁷ The idea of a "right to privacy" already existed in legal concepts and precedents in several areas of the common law.⁸ Judge Cooley appears to have coined the phrase "the right to be let alone," an idea which preceded the actual development of the right to privacy.⁹

The right to privacy as an independent legal concept dates back to an influential 1890 law review article written by Samuel D. Warren and Louis D. Brandeis.¹⁰ The authors originally conceptualized the right to privacy as an already existing common law right which embodied protections for each individual's "inviolable personality."¹¹ They examined decisions from many traditional areas of the common law, such as contracts, torts, property, trusts, and copyright,¹² and concluded that these cases were actually based upon a broader principle entitled to separate recognition which they called the right to privacy.

Warren and Brandeis' concern with the issue of privacy was triggered by the growing abuses of the press in an era of "yellow journalism."¹³ They

5. See *infra* notes 31, 41, 49 and accompanying text.

6. See *infra* notes 112-51 and accompanying text.

7. See, e.g., *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881) (intrusion upon childbirth); *Lord Byron v. Johnston*, 2 Mer. 29, 35 Eng. Rep. 851 (1816) (authorship of spurious poem attributed to plaintiff).

8. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 3 (1979).

9. T. COOLEY, *TREATISE ON THE LAW OF TORTS* 29 (1st ed. 1879): "Personal Immunity—the right of one's person may be said to be a right of complete immunity; the right to be let alone."

10. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For an excellent discussion of Warren and Brandeis' article, see generally Glancy, *supra* note 8.

11. Glancy, *supra* note 8, at 2.

12. For examples of various decisions see Prosser, *Privacy*, 48 CAL. L. REV. 383, 384 nn. 4-5 (1960); PROSSER & KEETON, *supra* note 1, § 117, at 849 nn. 5-6.

13. Warren & Brandeis, *supra* note 10, at 196.

contended that a remedy based upon the right of privacy was essential to protect private individuals from unjustifiable infliction of mental distress.¹⁴

Initially, courts accepted this new tort slowly, with only a few courts permitting recovery.¹⁵ In 1902, however, the New York Court of Appeals rejected the right of privacy in *Roberson v. Rochester Folding Box Co.*,¹⁶ a case involving publication of the picture of a young woman who never consented to her picture being used to advertise the defendant's brand of flour. As a result of the ensuing public controversy over this decision,¹⁷ New York passed a statute which recognized a limited form of the right to privacy.¹⁸ In 1905, the Georgia Supreme Court rejected the *Roberson* decision and recognized the existence of a right of privacy.¹⁹

Until the 1930s, controversy over whether to recognize a right to privacy continued, and authority was divided. The Restatement of Torts recognized a cause of action for interference with privacy in 1939, with the adoption of section 867.²⁰ This marked the first time the Restatement recognized an individual's interest in maintaining privacy as a cause of action independent from older bases of recovery, such as contract or property theories.²¹

The protection provided by section 867 was limited, depending on the circumstances.²² Liability was imposed only if the defendant should have known that a person of ordinary sensibilities would be justified in feeling seriously hurt or offended by his conduct, and where the intrusion into the plaintiff's privacy went "beyond the limits of decency."²³ The damages allowed by this section, whether nominal, compensatory, or punitive, were to

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

Id.

14. Prosser, *supra* note 12, at 384.

15. See PROSSER & KEETON, *supra* note 1, § 117, at 850 n.10.

16. 171 N.Y. 538, 64 N.E. 442 (1902).

17. See PROSSER & KEETON, *supra* note 1, § 117, at 850.

18. 1903 N.Y. LAWS 132, §§ 1-2, currently codified in N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976) (prohibiting the use for commercial purposes of the name, portrait, or picture of any living person without his consent).

19. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (defendant made use of the plaintiff's name and likeness, as well as a spurious testimonial, to advertise insurance).

20. See the Restatement which states: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT OF TORTS § 867 (1939).

21. RESTATEMENT OF TORTS § 867 comments a and b (1939).

22. For example, under the Restatement, § 867, two groups of people who are subject to legitimate public interest, public figures and criminals, are subject to some public scrutiny unless it is defamatory or exceeds the bounds of fair comment. RESTATEMENT OF TORTS § 867 comment c (1939).

23. RESTATEMENT OF TORTS § 867 comment d (1939).

be awarded in the same way as general damages for defamation.²⁴ This suggested a strong parallel between the torts of defamation and invasion of privacy.

Warren and Brandeis were primarily concerned with the invasion of the press upon a person's private life when they proposed a right of privacy. As the law of privacy has developed, what has actually emerged from the decisions is not merely one tort, but a complex of four. Professor William L. Prosser analyzed the decisions recognizing a right of privacy and classified the tort into four separate causes of action.²⁵ They are: 1) intrusion upon a person's seclusion or solitude, or into his private life; 2) publicity given to embarrassing private facts about a person; 3) publicity which places a person in a false light before the public; and 4) appropriation of a person's name or likeness for the advantage of the defendant. Today, a majority of jurisdictions recognize a right of privacy in one form or another.²⁶

RESTATEMENT TREATMENT OF THE RIGHT OF PRIVACY

In 1977, the American Law Institute added a new chapter to the Restatement dealing with the invasion of privacy and deleted the old, more general rules.²⁷ The new Restatement version is patterned after Prosser's classification of the tort into four categories,²⁸ but does not exclude or limit the possibility of other forms of tort liability developing in the future.²⁹

Intrusion

The first category recognized by the Restatement is intrusion upon seclusion.³⁰ The Restatement standard recognizes a cause of action for inva-

24. *Id.*

25. Prosser, *supra* note 12, at 389.

26. *See supra* note 3.

27. RESTATEMENT (SECOND) OF TORTS § 652A-I (1977).

28. Prosser, *supra* note 12. Each of the four forms of invasion involve interference with the interest of the individual in leading a private life, free from intrusion by others. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977), which provides:

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- (2) The right of privacy is invaded by
 - (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
 - (b) appropriation of the other's name or likeness, as stated in § 652C; or
 - (c) unreasonable publicity given to the other's private life, as stated in § 652D; or
 - (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

29. *See also* RESTATEMENT (SECOND) OF TORTS § 652A comment c, which states:

Other forms may still appear, particularly since some courts, and in particular the Supreme Court of the United States, have spoken in very broad general terms of a somewhat undefined "right of privacy" as a ground for various constitutional decisions involving indeterminate civil and personal rights. These and other references to the right of privacy, particularly as a protection against various types of governmental interference and the compilation of elaborate written or computerized dossiers, may give rise to the expansion of the four forms of tort liability for invasion of privacy listed in this Section or the establishment of new forms.

30. RESTATEMENT (SECOND) OF TORTS § 652B (1977). The form of invasion of privacy contemplated by this section consists solely of "intentional interference with his [plaintiff's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be *highly offensive to a reasonable man.*" *Id.* at comment a (emphasis added).

sion of privacy where the conduct complained of would be highly offensive to a reasonable person.³¹ The defendant is liable for the intrusion itself rather than for any publicity given to the plaintiff or to his affairs.³² The defendant is subject to liability only when he has intruded into a private place or has disturbed the plaintiff's seclusion. There is no liability for reading public documents or observing the plaintiff in a public place.³³

Commercial Appropriation

The second form of invasion of privacy recognized by the Restatement is appropriation of name or likeness.³⁴ The interest recognized by this form of invasion is similar to a property right in that the interest protected is an individual's interest in the exclusive use of his name or likeness, as far as its use may provide some benefits to the individual.³⁵ This tort is often called "commercial appropriation" because it involves the appropriation and use of the plaintiff's name or likeness for a commercial purpose, such as advertising the defendant's business or product.³⁶ The tort is not usually limited to commercial uses, but applies when the defendant makes use of the plaintiff's name or likeness for his own purposes, even though the benefit may not be a pecuniary one.³⁷ To recover under this tort, it is not sufficient to merely bring the name or image of the plaintiff before the public.³⁸ To be liable, the defendant must have appropriated the "reputation, prestige, social or commercial standing, public interest, or other values of the plaintiff's name or likeness" for his own benefit.³⁹

Private Facts

The third category of invasion of privacy is publicity given to private life.⁴⁰ The public disclosure of private facts can be distinguished from defa-

31. See RESTATEMENT (SECOND) OF TORTS § 652D, which provides: "One who gives publicity to a matter concerning the private life of another is *subject to liability* to the other for invasion of his privacy, if the matter publicized is of a kind that (a) *would be highly offensive to a reasonable person . . .*" (Emphasis added). And see § 652E: "One who gives publicity to a matter concerning another that places the other before the public in a false light is *subject to liability* to the other for invasion of his privacy, if (a) the false light in which the other was placed would be *highly offensive to a reasonable person . . .*" (Emphasis added).

32. RESTATEMENT (SECOND) OF TORTS § 652B comment b (1977).

33. *Id.* at comment c.

34. RESTATEMENT (SECOND) OF TORTS § 652C (1977). This section provides: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

35. RESTATEMENT (SECOND) OF TORTS § 652C comment a (1977).

36. RESTATEMENT (SECOND) OF TORTS § 652C comment b (1977).

37. *Id.* However, statutes in some states have limited the liability to commercial uses only. See, e.g., CAL. CIV. CODE § 3344 (West Supp. 1988); FLA. STAT. ANN. § 540.08 (West 1972); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); OKLA. STAT. ANN. tit. 21 §§ 839.1-2 (West 1983); UTAH CODE ANN. §§ 45-3-1 to 45-3-6 (Supp. 1981); VA. CODE ANN. § 18.2-216.1 (1982); WISC. STAT. ANN. § 895.50 (West 1983).

38. RESTATEMENT (SECOND) OF TORTS § 652C comment d (1977).

39. RESTATEMENT (SECOND) OF TORTS § 652C comment c (1977).

40. RESTATEMENT (SECOND) OF TORTS § 652D states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

mation's requirement of mere publication. While publication in the defamation context involves any communication by the defendant to a third person, "public disclosure" requires a publication which is substantially certain to reach the public and become a matter of public knowledge.

In this category of invasion of privacy, publication of a true statement may create liability. Truthful publication lies at the heart of this tort, for it permits recovery for publicity given to private facts about someone when the facts are not newsworthy and their publication would be highly offensive to most people.⁴¹ This tort is based on the idea that individuals have a right to be left alone, and to be free of publicity about those parts of their lives that are private.⁴²

The Restatement's position on this tort is based on the leading case in this area, *Sidis v. F-R Publishing Corp.*⁴³ Sidis was a former child prodigy who desired to avoid the public gaze and live as privately as possible. In 1940, the *New Yorker* published a brief biographical sketch of him, describing his present whereabouts and activities. The Second Circuit Court of Appeals held that the article contained nothing which would be objectionable to any normal person, but recognized that "revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."⁴⁴

Constitutional limitations narrow the scope of this tort considerably. Because of free speech and free press concerns, first amendment restrictions on tort actions involving false and defamatory publications also apply to publication of private facts.⁴⁵

False Light

The fourth and final form of invasion of privacy recognized by the Restatement is publicity placing a person in a false light.⁴⁶ The statements must be false in order to recover under this tort, and in this way "false light" is very similar to defamation. In some cases publicity will be defamatory and the plaintiff can sue on either, or both, tort theories.⁴⁷ However, under

This is the form of invasion of privacy originally formulated by Brandeis and Warren. For a discussion of the kind of information Brandeis and Warren thought should be protected and the standard they proposed, see Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 295 (1983).

41. RESTATEMENT (SECOND) OF TORTS § 652D (1977). See *infra* note 60 for a discussion of the concept of newsworthiness.

42. See, e.g., Warren & Brandeis, *supra* note 10.

43. 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

44. *Id.* at 809.

45. See RESTATEMENT (SECOND) OF TORTS § 652D, Special Note on Relation of § 652D to the First Amendment to the Constitution (1977). See also *infra* notes 82-94 and accompanying text.

46. RESTATEMENT (SECOND) OF TORTS § 652E (1977). This section states:

[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

47. It is important to note, however, that although the plaintiff can state a claim for either defamation or invasion of privacy, or both, there can be but one recovery for a single publication. See RESTATEMENT (SECOND) OF TORTS § 652E comment b (1977).

the false light theory, it is not essential that the plaintiff be defamed, as long as the publicity is unreasonable and objectionable and attributes false characteristics to the plaintiff.⁴⁸ When the plaintiff is placed in a false position before the public, false light invasion of privacy affords a remedy distinct from defamation.

The standard for recovery under the false light theory is "highly offensive to a reasonable person," which is the same as the standard for intrusive invasion of privacy and publication of private facts.⁴⁹ To qualify as a false light invasion of privacy, the publication must involve "a major misrepresentation of [the plaintiff's] character, history, activities or beliefs," rather than merely minor or unimportant inaccuracies.⁵⁰

LIMITATIONS ON PRIVACY ACTIONS

The law of privacy provides certain limitations which serve to protect defendants from infringement upon their right of free speech and from unwarranted lawsuits for less serious invasions of privacy. These protections exist both in constitutional and common law, and vary depending upon which privacy tort is at issue.

Several commentators have urged that the common law limitations on defamation actions should also apply to invasion of privacy actions.⁵¹ In-

48. RESTATEMENT (SECOND) OF TORTS § 652E comment b (1977).

49. RESTATEMENT (SECOND) OF TORTS § 652E (a) (1977).

50. RESTATEMENT (SECOND) OF TORTS § 652E comment c (1977).

51. See, e.g., Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L.L. REV. 329, 333 (1979); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1206, 1274-75 (1976). Examples of restrictions on defamation actions include the requirement that special damages must be proved, and the limitations imposed by retraction statutes. Where the publicity is also defamatory, so that the plaintiff has a cause of action for either tort, a strong argument can be made that the same restrictions which apply to defamation should also apply to false light cases. RESTATEMENT (SECOND) OF TORTS § 652E comment e (1977).

A recent summary of privacy law reports that most courts now apply common law defenses or privileges applicable to defamation claims to actions for false light invasion of privacy. Kovner, *supra* note 3, at 341. For example, the Maryland Court of Appeals applied the same standards to both defamation and invasion of privacy in *Phillips v. Washington Magazine Inc.*, 58 Md. App. 30, 472 A.2d 98, *cert. denied*, 300 Md. 89, 475 A.2d 1201 (1984). A West Virginia court applied the same privilege defenses available in defamation actions to invasion of privacy actions in *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W.Va. 1984).

Arizona has recognized several absolute and conditional privileges which apply to defamation, but no Arizona case has applied these limitations to invasion of privacy actions. Absolute privileges recognized by Arizona include: statements made in the context of judicial or legislative proceedings and administrative or executive functions of government, *Bailey v. Superior Court*, 130 Ariz. 366, 368, 636 P.2d 144, 146 (Ct. App. 1981); statements of public officials acting in the course of official duty specifically directed by law, *Wyatt v. Ruck Constr. Inc.*, 117 Ariz. 186, 190, 571 P.2d 683, 687 (Ct. App. 1977); statements in judicial pleadings related to the subject of the inquiry, *Drummond v. Stahl*, 127 Ariz. 122, 125, 618 P.2d 616, 620 (Ct. App. 1980), *cert. denied*, 420 U.S. 967 (1981); testimony of witnesses at judicial proceedings, *Todd v. Cox*, 20 Ariz. App. 347, 348-49, 512 P.2d 1234, 1236-37 (1973). Conditional privileges recognized by Arizona include: statements made pursuant to a legal, moral, or social duty, *Aspell v. American Contract Bridge League*, 122 Ariz. 399, 409, 595 P.2d 191, 192-93 (Ct. App. 1979); statements in editorials published in the public interest, *Klahr v. Winterble*, 4 Ariz. App. 158, 169-70, 418 P.2d 404, 415-16 (1966); statements made by union officials pursuant to official duties, *Ross v. Duke*, 116 Ariz. 298, 301-02, 569 P.2d 240, 243-44 (Ct. App. 1976); statements contained in public records kept pursuant to statute, *Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242, 1246-47 (1984); statements made to others who share a common interest in the subject matter thereof, *Hirsch v. Cooper*, 153 Ariz. 454, 458, 737 P.2d 1092, 1096 (Ct. App. 1986).

deed, Warren and Brandeis thought that the action for invasion of privacy should be subject to any privilege which would justify the publication of libel or slander.⁵² The Restatement adopted this idea, and applied the same absolute and qualified privileges available in defamation actions to actions for invasion of privacy.⁵³ In addition, the Supreme Court has applied at least some of the same constitutional restrictions to false light cases that have been applied to defamation actions.⁵⁴

Common Law Defenses

a. Consent

The primary defense which can be asserted in a privacy action is consent. Once established, this defense allows a defendant to avoid liability for an invasion of a plaintiff's privacy. Consent may be either expressly given or implied.⁵⁵ Consent can be implied either from the plaintiff's conduct or from a contractual arrangement.⁵⁶ As in any other tort, the plaintiff's consent provides an absolute privilege, and will bar recovery.⁵⁷ However, if the invasion exceeds the scope of the consent given by the plaintiff, the consent will not permit the defendant to escape liability.⁵⁸

b. Newsworthiness

Warren and Brandeis recognized a privilege for the press to publish "matter which is of public or general interest."⁵⁹ This privilege, generally termed the "newsworthiness" defense, actually encompasses two classes of newsworthy subjects privileged under privacy law. These are public figures and matters of legitimate public interest.⁶⁰

Whether a matter is properly deemed to be of public concern depends partly on whether the plaintiff is a public figure. The Restatement has recognized two types of public figures, voluntary and involuntary, and considers them both to be legitimate subjects of public interest.⁶¹ A voluntary public

52. Warren & Brandeis, *supra* note 10, at 216.

53. See RESTATEMENT (SECOND) OF TORTS §§ 652F-652G (1977).

54. For a discussion of the constitutional restrictions that apply to false light, see *infra* notes 82-94 and accompanying text.

55. Prosser, *supra* note 12, at 419.

56. *Id.* at 420.

57. *Id.* at 419.

58. *Id.* at 420. See RESTATEMENT (SECOND) OF TORTS § 652F comment b (1977).

59. Warren & Brandeis, *supra* note 10, at 214.

60. What is of legitimate public concern has come to be equated with "newsworthiness." Although this is a difficult concept, the Ninth Circuit has adopted the following standard:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern.

Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). This standard was first proposed in RESTATEMENT (SECOND) OF TORTS § 652D (Tentative Draft No. 21, 1975) comment f. It was subsequently included in the final draft of the Restatement at RESTATEMENT (SECOND) OF TORTS § 652D comment h (1977).

61. RESTATEMENT (SECOND) OF TORTS § 652D comments e, f and h (1977).

figure is "one who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment. . . ."62 Public officials are considered voluntary public figures, and include all elected officials and government employees who have substantial responsibility for the conduct of government affairs.⁶³

An involuntary public figure is an individual who did not seek or consent to publicity, but through his own conduct has become a legitimate subject of public interest.⁶⁴ These individuals may have voluntarily thrust themselves into the public eye, or may have been involuntarily thrust before the public eye as a result of events beyond their control.

Public figure status has been limited to some degree by *Gertz v. Robert Welch, Inc.*⁶⁵ In *Gertz*, the Supreme Court stated that, "absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."⁶⁶ This type of public figure is sometimes referred to as a "limited purpose" public figure.⁶⁷

Information concerning either voluntary or involuntary public figures which is of legitimate public interest is not limited to the particular events that first arouse public interest. Legitimate public interest may extend beyond matters made public to facts about the individual which would otherwise remain private.⁶⁸

Under common law, if a fact is found not to be of legitimate public concern, the defendant will be held liable only if the publication is found to be offensive to ordinary sensibilities.⁶⁹ The protection given to a plaintiff's privacy interest is "relative to the customs of the time and place,"⁷⁰ and a cause of action arises only when a reasonable person would justifiably feel seriously offended by the publicity.⁷¹ It is the community's rather than the victim's notions of decency that are at stake.⁷²

The "public figure" and "public interest" doctrines act as qualified privileges which immunize a defendant from liability as long as abuse of the privilege is not present.⁷³ Proof of a lack of newsworthiness is not only nec-

62. RESTATEMENT (SECOND) OF TORTS § 652D comment e (1977).

63. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). In Arizona, the following categories of persons have been held to be "public officials": student senators, *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966); police officers, *Rosales v. City of Eloy*, 122 Ariz. 134, 593 P.2d 688 (Ct. App. 1979); teachers, *Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978); and narcotics agents, *Hansen v. Stoll*, 130 Ariz. 454, 636 P.2d 1236 (Ct. App. 1981).

64. RESTATEMENT (SECOND) OF TORTS § 652D comment f (1977).

65. 418 U.S. 323 (1974).

66. *Id.* at 352.

67. Phillips, *Defamation, Invasion of Privacy, and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77, 82 (1975).

68. RESTATEMENT (SECOND) OF TORTS § 652D comment h (1977).

69. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (1977).

70. RESTATEMENT (SECOND) OF TORTS § 652D comment c (1977).

71. *Id.*

72. *See Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d. Cir.), *cert. denied*, 311 U.S. 711 (1940).

73. Newsworthiness may not always constitute a complete defense, if the facts publicized are so

essary under the common law, as defined by the Restatement, but also has a constitutional dimension.

Constitutional Limitations

a. Newsworthiness

The common law has long recognized that when matters of legitimate public concern are published, there is no invasion of privacy. This is no longer just a rule of common law torts, but of constitutional law as well.

The Supreme Court concluded in *Cox Broadcasting v. Cohn*⁷⁴ that there can be no recovery for disclosure of and publicity to facts that are a matter of public concern.⁷⁵ The result in the private facts context turns on whether the facts are public or private. If the information is found to be public, then publication is privileged. If the facts which were publicized were found to be private, the plaintiff must prove that the publication was not of legitimate public concern.⁷⁶

Another defense closely related to newsworthiness is the privilege to publish information found in the public record. In *Cox*, the Supreme Court held that the first and fourteenth amendments do not permit states to impose sanctions for the publication of truthful information contained in official records open to public inspection.⁷⁷ This privilege extends to allow publication of information which serves the public interest, as long as it is obtained legally and is of some public significance.⁷⁸

The Supreme Court has explicitly avoided deciding whether there is any blanket constitutional protection for publishing truthful information if it is not contained in the public record.⁷⁹ Some case law suggests extending of the fair reporting privilege to encompass the reporting of public events or

intimate and unwarranted as to outrage the community's notions of decency. In *Sidis*, the Second Circuit reserved judgement on this question.

The Arizona Supreme Court adopted both the consent and newsworthiness defenses in *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 304, 162 P.2d 133, 138 (1945). The court stated: [Invasion of privacy] does not exist if there has been consent to publication, or where the plaintiff has become a public character, and thereby waived his right to privacy, nor in the ordinary dissemination of news and events, nor in connection with the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit.

Id.

74. 420 U.S. 469 (1975). In *Cox*, a state statute provided that the names of rape victims were not to be published. The defendant obtained the names from public documents available at the trial and published them.

75. *Id.* at 496.

76. See *Cox*, 420 U.S. at 496. The burden of proof is so difficult to satisfy that some commentators have said that the newsworthiness defense to liability for publication of private facts has "swallowed the rule." See, e.g., Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326, 335-36 (1966); Hill, *supra* note 51, at 1255.

77. 420 U.S. 469, 491 (1975).

78. In *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97, 103 (1979), the Supreme Court held that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.

79. The Court stated:

Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments . . . it is appropriate to focus on the narrower interface between press and privacy

news,⁸⁰ but this has not generally been accepted. Under this "neutral reportage" privilege, when a prominent person or organization makes serious charges against a public figure or official, the accurate and disinterested reporting of those charges should be protected regardless of the publisher's private views on the validity of the charges. The rationale for this is that the accusations of a prominent person are newsworthy just because they are made, regardless of their truth.⁸¹

b. First Amendment Restrictions

In addition to the common law defenses to invasion of privacy actions, certain constitutional restrictions have been applied. The Supreme Court has held that the first amendment protections applicable in defamation actions apply to invasion of privacy actions as well. In *New York Times v. Sullivan*,⁸² the Court held that a defamatory falsehood concerning a public official fell within the protection of the first amendment, and that in order to recover for libel, the public official must show that the defendant published the falsehood "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁸³ In *Time, Inc. v. Hill*,⁸⁴ the Supreme Court extended first amendment protection to a false light invasion of privacy claim, and held that the privacy action could not succeed without a showing by the plaintiff of actual malice by the publisher

that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records

Cox, 420 U.S. at 491.

80. See *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

81. The privilege of neutral reportage was accepted as a defense by the Arizona Superior Court in *Marley v. Investigative Reporters & Editors, Inc.*, No. C 365969, Maricopa County Superior Court, June 8, 1979. No higher court in Arizona has reviewed the applicability of this standard, so its status in Arizona is unclear.

82. 376 U.S. 254 (1964).

83. *Id.* at 280.

The United States Supreme Court recently extended the protection of the *New York Times* actual malice standard to claims for intentional infliction of emotional distress. *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (claim for intentional infliction of emotional distress arising from the publication of an ad parody which portrayed claimant as having engaged in a drunken incestuous rendezvous with his mother in an outhouse). *Hustler* held that public figures and public officials cannot recover for intentional infliction of emotional distress caused by the publication of offensive material without showing that the publication contained a false statement made with actual malice, *i.e.*, "with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 882.

This decision appears to adopt an additional requirement for recovery for intentional infliction of emotional distress where an offensive publication is involved. The Court stated that where the publication cannot reasonably be interpreted to state actual facts about a public figure, the interest in protecting that public figure from emotional distress is not sufficient to deny first amendment protection to the speech involved. *Id.*

As a result of this decision, plaintiffs are prevented from circumventing the first amendment by pleading intentional infliction of emotional distress. There are intentional infliction cases where there is no publication involved, and therefore the first amendment is not applicable. It is clear, however, that where the injury is caused by the publication of offensive material, first amendment protection applies, whether the tort is libel, invasion of privacy, or intentional infliction of emotional distress.

84. 385 U.S. 374 (1967) (Review of a play portrayed the play as a reenactment of the actual experiences of the Hill family, who were held captive in their home, even though the play incorporated several elements of pure fiction).

where matters of public interest were involved.⁸⁵

*Gertz v. Robert Welch, Inc.*⁸⁶ relaxed the *Times-Sullivan* standard where private individuals are involved. *Gertz* left the "actual malice" requirement intact for public figures, but only required a private individual to prove negligence.⁸⁷ *Gertz* abandoned the requirement that the matter be of general or public interest as the determinative factor for deciding whether to apply the *Times-Sullivan* "actual malice" standard to defamation litigation brought by private individuals.⁸⁸ Instead, the Court concentrated on whether the plaintiff was a public or private figure.

The *Gertz* decision calls into question the continued applicability of the *Hill* decision. The Supreme Court has left open whether, in view of *Gertz*, "a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual, . . . or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases."⁸⁹ Courts that have considered this question have been divided. Some courts have held that *Gertz* limits the actual malice standard to false light claims asserted by a public figure, while other courts have held that *Hill* should apply until modified by the Supreme Court.⁹⁰

A more recent case, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁹¹ apparently has revived the "public concern" test abandoned by *Gertz*.⁹² *Dun & Bradstreet* focuses not only on the public or private status of the plaintiff, but also on whether the nature of the issue is of public or private concern.⁹³ Applying the logic of *Dun & Bradstreet* to false light invasion of privacy would leave the requirement of "actual malice" intact for public figures and apply the *Gertz* principles only to false light actions dealing with matters of public interest.⁹⁴

HISTORY AND DEVELOPMENT OF INVASION OF PRIVACY AS A TORT IN ARIZONA

Arizona case law recognizes the four invasion of privacy torts. Most jurisdictions that recognize the four invasion of privacy torts⁹⁵ appear to have adopted the Restatement's "highly offensive to a reasonable person"

85. *Id.* at 387-88.

86. 418 U.S. 323 (1974).

87. The Court gave two policy justifications for affording different treatment to private and public individuals. First, public figures have greater access to the media, and thus have a greater opportunity to counteract false statements. *Gertz*, 418 U.S. at 344. Second, public figures have voluntarily exposed themselves to greater risk of injury from the publication of false statements. *Id.* at 345.

88. *Id.* at 346.

89. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 n.19 (1975).

90. See Kovner, *supra* note 3, at 343-45 for a list of decisions. States that apply the actual malice standard to false light invasion of privacy actions include Arkansas, California, Illinois, Indiana, Iowa, Kentucky, Maryland, Ohio, Pennsylvania, and Texas. See Libel Defense Resource Center, *supra* note 3, at 861-64.

91. 472 U.S. 749 (1985).

92. Entin, *Privacy, Emotional Distress, and the Limits of Libel Law Reform*, 38 MERCER L. REV. 835, 849 (1987).

93. *Dun & Bradstreet*, 472 U.S. at 755-61.

94. Entin, *supra* note 92, at 849-50.

95. See *supra* note 3.

standard.⁹⁶ Arizona courts, on the other hand, have applied a much stricter standard. Rather than following the standard set forth in the Restatement, these decisions have held that where the damage alleged is emotional distress, the defendant's conduct must support a claim for intentional infliction of emotional distress; that is, it must be "extreme and outrageous" conduct.⁹⁷ This is a much stricter standard than the Restatement standard, and, as discussed below, has severe implications for the future of invasion of privacy actions in Arizona.

Recognition of the Tort

Arizona first recognized a cause of action for invasion of the right to

96. The following states have either explicitly adopted the Restatement standard or have applied a similarly worded standard to one or more of the four privacy torts: Alabama: Phillips v. Smalley Maintenance Services, 435 So. 2d 705 (Ala. 1983); Arkansas: Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980); California: Forsher v. Bugliosi, 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980); Connecticut: Jonap v. Silver, 1 Conn. App. 550, 474 A.2d 800 (1984); District of Columbia: Vassiliades v. Garfinkel's, Brooks Bros., 492 A.2d 580 (D.C. App. 1985); Florida: Cape Publications v. Hitchner, 514 So. 2d 1136 (Fla. App. 1987) (private facts); Georgia: Williams v. Coffee County Bank, 168 Ga. App. 149, 308 S.E.2d 430 (1983) (private facts); Idaho: Baker v. Burlington Northern, 99 Idaho 688, 587 P.2d 829 (1978) (private facts), and O'Neil v. Schuckardt, 112 Idaho 472, 733 P.2d 693 (1986) (intrusion); Illinois: Melvin v. Burling, 141 Ill. App. 3d 786, 490 N.E.2d 1011 (1986) (intrusion); Iowa: Stessman v. American Blackhawk Broadcasting Co., 416 N.W.2d 685 (Iowa 1987) (intrusion); Kansas: Werner v. Kliever, 238 Kan. 289, 710 P.2d 1250 (Kan. 1985); Kentucky: McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882 (Ky. 1981); Louisiana: Roshto v. Hebert, 439 So. 2d 428 (La. 1983) (private facts), and Jaubert v. Crowley Post-Signal, 375 So. 2d 1386 (La. 1979) (false light); Maine: Berthiaume's Estate v. Pratt, 365 A.2d 792 (Me. 1976) (false light); Maryland: Klipa v. Board of Educ., 54 Md. App. 644, 460 A.2d 601 (1983); Michigan: Hall v. Citizens Ins. Co. of America, 141 Mich. App. 676, 368 N.W.2d 250 (1985) (intrusion), Ledsinger v. Burmeister, 114 Mich. App. 12, 318 N.W.2d 558 (1982) (private facts), and Reed v. Ponton, 15 Mich. App. 423, 166 N.W.2d 629 (1968) (false light); Missouri: Buller v. Pulitzer Pub. Co., 684 S.W.2d 473 (Mo. App. 1984) (false light), and Brown v. Mullarkey, 632 S.W.2d 507 (Mo. App. 1982) (intrusion); Nebraska: NEB. REV. STAT. §§ 20-201 to 20-211, 25-804.01 (Supp. 1979); Nevada: Montesano v. Las Vegas Review Journal, 9 Media L. Rep. 2267 (BNA) (Nev. Sup. Ct. 1983); New Jersey: Bisbee v. John C. Conover Agency, 186 N.J. Super. 335, 452 A.2d 689 (1982); North Carolina: Hall v. Post, 85 N.C. App. 610, 355 S.E.2d 819 (1987) (private facts); Ohio: Killilea v. Sears, Roebuck & Co., 27 Ohio App. 3d 163, 499 N.E.2d 1291 (1985) (private facts); Oklahoma: McCormack v. Oklahoma Pub. Co., 613 P.2d 737 (Okla. 1980); Oregon: Dean v. Guard Pub. Co., 73 Or. App. 656, 699 P.2d 1158 (1985) (false light), Flowers v. Bank of America Nat'l. Trust and Savings Ass'n., 67 Or. App. 791, 679 P.2d 1385, *review denied*, 297 Or. 601, 687 P.2d 795 (Ct. App. 1984) (private facts), and Martinez by Martinez v. Democrat-Herald Pub. Co., 64 Or. App. 690, 699 P.2d 818 (1983) (commercial appropriation); Pennsylvania: Harris v. Easton Pub. Co., 335 Pa. Super. 141, 483 A.2d 1377 (1984) and Vogel v. W.T. Grant Co., 458 Pa. 124, 327 A.2d 133 (1974); Rhode Island: R.I. GEN. LAWS § 9-1-28.1 (1985); South Dakota: Baldwin v. First Nat'l. Bank of Black Hills, 362 N.W.2d 85 (S.D. 1985) (intrusion), and Montgomery Ward v. Shope, 286 N.W.2d 806 (S.D. 1979) (private facts); Texas: Texas Dept. of Mental Health & Mental Retardation v. Texas State Employees Union, 708 S.W.2d 498 (Tex. App. 1986) (intrusion); Washington: Eastwood v. Cascade Broadcasting Co., 42 Wash. App. 88, 708 P.2d 1216 (Wash. App. 1985) (false light), and Mark v. Seattle Times, 96 Wash. 2d 473, 635 P.2d 1081 (1981) (intrusion); West Virginia: Crump v. Beckley Newspapers, 320 S.E.2d 70 (W.Va. 1984) (false light); Wisconsin: Wis. STAT. § 895.50 (1979) (except false light).

97. Arizona cases which have applied the intentional infliction "extreme and outrageous conduct" standard to invasion of privacy claims include: Cluff v. Farmer's Ins. Exch., 10 Ariz. App. 560, 460 P.2d 666 (1969); Davis v. First Nat'l. Bank of Arizona, 124 Ariz. 458, 605 P.2d 37 (Ct. App. 1979); Duhammel v. Star, 133 Ariz. 558, 653 P.2d 15 (Ct. App. 1982); Valencia v. Duval Corp., 132 Ariz. 348, 645 P.2d 1262 (Ct. App. 1982); Creamer v. Raffety, 145 Ariz. 34, 699 P.2d 908 (Ct. App. 1985); Hirsch v. Cooper, 153 Ariz. 454, 737 P.2d 1092 (Ct. App. 1986); Godbehere v. Phoenix Newspapers, 155 Ariz. 389, 746 P.2d 1319 (Ct. App. 1987), *rev. granted*, CV-87-9379-PR (January 14, 1988).

privacy in *Reed v. Real Detective Publishing Co.*⁹⁸ The particular privacy action recognized by *Reed* was appropriation of the plaintiff's name or likeness for the defendant's advantage.

The defendant in *Reed* was charged with the publication and circulation of an alleged libelous statement, as well as the unauthorized publication and circulation of the plaintiff's photograph.⁹⁹ The plaintiff alleged that the use of his photograph, published in connection with a magazine story of a crime, but not as news, violated his right of privacy and subjected him to ridicule, mental pain and annoyance.¹⁰⁰

The Arizona Supreme Court, noting that a majority of jurisdictions supported the existence of a legal right of privacy independent of the common rights of property, contract, reputation, and physical integrity, concluded that this view was sound and adopted the doctrine of privacy in Arizona.¹⁰¹ The court then stated that to recover for an invasion of the right of privacy, there must be an injury to the plaintiff's feelings, such as mental anguish and distress caused by the publication.¹⁰² The plaintiff does not need to prove special damages, and damages for mental anguish alone may be recovered.¹⁰³ The test used in *Reed* is remarkably similar to the current Restatement standard of "highly offensive to a reasonable person."¹⁰⁴

Development of a Stricter Standard of Recovery

Subsequent Arizona decisions recognized Professor Prosser's classification of the tort into four separate causes of action,¹⁰⁵ and applied an increasingly strict standard for recovery.¹⁰⁶ These decisions recognized that the Restatement's treatment of invasion of privacy is concerned with the hurt feelings or emotional distress suffered by the plaintiff, and intends to com-

98. 63 Ariz. 294, 162 P.2d 133 (1945). Before *Reed*, the Arizona Supreme Court had never considered whether an action for invasion of privacy existed in Arizona. *Id.* at 304, 162 P.2d at 143.

99. *Reed*, 63 Ariz. at 297, 162 P.2d at 135.

100. *Id.*

101. *Id.* at 305, 162 P.2d at 138. The court enumerated the following principles:

[I]t is an incident of the person, and not of property. It is a personal action which does not survive the death of the injured party. It does not exist if there has been consent to a publication, or where the plaintiff has become a public character, and thereby waived his right to privacy, nor in the ordinary dissemination of news and events, nor in connection with the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit.

Id. at 304, 162 P.2d at 138.

102. *Id.* at 305-06, 162 P.2d at 139.

103. *Id.* at 306, 162 P.2d at 139. Unlike libel or slander, the gravamen of the cause of action is not injury to the character or reputation of the plaintiff, affecting his standing in the eyes of others, but is injury to the plaintiff's feelings caused by the publication. The court cited with approval the test for the action of wrongful invasion of privacy stated in 41 AM. JUR. 924, *Privacy*, § 12 (1936):

In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law.

Id. at 305, 162 P.2d at 139.

104. See RESTATEMENT (SECOND) OF TORTS §§ 652B-E (1977). For a discussion of the Restatement standard, see *supra* notes 31, 41, 49 and accompanying text.

105. *Cluff v. Farmer's Ins. Exch.*, 10 Ariz. App. 560, 563, 460 P.2d 666, 669 (1969) (citing Prosser, *supra* note 12). See also *Rutledge v. Phoenix Newspapers*, 148 Ariz. 555, 715 P.2d 1243 (Ct. App. 1986); *Davis v. First Nat'l. Bank of Arizona*, 124 Ariz. 458, 605 P.2d 37 (Ct. App. 1979).

106. See cases listed *supra* note 97.

pensate for injured feelings rather than for harm to reputation. However, these decisions have also uniformly held that where the damage alleged is emotional distress, the defendant's conduct must support a claim for intentional infliction of emotional distress,¹⁰⁷ which requires extreme and outrageous conduct.¹⁰⁸ This is a much stricter standard than the one adopted in the Restatement or the standard that has been adopted by the majority of states that have recognized this cause of action.¹⁰⁹

Application of the Stricter Standard to Intrusion

In *Cluff v. Farmer's Insurance Exchange*¹¹⁰ the Arizona Court of Appeals first applied the intentional infliction of emotional distress standard, as enumerated in *Savage v. Boies*,¹¹¹ to the tort of invasion of privacy.¹¹²

107. See *Cluff*, 10 Ariz. App. at 564, 460 P.2d at 670; *Davis*, 124 Ariz. at 462-63, 605 P.2d at 41-42; *Duhammel*, 133 Ariz. at 561-62, 653 P.2d at 18-19; *Valencia*, 132 Ariz. at 350, 645 P.2d at 1264; *Creamer*, 145 Ariz. at 45, 699 P.2d at 919; *Rutledge*, 148 Ariz. at 558, 715 P.2d at 1246; *Hirsch*, 153 Ariz. at 460, 737 P.2d at 1098; *Godbehere*, 155 Ariz. at —, 746 P.2d at 1320.

One case which appears to be an exception to the rule that a plaintiff must prove intentional infliction of emotional distress to recover for invasion of privacy is *Fernandez v. United Acceptance Corp.*, 125 Ariz. 459, 610 P.2d 461 (Ct. App. 1980). There, the plaintiff had entered into a retail installment contract to obtain a health spa membership. The contract was subsequently assigned to United Acceptance Corporation, which attempted to collect the monthly payments from the plaintiff. United Acceptance made repeated phone calls to plaintiff's place of employment, her residence, her neighbors and her husband; sent written notices; left messages at plaintiff's office; and threatened to repossess her car. Plaintiff and her husband filed a complaint against United Acceptance alleging invasion of privacy as a result of these actions.

In affirming the trial court's finding that the conduct of United Acceptance constituted an invasion of plaintiff's privacy, the court of appeals recognized the principle that a creditor has a right to take reasonable measures to pursue his debtor and to persuade payment even though such steps may result in some invasion of the debtor's privacy. However, the court also recognized that unreasonable measures taken by a creditor in attempting to collect a debt may be an invasion of privacy, and in this case the conduct of United Acceptance did constitute such an invasion.

Although the court did recognize that in Arizona, the gravamen of an action for invasion of privacy is injury to the feelings of the plaintiff, and the mental anguish and distress caused thereby—the definition of the tort given in *Reed*—the court in *Fernandez* did not cite any of the cases applying intentional infliction of emotional distress to invasion of privacy or follow the rule that in order to recover for invasion of privacy, a plaintiff must prove intentional infliction of emotional distress. There appears to be no reason for the court's failure to follow its rule, since this is an intrusive invasion of privacy claim.

108. For a recent summary of the development of intentional infliction of emotional distress as a tort in Arizona, and Arizona's definition of extreme and outrageous conduct, see Comment, *Lucchesi v. Frederic N. Stimmell, M.D., LTD.; Letting the Jury Decide the Question of Extreme and Outrageous Conduct for the Tort of Intentional Infliction of Emotional Distress*, 29 ARIZ. L. REV. 361, 367-69 (1987).

109. Most states that recognize invasion of privacy as a tort have adopted the Restatement, or a similarly worded standard. For a list of these states, see *supra* note 96. See generally Libel Defense Resource Center and Kovner, *supra* note 3.

110. 10 Ariz. App. 560, 460 P.2d 666 (1969).

111. 77 Ariz. 355, 272 P.2d 349 (1954). *Savage* adopted the 1948 Restatement test, which basically required an intention to cause severe emotional distress. In *Savage*, the Arizona Supreme Court quoted RESTATEMENT OF TORTS, § 48 (1948 supplement): "An intention to cause severe emotional distress exists when the act is done for the purpose of causing the distress or with knowledge on the part of the actor that severe emotional distress is substantially certain to be produced by his conduct." *Id.* at 358, 272 P.2d at 351.

This is a curious result. Although *Savage* was the first Arizona case to adopt the tort of intentional infliction of emotional distress, the Restatement standard at that time was not as strict as the current Restatement standard, which existed at the time of *Cluff*. To recover for intentional infliction of emotional distress under the current Restatement, the plaintiff must be the victim of "extreme and outrageous" conduct. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

In its discussion of the intentional infliction of emotional distress claim, the *Cluff* court quoted

The plaintiff in *Cluff* alleged that an insurance adjuster had willfully, intentionally, and maliciously inflicted mental suffering upon her to cajole her into settling a wrongful death claim of her son.¹¹³ The *Cluff* court concluded that the plaintiff's complaint failed to state a claim for relief for intentional infliction of emotional distress because the conduct alleged failed to meet the test of extreme and outrageous conduct.¹¹⁴ However, the court also concluded that the defendant's conduct fell into the category of intrusion upon the plaintiff's seclusion, solitude, or private affairs, a form of invasion of privacy that Arizona courts had not yet recognized.¹¹⁵

The court noted that this category of intrusion was strikingly similar to the tort of intentional infliction of mental distress. The basis of the wrong in both torts is the infliction of mental distress or suffering and not merely a trespassory intrusion, and the mental anxiety suffered must be more severe than merely hurt feelings.¹¹⁶ Thus, the court recognized a cause of action for intrusion upon the plaintiff's seclusion or solitude or into his private affairs, but concluded that the safeguards afforded under the tort of intentional infliction of mental distress should be applied.

In *Davis v. First National Bank of Arizona*,¹¹⁷ the Arizona Court of Appeals first applied the current "extreme and outrageous conduct" test to invasion of privacy.¹¹⁸ The plaintiffs brought an action for intentional

the 1965 Restatement standard. However, when it decided the invasion of privacy claim, the court stated "[w]e are of the opinion that the safeguards afforded under the tort of intentional infliction of emotional distress as enumerated in *Savage v. Boies* . . . should be retained." *Cluff*, 10 Ariz. App. at 564, 460 P.2d at 670 (emphasis added). Thus it appears that the *Cluff* court adopted the current Restatement standard for intentional infliction of emotional distress claims, and the old Restatement standard for intrusive invasion of privacy claims.

Both the old and the new Restatement standards differ from how Arizona currently applies the standard. In Arizona, to sustain an action for intentional infliction of emotional distress, the conduct complained of must fall "at the very extreme edge of possible conduct." *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 258, 619 P.2d 1032, 1035 (1980).

112. *Cluff*, 10 Ariz. App. at 564, 460 P.2d at 670. Two more recent Arizona decisions which applied the intentional infliction of emotional distress standard to intrusive invasion of privacy are *Valencia v. Duval Corp.*, 132 Ariz. 348, 645 P.2d 1262 (Ct. App. 1982) (claim for invasion of privacy against an employer for contacting plaintiff's personal physician and requesting information concerning a condition for which plaintiff sought a leave of absence failed because the conduct complained of was not extreme and outrageous) and *Creamer v. Raffety*, 145 Ariz. 34, 699 P.2d 908 (Ct. App. 1985) (claim for invasion of privacy resulting from a strip search failed because plaintiff did not meet the test of "extreme and outrageous conduct"). For a further discussion of *Valencia* see *infra* note 176.

113. *Cluff*, 10 Ariz. App. at 561-62, 460 P.2d at 667-68.

114. *Id.* at 562-63, 460 P.2d at 668-69.

115. *Id.* at 563-64, 460 P.2d at 669-70.

116. *Id.* at 564, 460 P.2d at 670. For support of this position, the Arizona Court of Appeals quoted Prosser:

One cannot fail to be aware, in reading privacy cases, of the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored. *Taking intrusion first, the gist of the wrong is clearly the intentional infliction of mental distress*, which is now in itself a recognized basis of tort liability. Where such mental disturbance stands on its own feet, the courts have insisted upon extreme outrage, rejecting all liability for trivialities, and upon genuine and serious mental harm, attested by physical illness, or by the circumstances of the case. But once 'privacy' gets into the picture, and the fact of intrusion is added, such guarantees apparently are no longer required.

Id. (quoting Prosser, *Privacy*, *supra* note 12, at 422) (emphasis added).

117. 124 Ariz. 458, 605 P.2d 37 (Ct. App. 1979).

118. *Id.* at 463, 605 P.2d at 42. The test applied in *Davis* was whether defendant's conduct was

infliction of emotional distress and invasion of privacy against First National Bank of Arizona for attempting to rescind a loan contract and restrict coverage under a disability policy and for requesting and obtaining confidential medical records and medical information about Ancil Davis without his consent.¹¹⁹ The court concluded that while the conduct complained of by the plaintiffs may have been annoying, it was not extreme or outrageous, and therefore the trial court properly granted summary judgment for the defendants on the claim for intentional infliction of emotional distress.¹²⁰ The court then turned to the invasion of privacy claim and cited *Cluff*¹²¹ for the proposition that this claim could only succeed if there was evidence of all of the elements inherent in a claim for intentional infliction of emotional distress.¹²² The plaintiffs failed to establish that the bank's conduct in obtaining the medical information was extreme and outrageous and therefore could not recover for invasion of privacy.¹²³

Application of the Stricter Standard to False Light

The *Davis* decision involved application of the intentional infliction of emotional distress standard to an allegation of invasion of privacy through intrusion into plaintiffs' private affairs. In *Duhammel v. Star*,¹²⁴ the Arizona Court of Appeals applied the same safeguards enumerated in *Davis* to a privacy claim which alleged that publicity placed the plaintiff in a false light in the public eye.¹²⁵

Star, a Scottsdale police officer, arrested Duhammel after responding to a noise complaint. Duhammel filed a complaint against Star, alleging false arrest, assault and battery, and civil rights violations, all stemming from the incident at Duhammel's residence. Star filed a counterclaim, alleging libel, slander, intentional infliction of emotional distress, and invasion of privacy. As the basis of these allegations, Star alleged that Duhammel made false statements of police brutality against Star by leading a demonstration at the Scottsdale City Council building, by addressing the city council and accusing Star, and by making the statements to reporters.

The court found that according to *Davis*, an invasion of privacy claim cannot be maintained unless the party can plead a claim for intentional in-

"so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965)). Compare this test with that used in *Savage*, 77 Ariz. at 358, 272 P.2d at 351, which required an intention to cause severe emotional distress, but lacked a conduct requirement.

119. *Davis*, 124 Ariz. 458, 459, 605 P.2d 37, 38.

120. *Id.* at 462, 605 P.2d at 41.

121. 10 Ariz. App. 560, 460 P.2d 666 (1969).

122. *Davis*, 124 Ariz. at 463, 605 P.2d at 42.

123. *Id.*

124. 133 Ariz. 558, 653 P.2d 15 (Ct. App. 1982).

125. *Id.* at 561, 653 P.2d at 18. Recently, the Arizona Court of Appeals denied recovery under a false light claim because the alleged conduct did not reach the required extreme and outrageous level in *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092 (1986) (claim by plaintiff ophthalmologist that another ophthalmologist made comments about plaintiff's medical skills and wrote a letter to the local ethics committee regarding plaintiff's ethical conduct, resulting in denial of plaintiff's application for membership in ophthalmological society and harm to plaintiff's medical practice).

fiction of emotional distress.¹²⁶ The court determined that the plaintiff in *Duhammel* had not met the test of "extreme and outrageous conduct" necessary to state such a claim.¹²⁷ The rationale given by the court for applying the "extreme and outrageous conduct" test to a false light invasion of privacy claim was that "[o]therwise, there would exist little if any reason to distinguish this particular tort from libel or slander."¹²⁸

Application of the Stricter Standard to Private Facts

*Rutledge v. Phoenix Newspapers*¹²⁹ was the first case to which the intentional infliction of emotional distress standard was applied to a claim for invasion of privacy based on the disclosure of private facts about an individual. *Rutledge* involved claims of negligent and intentional infliction of emotional distress and invasion of privacy based on public disclosure of private facts and false light publication stemming from an article published by Phoenix Newspapers regarding the plaintiff's litigation history.¹³⁰

First, the court concluded that the plaintiff's claim for intentional infliction of emotional distress failed because the publication of true facts taken from the public record regarding a controversial lawsuit of widespread public interest did not demonstrate the type of extreme and outrageous conduct necessary to recover under this action.¹³¹ The court then compared the invasion of privacy claims based on public disclosure of private facts with false light invasion of privacy in order to determine whether the requirements of intentional infliction of emotional distress should be extended to an action for invasion of privacy based on publicity given to private life.¹³² These torts differ from intrusive invasion of privacy in that they are not exclusively concerned with the harm resulting from emotional distress, but also "the interest of reputation, and move into the field of defamation."¹³³

126. *Duhammel*, 133 Ariz. at 561, 653 P.2d at 18.

127. *Id.*

128. *Id.* at 562, 653 P.2d at 19. A few states have decided that the tort of false light is so similar to libel that they will not recognize it. These states include Minnesota, New York, North Carolina, Virginia, and Wisconsin. Although state courts have held to the contrary, the 6th circuit held that Ohio doesn't recognize false light. *Angellotta v. ABC*, 820 F.2d 806 (6th Cir. 1987).

Although no other states appear to have equated invasion of privacy with intentional infliction of emotional distress as Arizona has done, several states have found false light to be so similar to libel that plaintiffs are required to comply with statutory requirements imposed on libel plaintiffs. Two recent examples are California, in *Fellows v. National Enquirer Inc.*, 42 Cal. 3d 234, 228 Cal. Rptr. 215, 721 P.2d 97 (1987); and Washington, in *Eastwood v. Cascade Broadcasting*, 42 Wash. App. 88, 708 P.2d 1216 (1985).

129. 148 Ariz. 555, 715 P.2d 1243 (Ct. App. 1986).

130. *Id.* at 556, 715 P.2d at 1244. At the time the article was published, the son of the appellants was involved in a controversial lawsuit against Arizona State University football coach Frank Kush.

131. *Id.* at 557, 715 P.2d at 1245.

132. *Id.* The court noted that *Cluff* required a showing of outrageous conduct for intrusive invasion of privacy in order to prevent plaintiffs from using that tort theory to circumvent the standards necessary to state a claim for intentional infliction of emotional distress. *Id.*

133. *Rutledge*, 148 Ariz. at 557, 715 P.2d at 1245, quoting Prosser, *supra* note 12 at 422. The court stated:

While these privacy theories and defamation may provide somewhat overlapping protection against the invasion of one's reputational interest, we think it is important to recognize that the underlying objective of all four of the generally recognized invasion of privacy theories is to provide protection from 'interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes,

The court concluded that the requirements of intentional infliction should also be required elements of a claim for invasion of privacy based on publicity given to private life.¹³⁴ As a result, since the *Rutledge* plaintiffs' claim for intentional infliction of emotional distress failed, their privacy claims failed also.

Present Status of Invasion of Privacy in Arizona

The most recent Arizona case to examine the showing necessary to recover under an invasion of privacy action is *Godbehere v. Phoenix Newspapers*,¹³⁵ which involved a claim for libel and false light publication. Godbehere, Sheriff of Maricopa County, and numerous employees of the Sheriff's office claimed that Phoenix Newspapers, Inc. and fourteen of its editors and reporters published false articles that damaged the plaintiffs' reputations, impaired their ability to find other employment, or to obtain satisfactory wages and retirement benefits, and subjected them to emotional distress and mental anguish. The articles in question stated that the plaintiffs participated in illegal activities, staged narcotic arrests solely for publicity purposes, illegally misused public funds and resources, illegally arrested citizens, committed brutality, were accused of illegal conduct by the U.S. Attorney, and were generally incompetent in the profession of law enforcement.¹³⁶

The trial court granted the defendants' motion to dismiss the invasion of privacy claims, but denied dismissal of the libel claims. The plaintiffs appealed the dismissal of the false light claim and urged the court to adopt the Restatement standard, which provides that the false light in which a plaintiff is placed must be "highly offensive" to a reasonable person.¹³⁷

The primary issue considered by the *Godbehere* court was whether the proper standard for a showing of invasion of privacy should be the Restatement standard of "highly offensive" or the Arizona standard of "extreme and outrageous conduct."¹³⁸ The court examined the Arizona line of cases from *Reed*¹³⁹ to *Rutledge*,¹⁴⁰ and compared them to the Restatement position.¹⁴¹ The court concluded that *Duhammel*¹⁴² and *Rutledge*,¹⁴³ which re-

ears and publications of others,' RESTATEMENT (SECOND) OF TORTS § 652A comment b, at 377 (1977), and to allow recovery for the mental distress occasioned by the interference. See RESTATEMENT § 652H. For this reason, we believe the requirements of intentional infliction of emotional distress, properly incorporated into an action for the invasion of privacy based on false light in *Duhammel*, should also be required elements of a claim for invasion of privacy based on publicity given to private life.

Id. at 557-58, 715 P.2d at 1245-46.

134. *Id.*

135. 155 Ariz. 389, 746 P.2d 1319 (Ct. App. 1987), *rev. granted*, CV-87-0379-PR (January 14, 1988).

136. *Godbehere*, 155 Ariz. at —, 746 P.2d at 1320.

137. RESTATEMENT (SECOND) OF TORTS § 652E (1977). See *supra* note 46 for text of this section.

138. *Godbehere*, 155 Ariz. at —, 746 P.2d at 1321.

139. 63 Ariz. 294, 162 P.2d 133 (1945).

140. 148 Ariz. 555, 715 P.2d 1243 (Ct. App. 1986).

141. The key section which interested the court in its analysis was § 652E. See *supra* notes 46 and 137 and accompanying text.

142. 133 Ariz. 558, 653 P.2d 15 (Ct. App. 1982).

quired a showing that defendant's conduct was extremely outrageous,¹⁴⁴ were consistent with *Reed*.¹⁴⁵

The court did not articulate why it found these cases to be consistent. The *Godbehere* court apparently equated the cause of action for invasion of privacy with the cause of action for intentional infliction of emotional distress because *Reed* found the gist of the cause of action for invasion of privacy to be mental anguish and distress caused to the plaintiff.¹⁴⁶ The court of appeals affirmed the trial court's determination that the complaint failed to state an action for false light invasion of privacy,¹⁴⁷ declined to adopt the Restatement position, and reaffirmed prior decisions which require a plaintiff to plead a claim of intentional infliction of emotional distress in order to recover for tortious invasion of privacy.¹⁴⁸

Currently in Arizona, the showing necessary for recovery under intrusive invasion of privacy,¹⁴⁹ public disclosure of private facts,¹⁵⁰ and false light invasion of privacy¹⁵¹ is proof of the elements necessary to prove intentional infliction of emotional harm. The only category not requiring proof of "extreme and outrageous conduct" for recovery is commercial appropriation.

Arizona appears to be the only jurisdiction using the intentional infliction of emotional distress standard to determine invasion of privacy. Requiring extreme and outrageous conduct to recover under an invasion of privacy claim means the tort of intentional infliction of emotional distress has swallowed the invasion of privacy tort, and privacy has become merely a subset of intentional infliction of emotional distress.

ARIZONA TORT LAW WOULD BE BETTER SERVED BY THE RESTATEMENT STANDARD FOR INVASION OF PRIVACY

The Arizona Court of Appeals has justified using the same standard for invasion of privacy and intentional infliction of emotional distress claims on the basis of the similarity between the torts of intentional infliction and invasion of privacy, and the similarities between false light invasion of privacy and defamation.¹⁵² Unfortunately, these torts also have many differences, and the court of appeals' approach to them can leave plaintiffs without a claim under the Arizona standard, although one would exist under the Restatement. The major problem is that each tort serves different purposes and

143. 148 Ariz. 555, 715 P.2d 1243 (Ct. App. 1986).

144. *Duhammel*, 133 Ariz. at 561, 653 P.2d at 18; *Rutledge*, 148 Ariz. at 558, 715 P.2d at 1246.

145. 63 Ariz. 294, 162 P.2d 133 (1945).

146. *Godbehere*, 155 Ariz. at —, 746 P.2d at 1321.

147. *Id.* at 392, 746 P.2d at 1322.

148. *Id.* at 391, 746 P.2d at 1321.

149. *Cluff v. Farmer's Ins. Exch.*, 10 Ariz. App. 560, 460 P.2d 666 (1969); *Davis v. First Nat'l Bank of Ariz.*, 124 Ariz. 458, 605 P.2d 37 (Ct. App. 1979); *Valencia v. Duval Corp.*, 132 Ariz. 348, 645 P.2d 1262 (Ct. App. 1982); *Creamer v. Raffety*, 145 Ariz. 34, 699 P.2d 908 (Ct. App. 1985).

150. *Rutledge v. Phoenix Newspapers*, 148 Ariz. 555, 715 P.2d 1243 (Ct. App. 1986); *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092 (Ct. App. 1986).

151. *Duhammel v. Star*, 133 Ariz. 558, 653 P.2d 15 (Ct. App. 1982); *Rutledge v. Phoenix Newspapers*, 148 Ariz. 555, 715 P.2d 1243 (Ct. App. 1986); *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092 (Ct. App. 1986).

152. *Cluff*, 10 Ariz. App. at 564, 460 P.2d at 670; *Duhammel*, 133 Ariz. at 562, 653 P.2d at 19.

interests and is affected differently by truth and degree of publicity. The following discussion will analyze the reasoning behind the Arizona decisions and show how policy considerations would be better served by the Restatement's "offensive to the reasonable person" standard for invasion of privacy claims, and that the Restatement standard would maintain full redress for plaintiffs.

Invasion of Privacy Distinguished From Intentional Infliction of Emotional Distress

Two main reasons have been advanced by the court for imposing the intentional infliction of emotional distress standard on privacy actions. First, the court has argued that because the tort of invasion of privacy is based on infliction of mental distress, it is substantively similar to intentional infliction of emotional distress, and therefore the same standards that apply to intentional infliction of emotional distress should apply to invasion of privacy.¹⁵³ The court's purpose apparently has been to safeguard defendants against unwarranted lawsuits.¹⁵⁴ The court has also suggested that imposing the stricter standard would prevent plaintiffs from circumventing standards necessary to state a claim for intentional infliction of emotional distress by pleading invasion of privacy instead.¹⁵⁵

Although correct in its conclusion that the torts are similar, the court of appeals has failed to consider how the torts differ. Intentional infliction of emotional distress and invasion of privacy are distinct torts, developed to protect different interests, and should not be confused with each other. Intentional infliction of emotional distress has been developed primarily to provide plaintiffs with a means of recovery where otherwise tortious extreme misconduct caused emotional rather than physical injury.¹⁵⁶ Prior to this development, damages for mental suffering had to be tied to physical harm resulting from a traditional tort, but gradually the courts accepted inten-

153. *Cluff*, 10 Ariz. App. at 564, 460 P.2d at 670.

154. *Duhammel*, 133 Ariz. at 561, 653 P.2d at 18.

155. *Rutledge*, 148 Ariz. at 557, 715 P.2d at 1245. Ironically, while the Arizona Court of Appeals is concerned with preventing plaintiffs from circumventing restrictions on intentional infliction of emotional distress, at least one commentator has expressed just the opposite concern. In an article discussing the application of certain libel law reforms to privacy and intentional infliction of emotional distress claims, Professor Jonathan L. Entin made the following observation about intentional infliction of emotional distress:

This new cause of action protects the interest in freedom from mental disturbance. As noted earlier, however, both defamation and invasion of privacy actions permit recovery for psychic harm. Although emotional distress differs in certain respects from the other theories, there is no reason to allow plaintiffs—whether public officials, public figures, or private figures—who cannot or will not vindicate their interests through libel or privacy suits to circumvent whatever constitutional restrictions apply to such litigation by denominating their grievances as claims for intentional infliction of emotional distress.

Entin, *supra* note 92, at 857.

The recent Supreme Court decision in *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988), appears to obviate the problem envisioned by Professor Entin, at least with respect to public figures and public officials. In *Hustler*, the Court held that the first and fourteenth amendments "prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact made with actual malice." *Hustler*, 108 S. Ct. at —. See also *supra* note 83.

156. See generally PROSSER & KEETON, *supra* note 11, § 12, at 56-57.

tional infliction of emotional distress as a separate cause of action¹⁵⁷ designed to protect the interests of freedom from mental disturbance.¹⁵⁸

Conversely, the tort of invasion of privacy was developed to provide redress for invasions of a plaintiff's "right to be let alone."¹⁵⁹ The primary purpose of this tort is to protect against particular types of intrusions on a person's solitude or seclusion.¹⁶⁰ The harm suffered is mental distress, but the focus of the tort is on the act causing the distress rather than the distress itself.

This provides a crucial distinction. Intentional infliction of emotional distress focuses on the extreme nature of the conduct, regardless of the context or circumstances under which the conduct occurred, but a privacy action turns specifically on whether the act occurred in the context of invading privacy. Invasion of privacy and intentional infliction of emotional distress are substantively different torts, and should be treated differently. Therefore, the Arizona Court of Appeals' argument for applying the same standard to both torts must fail.

Even if the torts were thought to be substantively similar, the court's argument for applying the same standard to both intentional infliction and invasion of privacy would not work. Although invasion of privacy can be considered a subset of intentional infliction of emotional distress because it is based on the infliction of mental distress, recognition of the tort as a separate cause of action necessarily implies that the two torts have different elements, and should be treated differently. If intentional infliction of emotional distress and invasion of privacy are so similar that they contain no elements that are different, there is no reason to recognize them as separate torts. Recognition of invasion of privacy by the courts as a separate cause of action can be viewed as recognition that, as a matter of law, any case that falls within the definition of invasion of privacy is a case that meets the standard for intentional infliction of mental distress. Invasion of privacy *is* outrageous and *does* cause severe mental distress. Arizona courts have recognized invasion of privacy as a separate cause of action and therefore must also recognize that it is different from intentional infliction of emotional distress. If this distinction is going to be maintained, the two torts must be treated differently.

Invasion of Privacy Distinguished From Defamation

A second reason advanced by the court for adopting the "extreme and outrageous" standard is that false light invasion of privacy so closely resembles defamation that if the intentional infliction of emotional distress standard were not imposed, there would be no reason to distinguish this tort from libel or slander.¹⁶¹ The court failed to articulate why there would be no reason to distinguish false light invasion of privacy from libel and slander.

157. *Id.*

158. Entin, *supra* note 92, at 857.

159. Warren & Brandeis, *supra* note 10, at 193, 195 (quoting T. COOLEY, LAW OF TORTS 29 (2d ed. 1888)).

160. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

161. *Duhammel*, 133 Ariz. at 562, 653 P.2d at 19.

The implication of this argument is that if a lesser standard were used, defamation and false light would be indistinguishable. However, defamation and invasion of privacy can be distinguished.¹⁶² Despite their similarities, particularly in false light cases, the nature of the interests protected by each tort differs markedly.

Defamation involves injury to reputation, while privacy actions concern injuries to emotions and mental suffering.¹⁶³ The injury in a defamation action does not result merely from bringing a fact to public attention, but from the damage to a person's reputation caused by the disclosure of false information.¹⁶⁴ Privacy, on the other hand, does not protect reputation, but instead protects the individual's interest in maintaining the privacy of certain facts. Public disclosure of such facts can injure a person whether or not the disclosure affects the individual's reputation. As one commentator put it, "the injury is to man's interest in maintaining a haven from society's searching eye."¹⁶⁵

A major difference between defamation and invasion of privacy in general is the role played by truth. In defamation cases, only false statements are actionable, and truth is a defense.¹⁶⁶ In privacy law true statements are actionable, except for false light cases, and it is the truth of the facts published that creates the invasion of privacy.¹⁶⁷ The main reason that false light invasion of privacy is equated with defamation is that, as in defamation, false statements are required in order to recover under this tort.¹⁶⁸ However, in a false light case, where falsehood is present, a plaintiff does not have to show the same reputational injury that is the basis of a defamation action. It is generally enough to show that some matter has been made public, or that a right of privacy was invaded, in an unreasonable or unjustified manner.¹⁶⁹

Finally, the degree of publicity required in privacy actions is greater than in defamation actions. In a defamation suit, it suffices that the defamatory statement was made to only one other person. In an invasion of privacy action, the publicity must have been widespread in order for the plaintiff to recover.¹⁷⁰

162. Many commentators have discussed the similarities and differences between the two torts. See, e.g., Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962); Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 958-59 (1968); Phillips, *supra* note 67, at 98; Emerson, *supra* note 51, at 333.

163. *Reed*, 63 Ariz. at 306, 162 P.2d at 139; *Godbehere*, 155 Ariz. at —, 746 P.2d at 1320. See also *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 87 (W.Va. 1984), citing *Goodrich v. Waterbury Republican-American*, 188 Conn. 107, 128 n.19, 448 A.2d 1317, 1329 n.19 (1982).

164. Nimmer, *supra* note 162, at 958.

165. *Id.*

166. Emerson, *supra* note 51, at 333.

167. *Id.*

168. See *supra* text accompanying note 48.

169. Phillips, *supra* note 67, at 98.

170. Note, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 132 (1979).

Possible Implications of Applying the Intentional Infliction Standard to Invasion of Privacy

On the surface, the court of appeals' approach seems reasonable. Both invasion of privacy and intentional infliction of emotional distress permit recovery for the plaintiff's emotional distress caused by the defendant's actions. The false light and private facts varieties of invasion of privacy are similar to defamation in that they involve a communication of information to the public which results in harm to the plaintiff. However, the court did not consider all the ramifications of applying the stricter standard to invasion of privacy.

One problem with requiring a plaintiff to prove intentional infliction of emotional distress in order to recover for invasion of privacy is that there may be instances where the conduct involved does not rise to the level necessary to meet the "extreme and outrageous" standard, but the invasion of privacy is something for which recovery would be appropriate. It is possible to conceive of situations where a plaintiff's privacy is invaded in such a way that intentional infliction of emotional distress cannot be proved because the defendant's conduct is not extreme and outrageous enough to satisfy the test, and where the plaintiff is also unable to state a claim under defamation law because the information publicized is true, yet most people would agree that the plaintiff's privacy was invaded, and recovery should be allowed. An example of such a situation might be where an adoptive child acquires and publishes information about the biological parents which the parents assumed was confidential.¹⁷¹ A similar problem could occur in employment situations, where employees are increasingly required to submit to lie detector tests and drug and AIDS virus screening.

APPLICATION OF THE LIMITATIONS ON PRIVACY ACTIONS TO THE ARIZONA PRIVACY CASES

The Arizona Court of Appeals failed to consider the available limitations on privacy actions when it applied the intentional infliction of emotional distress standard to the tort of invasion of privacy. When the court chose to determine privacy issues by using the standard of "extreme and outrageous conduct" instead of the Restatement's "ordinary person" standard, it did so with the intent of achieving certain goals.¹⁷²

In most if not all of the cases, it was unnecessary for the court to apply the extreme and outrageous conduct standard in order to achieve the desired result. The court could have reached the same conclusion using another theory. More specifically, the court's goals could have been achieved by applying the Restatement standard in combination with the constitutional and common law privileges and defenses available to defendants. The privileges and defenses would help to prevent unwarranted lawsuits. Invasion of pri-

171. A twist on this situation occurred in a recent North Carolina case. A newspaper was sued by the adoptive mother and daughter for invasion of privacy for publishing an account of a successful effort by the girl's natural mother to locate the child she abandoned some years earlier. Hall v. Post, 85 N.C. App. 610, 355 S.E.2d 819 (1987).

172. See *supra* notes 153-55 and accompanying text.

vacy under the Restatement requires proof of enough distinct elements to prevent plaintiffs' attempts to circumvent intentional infliction of emotional distress claims by pleading invasion of privacy.

Common Law Limitations

In several of the Arizona cases in which the privacy claim failed under the extreme and outrageous standard, the court could have found no invasion of privacy to begin with, either because the plaintiff consented to the invasion or because the invasion was not a serious intrusion on the plaintiff's privacy. In *Cluff*¹⁷³ for example, the alleged invasion of privacy consisted of an insurance adjustor contacting a person to whom his company was possibly liable in order to obtain a settlement of the claim after the person had retained counsel and requested that all further contact be made through the attorney.

Although this may have been unpleasant, it is doubtful that the conduct of the insurance agent was sufficient to constitute an actionable invasion of privacy under the Restatement's requirement that the invasion be substantial and highly offensive to the ordinary man. There are two reasons for this conclusion. First, the Restatement permits some reasonable attempt to contact an individual regarding business debts,¹⁷⁴ and second, reasonable investigation of insurance claims is privileged.¹⁷⁵ Therefore, the claim would have failed under the Restatement standard and, even if it had not, the defendant had a privilege defense. This would have satisfied the court's goals of preventing the plaintiff from circumventing intentional infliction of emotional distress. Not only was the defendant's conduct not extreme or outrageous enough to satisfy the requirements for intentional infliction of emotional distress, but the defendant's actions did not satisfy the requirements of a privacy claim under the Restatement either.

Other defenses available under common law would also prevent the unwarranted lawsuits feared by the court. The consent defense, for example, would have achieved the same result that the court reached in *Davis*.¹⁷⁶

173. 10 Ariz. App. 560, 460 P.2d 666 (1969). See *supra* notes 110-16 and accompanying text for background on this case.

174. The Restatement would not impose liability for one instance, or even several, where the defendant knocks at the plaintiff's door and demands payment of a debt. Instead, it requires repetition of such frequency and persistence that it amounts to a substantial burden to the plaintiff's existence. See RESTATEMENT (SECOND) OF TORTS § 652B comment d (1977).

175. PROSSER & KEETON, *supra* note 11, at 868 n.3. No Arizona privacy case has explicitly recognized this privilege, but it is reasonable to assume it is applicable in Arizona. Although the defendant in *Cluff* was not demanding payment of a debt, his conduct would probably be privileged as a reasonable investigation of an insurance claim.

176. 124 Ariz. 458, 605 P.2d 37 (Ct. App. 1979). See *supra* notes 119-23 and accompanying text for a discussion of the facts of this case.

Another case that failed to state an adequate claim for invasion of privacy is *Valencia v. Duval Corp.*, 132 Ariz. 348, 645 P.2d 1262 (1982). In *Valencia*, the conduct complained of was termination of Valencia's employment by Duval as a result of Valencia's failure to provide medical verification of a condition for which he sought a leave of absence. Valencia complained that the conduct of the personal relations supervisor, who spoke to the company-designated physician concerning Valencia's condition, and the conduct of the company-designated physician, who spoke to Valencia's personal physician about his diagnosis, invaded his privacy.

In holding that the conduct was not so extreme or outrageous as to allow Valencia to prevail on an invasion of privacy claim, the court failed to consider that the conduct was insufficient to state a

There, the plaintiffs had a loan on a travel trailer with the defendant, and had credit disability insurance covering the term of the loan. Mr. Davis had a heart attack, and claimed on the disability insurance. The bank solicited and obtained medical information from the insured's doctor without his consent. The plaintiffs claimed this invaded their privacy and caused them emotional distress.

The real question in *Davis* is whether the bank acted as agent for the insurance company that issued the disability policy.¹⁷⁷ If the bank acted as agent, then no invasion of privacy occurred, because the bank would have had the implied consent of the Davises to investigate their claim against the policy.¹⁷⁸ If the bank did not act as agent for the insurance company, then it is possible that its actions could have been construed as falling within a creditor's privilege to take reasonable measures to pursue his debtors and to persuade payment.¹⁷⁹

Constitutional Limitations

In several other privacy cases, the court of appeals could have avoided the necessity for adopting the intentional infliction of emotional distress standard by applying the constitutional protections.¹⁸⁰ The court could have reached the same result in *Duhammel*¹⁸¹ by applying the "public figure doctrine."¹⁸² Star, as a police officer, was a public official acting within the scope of his duties. As such, his actions were of legitimate public interest and he was open to public criticism and could recover only if the false statements were made with actual malice.¹⁸³

In *Rutledge*,¹⁸⁴ the court stated that the publication of true facts taken from the public record regarding the litigation history of the family of a person involved in a controversial lawsuit of widespread public interest did not meet the extreme and outrageous standard necessary to state a claim for

claim for intrusion. *Id.* at 350, 645 P.2d at 1264. The information discussed by the physicians was already in Valencia's personnel file. In addition, the employer's actions were probably privileged, since the employee manual indicated that the company would request medical verification by a physician regarding illnesses for which short-term disability claims were submitted. The company was privileged to conduct a reasonable investigation of the claim, and in accepting employment, Valencia could be said to have impliedly consented to the investigation. *Id.* For further discussion of *Valencia*, see *supra* note 110.

177. The court did not decide whether the bank was acting as agent for Occidental, the insurance company. *Davis* 124 Ariz. at 463, 605 P.2d at 42.

178. *Id.*

179. Arizona has recognized the principle that a creditor has a right to take reasonable measures to pursue his debtor and to persuade payment even though such steps may result in some invasion of the debtor's privacy. See *Sears, Roebuck and Co. v. Moten*, 27 Ariz. App. 759, 558 P.2d 954 (1976).

180. See *supra* notes 51-97 and accompanying text for a discussion of the limitations on privacy actions.

181. 133 Ariz. 558, 653 P.2d 15 (Ct. App. 1982). For a discussion of the facts of this case, see *supra* notes 124-28 and accompanying text.

182. See *supra* note 180.

183. In *Time Inc. v. Hill*, 385 U.S. 534, 542 (1967), the United States Supreme Court held that when matters of public interest are involved, the *New York Times* "actual malice" standard is applicable to invasion of privacy actions. *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967), utilized the *Hill* public interest analysis to extend the "actual malice" requirement to cases involving public figures as well as public officials. *Id.* at 147-48.

184. 148 Ariz. 555, 715 P.2d 1243 (Ct. App. 1986). See *supra* notes 129-35 and accompanying text.

relief for intentional infliction of emotional distress. Therefore, the plaintiff's privacy claims also failed. The court could have reached the same result by finding the publication privileged. The information was in the public record and was newsworthy. The Supreme Court has held that there can be no recovery for disclosure and publicity of facts that are a matter of public record,¹⁸⁵ since publication of information in the public record is privileged.¹⁸⁶ The court merely had to state that the plaintiff in *Rutledge* could not claim invasion of privacy for publication of matters of public record, and did not need to apply the intentional infliction of emotional distress standard.

*Godbehere v. Phoenix Newspapers*¹⁸⁷ is another Arizona invasion of privacy case which unnecessarily applied the intentional infliction of emotional distress standard. The plaintiff, as sheriff, was a public figure whose conduct was a matter of legitimate public interest. Publication of information about his conduct was therefore privileged. Additionally, the court could have applied the constitutional restrictions set forth in *Hill*¹⁸⁸ and incorporated into the Restatement.¹⁸⁹

The Restatement requires that the publisher have knowledge of the falsity of the published material or act in reckless disregard as to its falsity and the false light in which the plaintiff would be placed.¹⁹⁰ The court failed to address this question and thus continued the pattern it began in *Cluff* of failing to address the differences between the torts of defamation, invasion of privacy, and intentional infliction of emotional distress, and of failing to consider how the Restatement's reasonable person standard together with common law privileges and defenses would achieve the goals the court originally set out to meet.

ARIZONA'S OPPORTUNITY TO ADOPT THE RESTATEMENT STANDARD FOR RECOVERY FOR INVASION OF PRIVACY: GODBEHERE V. PHOENIX NEWSPAPERS, INC.

The Arizona Supreme Court recently granted review of the *Godbehere* case.¹⁹¹ Count II of the complaint, alleging false light invasion of privacy, was dismissed on its face by the lower court for failure to state a claim, and affirmed by the court of appeals.¹⁹² The court granted review to consider whether Arizona should adopt the Restatement standard, and whether false light invasion of privacy should be included within intentional infliction of emotional distress.¹⁹³ Oral arguments have been held and the decision is

185. See *supra* note 74.

186. See *supra* notes 77-78 and accompanying text.

187. 155 Ariz. 389, 746 P.2d 1319 (Ct. App. 1987), *rev. granted*, CV-87-0379-PR (January 14, 1988). See *supra* text accompanying notes 136-48 for a discussion of this case.

188. See *supra* notes 84-85 and accompanying text.

189. See RESTATEMENT (SECOND) OF TORTS § 652E (b) (1977).

190. *Id.*

191. *Godbehere v. Phoenix Newspapers*, 155 Ariz. 389, 746 P.2d 1319, *rev. granted*, CV-87-0379-PR (January 14, 1988).

192. *Godbehere*, 155 Ariz. at —, 746 P.2d at 1322.

193. Petition for Review at 3, *Godbehere v. Phoenix Newspapers*, 155 Ariz. 389, 746 P.2d 1319 (Ct. App. 1987) (No. 1 CA-CIV 9159), *rev. granted*, CV-87-0379-PR (January 14, 1988).

pending.

There are three possible outcomes. First, the court could approve the intentional infliction of emotional distress standard used by the court of appeals. Under this outcome the status quo would be maintained. It would continue to be necessary to prove intentional infliction of emotional distress to recover for invasion of privacy.

A second possibility is that the court could decide that false light invasion of privacy should no longer be recognized in Arizona as a separate cause of action. If this occurs, a plaintiff would only be able to recover for actions amounting to false light invasion of privacy if defamation could be proved, or if the conduct involved is so extreme and outrageous that the intentional infliction standard would be satisfied. In effect, this result also would maintain the status quo, since under the current standard it is necessary to prove intentional infliction to recover for false light invasion of privacy.

A third possibility is that the court could reject the court of appeals standard and adopt the Restatement standard. This is the preferable result since it would preserve a plaintiff's right of recovery for significant invasion of privacy, while providing sufficient protections against frivolous and unfounded claims.

CONCLUSION

Although the torts of intentional infliction of emotional distress, invasion of privacy, and defamation overlap to some degree, they are clearly distinct theories of recovery developed for vastly different purposes and are entitled to separate consideration by the courts. What appears to have happened in Arizona is that in *Cluff* the court of appeals adopted the intentional infliction of emotional distress standard for invasion of privacy actions without thoroughly analyzing the relationship between the two torts, the purposes for which they were developed, and the differences, as well as the similarities, between them. Subsequent decisions then applied the *Cluff* holding, or even extended it to other types of privacy actions, without careful consideration of whether the analysis in *Cluff* was thorough or whether the conclusion reached was a supportable one. The *Cluff* court seemed to assume that the requirements of intentional infliction of emotional distress were properly incorporated into an action for invasion of privacy,¹⁹⁴ without looking any deeper into why this was the correct approach. The only case to even address the question of whether the new Arizona standard or the Restatement standard was the correct one was *Godbehere*,¹⁹⁵ but the court of appeals merely reaffirmed its earlier decisions without taking a careful look at the rationale for doing so.

What the Arizona Court of Appeals appears to fear is wholesale recovery under the invasion of privacy tort if the stricter standard for intentional infliction of emotional distress is not applied. This fear is unfounded. It is

194. See *Rutledge*, 148 Ariz. at 557-58, 715 P.2d at 1245-46.

195. 155 Ariz. 389, 746 P.2d 1319 (Ct. App. 1987), *rev. granted*, CV-87-0379-PR (January 14, 1988).

already fairly difficult to recover under invasion of privacy.¹⁹⁶ There are sufficient constitutional and common law limitations on this tort in existence already that it is unlikely that a plaintiff can recover on an unworthy claim.

The legal right of privacy was developed to fill in certain gaps previously existing in the common law.¹⁹⁷ If the Arizona courts continue to follow their present course of action and require a plaintiff to prove intentional infliction of emotional distress to recover for invasion of privacy, those gaps will still exist. This is a particularly serious result, given the increasingly sophisticated methods available to intrude upon a person's privacy. Therefore, Arizona should adopt the Restatement standard requiring that an invasion of privacy be highly offensive to a reasonable person. This provides defendants with sufficient protection against frivolous lawsuits, while still allowing plaintiffs a means to seek redress of serious invasions of their privacy.

196. See Zimmerman, *supra* note 40, at 293.

197. Wade, *supra* note 162, at 1107.

