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PHOTOGRAPHY AND THE RIGHT TO PRIVACY: THE FRENCH AND AMERICAN APPROACHES

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INTRODUCTION

The right of everyone to his or her own likeness is today well recognized in the overwhelming majority of American jurisdictions and in other countries. This right may be based on property or quasi-property rights, extended to such an intangible as someone’s physiognomy, on the idea of privacy, or on special legislative enactments, providing protection to an interest which the common-law courts had difficulty in proclaiming. In France—a codified legal system—the courts have had little trouble in asserting that the right to likeness exists, even in the absence of statutory provisions regulating the problem. The right to likeness derived from the vague concept of the right to personality, a concept which once stood as a separate legal institution in French law. Only as late as 1970 did the French enact a statute protecting privacy.1

The extent and application of every right has to be delineated. Even so, there will always be situations in which a right of one individual will overlap or conflict with that of another. In the case of likeness, rarely does someone endeavor not even to show his face to others, although there may be the case of a hermit hiding from the commotion of life somewhere on a desert or that of a nun whose religious order prohibits the exhibition of her physiognomy to outsiders. In general, to repeat the

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1 C. civ. art. 9, No. 70-643 (1970).
statement by Aristotle, "man is a 'zoion politicon'"—a social or political creature.1 He lives surrounded by other people, communicates with them, and depends on contacts with them for his physical and mental well-being. At all times, he exposes his face to the sight of his fellow man. He cannot, and does not generally desire to, hide his physiognomy along with his secret memoirs or correspondence.

Among the problems of how to implement the right to likeness, there is one of a basic nature: do we have the right to prevent others even from the taking of our likeness by photograph, or just from using the photograph? Shooting pictures without previous consent, express or implied, occurs usually in public places. Once we place ourselves in the sight of all who may happen to be at the same spot, we become a part of the general scenery. May we still protest to our picture being taken and used?

It would seem that the first of the above questions is academic since not many persons are interested in taking photographs just for the fun of it, without making use of them. Indeed, litigation on this point is scarce. The problem is interesting, however, from the theoretical viewpoint. The second question, regarding the use of photographs taken in public places, in which some persons appear, raises practical problems.

In France, solid foundations for the right of privacy were laid by a series of decisions beginning in the middle of the nineteenth century.2 They emphasized the right of everyone to his own likeness.3

In more modern literature, conflicting views have been expressed on the question of how extensive the protection should be. While recognizing the right of citizens to object to the publication of their photographs, Nerson asserted that the possibility of prohibiting the very taking of the pictures would be "a too fargoing prerogative,"4 and continued:

An absolute prohibition of any representation of a picture would be conceivable if the subject should want and could live in a state of absolute solitude; to the contrary, his real participation in numerous concrete relations to the social life implies a consent to these objective contracts of his person. Therefore, the right to his own likeness does not include the right to object to any reproduction of his own person; but it involves the power to prohibit

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1 "Man is by nature an animal intended to live in society." ARISTOTLE, POLITICS 1253a.
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any publication.6

A contrary view has been taken by Kayser, who could not disassociate the right to take photographs from that of publishing them, and stated:

It does not seem possible to admit that a person should have the liberty of taking a picture which he would have no liberty to publish. On the other hand, the power to object to the publication of a picture has as a natural complement the right to object to its creation.7

Desbois saw some merit in both approaches. On the one hand, he made an analogy between taking a photograph and making a copy of a literary piece of work for private use, to which no consent of the author would be necessary, as contrasted with circulating copies of the same literary production which would be unlawful. On the other hand, more persuasive arguments seemed to him to outweigh the previous considerations:

[T]he extension of the prohibition seems justified. Indeed, by the very definition, private life is closed to indiscreet glances; only those persons who are invited or admitted to penetrate there may see what is going on. But this authorization does not include, ipso facto, permission to procure a souvenir by taking a negative . . . . Thus, it is not only the divulgence of matters taken from private life which depends on the discretionary power of the persons interested, but also, at the very outset, the taking of the view.8

Again, Stoufflet recognized the possibility of inflicting damages not only because of circumstances in which the likeness was circulated, but also by the very fact of taking the picture. However, he took a lenient view on shooting street pictures in normal situations. He rejected the distinction between street scenes in which a person is incidentally represented and photographs of individuals as main subjects in a public place, arguing that the distinction would be difficult to apply. To Stoufflet, a person circulating on a public way places himself outside of his sphere of

6 Id. For Nerson's observations, along the same lines, on cases involving persons and family rights, see 1966 Rev. Trim. Dr. Civ. 65, 67. A recent treatise on civil law emphasized that coupled with the right to prohibit the reproduction of someone's likeness is the right to prohibit the taking of a photograph without consent. Carbonnier, Droit civil (Civil Law) t.1, No. 70 (8th ed. 1969).
7 Kayser, Le droit à l'image (The Right to Likeness) in 2 Mélanges Paul Roubier 73, 79 (1961). One recent study suggested that a separate consent should be required for the taking and for the use of a photograph. Le droit au respect de la vie privee (The Right to the Respect of Private Life) [1968] Juris-classeur périodique, la semaine juridique I [J.C.P.] No. 25, 2136.
privacy.9

The first effort to pinpoint applicable rules by a legislative text in France occurred during the work of the Commission of the Reform of the Civil Code in 1951. The text submitted to this body by its secretary, Houin, provided for the possibility of recovery in the case of an unconsented “publication, exhibition or use”10 of another’s likeness. Commenting upon the suggested provision, the president of the Commission, Julliot de la Morandière, pointed out that the taking of the likeness would not, by itself, be proscribed. Agreeing with the approach, he continued:

A tourist who makes a photograph of a passer-by, at the same time as of a historical monument, cannot be prohibited from taking this view; but, on the contrary, it is forbidden to him to publish and e.g., to exhibit this photograph in a display window. In case of need, it is up to the police power to be more severe, e.g., by prohibiting photographing others by itinerant professionals. Likewise, it is up to criminal judges to forbid scandalous practices of certain reporters.11

The Commission went along with the proposal, and the text it adopted repeated the phraseology which had been submitted to it, with a minor stylistic change.12

In a 1966 French case,13 the tribunal for important cases of the Seine stated that everyone has the right to object to his likeness being either photographically “arrested” or exhibited or published. The broad view taken by the Tribunal, however, was only by way of dictum (if such a term may be applied to French opinions), since the plaintiff’s picture in the case was published by four defendants in their magazines, some with damaging comments.

In the United States, in the famous article by Warren and Brandeis,14 which laid the foundation for the legal protection of privacy, the authors did not examine the question whether taking photographs should be treated differently than using them. The classic dissent of Judge Gray in Roberson v. Rochester Folding Box Co.,15 which inspired many future

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9 Stoufflet, Le droit de la personne sur son image, [1957] J.C.P. I 1374. This, however, does not seem to be convincing. Indeed, unless one is a Howard Hughes, how can one become a recluse and avoid being seen by others? We have no choice but to appear in some public places, even if we would prefer to live the life of a hermit and not be seen by anyone.


11 Id. at 60.

12 Id. at 72.


15 171 N.Y. 538, 64 N.E. 442 (1902) (Gray, J., dissenting).
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decisions, distinguished the two situations. Although asserting that taking photographs without the previous consent of the subject may have the characteristics of "a species of aggression," Gray conceded that this could be "an irremediable and irrepressible feature of the social evolution." On the other hand, he saw "an act of invasion of the individual's privacy" in their "commercial or other uses for gain." 

MEDICAL CASES

A *cause célèbre* on unauthorized photographs in France involved the son of a famous movie star, Gérard Philippe, and his parents. The boy, 9 years old, had been taken to a hospital to undergo emergency treatment. A few photographers succeeded in gaining access to his room and in spite of the fright and protestations of the young patient, took a number of pictures, which were alleged to have severely aggravated the boy's condition. A few days later, one of the photographs appeared in the weekly *France-Dimanche*, together with other pictures of the boy and his parents. They were published along with a report about the state of health of the child which, incidentally, was inaccurate. In order to promote the sale of the weekly, posters representing him with his deceased father were displayed in various places.

The boy's mother, Madame Philippe, brought an action against the publishing company, in her own name and that of her son, asking the court to order an immediate seizure of the weekly and the posters in summary proceedings. She obtained the relief requested, and defendant brought an appeal, claiming that the press printed other articles about the sickness of the boy, that the write-up in question was laudatory regarding Madame Philippe, and that most of the photographs used had been published previously. The Court of Appeals of Paris affirmed, rejecting the arguments of the defendant as irrelevant (*sans intérêt*) and terming the publication of the pictures and of the article, with a "purely commercial purpose," as an "intolerable interference with the private life of the Philippe family." 

The defendant continued to litigate, taking the case to the *Cour de Cassation*. The highest court affirmed, emphasizing both the commercial purpose of the appellant and the fact that the reproduction of the pictures was made from "unauthorized negatives." The finding of "intolerable interference" was left undisturbed, and the measures ordered by the court below were held to be proper in summary proceedings as necessary "to mitigate damages to all possible extent."

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16 *Id.* at 563, 64 N.E. at 450 (Gray, J., dissenting).
It is difficult to disagree with the result of the case, but a few comments suggest themselves. First, the theory of the summary proceedings is that only provisional measures should be taken which would not prejudice the rights of the parties after their difficulties are decided on the merits. This principle risks violation in a case like *Philippe*. Indeed, if the decision on the merits should be for the defendant, the seizure of his periodical at an earlier date would have been an irreparable and unwarranted injury. Second, in reaching their decision, the courts pointed out that the conduct of the defendant was “intolerable”—a counterpart of the common American requirement that the invasion of privacy be “serious” in order to become actionable.

Among the hundreds of American privacy cases, there are some involving surreptitious photographs of sick or deformed people. The great majority of them involve the question of publication. One of the best known is *Barber v. Time,* in which the defendants were held liable for taking and publishing photographs of the plaintiff in a hospital where she went to be treated for an unusual condition. She was suffering from an unsatisfactory appetite and could not stop eating even though she was quite overweight. In spite of having eaten enough to feed a family of ten, she had lost twenty-five pounds in the year before she was admitted to the hospital. One of the defendant's reporters took her photograph while the other was trying to persuade her to consent to publicity. It may be inferred that plaintiff objected to the very taking of the photograph, but the gist of the action revolved around publicity, which was given in the defendant's magazine under the caption: “Starving Glutton”. The court's holding for the plaintiff was laid on the ground that the right of privacy ought to protect a person from publication of a picture taken without consent while ill or in bed.

In *Clayman v. Bernstein,* the defendant physician took the hospitalized plaintiff's photographs while she was in a semiconscious condition without her permission, in order to record for his files the facial disfigurement that resulted from her illness. The plaintiff brought a bill in equity to enjoin the physician from developing or making prints of these photographs, from using the prints in any manner whatsoever, and also to direct him to turn over the undeveloped films, negatives, and prints to the plaintiff. It was averred in the bill that upon being informed of the action of the defendant, the plaintiff “suffered mental pain and anguish” and

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19 348 Mo. 1199, 159 S.W.2d 291 (1942).
became "distressed and disturbed mentally from the reaction knowing that the photographs [were] in existence and in possession of defendant, who [had] refused to deliver them to plaintiff upon her request."²²

In ruling for the plaintiff, the court stated that "[w]idespread distribution of a photograph is not essential nor can it be said that publication in its common usage or in its legal meaning is necessary"²³ for liability. The court continued:

Plaintiff's picture was taken without her authority or consent. Her right to decide whether her facial characteristics should be recorded for another's benefit or by reason of another's capriciousness has been violated. The scope of the authorization defines the extent of the acts necessary to constitute a violation. If plaintiff had consented to have her photograph taken only for defendant's private files certainly he would have no right to exhibit it to others without her permission. Can it be said that his rights are equally extensive when even that limited consent has not been given?²⁴

The decree for the plaintiff was corroborated by the defendant's "presumptive intent not only to develop the film but to print the negative and exhibit the print,"²⁵ since he contended that "he not only had the right to take the picture but also to make reasonable use of the prints . . . for the purposes of medical instruction."²⁶ The court concluded that in the present state of the law physicians have no "right to photograph their patients without their consent,"²⁷ and it therefore afforded the relief prayed for, since "[t]he remedy afforded must be such as to destroy the roots of the evil and this can only be done by mandatory injunction."²⁸

Commenting on the doctor-patient relationship, one writer reached the conclusion that "a legal consent should be obtained from the patient before a photograph is taken."²⁹

A case similar to the medical treatment situation was McAndrews v. Roy,³⁰ a Louisiana case in which the plaintiff's photographs were taken, with his consent, before and after he took a physical improvement course from the defendant. They were published approximately 10 years later. The plaintiff recovered $1,000 for the invasion of his privacy on the ground that it was unreasonable to publish the pictures after the lapse of

²² Id. at 544.
²³ Id. at 546.
²⁴ Id. at 547.
²⁵ Id.
²⁶ Id. at 547-48.
²⁷ Id. at 548.
²⁸ Id. at 550.
such a long time without asking for the extension of his consent.

The test of reasonableness has also been applied in other Louisiana cases. Thus, an insurer has been found unreasonable in publishing a photograph of an insured, with his name, address, and telephone, in order to obtain more information about an accident. In *Bazemore v. Savannah Hospital* it was held that the plaintiffs had a valid cause of action where the defendants, who were permitted to take a photograph, published a picture of the plaintiff's child, born with its heart on the outside of its body, in a nude condition without the permission of the parents.

In a New York case, *Griffin v. Medical Society*, the defendant physicians took the plaintiff's photographs before and after the treatment and published them in a medical journal without the plaintiff's consent. The court denied the motion to dismiss on the ground that the article, "even in a scientific publication, may be nothing more than someone's advertisement in disguise." The court stated that the article in question could have been published to advertise the physicians and their handiwork. Therefore, the use of the plaintiff's photograph could be found to have been for advertising or purposes of trade, thus fitting within the prohibitions of the New York statute.

Of course, the doctor-patient relationship is delicate and confidential. Usually, if photographs of patients are taken, it is done with their consent, and it is usually understood that the photographs are taken only for the physician's files to illustrate the case history of the patient's condi-

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31 Hamilton v. Lumbermen's Mut. Cas. Co., 82 So.2d 61 (La. App. 1955), noted in Campbell, *Torts and Workmen's Compensation*, 16 La. L. Rev. 267, 275 (1956). It has been said that in Louisiana there is a distinction between two types of invasion of privacy: actual and actionable. Recovery is granted only for the latter, which is found to exist if the defendant acted unreasonably. "This test contemplates a balancing of the defendant's interest in pursuing his course of conduct against the plaintiff's interest in having his privacy protected from serious invasions." Comment, *The Right of Privacy in Louisiana*, 28 La. L. Rev. 469, 477 (1968). From the angle of reasonableness one commentator supports encroachments on privacy, positing "that most people will not only expect, but will welcome encroachments within 'reasonable' bounds as part of their acquiring a segment of societal responsibility." Slough, *Privacy, Freedom, and Responsibility*, 16 U. Kan. L. Rev. 323, 323 (1968). That people welcome the violation of their rights does not seem to be realistic, however, as it disregards the frequent tendency of the American to bring actions whether injured or not as long as there is a slight possibility of success. In any event, it does not seem that in practical application the Louisiana view is different from the prevailing American approach that the law prohibit only serious invasions of privacy. See *Restatement of Torts* § 867 (1939).

171 Ga. 257, 155 S.E. 194 (1930).

But see Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956). The Waters court held that publication of a picture of a murdered child's body without permission of the parents was a matter of public interest and did not violate the mother's right of privacy. Id. at 165, 91 S.E.2d at 348.

7 Misc. 2d 549, 11 N.Y.S.2d 109 (Sup. Ct. N.Y. County 1939).

Id. at 550, 11 N.Y.S.2d at 110.
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PHOTOGRAPHY INVOLVING JUDICIAL PROCEEDINGS

The very taking of photographs may be prohibited in rare situations, and in particular, in the courtroom. Probably, the first reported American case in which it was held that a court has the power to prohibit courtroom photographs and punish the violators by contempt of court proceedings was Ex Parte Sturm. There, no mention was made of privacy, but an announcement of the judge stated that photographs will not be permitted because of the requirements of both judicial dignity and the fact that the prisoner "is not able . . . to protect himself, and he will be protected by this court from any publicity of that character." The court added that "[t]he liberty of the press does not include the privilege of taking advantage of the incarceration of a person accused of crime to photograph his face and figure against his will."

The Federal Rules of Criminal Procedure state that "[t]he taking of photographs in the courtroom during the progress of judicial proceedings . . . shall not be permitted . . .," and similar regulations have been adopted by many courts throughout the country. Their validity has been sustained. The Pennsylvania Rules of Civil Procedure ban the taking of photographs and motion pictures in the courtroom during trials. A new code of judicial conduct was reported by the court, Canon 3 subd. A(7) of which prohibits, inter alia, photographs in the courtroom with some exceptions. Id. at 25.

The taking of photographs in the courtroom or its environs or radio or television broadcasting from the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session, is prohibited. The environs of the courtroom is defined as the area immediately surrounding the entrances and exits to the courtroom.

Id. The most evident purpose of such a prohibition is to protect judicial proceedings from

56 Challener, supra note 29, at 628 (citing Opinion of the Attorney General of New York 374 (1934)).
58 Id. at 116-17, 136 A. at 313.
59 Id. at 120, 136 A. at 314.
60 Fed. R. Crim. P. 53.
61 See, e.g., In re The Florida Bar—Code of Judicial Conduct, 281 So. 2d 21 (Fla. 1973). A new code of judicial conduct was reported by the court, Canon 3 subd. A(7) of which prohibits, inter alia, photographs in the courtroom with some exceptions. Id. at 25.

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Westmoreland County rule of court extended the prohibition to “any place in the courthouse within forty feet of the entrance to any courtroom” and to prisoners or inmates of the county jail as long as they are in the jail or on the way to or from a session of court. The rule also requires consent of the subjects in other situations:

No pictures or photographs of any party to a civil or criminal action, juror or witness, shall be taken in the law library or in any office or other room of the courthouse, except with the knowledge and consent of the person or persons photographed.

In In re Mack, seven press photographers violated the prohibition by taking and then publishing photographs of a convicted murderer on his way from the county jail to a courtroom. Even though the pictures were taken by means of infrared rays not requiring the use of flash bulbs and causing no commotion or noise, the defendants were convicted, and this result was affirmed by the Supreme Court of Pennsylvania. Calling the proceeding a “test case,” however, it modified the sentences by striking provisions for imprisonment and leaving merely the imposition of fines and costs. Besides the necessity of maintaining the dignity of the courts, the court emphasized the duty of the fiduciary “to protect the right of privacy of the prisoner.” Of course, in the great majority of situations, persons who take pictures of those involved in court proceedings are professional photographers whose livelihoods require publishing the photographs. However, the Westmoreland rules and regulations make no exceptions and relate to everyone, including individuals who might wish to take pictures for their own pleasure and files. Given such a prohibition, the question arises whether the law should protect the privacy of criminals or suspected criminals to a greater degree than that of an average citizen on the street, who would not be protected from uninvited picture taking.

disturbances, but the rule is broader than that and applies even if no trouble is threatened. Thus, its beneficiary is the right of privacy.

Westmoreland County Ct. R. 6084(a).

Id. 6084(d).

Id. 6084(c).


Id. at 259, 126 A.2d at 683.

In a separate opinion in Mack, Justice Bell argued that regulations prohibiting the photographing of prisoners “not near the Courtroom” should be held invalid, since persons charged with or convicted of crimes do lose their privacy to some extent and become public figures. Id. at 266, 126 A.2d at 686 (Bell, J., dissenting in part).

A strong and lengthy dissent was delivered by Justice Musmanno who stressed the freedom of press section of the Pennsylvania constitution and the discreet manner in which the defendant acted. Justice Musmanno also noted the extensive and justified public interest in the notorious killer, reasoning “that party litigants and witnesses do not expect the isolation
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The constitutionality of restrictions on taking photographs in courts was challenged in Mack and in a few other cases on the ground that they violate the freedom of press guaranteed by the first and fourteenth amendments, as well as the federal Civil Rights Act. In a federal case, the court did not agree, saying that a partial abridgement of civil rights is permitted in the interest of public order. The court stated that the courts have the duty “to protect the right of an accused’s privacy” by “all reasonable means” and added:

Undoubtedly, such right of privacy is to be subordinated at least to the extent of permitting a limited scrutiny, to the public interest in obtaining information . . . . [T]he constitutional right of the accused to a public trial is a privilege intended for his benefit. It does not entitle the press or the public to take advantage of his involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law either while in jail, going or coming from court or while actually in the courtroom.

The reference of the court to the “press or the public” may be understood that the court read the rule literally and felt that the accused should be protected not only against the publication of his likeness in the press, but also against a possible taking of his photograph for private use.

A few other texts express the same idea. Canon 35 of the American Bar Association’s Canons of Judicial Ethics states as follows:

Proceedings in court shall be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.
A 1964 Pennsylvania survey showed that when photographing in the courtroom was permitted and was carried out inconspicuously, those participating in the proceedings "who were unaware of what was going on . . . objected strongly and some of them said that they never would voluntarily appear in court again" when they saw their pictures in the newspapers.²⁴ Of course, this results from the use of the photographs rather than from merely taking them. These situations in which someone would be interested in taking pictures in court just in order to keep them in his own archives are unlikely to arise frequently. The ban on photographing in court, where it exists, is general—it covers newspaper reporters as well as any other persons.²⁵

The reasons frequently given against restrictions on any kind of publicity about trials do not impress many courts and rulemakers to the extent of their giving up any controls. Among these reasons, it has been asserted that "the presence, or the possible presence, of members of the general public is a guarantee of the fairness of the trial"²⁶ and that—according to arguments advanced by the media of communications—there is "the public's right to know."²⁷ This argument seems to be weak. Indeed, the unlimited "right of the public to know" as advanced in recent years has resulted in irreparable harm to the United States and to the interests of some of its citizens. The press penetrates everywhere and publishes every bit of information it is able to secure, irrespective of the vital interests of the country. Spying is hardly necessary any longer, because most classified information is made public by "leaks," condoned on the ground of the imaginary "right to know." In the private litigation sector this "right" has been criticized on the ground that it may amount simply to entertaining people at the expense of others, as by publicizing a sex trial, or to feeding the public with news in which there is no legitimate interest, as in tax cases.²⁸

It has been said that the use of a camera is a lawful activity and that the citizens' privilege to take pictures is a civil right protected by the Constitution, although it may sometimes be made unlawful by a statute.²⁹ A rule of a court may be a substitute for a statutory prohibition, but the courts do not have to take advantage of their regulatory power. Thus, in a 1948 case, a trial revealed some scandalous occurrences in the parties' do-

²⁴ Hockenberry, Pennsylvania’s Courtroom Ban on Camera Equipment, 36 Pa. B.A.Q. 76, 79 (1964). It was also stated that photographing would disrupt the proceedings, tempting participants to pose for photographs. Id.
²⁵ Id.
²⁶ Id.
²⁸ Id. Winters expounds that in many cases the public has no real interest at stake or right to be entertained. Id.
²⁹ Id.
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mestic life. Despite objections, the defendant took photographs of the plaintiff while he was in the courtroom during a recess in a divorce and custody proceeding, and later published the photographs. In a subsequent lawsuit, the court held for the defendant stating that when involved in a lawsuit, the plaintiff was forced, by the circumstances, "to throw aside the mantle of privacy" and become a "quasi-public figure." He was "an actor in an occurrence of public interest" and could not complain when a story and photographs about him were published as legitimate news items. The court noted that a "picture . . . in the courtroom does not add to, nor detract from, whatever right [the plaintiff] may have to recover . . . [since] [t]here is no rule . . . which prohibits the taking of photographs in the courtroom when the judge is not on the bench."

It may be noted that a rather faroing English statute, the Criminal Justice Act of 1925, prohibits not only the taking of photographs in any court but also the making of portraits or sketches of any person involved in the proceedings with a view toward publication. The prohibition covers the courtroom, the buildings, and the precincts of the buildings. On the other hand, with the growing emphasis on "freedom of information" in America, a few states recently decided to permit court photographing. Following the view of Alabama and Colorado, Washington decided to take the liberal approach. The supreme court of that state removed a previous ban, and as of September 1976, newsmen are allowed to photograph and tape record trials in progress.

STREET PHOTOGRAPHS

Photographs can often be taken inconspicuously on the public street. Very frequently, photographs are used to promote a defendant’s business. The first famous privacy cases, decided either for the defendant or plaintiff involved such situations. Frequently, defendants are treated more severely in such cases. The statutory protection of privacy in New York and a few other states is granted only for invasions for commercial use. Thus, one New York court expressed the lenient view in force in its jurisdiction when stating that "[e]ven private social affairs and prevailing fashions involving individuals who make no bid for publicity are, by cus-

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* Id. at 961.
* Id. at 962.
* The English Criminal Justice Act, 1925, 15 & 16 Geo. 5, c.86, § 41(1).
tom, regarded as public property, where the apparent use is to convey information of interest and not mere advertising." On the other hand, in the early case of Kunz v. Allen, the plaintiff complained that defendants took "moving picture films . . . of her face, form, and garments" without her knowledge and claimed that this amounted to "an invasion of her private rights for which she was entitled to recover." The Supreme Court of Kansas ruled for the plaintiff even though she did not prove any actual damages. In the opinion, the fact that defendants used the motion pictures to advertise their business, by showing them in a theatre, was emphasized: they had represented plaintiff while she was shopping in the defendants' dry goods store. This was a rather progressive decision. In similar situations, a few French courts suggested that the defendant should delete the faces of potential plaintiffs to avoid liability, but such a suggestion does not seem to have been accepted by American courts.

The restrictive New York approach is a reflection of the traditional common law failure to recognize privacy as a right. This is still the situation in England, where the assertion by Judge Horridge, made 60 years ago, is still good law:

In my judgment, no one possesses a right of preventing another person's photographing him any more than he has a right of preventing another person's giving a description of him, provided the description is not libelous or otherwise wrongful. Those rights do not exist.

Agreeing with this approach, a commentator in 1932 stated that protection against the taking of photographs seemed to be practically impossible, and that anyone may take another's picture on any occasion that presents itself. Protection would be given solely against the use made of the photographs. The use of another's photograph is permitted, according to the cases, as long as it is not connected with commerce, trade, or business. "Cases involving uses such as those of personal satisfaction, decoration of private rooms or homes, have not arisen. These are appropriations against which society does not yet demand protection." The author asserted that if someone wants to be protected from being photographed, he must take proper steps to prevent it, because "[t]he photographer has open season on all who expose themselves to public view."
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Most humans, however, must appear in the public, whether they like it or not. Complications may result. Let us first examine a few situations that arose in French courts.

An interesting case was decided in 1963. A married couple, the Villards, sued a periodical. The husband, a professor of physical education, was sent by the French Government to Rome for the Olympic Games. On the way back, accompanied by his wife, a member of the same profession, he stopped in Pisa. They were photographed on the background of the famous leaning tower in scanty dress, which was due, according to their explanation, to very hot weather.

The photograph was published by the weekly Le Petit Echo de la Mode, which unfavorably commented on the married couple's attire and branded it as excessively bare and ridiculous. The names of the plaintiffs were not given, but they were recognized by many persons, some of whom, particularly colleagues and parents of their students, sent letters expressing their disapproval and astonishment over this publicity, which tended to undermine the prestige of the educators in the eyes of the young generation and injure the standing of the profession.

The plaintiffs, contending that the publication of the photograph was made without their knowledge and consent, asked for damages, including some for mental suffering and some based on the fact that the plaintiff husband did not receive a position for which he had applied.

The defendant company answered by stating that the photograph had been taken with the plaintiffs' consent and pointed out that its publication served the company's campaign against undesirable attire, since it showed the plaintiffs wearing revolting clothes and well illustrated an article which appeared in the weekly. The defendant contended that the sale of the photograph was known to the plaintiffs, and that if it had been reproduced with favorable comments, they would certainly not have thought about advancing any objections.

The tribunal found that the plaintiffs gave their consent to the taking of the picture. The publication of the photograph, however, presented another question:

[By virtue of a legal principle laid down by a series of judicial decisions, the person photographed has an absolute property right in his likeness and the use of it, and nobody can take advantage of it without his consent. . . . In lack of such consent, reproduction . . . amounts to a wrong which generates damages calling for a redress.]

The effects of the unauthorized publication of the photograph were aggravated, said the tribunal, by the unfavorable comments. While agree-

75 Id.
ing with the plaintiffs that recovery should be granted and that it should include damages for mental disturbance, the tribunal refused to take into consideration the lost expectancy of obtaining a desired appointment, finding it purely conjectural.

The judgment was modified by the Court of Appeals of Paris, which took a different view of the problem. The conclusion of the defendant's liability was the same, but for other grounds, and the amount of damages was greatly reduced. The court expressed a liberal view of the rights to publish photographs taken in public places, and emphasized some features of the case not discussed by the tribunal below. It took a more lenient approach towards publishers than that taken by some other courts.

In contrast to the tribunal below, the court of appeals expressed its own opinion about the plaintiffs' dress. It found that their attire "had no features which could offend the public morality." Yet, because of its scantiness it could justify criticism, which was actually formulated in moderate terms by the journalist, and the article did not question either the usual dressing habits of the plaintiffs, in periods other than during vacations, or their behavior.

The court proceeded to lay down the rules it deemed proper and applicable to the facts presented:

[B]y lingering in a public place, the spouses Villard exposed themselves to the sight of everyone and they cannot complain if someone, availing himself of the same right, found himself at the same spot and looked at them or even retained, by the means of a camera, the scene which they were offering to the sights in front of a public monument which numerous tourists are constantly photographing; their presence before this monument could not give them the excessive right to prevent any pictures being taken; the right to reproduce a photograph in the press must be admitted as long as it has been taken in a public place; the plaintiffs did not try to hide themselves from the scene in question, and they were not suddenly placed, by an interplay of unforeseen circumstances, against their wishes, in a disagreeable and ridiculous situation.

If the right to publish photographs taken in public places is so broad, how could the Villard court find the defendants liable? The exercise of a right, reasoned the court, must be carried out "with prudence which has roots in the endeavor of doing nothing which could expose another to criticism and mockery of those who surround him," provided that special circumstances, such as an offense against public morality, do not warrant

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77 One commentator observed that the Villard court was inconsistent by charging the plaintiffs with lack of prudence in the selection of their dress while stating that they could not offend the public morality. Nerson, supra note 5, at 68.
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a farther-going attitude. This prudence, said the court, was not shown by
the defendant, who published "only a part of the photograph, which has
the effect of attracting the attention of the reader . . . on the couple repre-
represented," and "did not take any measures by which the spouses Villard
could not be recognized." This lack of prudence amounted to a fault
which engaged the liability of the defendant.

This liability, however, should be mitigated, according to the court,
by the "bad taste" of the plaintiffs, which they displayed by showing
themselves to public view and taking photographs in attire the impropri-
ety of which could not escape attention. Thus, the Villard's lack of pru-
dence contributed to the wrong they sustained, a wrong which the court
found as not serious and for which it granted to each of the plaintiffs the
amount of 200 F.

It does not appear that a reported case on the same facts as those in
the Villard case was ever decided by an American court. The closest was
the contemporaneous New York case of La Forge v. Fairchild Publica-
tions, Inc.79 In La Forge, the defendants published a story entitled "Fash-
ion Follows a Pattern" and illustrated it by photographs taken at a race
track of persons wearing short jackets of a particular material. They were
not identified, nor were they asked to express consent to the publication.
The writeup stated that the fabric of the jackets was a "runaway fashion."

Plaintiff, whose photograph was one among the others which had
been published, complained of the invasion of his privacy. Reversing an
order denying defendants' motion to dismiss the complaint for legal in-
sufficiency, the Appellate Division of the New York Supreme Court held
that, according to the law of the state, the plaintiff's rights had not been
violated. New York is one of the few American jurisdictions in which the
law of privacy has been reduced to writing, and, even if the relevant pro-
vision is broadly construed by the courts, the scope of protection granted
to privacy is less comprehensive than in most jurisdictions.80 The statute
grants relief to "any person whose name, portrait or picture is
used... for advertising purposes or for the purposes of trade without... written
consent... ."81 The La Forge court stated that the statutory require-
ments had not been met, since the article was on a matter of public inter-

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79 23 App. Div. 2d 636, 257 N.Y.S.2d 127 (1st Dep't 1965) (per curiam).
common law right of privacy could be found by the New York Court of Appeals. Cf. Nader
York court applied District of Columbia privacy law). The Galella court expressed the opin-
ion that the New York Court of Appeals would not follow the Roberson case today. 353 F.
Supp. at 229.
est, and the photographs were related to it rather than being “direct, concealed [or] subtle advertising.”

Another interesting French case involving the taking of street photographs and their use without the subjects’ consent is *Andrieu v. Later.* Defendant took two photographs at a horse market. The views represented the animals and some persons, including the plaintiffs, who did not know that the pictures had been taken. The scenes were subsequently used for the manufacture of postcards. Dismissing the complaint, the court stated that

it is in vain that one could look for a legal basis on which a prohibition . . . to make reproductions of scenes photographed on the street or a public square could be rested; . . . if the right of an individual to prohibit the reproduction of his likeness taken in private may be justified, there is no similar justification as to photographs taken on a public way . . . . [T]he likeness of an individual on the street is subjected to the view of all, and all that the drawing or the photograph do is to fix it in a permanent way; . . . there is no legal provision limiting those views or prohibiting such a fixation or such a reproduction; . . . in these circumstances the representation of individuals by a drawing or a photograph falls into the category of normal servitudes of our life in the society and cannot be prohibited more than descriptive reports, by the way of press, of the presence of the individual in the same circumstances.

Consequently, it was held that the plaintiffs could not recover as they were photographed on a public square. The same result was reached on the reproduction of the picture. The court emphasized the lack of injury; the absence of wrongful intention, and the fact that the physiognomies of the plaintiffs were difficult to recognize and were lost in a group of other persons. It may be noticed that, contrary to the *Villard* case, the

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*23 App. Div. 2d at 636, 257 N.Y.S.2d at 128. In Neff v. Time, Inc., 406 F. Supp. 858 (W.D. Pa. 1976), the court found for the defendant where a football fan was photographed with the zipper of his trousers open. The picture was published in a sports magazine in connection with an article about football fans. The plaintiff claimed invasion of privacy, adding that he had been exposed to ridicule, injury to his esteem, and mental and emotional distress. The *Neff* court recognized that the photograph was deliberately selected for publication by an editorial committee from a number of similar pictures. While the court admitted that it had “some misgivings,” it held that “the publication of Neff’s photograph taken with his active encouragement and participation, and with knowledge that the photographer was connected with a publication, even though taken without his express consent, is protected by the Constitution.” *Id.* at 862.


*Id.*

One commentator greeted the decision as setting a proper limitation on the prohibition of reproducing an individual’s likeness. A publication will be permitted if the picture does not amount to a “portrait” but represents a scene of public life and the individual has been photographed in a group and is hardly recognizable—at least if the defendant did not act
plaintiffs were not specifically the subject of the picture. On the other hand, no consent had been given by the photographed persons.

An American case similar to Villard arose when a married couple, who, like the plaintiffs in the French case, had been photographed, allegedly without their consent, at the famous Farmers' Market in Los Angeles. The picture represented the plaintiffs sitting at a counter in their ice cream establishment, the husband with his arm around his wife. The photograph was published in a journal as an illustration of an article entitled "Love" in which one of the defendants described various kinds of relations between persons of opposite sex. The article attributed to the plaintiffs (without revealing their names) feelings based on mere intense sex attraction, with negligible affection and respect. This kind of love was branded as wrong. Most probably, the plaintiffs would not have objected to the publication of the photograph itself, but they complained that the article "depicted them as loose, dissolute, and immoral persons," which held them up to "public scorn, ridicule, hatred, contempt and obloquy" and which resulted in their loss of business and injury in social contacts, reputation and health. Clearly, those allegations were classic statements in any case of defamation, but plaintiffs claimed that their right of privacy had been invaded.

The two cases brought against the several defendants who took the photographs, wrote the article, and permitted their publication reached the Supreme Court of California.

From the pronouncements of the courts in the case brought against Hearst Publishing Co., it appears that the final view taken in California is that not only may street photographers take pictures, but their publication is permitted as well. The California Supreme Court did not find any "actionable invasion of plaintiffs' right of privacy," since it gave priority to considerations of "public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and of the press." The publication in question was found to have "no particular news value but was designed to serve the function of entertainment as a matter of legitimate public interest," and as such, it should be protected. In reaching this conclusion, the court emphasized several elements. First, "the right of privacy is determined by the norm of the ordinary man," so that if the
publication does not appear offensive to persons "of ordinary sensibilities," it will not be actionable.\textsuperscript{86} Second, the photograph was not "surreptitiously snapped on private grounds, but . . . was taken of plaintiffs in a pose voluntarily assumed in a public market place,"\textsuperscript{91} thereby waiving their right of privacy and placing the photographed incident in the "public domain." Third, far from being "discreditable" and objectionable, the photograph could be said "to be complimentary and pleasing in its pictorial representation of the plaintiffs."\textsuperscript{92} Finally, the publication was not "for advertising or trade purposes."\textsuperscript{93} The Court rejected the right of individuals to prevent publication of any photograph taken without their permission,\textsuperscript{94} which taken to its logical conclusion would result in the impossibility of publishing a photograph of a parade or a street scene.\textsuperscript{95}

In a dissenting opinion, Justice Carter found it to be "obvious" that there was no "news or educational value whatsoever in the photograph alone,"\textsuperscript{96} expressing the view that the publication of the photograph alone violated the plaintiff's privacy.\textsuperscript{97} He "most emphatically" dissented from the holding of the majority, reaffirming the approach taken by the court in the same case before rehearing, in which he delivered the opinion for the unanimous court.\textsuperscript{98}

The hesitation shown by the court—the hearings, rehearings, and reversals, the dissenting and concurring opinions—indicate that the problem is difficult and its solution not well settled.

The other case, brought against Curtis Publishing Co., was hardly

\textsuperscript{86} Id.
\textsuperscript{87} Id. at 230, 253 P.2d at 444.
\textsuperscript{88} Id. at 230-31, 253 P.2d at 445.
\textsuperscript{89} Id. at 231, 253 P.2d at 445.
\textsuperscript{90} Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E.2d 753 (1940). In Themo, the defendant took the plaintiff's photograph without his consent, representing the plaintiff in conversation with a police captain and published it on the front page of its newspaper. The court held that "if" the right of privacy exists in Massachusetts, "it does not protect one from having his name or his likeness appear in a newspaper when there is legitimate public interest . . . ." Id. at 58, 27 N.E.2d at 755.
\textsuperscript{91} RESTATEMENT OF TORTS § 867, Comment c (1939).
\textsuperscript{92} 40 Cal. 2d at 232, 253 P.2d at 446 (Carter, J., dissenting in part).
\textsuperscript{93} Judge Carter stated:

By plaintiffs doing what they did in view of a tiny fraction of the public, does not mean that they consented to observation by the millions of readers of the defendant's magazine. In effect, the majority holding means that anything any one does outside of his own home is with consent to the publication thereof, because . . . he waives his right of privacy . . . . If such were the case, the blameless exposure of a portion of the naked body . . . . as the result of inefficient buttons . . . . could be freely photographed and . . . . published . . . .

Id. at 232-33, 253 P.2d at 446 (Carter, J., dissenting in part).
\textsuperscript{94} 239 P.2d 636 (Sup. Ct. Cal. 1952) (en banc), vacated, 40 Cal. 2d 224, 253 P.2d 441 (1953) (en banc).
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less troublesome for the California courts. Here, the gist of the complaint was against the publication of the article on love along with the photograph. The final decision was that a cause of action had been stated. The district court of appeals held that the alleged facts showed “an unwarranted and unreasonable interference with appellant’s interest in not having their likeness exhibited in such a manner.” The supreme court added that the article was susceptible to the construction placed thereon by plaintiffs: that they were depicted “as dissolute and immoral persons” whose “only interest in each other is sex.”

Other jurisdictions have experienced similar difficulties in setting the borderline between what should be permitted and what should not. The New York statutory distinction has to be construed by the courts, which usually tend to extend the scope of protection of privacy. In a 1955 case, the defendant published a photograph of some boys on a public street to illustrate a story on gangs. Their assent to the taking of the picture had been given, but they were not asked to express agreement to the particular use of the photograph, which took place some time after it had been taken. The court held that situation to be within the New York statute and granted recovery for the plaintiffs’ “flagrant violation” of privacy even though defamation seems to have been the essence of the wrong the plaintiffs suffered.

STREET SCENES

In Blumenthal v. Picture Classics, Inc., the defendant produced and distributed a motion picture entitled “Sight-Seeing in New York with Nick and Tony.” The exhibition of the film lasted for 17 minutes. During 6 seconds, the film showed the plaintiff, representing her in the act of selling bread and rolls to passersby. In an action for an injunction, the majority ruled in her favor. In a very short opinion, the court stated that plaintiff was granted by the New York statute “an absolute right” to object to the use of her picture for trade purposes, “even though her trade brings her into public view.” As the scene in which she appeared “was a front view closeup of her and was intended to show her alone in the act of vending her goods for sale,” she was entitled to relief. The two dissenting justices pointed out that at no time did the plaintiff’s picture appear

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102 Id. at 279, 239 P.2d at 634.
104 235 App. Div. 570, 257 N.Y.S. 800 (1st Dep't 1932), aff'd mem., 261 N.Y. 504, 185 N.E. 713 (1933).
alone; it was just a usual reproduction of life in the town, so that the motion picture was a newsreel rather than a photoplay which is a work of fiction. The dissent concluded that the film should be protected as an item of current events of public interest rather than a production for the purposes of trade.

As the last case on this point, let us discuss Thayer v. Worcester Post Co., wherein plaintiff was photographed in a group of five persons at an airport. She did not object, believing that her husband extended consent. There was no evidence that the plaintiff agreed to have the photograph published, but the court did not find that material, stating that a person who posed for a photograph under the circumstances of the case had no right to object to its publication, and continued:

There is nothing to indicate that so far as the plaintiff was concerned it was taken for a private use or a restricted purpose . . . . The circumstances imposed no express or implied limitation by the plaintiff upon its publication by the person owning it. The contention of the plaintiff in substance is that, although she had no property right in the picture itself and the defendant may have rightfully obtained property right in it and the right to publish it, so far as the owner of the tangible basis for a picture can transfer it, yet she has an absolute right not to have it published in the circumstances disclosed without her consent. That contention cannot be supported.

The court took a lenient approach to the defendant's acts. Its decision is the more noteworthy because only a part of the photograph had been published, thereby presenting the plaintiff in a specific light: out of five persons including the plaintiff's husband who appeared on the original picture, the defendant published only the plaintiff and her husband's chauffeur. Denying the plaintiff's claim of invasion of privacy, the court permitted a cause of action for a libelous writeup about marital scandals of the plaintiff, illustrated by the photograph in question.

Further examination of cases will not bring in new elements. Both in France and the United States the decision will depend on particular facts of the situation, which sometimes may seem to be not very significant, but which tip the scale in borderline cases. Of course, statutory enactments may give some guidance.

Recent developments do not detract anything from the validity of early observations by the French author Fougerol, made on the ground of a few early French cases and his own analysis of the problem. He distinguished two situations. In the first, the photographer intended to take a picture of the public place itself, and some individuals just happened to.

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107 Id. at 164, 187 N.E. at 293-94.
108 FOUGEROL, LA FIGURE HUMAINE ET LE DROIT (1913).
be at the spot. The author would permit the use of such photographs, limited by the right of the subjects to object. If they notify the photographer about their objections, their likenesses should be taken off or so obliterated as to render them unrecognizable.\footnote{\textit{Id.} at 62.}

In the second situation, certain persons are the primary target of the photographers. In the absence of their consent, the taking of the photographs is unlawful from the very outset, unless the persons in question had participated in an overt activity, thereby abandoning the "monopoly" to their likeness. In such a case, "their portrait belongs to history and to current news."\footnote{\textit{Id.} at 68.} The exception does not extend to private ceremonies, such as funerals or marriages.

For the sake of comparison, it may be mentioned that in West Germany the courts have developed a "right of personality," similar to the French concept, from some general provisions of the 1949 Constitution.\footnote{Krause, \textit{The Right of Privacy in Germany—Pointers for American Legislation?}, 1965 \textsc{Duke L.J.} 481, 482.} Although until recently no reported case had prohibited the mere taking of a photograph, a 1957 decision held that the secret taking and publication of a picture exceeds the privilege to report on matters of current events.\footnote{24 BGHZ 200 (1957). As the taking and publication were strictly connected, the holding of the court cannot be understood as an authority on mere photographing. \textit{See} Krause, \textit{supra} note 111, at 523.} On the ground of the approach of the judiciary, supplemented by materials published in legal literature, the Ministry of Justice prepared in 1958 a bill on "Protection of Personality and Honor," which included a provision that "it is a wrongful injury . . . if somebody makes a picture of another against the other's discernible will or, by making a picture, injures a legitimate interest of the person pictured."\footnote{Krause, \textit{supra} note 111, at 492.} The draft was approved by the upper chamber, but the lower house took no action, largely because the statute would result in an abridgement of free speech.\footnote{\textit{Id.} at 495.}

**Professional Street Photographers**

Before amateur photography became as popular and widespread as it is today, the number of photographs taken by tourists was small in comparison with those taken by professional street photographers who made pictures of the passersby and offered to sell them copies at a profit. Sometimes, their behavior was rather aggressive and gave rise to resentment. The question arose whether they should be permitted to freely ex-
exercise their trade, be subjected to some regulations and restraints, or be simply barred from their activity on the ground it interfered with the right of the citizens not to be photographed without previous consent. Both above-mentioned restrictive approaches have been taken by the French administrative authorities and have received some judicial attention.

On the one hand, some good arguments could be advanced in support of the unrestricted exercise of the profession. An early French statute\textsuperscript{115} proclaimed that “everyone is free to engage in such activity or to exercise such profession, art or craft as he pleases,” and the Law of July 16, 1912, provided that itinerant merchants “shall not be subjected to any extraordinary measures of general law, and in particular, to any exceptional prophylactic regulations . . . .”\textsuperscript{116} Inquiries about the feelings of the general public indicated that there was no prevailing discontent with respect to street photographers. Neither satisfaction nor indifference was noted. No instances of the use of photographs for blackmail were reported, and negatives were destroyed upon the request of the person interested.\textsuperscript{117}

On the other hand, it could be asserted that the photographers encumber public passageways; that their activities bring about a risk of public disorder in case someone is annoyed enough to display his objections in a violent way; that abuses might be perpetrated by photographing someone in an attire or in a company which could give rise to gossip or disapproval by others. Even in the absence of such possibilities, professional street photography should be prohibited if the right to likeness should be understood as necessitating previous consent before the very taking of the photograph.\textsuperscript{118}

Some support for the power of the administration to regulate street photographing could be deduced from the French Article 97 of the Law of April 5, 1884, which dealt with the police power and which assigned to local authorities the task of assuring public order, security, and proper health conditions. By virtue of the statute, this power included:

1. All which concerns the security and the convenience of passing on the streets, wharves, public squares and roads . . . ;
2. The authority to repress disturbances of the public peace such as quarrels and disputes accompanied by disorders on the streets;
3. The maintenance of public order in places where large gatherings of people take place.

\textsuperscript{115} C. civ. art. 7 (1791).
\textsuperscript{116} C. civ. art. 1 (1932).
\textsuperscript{118} Id.
Soon after the profession of street photographing became established, it incurred the wrath of those photographers who limited their activities to the work in their establishments, and in some instances, administrative authorities decided to intervene. The result, as of 1928, was an outright prohibition against exercising the profession in Paris, and restrictions were imposed on it in some other localities. The few reported cases that dealt with these regulations did not arise until after World War II.

The first one was a criminal proceeding directed against a street photographer who violated a Grasse City ordinance prohibiting the taking of photographs of passersby on public roads "with a commercial purpose, and particularly in view of selling these portraits to the persons thus photographed by surprise." The defendant disregarded the ordinance, claiming it was illegal as contrary to the principle of freedom of commerce and industry. An action against him was instituted by an association of professional photographers.

The right of the mayor of a town to regulate the profession of photographers was upheld:

The custom established by the photographers of pursuing customers in the streets without waiting for them to appear in their studios . . . seems to be only an abusive extension of the right to exercise the freedom of trade and industry; . . . the exercise of any profession whatever is unlawful when respect for freedom and desires of others is not taken into consideration; . . . the power to settle rules which the mayor has corresponds with the necessity to ensure respect of the human person and freedom of customers.¹¹⁰

The tribunal proceeded to impose a fine of 1,200 F and recognized that the association of photographers, as the "civil party" in the case, represented the interests of those members of the profession who are "respecting the customers' freedom." According to the tribunal, they were damaged by the defendant's conduct and were granted the token amount of 1 F as nominal damages.¹²⁰

The case did not go further than to the court of first instance. Its result did not escape criticism. Thus, commenting upon the decision, Professor Carbonnier, a leading French expert in the field of civil responsibility, recognized the authority of the mayor to exercise the police power over public streets, but questioned their jurisdiction in the field of assuring individual freedom to the citizens in the absence of legal texts on which such an action could be based. Asserting that the right to one's own likeness is one of "the personality rights" rather than a property right, he stated that the element of damages is necessary for judicial in-

¹²⁰ Id.
tervention and that no damage could be inflicted, except in some unusual situations, by the defendant, as the passersby were exhibiting their faces to one another. Stating that previous cases supported only the proposition that everyone has the right to object to the reproduction and publication (rather than to the taking) of his likeness, Carbonnier concluded that the extensive protection of the "dignity of the human person," advanced by the tribunal in times where the State itself forces us to be frequently photographed, could seem to be precious. Behind the facade of individual freedoms, however, two business interests staged a fight: those of sedentary and those of street photographers. If a custom of street photographing was being established, it could be said that taking advantage of it could not amount to any wrongful conduct.\footnote{Id.}

Soon thereafter, the Council of State was called to express its opinion whether administrative authorities have jurisdiction to interfere with the profession. It expressed its approach to the problem in three opinions of 1951, dealing with the validity of some local ordinances. The first ordinance, issued by the mayor of Montauban, required street photographers to obtain licenses whose conditions were set out in some detail before they could engage in their activities, even temporarily. The second ordinance, issued by the mayor of Villeneuve-sur-Lot, simply prohibited the taking of photographs of the passersby on public streets "when such activities are engaged in for any commercial purpose, and in particular, with the view of selling their portrait to persons thus photographed by surprise." The wording of the ordinance involved in the third case and issued by the mayor of Rodez was nearly identical with that of Villeneuve.

The opinions of the Council were very short, even by French standards. In the first case, citing the Law of 1884, it reaffirmed the powers of local authorities to prevent possible inconveniences to circulation and public order, particularly "by prohibiting . . . the taking of photographs of the passersby against their wish or by forbidding, in case of necessity, the exercise of this profession on certain streets or at certain hours." The Council held, however, that the freedom of industry and commerce guaranteed by the Law of 1912 would be violated by subjecting the profession to licensing, and therefore, the challenged ordinance was invalid, as the mayor issuing it acted in excès de pouvoir.\footnote{Daudignac, Council of State, June 22, 1951 [1951] J.C.P. II 6515.}

If licensing of street photographers is contrary to the law, there is no problem about invalidating a total prohibition to exercise the profession. The court annulled the ordinances in the second\footnote{Association of Photographers, etc., Council of State, June 22, 1951 [1951] J.C.P. II 6515.} and third case.\footnote{National Federation of Photographers, Council of State, June 22, 1951, [1951] D.L. 589.} The opinions were greeted by Professor Carbonnier as being inspired "by a
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most fargoing wisdom," because the taking of photographs without receiving consent is permissible; it is unlawful, however, if permission has been denied.125

A few years later, the Cour de Cassation was called to express its opinion on a city ordinance issued by the mayor of Nice, similar to the one in Grasse and involving the same party. The court affirmed the power of the authorities to issue all regulations necessary "to remedy the inconveniences which the exercise of the profession of photographing on public streets may present to the traffic and the public order" and in particular, to prohibit the taking of photographs against the wish of the passersby and to prohibit this activity on certain streets or during some hours. The court went on to invalidate the ordinance, however, on the ground that it was too broad, being applicable to fifty-eight streets, as well as the beach during 5½ months and in some other places. Such rules "make it practically impossible to exercise the profession" and are "repugnant to the freedom of industry and commerce."126

While a ministerial decree of July 22, 1952 was held to be valid as long as it required advance declarations of the photographers about their activities, prohibited exhibition of the photographs, and provided for the destruction of the negatives upon a request of the interested persons, it was invalid where it outlawed the taking of photographs in the vicinity of sedentary photographers.127 One of the recent developments is an ordinance issued by the police chief of Paris, banning street photographs in tourist areas of Paris, which included a long list of monuments, parks and streets covered by the ordinance.128 It appears that the ordinance has yet to be examined by the courts.

In the United States, no identical problems have been decided by the courts. The most widely publicized case in recent years involved a photographer who established as his profession the taking of pictures of Mrs. Jacqueline Onassis and selling them for a profit.129 The photographer, Ronald Galella, sued Mrs. Onassis for interference with his trade, and she counterclaimed, inter alia, that his actions constituted a violation of common law and constitutional rights of privacy. It is interesting to note that

125 Note signed J.C. to the first and third cases in [1951] D.L. 589. One commentator remarked that "[T]he Council of State delivered its decision only in view of the requirements of circulation as a public street, ... a solution [which] does not endanger, in any way, personality rights, because ... the photographer cannot give any publicity to the negative." Stouffel, supra note 9, at 10.


nowhere in the *Galella* opinions did the courts suggest that Galella should not take pictures of Mrs. Onassis. Rather, the decisions were concerned with his conduct in taking them. The district court recognized that "'[Mrs. Onassis] is a public figure. Nevertheless, the First Amend- ment does not immunize all conduct designed to gather information about or photographs of a public figure. There is no general constitutional right to assault, harass, or unceasingly shadow or distress public figures." With regard to Galella's photography, the court stated: "Galella’s occupation is lawful and the objective of [our] order is to modify his conduct, not to prevent his photography.'"

The district court designated a minimum distance from which Galella could photograph Mrs. Onassis, her children, her home, and the children's schools. The distance was reduced by the court of appeals. There were no allegations, at least in the text of the opinions of the two courts, that Galella was intruding upon Onassis' privacy through the use of telephoto equipment. Galella was enjoined, however, from "performing surveillance of [Onassis] or her children." Among the many recent French invasion of privacy cases involving famous persons, there are a few in which Brigitte Bardot was the plain-
tiff. One dealt with the publication of photographs, surreptitiously taken. It appears that the defendant's photographers climbed a tree and took some pictures of the actress by telescopic lens while she was playing with her child in the privacy of her garden. The defendant argued that the plaintiff was a well-known personality who was holding many press con-
fERENCEs and interviews, did not object to the taking and publishing of her photographs in the past, and declared that she was an open book. In es-
sence, the defense claimed she was a public figure accepting and even seeking publicity.

The court nevertheless sided with the plaintiff, reasoning that her lack of objections to the circulation of her photographs, "even for an ex-
tended period of time, cannot raise a presumption of either a waiver of her personality right to her likeness or of an equation of her private life to her public life." The court held that the publication of a photographic likeness of another without his consent "constitutes a fault the author of which is bound to repair," with the exception of public figures repre-
sented in the course of their professional life. The court limited the recov-
ery to the nominal amount of 1 F "for the mental disturbance she experi-
enced" and the publication of the judgment in three newspapers.

One commentator of the case has observed that the fact that the

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130 353 F. Supp. at 223.
131 Id. at 237.
132 Id. at 241.
plaintiff used to undress on the screen did not authorize others to peep through the keyhole to observe plaintiff in other activities.\textsuperscript{134} Professor Rodiere added that it would be permissible to publish the plaintiff's photograph taken in a public place, even against her wishes, because a personality may be considered as being "presented to the public" as soon as he is on the public street. The photographers in the Bardot case, however, were hiding from the plaintiff, realizing that the permission to take the pictures would be denied to them. They were aware that they were violating a right; they acted "in bad faith."\textsuperscript{135} In a similar case, The Duchess of Windsor was granted $32,000 in damages by a French court against a television station and a newspaper which published a picture surreptitiously taken of her hobbling about her garden.\textsuperscript{136}

The Restatement of Torts for actionable interference with privacy 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.

Comments to this section specify:

c) . . . One who is not a recluse must expect the ordinary incidents of community life of which he is a part. These include comment upon his conduct, the more or less casual observation of his neighbors as to what he does upon his own land and the possibility that he may be photographed as a part of a street scene or a group of persons . . . .

d) . . . [L]iability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability occurs. These limits are exceeded where . . . photographs of a person in an embarrassing pose are surreptitiously taken and published . . . . In determining liability, the knowledge and motives of the defendant, the sex, station in life, previous habits of the plaintiff with reference to publicity, and other similar matters are considered.\textsuperscript{137}

Citing the Restatement, a Tennessee court denied relief in Martin \textit{v. Senators, Inc.},\textsuperscript{138} stating that the use of the plaintiff's photograph after her consent to its "virtually public exhibition" on a former occasion "could not be characterized as an unreasonable and serious interference with privacy."\textsuperscript{139}

\textsuperscript{134} \textit{Id.} (Comment signed by R.L.).
\textsuperscript{135} Rodière, in 1966 \textit{Rev. Trim. Dr. Civ.} 288, 294.
\textsuperscript{136} Detroit News, October 14, 1976.
\textsuperscript{137} \textit{RESTATEMENT OF TORTS} § 867 (1939).
\textsuperscript{138} 220 Tenn. 465, 418 S.W.2d 660 (1967).
The most recent thinking is reflected in Tentative Draft of the Restatement Second (April 5, 1975), which lays down the general principle that "one who invades the right of privacy of another is subject to liability to the other if the invasion is unreasonable." It also specifies that two elements are necessary for liability: the matter concerning the private life of another which was published must be "highly offensive to a reasonable person," and "is not of legitimate concern to the public."

Photographing employees in the course of their employment may be warranted for research efforts to increase efficiency of operations and promote safety of employees. In *Thomas v. General Electric Co.*, the plaintiff requested that his picture not be taken but did not disclose any reason other than he felt that the taking of pictures invaded his right of privacy. Subsequently, the defendant employer took motion pictures of the plaintiff, which were to be used only in the study of the defendant's operations, without his consent. The court found the defendant not liable, agreeing with counsel that

[a] defendant employer has a right to photograph its employee in the performance of his . . . duties to increase the efficiency of its operations or to promote safety, but that this right is inferior to the rights of the employee when said photographing may affect the health, welfare, domestic situation of employee's home life, may make the employee nervous or subject the employee to undue or unfair criticism by his or her fellow employees."

None of these elements were found to exist in *Thomas*, however, and the court noted that it found no case forbidding an employer to use such means to improve the efficiency of its workers and promote their safety.

It should be added that there may not be liability where the plaintiff is unidentifiable. Thus, where the defendant published a photograph of a racing car accident in which the plaintiff was involved, but in which the car alone could be seen, the case was dismissed. The name of the plaintiff need not appear in the publication, however, in order to make it actionable. Where a photograph of a taxicab driver was published as an illustration in an article directed against taxicab drivers, identification of the plaintiff was sufficient to entitle her to bring an action.

**CONCLUSION**

The angry reaction of some persons to the taking of their photographs is well known; and in many situations, they do not care whether the photographer will keep the pictures for himself or make public use of

141 Id. at 799 (quotation omitted).
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them.

It happens much less frequently that a public official raises similar objections, although such instances are not uncommon. Thus, in Martin v. Dorton, "a sheriff assaulted a newspaper representative who took photographs of the sheriff and of a crowd signing petitions for better law enforcement. It was unclear whether he knew the identity of the photographer or the purpose of taking the photographs. In an action for assault and battery, the sheriff interposed a defense predicated upon a violation of his right of privacy, but the court found his conduct unjustified, as the pictures had been taken in connection with a legitimate news story. As shown above, the main concern of judicial decisions and legislation is about the publication of photographs rather than their taking. The very taking, however, may be objected to and disturbing, since nobody takes photographs to keep the negatives undeveloped and unused. It seems that it would be advisable to extend protection to the taking of photographs against an individual's wishes, in proper situations. After all, the issue of the right of privacy is the mental tranquillity of the people rather than their property or financial interests. In some jurisdictions, the "right to publicity" has been developed by the courts, and it can be computed in monetary terms. In general, however, the gist of privacy is human dignity.

An example for the treatment of mere photographing may be taken from another area of privacy: wiretapping. Here, the courts are willing to grant recovery whether the overheard conversations are published or not.

144 210 Miss. 668, 50 So. 2d 391 (1951).
145 The Martin court added:

While it is true that the modern invention of instantaneous photography now in vogue is such as to afford the means of securing a portraiture of an individual's face and form without first giving an opportunity in advance for adequate adjustment of the facial expression, wearing apparel and posture of the person to be photographed, and often may not result in a good likeness being obtained such as would be pleasing to the officer involved and to his admiring friends and constituents, it is nevertheless not a sufficient ground to justify an assault and battery on an otherwise inoffensive photographer. If a servant of the dear people is thus humiliated by a published photograph that does not seem to do justice to him, the law leaves his feelings of disappointment and chagrin to be helped and vindicated by the tremendous force of public sympathy.

Strange as it may seem, however, most public men are natural born pacifists even toward an impertinent person with a camera, while now and then a few assume a more or less beligerent attitude, either real or fancied, depending upon the circumstances in each case and the mood of the victim.

Id. at 675, 50 So. 2d at 394. Following the battery, the sheriff's photograph appeared in the local newspaper, and it "[compared] favorably with that of most of the other sheriffs . . . ."

Id.

Thus, in *Roach v. Harper*,\(^{147}\) for example, the defendant rented an apartment to the plaintiff. By installing a listening device connected to a speaker in his office, the defendant heard everything said in the plaintiff's apartment, including numerous personal, social, private, and confidential conversations. In an action for invasion of privacy, the defendant demurred on the ground that the plaintiff did not allege that the defendant repeated or published anything he overheard and that she did not suffer any special damages. The Supreme Court of West Virginia overruled the demurrer, stating that publication may aggravate the tort, but is not essential for recovery. Stressing the importance of the right of privacy in present times, the court equated photographing with eavesdropping, saying: "To hold otherwise, under modern means of communication, hearing devices, photography, and other technological advancements, would effectively deny valuable rights and freedoms to the individual."\(^{148}\)

Therefore, with respect to private individuals not involved in current events of legitimate public interest, protection of privacy should be farrowing and include prohibition against the very taking of their photographs not only in private but also in public places, as soon as they express any objection, and irrespective of whether the defendant acts reasonably and whether the invasion of privacy is serious. Of course, no damages should be required to be proven.

The taking of photographs as a part of the general scenery in public places should be permitted, with the reservation that if the picture should encompass a person who does not care to be on the picture, the photographer should give him an opportunity to get out of the range of vision. For a photographer aiming at the taking of a specific individual's picture, his advance consent should be necessary. The same rule should apply to photographs taken in private places.

Publication of public scenes including an individual who incidentally finds himself on the picture should be permitted with the reservation developed by the French that in case he objects, his face should be obliterated so as to make him unidentifiable.

All world travelers have experienced difficulties in taking photographs of street scenes in many countries. Frequently, the local populace advance serious objections about appearing on the picture, either as the main subject or as a part of the general scenery. While sometimes their resistance thaws on the sight of a coin, their general sentiment is that it is up to them to give or refuse permission to be on the photograph. There is no question of legal rules—just of the deeply imbedded feelings.

It is remarkable that the development of the law of privacy was the

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\(^{147}\) 143 W. Va. 869, 105 S.E.2d 564 (1958).

\(^{148}\) Id. at 876, 105 S.E.2d at 568.
work of the courts, both in the United States and in France, where the statutory texts were adopted as late as 1970. The texts are very general and provide only sketchy guidance. It may thus be said that the rules created by judicial decisions will continue to be the basis of the law of privacy.  

The new text of Article 9 of the French Civil Code provides that “everyone has the right to have his private life respected,” and Article 368 of the Criminal Code, enacted at the same time, makes it a crime punishable by imprisonment from 2 months to 1 year or by fine or both the “fixing or transmitting, with any device, the likeness of someone being in a private place, without his consent.” It is added that consent is presumed where the acts in question have been accomplished “during a meeting, within the sight and knowledge of the participants.” It has been emphasized that the new law does not require a proof of damages for recovery.

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150 C. civ. art. 9, No. 70-643 (1970).
151 Pradel, supra note 149, at 111.