The Laws of Image

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We live in an image society. Since the turn of the 20th century if not earlier, Americans have been awash in a sea of images – in advertisements, in newspapers and magazines, on billboards, throughout the visual landscape. We are highly attuned to looks, first impressions and surface appearances, and perhaps no image is more seductive to us than our own personal image. In 1962, the cultural historian Daniel Boorstin observed that when people talked about themselves, they talked about their images.1 If the flourishing industries of image management -- fashion, cosmetics, self-help -- are any indication, we are indeed deeply concerned with our looks, reputations, and the impressions that we make. For over a hundred years, social relations and conceptions of personal identity have revolved around the creation, projection, and manipulation of images.2

The rise of the image society has been a familiar subject of commentary in the fields of social and cultural history,3 yet its legal implications have not been explored or understood. This is unfortunate, as the law has been foundational to the image society; legal doctrines and institutions facilitated the culture of images and were in turn altered and shaped by it. In what follows, I want to contemplate one legal consequence of the advent of the image society: the evolution of an area of law that I describe as the tort law of personal image. By the 1950s, a body of tort law -- principally the privacy, defamation, publicity, and emotional distress torts4 -- had developed to protect a right to control one’s own image, and to

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2 Susan Sontag has written that a society becomes “modern when one of its chief activities is producing and consuming images, when images have extraordinary powers to determine our demands upon reality and are themselves coveted substitutes for firsthand experience and become indispensable to the health of the economy, the stability of the polity, and the pursuit of private happiness.” On Photography 153 (1978).
3 See e.g., Boorstin, supra; Stuart Ewen, All Consuming Images: The Politics of Style in Contemporary Culture (1990); Stuart Ewen and Elizabeth Ewen, Channels of Desire: Mass Images and the Shaping of American Consciousness (1992); Christopher Lasch, The Culture of Narcissism (1978); T.J. Jackson Lears, Fables of Abundance: A Cultural History of Advertising in America (1995); Peter Stearns, American Cool, infra.
4 The legal action for defamation is not a modern tort, but as this article suggests, the 20th century version of the tort is significantly different from what preceded it. Defamation law has come to protect not only “reputation” but personal image and one’s feelings about
be compensated for emotional and dignitary harms caused by egregious and unwarranted interference with one’s self-presentation and public identity. The law of image gave rise to the phenomenon of the personal image lawsuit, in which individuals sued to vindicate or redress their image rights. By the postwar era, such lawsuits had become an established feature of the sociolegal landscape, occupying not only a prominent place on court dockets but also in the popular imagination. The growth in personal image litigation over the course of the 20th century was driven by Americans’ increasing sense of entitlement to their personal images. A confluence of social forces led individuals to cultivate a sense of possessiveness and protectiveness towards their images, which was legitimated and enhanced by the law.

This article offers a broad overview of the development of the modern “image torts” and the phenomenon of personal image litigation. An intertwined history of the law, culture, and the self, it explores how the law became a stage for, and participant in, the modern preoccupation with personal image, and how tort law’s models of personhood and identity in turn transformed understandings of the self. Through legal claims for libel, invasions of privacy, and other assaults to the image, the law was brought, both practically and imaginatively, into popular fantasies and struggles over personal identity and self-presentation.

Throughout the article, I refer to the concept of image – public image or personal image. Although the term “reputation” is familiar in the law, it is inadequate to describe the nature of the interests at stake in many legal disputes over invasion of privacy, unwanted publicity, and defamation. Reputation, a mode of social evaluation historically associated with stable and enduring communities, is based on appraisals and judgments accrued over time. Image, by contrast, is the representation of self that one’s image.

5 In describing these as “image torts” rather than “personality torts,” as they are traditionally categorized, this article offers a reclassification and reconceptualization of this area of tort law, one that suggests an alternative view of the protected interests at stake. For classifications of the defamation and privacy law as protecting “rights of personality,” see Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890); Leon Green, Relational Interests, 29 ILL. L. REV. 460 (1934); Roscoe Pound, Interests of Personality, 28 HARV. L. REV. 343, 363-64 (1915); Paul M. Schwartz, Karl-Nikolas Peifer, Privacy and the German Right of Personality, 98 CAL. L. REV. 1925, 1943-46 (2010); Edward Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962 (1964).

6 See, e.g., R. Zinko, G. Ferris, F. Blass, and M. Laird, Toward a Theory of Reputation in Organizations in 26 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 4 (2007). “Reputation is a perceptual identity formed from the collective perceptions of others, which is reflective of the complex combination of salient personal characteristics and accomplishments, demonstrated behavior, and intended images presented over some
constructs and presents in a world defined by mobility and relatively transient social relations: the fleeting contacts of the city, the momentary connections of the world wide web. When a person is depicted in the media in an embarrassing manner, she may be worried about her reputation among her peers, but she is also likely concerned with her image: the undesirable impression she has made on a mass audience, albeit faceless and unknown to her. She may resent not only that she has been portrayed negatively, but even more, the fact that she has lost control of her public image. The mass media have been regarded as one of the primary threats to personal image in modern times, and this article focuses on cases brought against media defendants. In these cases, the principle that one has a right to control one’s own image -- to be the primary author of one’s image -- was written, albeit with qualifications, into tort law.

The story of the modern tort law of image begins in the late 1800s, when new technologies of visual representation and the fragmented and unstable nature of interpersonal relations in the city generated new anxieties around image, identity, and self-presentation in public. In an environment characterized by fleeting encounters with strangers, where the mass media was beginning to assume a central place in social life, appearances, first impressions and images became matters of great individual and collective significance. It was in this milieu that courts and legal theorists began to discuss the possibility of a legal right to privacy. Although the right to privacy is often described as a “right to be let alone,” privacy was primarily understood, in the legal and popular discourse of the time, as a right to control one’s public image and to be compensated for the dignitary harms caused by unwanted and undesirable publicity. As Part One explains, the privacy tort was the legal manifestation of a nascent appearance-conscious, image-conscious culture.

The further development of the visual mass media, the rise of a consumer culture in the early 20th century, and the transitory nature of modern social relations heightened the cultural emphasis on personal image and the act of image-making. As individuals were unmoored from social institutions that had traditionally anchored personal identity, they conceived of themselves increasingly in terms of images and manufactured appearances. One’s identity came to be seen as congruent with the impressions and images one projected to the world, and the ability to control these surface representations regarded as essential to personal

period of time as observed directly and/or reported from secondary sources, which reduces ambiguity about expected future behavior.” For other definitions of reputation, particularly as they bear on defamation law, see Post, supra at 693-715; David S. Ardia, Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law, 45 HARV. C.R.-C.L. L. REV. 261, 267-272 (2010).
autonomy and self-definition. The 1930s and 40s saw the doctrinal expansion of the image torts and the rise of the personal image lawsuit -- a legal action, typically for invasion of privacy or defamation, often brought against the mass media. The harm alleged was that one’s feelings and dignity were injured when the media interfered with her perceived right to fashion her own public persona. As Part Two explains, by the 1950s, tort law had come to be regarded by many as a tool in the all-important project of image management.

Part Three describes the flourishing of the image society in the latter twentieth century, and the near-obsession with personal image that has been a defining feature of the recent American social experience. It tracks the rise of what sociologists and critics have described an “other-directed” self – a modal personality type, ubiquitous in the affluent culture of postwar America, that was consumed with personal image and the act of constructing a pleasing public facade. In a highly individualistic society, influenced by ideals of psychotherapy and consumerism, the ability to freely shape one’s own public persona, to “express oneself” through one’s public appearance, and to maximize one’s success by transforming one’s image were bound up with prevailing ideals of self-fulfillment, self-enhancement, and freedom of choice. Personal image litigation increased in the last quarter of the twentieth century, as did the variety of legal pathways available to vindicate harms to one’s image, including a family of privacy torts, a “right of publicity,” and an independent tort action for emotional distress. The deeper Americans’ investment in their images, and the greater the perceived threats to personal image, the more instinctive the resort to the law to protect them. Freedom of speech notwithstanding, we remain committed to the idea that interference with one’s public image can, under many circumstances, violate important rights of personhood.

In describing this body of law as image torts, I do not want to suggest that the parties who made use of them were concerned only with their images. Many of the kinds of mass media misrepresentations that we will see produced feelings of shock, hurt and outrage that can be rightly understood as more than merely an interest in how one appeared to others. Yet in many cases, it is clear that what drove these feelings of personal insult and violation was a sense of image-consciousness. Defamations, embarrassing publications of private facts, and false representations before the public can and often do produce serious emotional and psychic injuries; they do so, in part, because we have put so much weight on our public images and freighted them with intense personal meaning and import.

I realize that some may take issue with my characterization of American law as especially solicitous of personal image. As many have pointed out, American privacy and defamation laws, limited by the First
Amendment, do not protect the right to one’s image as extensively as in other parts of the world, particularly continental Europe. It is true that image laws in the United States have been substantially constrained by freedom of speech. These limitations represent another dimension, perhaps the flip side, of modern image consciousness. In a culture where images have been the currency of social exchange, where politics and social life have been mediated by images, the ability to freely disseminate images of individuals and public affairs has been linked to the “free and robust” public discussion said to be at the core of the First Amendment’s domain. The ideal of modern expressive freedom has cut both ways: it is the prerogative to express oneself through one’s image, and at the same time, the freedom to image others. The history of American image law is thus a saga of simultaneous expansion and contraction – the greater recognition of personal image rights and at the same time, their restriction. Much of the legal scholarship in this area has focused on the latter. This piece investigates the expansionary trend and suggests why we have a law of image in the first place.

I. PERSONAL IMAGE AND THE LAW, 1880-1920

The tort law of image traces its origins to the drama, tension and uncertainty of social relations in the American cities of the late 1800s. It was in this milieu of intensifying concerns with image and self-presentation in public that the tort “right to privacy” was conceived and took root. In its broadest terms, the right to privacy was described as the right to control one’s public image, “to exhibit [oneself] to the public at all proper times, in all proper places, and in a proper manner.” Public image was becoming not only an increasing preoccupation of Americans of all backgrounds, but legalized, in the sense that people came to regard their public appearances

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and reputations not only as matters of social contestation and negotiation, but as proper subjects for legal involvement and intervention.

A. Image Consciousness

In the mid to late 19th century, the major American cities, driven by industrialization and immigration, grew exponentially. In 1840, about 11 percent of the population lived in towns and cities of more than 2500 inhabitants; by 1860 that had jumped to nearly 20 percent. Between 1860 and 1910, America’s urban population increased sevenfold. Freed from their backgrounds and the weight of custom and tradition, newcomers to the city faced the prospect of constructing entirely new lives, social identities, and reputations.

The opportunity to transform one’s fate by recreating one’s reputation was often described as the marrow of the fabled American dream, the ideal of self-transformation and self-determination that had been held out since the nation’s founding as its particular merit and virtue. In a democratic society, where “rank and status were fluid, flexible, and changeable,” the ability to chart one’s own course in life by fashioning a favorable reputation was regarded, at least in theory, as every person’s birthright. As Robert Post has observed, one of the enduring faiths of modern market societies has been the belief that one is capable of making and remaking his reputation; that one “always retains a capacity to work towards the production of a new reputation.” The idealized “self-made man” achieved success by cultivating a reputation for honesty and trustworthiness, and the reward was the confidence of potential business relations and the respect of one’s peers.

Reputation had been historically understood as a personal asset achieved or accrued over time, “slowly built up by integrity, honorable conduct, and right living.” It was a form of social appraisal particularly suited to stable and enduring communities where individuals were in repeated and continuous contact. As a New York appeals court explained...
in 1845 in *Cooper v. Greely & McElrath*, a “reputation of a person is the estimate in which he is held by the public in the place he is known.” One cannot have a reputation where one is unknown. In cities of recent transplants, where social life consisted of frequent interaction with strangers, first impressions, perhaps even more than reputations, were becoming an important foundation of social evaluation and judgment. As historian John Kasson has written, in “the pluralistic world of the 19th century commercial metropolis,” the immediate impressions people made upon each other were coming to be seen as “the very basis of social existence.”

From these transitory and unstable urban social relations emerged a new kind of self-consciousness and a heightened sensitivity to one’s image before the public. There was increased attention to the presentation of self in everyday life, and a more urgent self-scrutiny, one that “fed upon uncertainties of status, of belonging, of living up to ambiguous standards” of social conduct in an environment “in which all claims of rank were subject to challenge,” in Kasson’s words. Popular advice literature encouraged readers to create favorable images and impressions that could be conveyed to others through quick and insignificant contact.

One was to adopt an external perspective on one’s self, to consider at all times how one might appear in the eyes of strangers, and dress, gait, speech, and gestures were to be monitored with great care and carefully manipulated in order to impress one’s peers and achieve social advancement.

This attentiveness to personal image and self-presentation in public was enhanced by the development and widespread use of new visual technologies. The period between 1885 and 1910 has been described by historians as a “visual revolution” – the generation of Americans living in this period “went through an experience of visual reorientation that had few earlier precedents,” according to historian Neil Harris. Billboards, first

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16 Cooper v. Greely & McElrath, 1 Denio 347 (1845).
17 KASSON, supra at 114.
18 Image is distinct from reputation and also from honor, a system of social stratification in traditional societies that is dependent on the existence of fixed classes and rigid social hierarchies. On the meaning of honor, see Post supra at 725; FRIEDMAN supra at 41; BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH (1982).
19 KASSON, supra at 180.
20 Id., Chapters Four and Five.
21 See KAREN HALTUNNEN, CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830-1870, 93 (1986).
22 NEIL HARRIS, CULTURAL EXCURSIONS: MARKETING APPETITES AND CULTURAL TASTES IN MODERN AMERICA, 307.
used in the mid-1800s, came to scatter the urban environment.\textsuperscript{23} The development of chromolithography and halftone printing led to the proliferation of visual images in the press.\textsuperscript{24} Portrait and Kodak photography were coming into wide use, and Americans had become familiar with the experience of posing for photos and seeing themselves in terms of the visual impressions they made on others.\textsuperscript{25}

By the late 19th century, middle and upper-class urban dwellers were being encouraged to cultivate an attitude towards their bodies, appearances, and feelings that was strategic and instrumental.\textsuperscript{26} As historian Charles Ponce DeLeon has written, “the residents of cities in the United States…had concluded that everyone employed ‘fronts’ when in public, [and] that all self-presentation was, to one degree or another … artificial.”\textsuperscript{27} The potentially deceptive nature of self-presentation was the subject of great anxiety, and to assuage these fears, social performance was often rationalized in terms of moral objectives. The goal of the idealized social performance was not to mislead, it was said, but rather to externalize personal qualities sincerely held -- industry, frugality, self-discipline, and deferred gratification, prized values in an industrializing economy.\textsuperscript{28} The virtuous person who carefully cultivated good character, and who displayed it in his appearance and conduct, was not presenting a false front but merely displaying his true inner nature.\textsuperscript{29} This “character” ideal was gendered, and special burdens were placed on women, who were to convey the signs of sexual virtue through their dress, speech, and expressions.\textsuperscript{30}

\textsuperscript{23} See Id. at 419.
\textsuperscript{26} On 19th century advice books and etiquette literature, see generally KASSON, supra; HALTUNNEN, supra. Though these exacting and self-conscious standards of decorum are most often associated with the middle and upper classes, historical evidence suggests that Americans of all classes, particularly the aspiring middle-class, followed this ethic of intense self-monitoring and polite self-restraint. See T.J. JACKSON LEARS, \textit{No Place of Grace: Antimodernism and the Transformation of American Culture 1880-1920}, 15 (1994).
\textsuperscript{29} The outward display of inner virtue was seen as “an integral part of character itself.” HALTUNNEN, supra.
\textsuperscript{30} See Kasson, supra at 128-132.
The demands of the “genteel performance” were exacting. They required not only close attention to one’s looks and conduct but also to the intricacies of context and setting.\footnote{Id.} Being socially skilled meant calibrating one’s behavior to meet the demands of different audiences and situations. Conduct before one’s family was inappropriate before houseguests, and behavior suitable for one’s parlor was not to be shared with strangers.\footnote{Id.} One of the most grievous social gaffes was to present oneself out of context, in a manner unsuited to a given social environment.\footnote{KASSON, supra at 93.} In these rituals of public performance, “privacy” assumed particular importance.

2. The origins of the right to privacy

By the 1880s, a “right to privacy” was beginning to be discussed in popular, scholarly, and legal literature. Although the concept of “privacy” was, as it remains, laden with an array of meanings and connotations, in the late 19th century it was bound up with the culture of the image and the intensifying demands of self-presentation in public. At the time it made its debut in American law, “the right to privacy” was largely understood as a right to protect one’s public image by concealing embarrassing, personal or “private” matters from public view.\footnote{See, e.g., Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890); E.L. Godkin, The Rights of the Citizen IV – To His Own Reputation, SCRIBNER’S 58 (July 1890).} The domain of the “private” swept broadly. It encompassed not only one’s home and family life, but also matters pertaining to one’s body, physical functions and emotions.\footnote{19th century society perceived a strict division between public and private “spheres” of life. The sanctity of the private household was regarded as a refuge from the world of the aggressive marketplace; in the home, one could cultivate close relationships and express intense and spontaneous feelings proscribed in the formal, judgmental realm of the public. This segmentation of society was mirrored by a segmentation of self. There was a public self and a private self, each attuned to the demands of its respective sphere. Only in the private sphere could one let down one’s guard and display one’s emotions and “true self.” See HALTUNNEN, supra at 104; KASSON, supra at 61, 116 (1991); ERVING GOFFMAN, THE PRESENTATION OF SELF IN DAILY LIFE (1959).} The dignified person was respectably modest and “pained and distressed by anything resembling publicity” of his personal affairs.\footnote{The Right of Privacy, N. Y. TIMES, July 3, 1902.} A “sure mark of good breeding,” one advice manual summarized, was the suppression in public of “any undue emotion, such as anger, mortification, or laughter.”\footnote{KASSON, supra at 180.} With its ability to expose individuals and their personal affairs to a mass audience in ways that were undignified and humiliating, the popular press
was coming to be described as the primary threat to privacy in contemporary social life. The “penny press” of the 1830s and 40s, and its successor, the sensationalistic yellow press of the late 19th century, developed the genre of human interest journalism, which focused on true stories and private lives. The penny papers initiated society and gossip columns, which allowed readers to peer in on “private houses...banquets, balls, [and] teas.” The mid-1800s saw the beginning of the widespread use of the personal interview in reporting on public figures, interviews that were said to enable readers to “get behind the veil with which everyone attempts to conceal his innermost thoughts and feelings.” By the end of the century, most papers ran gossip columns on politicians, businessmen, society leaders, and actors that offered readers a glimpse of their private lives and an appraisal of the subject’s intimate “personality” and “habits.” This focus on the private and the personal helped make popular journalism a mass fascination and pastime. There was great public curiosity not only about the rich and famous but also the private lives of ordinary people. Publishers catered to this interest by excavating and displaying the personal affairs of average citizens. The front pages of the papers featured divorce cases, stories of secret affairs, crimes of passion, and the stories of men and

39 Helen McGill Hughes, News and the Human Interest Story: A Study of Popular Literature (1940). The 19th century popular press “methodically violated” the private sphere, writes historian Gunther Barth, and in so doing, “steadily broadened people’s idea of what was news.” Gunther Barth, City People: The Rise of Modern City Culture in Nineteenth Century America 72 (1982).
41 Ponce De Leon, supra at 57.
42 “Please impress upon the men who write our interviews with prominent men the importance of giving a striking, vivid pen sketch of the subject; also a vivid picture of the domestic environment, his wife, his children, his animal pets, etc,” publisher Joseph Pulitzer told his writers in the 1880s. Quoted in Fred Inglis, A Short History of Celebrity 125 (2010).
43 This is one way that American publishing was different from its European counterparts, which tended to focus on the private lives of elites. While the point of the continental scandal sheets was to take down the wealthy and powerful by exposing their private misdeeds and hypocrisies, the focus in the American press on average citizens’ private lives and public selves was intended to aid readers in the construction of an “American identity.” See Mitchell Stephens, A History of News (2007); Barth, supra at 106-108.
44 Between 1870 and 1900, the readership of daily urban newspapers increased 400%. Pember, supra at 10.
45 See Barth, supra at 106.
women lost in the “shuffle of daily life.”

With its promise to go “behind the scenes,” to allow readers to see whether individuals were the same in private life as in public, mass journalism played to the public’s interest in the instability and malleability of social identity and the constructed nature of public images. The more that personal identity was seen in terms of the presentation of facades and “fronts,” the greater the public’s interest in deconstructing other people’s fronts. The popular media became, in effect, an industry of counterimage.

It was in this milieu of intensifying concerns with image, and threats to public image, that the foundations of the modern tort law of image were established. The opening chapter in this story involved the effort of courts and legal scholars in the late 19th century to theorize and implement a legally enforceable “right to privacy.” In an 1880 essay, critic and New York Post editor E.L. Godkin called for a revision of libel law to protect “the right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation and discussion.”

In an article in Scribner’s magazine ten years later, he advocated a “right to privacy,” distinct from libel, which he described as the individual’s right to “decid[e] how much or how little the community shall see of him, or know of him.” The right to privacy was “the right to decide how much knowledge of ... personal thought and feeling, and how much knowledge...of tastes and habits, of his own private doings and affairs...the public at large shall have.” This was “as much one of [one’s] natural rights as his right to decide how he shall eat and drink, what he shall wear, and in what manner he shall pass his leisure hours.”

Godkin’s piece inspired the writing, later that year, of the famous

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46 Id.
47 The public’s fascination with the potential instability of appearances found expression in the art, literature, and popular culture of the time. Stories about “confidence men,” undercover detectives, and others who dealt in disguises revealed the ways that social appearances were potentially subject to manipulation. Stunt reporters became famous for the guises they took on to do undercover journalism, and the newspapers were filled with the details of masked balls, costume parties, and other plays on identity. See Kasson, supra at 105-109; Barth, supra at 74, 107
49 Godkin, The Rights of the Citizen, supra at 65.
50 Id.
51 Id. According to Godkin, curiosity “in its modern form, published gossip, was the chief enemy” of privacy in contemporary life. Id. at 66. See also Rochelle Gurstein, Repeal of Reticence: A History of America’s Cultural and Legal Struggles Over Free Speech, Obscenity, Sexual Liberation, and Modern Art 37, 57 (1998).
article “The Right to Privacy,” the Harvard Law Review piece by Samuel Warren and Louis Brandeis that is credited with originating the legal right to privacy.\(^{52}\) An attack on the popular press, the article decried gossip columns and information about personal affairs “spread broadcast in the columns of the daily papers.”\(^{53}\) Warren and Brandeis accused the press of invading privacy when it displayed a person’s emotions and idiosyncrasies—“peculiarities of manner and person”—before a public audience.\(^{54}\) Newspapers invaded privacy when they published a person’s photograph, unauthorized, even if it was taken in a public place,\(^{55}\) and when they publicized, without consent, one’s participation in social events, such as weddings or dinner parties.\(^{56}\) The picture of a woman as she walked down the street technically was not “private,” nor was the fact of her attendance at a ball or a banquet. Such disclosures nonetheless were said to “invade privacy” because, in depicting the subject before an unwanted mass audience, they interfered with her prerogative to present herself in an appropriate and desirable manner and context. The right to privacy was both the right to keep one’s “private” affairs out of the public eye, and more broadly, to prevent egregious and unwarranted interference with one’s public image. It was, as the Georgia Supreme Court described it 15 years later, the right “to exhibit [oneself] to the public at all proper times, in all proper places, and in a proper manner.”\(^{57}\)

The article proposed a cause of action that would allow the victims of “invasions of privacy” to sue in tort and recover damages for dignitary and emotional injuries. The thrust of the legal argument was that a right to privacy as a right to control one’s image already existed in the common law. The existing legal protection of artistic expression demonstrated that “the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”\(^{58}\) The press had no more right to interfere with a person’s public image without consent than it did to misappropriate a

\(^{53}\) Id. at 196.
\(^{54}\) Id. at 215.
\(^{55}\) See Id. at 195 (discussing the case of Manola v. Stevens & Myers).
\(^{56}\) The catalyst for the article was Warren’s outrage that a Boston newspaper published an account of his niece’s wedding. See PEMBER, supra at Chapter Two. See also Amy Gajda, What if Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage That Led to “The Right to Privacy,” 2008 MICH. ST. L. REV. 35, 55-58 (2008).
\(^{58}\) Id. at 198.
painting, lithograph, or other artistic image. Under the proposed privacy tort, damages could be recovered for “injury to feelings.” This proposition was novel and contested at the time; the common law did not recognize the interest in one’s peace of mind as deserving of general and independent legal protection, and compensation for emotional harms was usually parasitic upon a cause of action for the violation of some other legal right.

Libel law, which imposed liability for defamatory falsehoods, protected a different interest from the right to privacy -- in one’s reputation, the esteem in which one was held by others. The right to privacy, by contrast, proscribed embarrassing but truthful information and implicated an interest that was personal and “spiritual,” according to Warren and Brandeis. It did not protect one’s standing before others so much as a person’s feelings about her public image, and her capacity to independently determine her own image. Liability could not be had for every interference with self-presentation, Warren and Brandeis had written; the law of privacy was not to be a remedy for back fence gossip or trivial slights. Only material that was distributed to a wide public audience, that was published solely for the purpose of amusement or curiosity, and that was “flagrant” in its disregard of standards of social decency would be actionable under the privacy tort.

As protection for freedom of the press, Warren and Brandeis envisioned a privilege for “matters of public interest,” which exempted from liability the publication of private information justified by an overriding public need. The privilege was narrow and to be limited only to certain publications involving public figures, such as the limited discussion of the personal qualities of a public official that bore on his fitness for office. At a time when the reigning judicial position on free speech was far more deferential towards state-imposed restrictions on speech and publishing than in the post-1930s, civil libertarian era, jurists and legal

\[\text{The wrongs and correlative rights recognized by the law of libel and slander are in their nature material rather than spiritual.} \]  

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59 Id. at 206.  
60 Id. at 219.  
62 Warren and Brandeis, *supra* at 197. In the history of defamation law, reputation had been regarded as having material value and as a form of property. Robert Post has observed that the concept of reputation as property was so deeply entrenched that a prominent 19th century writer could conclude that in defamation law, the “protection is to … property” and “pecuniary loss to the plaintiff is the gist of the action for libel or slander.” Post, *supra* at 696; see also Randall Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 538 (1988).  
63 Id. at 216.  
64 Id. at 214.
scholars generally agreed that the privacy tort, with this narrow public interest exception, did not encroach on the constitutional freedoms of speech and press.\(^6\)

Warren and Brandeis described the prerogative to establish and control one’s own public image without interference from a prying, sensationalistic press as essential to personal dignity. The concept of dignity, a “key cultural trait of the northern states”\(^67\) in this time, held that in theory, every person had “intrinsic value” and an equivalent right to self-determination.\(^68\) Every person had a privacy right “whatsoever...their position or station,” Warren and Brandeis had written.\(^69\) Continental Europe had developed legal protections for privacy and personal image as dignitary rights, and Warren and Brandeis cited these favorably in the article.\(^70\) In the mid-19th century, Germany had developed a right to privacy, understood as a right to one’s image, as part of a broader body of “personality” rights.\(^71\) The German right to privacy rested on the principle that each person has a unique soul or essence, and that the ability to freely express one’s inner self through one’s appearance and public image is fundamental to self-realization.\(^72\) Similar strains of expressive individualism had been present in the United States in a 19th century Romantic tradition, and “The Right to Privacy” reflected their influence.\(^73\)

Warren and Brandeis characterized privacy’s domain as the emotions and the spirit; privacy was the freedom to express one’s self as

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\(^{66}\) In the words of the *Virginia Law Review*, freedom of the press “was not intended to confer a license, without any limitation, to override the rights of others,” including “the right to be left alone.” *The Right to Privacy*, VA. L. REV. 92 (1906); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

\(^{67}\) FRIEDMAN, supra at 41.


\(^{69}\) *Id.* at 195.

\(^{70}\) By the 1870s, France had developed a right to one’s image, which forbade the publication in periodicals of “anything relating to a man’s private life which is not ... before the courts in a criminal proceeding.” The right to one’s image was an important aspect of the “right to privacy” in France, and it was mobilized by aristocrats and other high status persons seeking to keep their family and personal affairs from public view. See Elbridge Adams, *The Right of Privacy and its Relation to the Law of Libel*, 39 AM. L. REG. 37, 52 (1905).

\(^{71}\) Whitman, *supra* at 1178-9.

\(^{72}\) *Id.*

one wished, a self that was immanent in one’s appearance. Yet the right to privacy, particularly as it came to be understood by the public, had a more earthly, strategic and instrumental aspect. Particularly in the late 19th century, a time of aggressive Gilded Age individualism, success was understood as a function of individual will, initiative and effort. This included creating and putting forth the best possible personal image, whether deceptive or authentic. Public misrepresentation robbed one of one’s perceived right, in a nation of opportunity and mobility, to determine his own fate and maximize his fortunes by perfecting his image before others. The success of the right to privacy, both as a popular concept and as a matter of formal law, was rooted in practical and material concerns with image in American social life and popular culture.

3. Litigating the image

Following the publication of the highly influential Warren and Brandeis article, a series of cases were brought in state courts over alleged “invasions of privacy.” In many of the cases, the aggrieved individual did not allege that an intimate or “private” matter had been exposed to public view, but rather that she had been depicted in a publication in an undesirable or misleading context that contradicted the way she wanted to be known to others. This injury to her ability to control her public image, and to her feelings about her image, was said to be a violation of her “right to privacy.”

In these privacy cases, and also libel cases from this period, we can detect the origins of a possessiveness towards one’s image -- an entitlement to one’s image -- that would intensify over subsequent decades. Social elites, as well as politicians, actors, and other public figures who depended

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74 See generally Sennett, supra.
75 See generally Cawelti, supra. On the “utilitarian individualism” that has long defined the American tradition -- the idea that one can achieve social and material success largely by one’s own initiative -- see Bellah, supra at 33.
76 As John Cawelti has observed, “by the end of the 19th century self-help books were dominated by [an] ethos of salesmanship and boosterism” that linked success to a positive public image. Cawelti quoted in Lasch, supra at 58.
77 See Glancy, supra at 7, noting popular support in the late 19th century for a right to privacy. As Benjamin Bratman writes, it “seems beyond dispute that at the dawn of the twentieth century, the American legal community and the lay public zealously supported the enactment of legal protection for their privacy.” Benjamin C. Bratman, Brandeis and Warren’s The Right to Privacy and the Birth of the Right to Privacy, 69 Tenn. L Rev. 623, 650 (2002).
78 Pavesich v. New England Life Ins. Co., 50 S.E. 68 (G a. 1905); Foster-Millburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909), appeal after remand, 127 S.W. 476 (Ky. 1910); Roberson v. Rochester Folder Box Co., 64 N.E. 442, 450 (N.Y. 1902); Marks v. Jaffa, 6 Misc. 290 (N.Y. Super. Ct. 1893);
on public favor for their livelihoods, had long been concerned with their images and reputations. Yet the majority of reported privacy and libel claims in the late 19th and early 20th century were brought not by public figures but by private citizens. Ordinary men and women seemed to think that their public images and appearances were valuable matters worth protecting, and that interference with their ability to construct a desirable public image warranted legal redress. The legal recognition and embrace of this attentiveness to image, albeit yet hesitant and tentative, marked a turning point in the history of the law and the modern social history of the self.

Many of the early privacy cases were brought over the unauthorized use of portraits and other visual depictions of individuals in advertisements. In the late 19th century, new printing technologies permitted advertising, once exclusively word-based, to become image-based, and advertisers “went on a binge of image appropriation,” looking for visual impressions to “create favorable associations for their products.” Advertisers often purchased portraits from photography studios for use in ads, typically without the consent of the photographic subjects; by 1900, there was a large market in such images. A photograph of one’s face was considered particularly intimate -- a “window into the soul,” and for that reason, to be especially “private.” The unauthorized advertising

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79 See generally Lawrence Friedman, Guarding Life’s Dark Secrets: Legal and Social Controls Over Reputation (2005); Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History, 30 Hofstra L. Rev. 1093 (2002).


81 Madow, supra at 157.

82 On the haphazard way that newspapers of the time handled photographs, see Henry B. Brown, The Liberty of the Press, 34 Am. L. Rev. 321, 327 (1900). (“An enterprising editor never allows the trivial fact that he has no photograph of a particular individual to prevent his publishing one. With hundreds of pictures in his collection, why should he not take his choice, since not one in a thousand will ever detect the fraud?”)

83 Mensel, supra at 32. Photographic portraits were even sold from vending machines and given away free in cigarette packs. One late 19th century paper noted that junk shops peddled the “second hand stock of the cheapest …photograph parlors…pictures of bridal couples in full regalia…unhappy looking family groups.” Hundreds were sold to collectors for as cheap as a penny a piece. See also Kunz v. Bosselman, 115 N.Y. Supp. 650 (1909) (describing the activities of a photographic peddler in this period).

84 Mensel, supra at 30. As an 1869 article on photographs and the law of evidence had explained, unlike written material, photographs were not interpretations but literal depictions of reality; they were natural and spoke the “truth without flattery or detraction.” The Legal Relations of Photographs, 17 Am. L. Reg. 1, 7 (January 1869).
use of one’s portrait was thus considered to be an egregious invasion of privacy, as it put the most intimate expression of the self into a cheap and undignified context.\textsuperscript{85} It associated a person with what was considered to be the immoral taint of commercialism and created the false impression that one endorsed a particular product.\textsuperscript{86}

In several cases around the turn of the century, courts recognized unauthorized uses of personal portraits in advertising as a dignitary harm redressable under a right of privacy. The 1905 Georgia case \textit{Pavesich v. New England Life Insurance Co.}, the first in which a state recognized the common law privacy tort, involved a photographic portrait of an artist that had appeared without his consent in an insurance company’s advertisement that was published in the \textit{Atlanta Constitution}.\textsuperscript{87} The Georgia Supreme Court held that the artist had a cause of action for invasion of privacy. Such unwanted, undesirable publicity deprived him of his ability to control the terms of his public persona – to display himself to the public as he wished and “to withdraw from the public … as [he] may see fit.”\textsuperscript{88} This injury represented an assault not only to his dignity but to his “liberty.”\textsuperscript{89} On this same theory, in 1908, a young boy’s parents sued a jewelry company over emotional injuries caused by the unauthorized use of his picture in an advertisement. The court held that he had a cause of action for invasion of privacy.\textsuperscript{90} Kansas’ highest court held that a woman had a valid claim for invasion of privacy when a dry goods store took a film of her which was used without her consent in a newsreel advertisement.\textsuperscript{91}

In a famous New York case from 1902, a woman alleged invasion of privacy when her portrait was used in an advertisement for flour, alleging that the display of her picture in disreputable places such as “stores, warehouses, and saloons”

\textsuperscript{85} See Mensel, \textit{supra} at 32, noting that “many people felt a profound sense of exposure and violation upon being photographed, or upon finding their photographs displayed and sold in photo shops, or used in advertisements, without their consent.”

\textsuperscript{86} As Neil Harris writes, in this period “photography was always associated with commercialization – the taint of money-making and profitable exploitation attached itself to this iconographic revolution.” HARRIS, \textit{supra} at 308. See also Rhodes v. Sperry v. Hutchinson, 120 A.D. 467 (N.Y.A.D. 1907).

\textsuperscript{87} The text of the ad made it appear, falsely, that he had consented to the publication and was endorsing the company’s life insurance. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905).

\textsuperscript{88} His image, indelibly imprinted in the pages of the newspaper, could appear in disreputable places – saloons, brothels, and the “walls of private dwellings” – where he himself would never choose to appear. \textit{Pavesich}, 50 S.E. at 70.

\textsuperscript{89} \textit{Id.} at 80.

\textsuperscript{90} Munden v. Harris, 134 S.W. 1076, 1080-81 (Mo. Ct. App. 1911).

\textsuperscript{91} The woman claimed that she had become the laughingstock and “common talk of the people,” since her peers assumed falsely that she was a disreputable commercial model and had been paid to pose for the ad. Kunz v. Allen, 172 P. 532, 533 (Kan. 1918).
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led to “mortifying notoriety,” humiliation and emotional distress. 92 None of these plaintiffs sued over lost profits; it was considered undignified to attempt to make money off one’s image, and “commodification of name and likeness had not advanced sufficiently at the turn of the century for judges to conceive of the persona as ‘thing’.” 93 Rather than economic injury, these claimants argued that advertisers had deprived them of a dignitary interest in autonomous self-presentation.

By 1910, several states recognized a “right to privacy” at common law or by statute. 94 New York’s highest court refused to acknowledge the privacy tort, claiming that without a foundation in a property right, there was no legal basis for a right to privacy, and that the common law did not provide redress for independent harm to feelings. 95 In response, in 1903, that state’s legislature enacted a privacy statute that permitted damages and injunctive relief for the dignitary and emotional injuries caused by the unauthorized use of one’s image in a commercial context. 96 The Supreme Court of Michigan refused to acknowledge the privacy tort because of its potential implications for freedom of the press. 97 Where a cause of action for invasion of privacy was approved, it was understood largely in the spirit of Warren and Brandeis. The right to privacy was not only about concealing the private, but consisted of a broader right to selective and self-controlled publicity. It was the right to choose whether one would be publicized and how – the right “to pass through the world, if one chose, without having his picture published, his business enterprises discussed …or his eccentricities commented upon either in handbills circulars, catalogues, periodicals, or newspapers.” 98 It was the prerogative to “live a life of publicity as to certain

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95 Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. 1902).
96 N.Y. CIV. RIGHTS LAW § 50. Because the interest protected was one’s right to keep one’s identity outside of a commercial setting, an actionable injury could occur even if the depiction was sympathetic or flattering. In Almind v. Sea Beach Railway, from 1913, a New York appeals court upheld an injunction against a railway company that had made a short instructional film about railroad safety and used a short film clip of the plaintiff getting out of a rail car. The scene was in no way humiliating or embarrassing. The court nonetheless held that the woman’s privacy had been invaded because the film was for “advertising purposes.” Almind v. Sea Beach Railway, 157 AD 230, 232 (1913).
98 Adams, The Law of Privacy, supra at 361.
matters and of privacy as to others.” To paraphrase one modern privacy scholar, privacy was a legal principle of public “identity maintenance.”

3. Libel and the Law of Image

Given the concerns with “invasions of privacy” committed by the press, there were surprisingly few cases in this period brought over newspaper “gossip” and the publication of private facts. One reason may have been the seriousness of the injury -- the publication of highly personal information may have been so humiliating that victims were reluctant to bring a lawsuit and draw further attention to the embarrassing matter. Another reason may have been the availability of the libel tort as a means of redress for gossip and other undesirable publicity.

The law of libel and slander – written and spoken defamation, respectively – was an elaborate system of complex doctrines that dated back to the earliest history of the common law. A defamatory statement “expose[d] a person to hatred or contempt…injure[d] him in his profession or trade, [and] cause[d] him to be shunned by his neighbors,” in the words of an 1890 treatise. The essence of the harm was the loss of one’s good name in the community. Privacy law looked inward, to a person’s emotions; defamation law looked outward, to the quality of one’s social relations.

Before 1964, the plaintiff in a libel suit needed only to present the derogatory statement and prove that the defendant was responsible for publishing the statement to others, not that the statement was false. Although the defamation tort at this time was “free of rigid and

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99 Pavesich, supra at 70.
102 WILLIAM ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER 19 (1887).
103 I will focus on libel law and written publications because they were more likely than spoken communication to be involved in the creation of a “public image” in the sense I have described it -- the impressions one made before a public audience. Libels had traditionally been considered to be more dangerous than slander because of the wide circulation and permanency of written communication. See Ingber, supra at 797.
104 Reputation was a “relational interest.” See Leon Green, Relational Interests, 29 ILL. L. REV. 460, 463 (1934). See also Bezanson, supra at 341.
strictly circumscribed social class distinctions and ... available to remedy injuries to a wide range of reputational interests.”

The typical libel case had involved a public figure plaintiff, usually a politician or other high status person, suing the press over political criticism or accusations of immoral conduct. There was nonetheless something of a reluctance to sue over injurious words; as E.L. Godkin had noted in 1880, particularly in the South, there was a strong feeling that there was something “unmanly or discreditable in seeking redress for libel in the courts, instead of challenging the offender to single combat.” By the end of the century, this reticence appears to have waned. Popular journalism, with its focus on personalities and private lives, and its efforts to lure readers through gossip, sensationalism, and “true stories,” led to dramatic depictions, portraits, and accusations that injured the vanity and sensibilities of those caught in its path and produced legal responses. With frequency, apparent zeal, and perhaps even skill, Americans were mobilizing the law to deal with the mass media and its perceived assaults to personal image.

Though libel cases in this period were often brought around serious charges, such as allegations of adultery or dishonesty in business, many involved publications that were more likely to cause embarrassment or hurt feelings rather than serious reputational injuries. Many alleged libels, in other words, involved material that was not clearly false or defamatory -- in many cases not even unflattering -- but, like many claimed “invasions of privacy,” contradicted the way plaintiffs wanted to be known to the public.

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106 See Bezanson, supra at 539.
107 On libel suits pursued by the political elite in the 19th century, see Rosenberg, supra.
108 See David Riesman, Democracy and Defamation: Control of Group Libel, 42 Colum. L. Rev. 727, 734-745 (noting that the roots of libel law emanate from a legal attempt to protect the ruling class from scorn and criticism).
109 On dueling, see Warren Schwartz, Keith Baxter, David Ryan, Duel: Can these Gentlemen be Acting Efficiently, 13 J. Leg. Stud. 321, 325 (1984) (noting the sociology of the duel and that many duels arose out of cases of libel or slander. “The duel offered an alternative private means of controlling conduct that could be sanctioned by invoking legal remedies.”)

Zechariah Chafee noted that “a libeled American prefers to vindicate his reputation by steadily pushing forward his career, not by hiring a lawyer to talk in a courtroom.” Chafee, quoted in Rodney Smolla, Suing the Press: Libel, the Media, and Power 17 (1987).
110 In the words of historian Norman Rosenberg, “the colorful content of [19th century] popular journalism created more than the chance for greater numbers of libel suits; it also produced new types of defamation cases.” Rosenberg, supra at 187.
111 In the last three decades of the 19th century, libel suits against the press became more common, and some newspapers were beginning to hire in house lawyers to provide prepublication advice on potential legal problems. Id. at 197.
112 Bezanson, supra at 538.
In a 1912 case, a former Oxford professor brought suit when an article in a New York newspaper alleged that he was unemployed and “too educated to make a living.” In *Corr v. Sun Printing & Publishing* (1904), the *New York Sun* published a story about a woman robbery suspect and named her as a 35 year old teacher, Kittie Carr. Kate Corr, a 26 year old teacher, sued the paper, claiming that the publication damaged her reputation, as “Kate and Kittie are the same name” and their surnames were similar. The court rejected the claim. The piece had not defamed her; the only thing it had done was to raise the anxieties of an image-conscious woman who feared, probably unreasonably, that others’ impressions of her had been tarnished.

Many libel cases, like privacy cases, involved the publication of photographs in contexts that were undesirable to the subject, although nondefamatory and often nondisparaging. In *Knickerbocker v. Press Publishing* (1911), an 18-year old woman unsuccessfully sued over the newspaper publication of a photograph of her taken when she was a baby, claiming it to be libelous because it was embarrassing.

A valid claim for libel would exist only if such depictions conveyed a false impression and were damaging to one’s standing among one’s peers. Actions would not be permitted for statements or portrayals that were merely unflattering, misleading, or offensive solely to the subject of publicity. The libel tort did not permit damages to be awarded for emotional harms in the absence of injury to reputation; it was not a “balm for wounded feelings.” Damages for emotional injuries could be awarded in

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115 The court held that the publication was not defamatory because it could not be construed as being “of and concerning the plaintiff.” *Id.* at 136.
116 In one noted case in this genre, a woman sued a newspaper for libel and invasion of privacy when it published a photo of her alongside a story about her father’s involvement in a real estate fraud. Hillman v. Star Publ’g, 117 P. 594 (Wash. 1911). *See also* Wilbur Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693, 700 (1912).

118 In 1909, a man sued a dry goods company for libel when it used a photo of him seated in a car in an advertisement for coats. He alleged that the ad, which he had not posed for or endorsed, made him the subject of public mockery and injured his dignity and reputation. The court held that he had not made out a libel claim. Although he may have been presented in a way that was embarrassing to him, it did not rise to the level of being defamatory. Henry v. Cherry & Webb, 73 A. 97, 98 (R.I. 1909).
cases where a defamatory publication was proven, on the theory that hurt feelings inevitably accompanied a loss of reputation. Legal critics of the time argued that given the potential severity of the harms, defamation law should compensate emotional injuries inflicted by unflattering depictions in the media, even in the absence of harm to reputation. An author in the American Law Register had written that embarrassing photographs depicting the subject in a “ridiculous light” should be actionable as libels, even if the photo did not convey an impression that was false or defamatory. John Henry Wigmore advocated a cause of action that would permit individuals to be compensated for dignitary harms caused by certain classes of false or misrepresentative statements, even if they did not fall within the accepted definition of defamation. Elbridge Adams criticized the fact that under existing libel doctrine unwanted publicity that did not injure reputation could not be remedied under the law, no matter how distressed the subject was by it. Early twentieth century courts were generally unwilling to alter libel doctrine in this way. Fifty years later, however, libel law’s scope had expanded to cover a broad range of injuries to the image, injuries that were not only external and objective -- to one’s reputation and standing before the public -- but also internal and subjective -- to one’s feelings about one’s public image.

II. The Image Society, 1920-1950

The image society matured in the period between 1920 and 1950, and the law was intertwined with it and shaped by it. This era saw an increasing cultural focus on personal image, the growth of the mass media, a profusion of images in the visual environment, and new industries of

119 Damages for emotional injury could be awarded as part of general damages in cases of libel per se, where the libel was apparent on its face. In slander cases, and in cases of libel per quod, where the libel must be demonstrated by extrinsic facts, damages for emotional harm could not be awarded without proof of economic loss. See Gertz v. Robert Welch, 418 U.S. 323, 349; Michael T. Mather, Defamation Damages, 38 Baylor L. Rev 917, 920; Randall Bezanson and Brian Murchison, The Three Voices of Libel, 47 WASH L. REV. 213, 217 (1990); Prosser, Libel Per Quod, 840.

120 John Henry Wigmore, The Right Against False Attribution of Belief or Utterance, 4 KY. L. J. 8 (1916) (“the right to privacy is really a right to be protected against a certain kind of injury to feelings.” Defamation, “loss of repute and patronage among other persons, does not here reach the essence of the wrong.”)

121 The Legal Relation of Photographs, 8.

122 Wigram, supra at 8. See also Harvey Zuckman, Invasion of Privacy: Some Communicative Torts Whose Time Has Come, 47 WASH & LEE L. REV. 253, 256.

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124 These developments contributed to the expansion of image law to protect a broader range of perceived threats to the image and to the rise of the personal image lawsuit. In a series of cases involving false, embarrassing, and unfavorable depictions in the media, courts affirmed the prevailing popular belief that individuals had a legal entitlement to control their self-presentation before the public, one that could, under many circumstances, override public rights to a free press and freedom of expression.

A. An “escalating cycle of self-consciousness”

In the first third of the twentieth century, as historian Jackson Lears has observed, personal identity had become much more “problematic than earlier generations had imagined,” and concerns with the presentation of self in public reached new levels of intensity.125 This “escalating cycle of self-consciousness” can be attributed in significant part to the preoccupations and pressures of a mass consumer society. By the 1920s, the producer economy of the 19th century, in which creative, psychic, and productive energy were directed towards the production of goods, had been supplanted by a consumer society, where the focus was on the acquisition of goods.126 Advertising encouraged people to define their identities in terms of their possessions and purchases, and shopping was transformed from a functional activity into a form of leisure and a source of meaning and pleasure.127 This shift from production to consumption led to the growth of the sales and service industries and the rise of a white-collar work force. Critics feared that the self-made man, pioneering his way to prosperity on the frontier or in the freewheeling urban marketplace, had become extinct in a world of large corporations managed by faceless bureaucracies.128

These shifts in economic organization and the nature of work called for the cultivation of personal qualities that were different from the “real or imagined virtues” of the self-disciplined “Victorian entrepreneur.”129 Bureaucratic jobs removed more and more individuals from direct involvement in the production process and demanded involvement with

125 Lears, supra at 37.
127 See Ewen, infra.
people rather than things. Advancement no longer required displaying personal attributes associated with productivity, industry, and self-restraint, but rather knowing how to persuade and charm. To a far greater extent than the earlier ideal of self-presentation, which involved to some degree the externalization of inner moral traits, the new model was more frankly oriented around pleasing appearances. People were told that they had to “sell” themselves and their images to others in order to succeed, and were encouraged to develop a “hypersensitivity” to the feelings and judgments of others as a means to public acceptance and social mobility.

At the same time popular advice literature asserted that people should be natural and express themselves, “in virtually the same breath, the reader is also urged repeatedly to... eliminate the little personal whims, habits, [and] traits that make people dislike you,” according to historian Warren Susman. As Orison Swett Marden, the author of the advice manual Masterful Personality summarized in 1921, “so much of our success depends on what others think of us.” Dale Carnegie’s 1936 bestseller How to Win Friends and Influence People reinforced the idea that the key to success was to manipulate one’s image in order to impress and manipulate others. The notion that social advancement and career success could be achieved through superficial alterations of one’s conduct and appearance was not merely the claim of advertisers and self-help gurus. Employers were paying increasing attention to the looks and personalities of potential employees when making hiring decisions, particularly in the burgeoning service professions.

This project of meticulous image management was driven by new industries of image. This period saw an explosion of visually-illustrated

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130 Id.
131 Warren Susman, Personality and the Making of Twentieth Century Culture, in CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY 273-4 (1984) (“the stress was clearly moral and the interest was almost always in some sort of higher moral law.”)
132 As sociologists Robert Park and Ernest Burgess observed, “the individual’s status is determined to a considerable degree by ...by fashion and front -- and the art of life is largely reduced to skating on thin surfaces and a scrupulous study of style and manners.” ROBERT E. PARK AND ERNEST W. BURGESS, THE CITY 40 (1925).
133 “In the interdependent urban marketplace,” Lears writes, “the ...self became a commodity like any other, to be assembled and manipulated for private gain.” LEARS, supra at 37.
134 STEARNS, supra at 216.
135 Susman, supra at 278.
136 ORISON SWETT MARSEN, MASTERFUL PERSONALITY 71 (1921).
137 DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (1936).
print media and new technologies for capturing and reproducing images on a mass scale, including motion pictures. Radio, movies, and print media achieved nationwide audiences and became the common denominator of American culture.\textsuperscript{139} The emerging beauty, cosmetics and mass-produced fashion industries heightened the average person’s attention to her visual image and offered new possibilities for transforming it. Makeup and clothing manufacturers encouraged women to change their styles to achieve popularity and meet the social demands of the moment.\textsuperscript{140} Advertising had become a persistent feature of everyday life,\textsuperscript{141} and the mission of the ad agency was to create discomforts and dissatisfactions with one’s appearance and image that could only be assuaged through the purchase of goods. Beginning in the 1920s, “the women in ads were constantly observing themselves, ever self-critical….a noticeable proportion of magazine ads directed at women depicted them looking into mirrors,” according to historian Stuart Ewen.\textsuperscript{142} “Each portion of the body was to be viewed critically, as a potential bauble in a successful assemblage.”\textsuperscript{143} Through the careful use of products, one could create a new image and a brand new self.\textsuperscript{144} It was in this period that the concept of the “makeover” entered popular culture.\textsuperscript{145}

The early 20\textsuperscript{th} century saw the rise of a national celebrity culture that revolved around entertainment stars, particularly film actors. The actor, for whom taking off and putting on guises was an art and a profession, became an object of immense interest and fascination, and a kind of modal self in an age of image consciousness. Typically of humble origin, the would-be celebrity transformed her self, her status, and her fortunes in life by changing her image.\textsuperscript{146} The emergence of this success narrative –that one


\textsuperscript{141} LEARS, \textit{supra} at 196.

\textsuperscript{142} LASCH, \textit{supra} at 92.

\textsuperscript{143} Ewen, \textit{supra} at 47. \textit{See also} ROLAND MARCHAND, \textit{ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY}, 1920-1940 (1986).

\textsuperscript{144} A booklet from the 1920s advertising beauty aids depicted on its cover the slogan, “Your Masterpiece, Yourself.” ELIZABETH ARDEN, INC., \textit{YOUR MASTERPIECE-YOURSELF: HOW TO CULTIVATE BEAUTY AND CHARM} (1929).

\textsuperscript{145} Ewen, \textit{supra} at 47.

\textsuperscript{146} In the Hollywood myth that had become central to the national folklore, the aspiring actress perfected her appearance, changed her name, altered her voice, and was subsequently “discovered” and vaunted to stardom. SAMANTHA BARBAS, \textit{MOVIE CRAZY: FANS, STARS AND THE CULT OF CELEBRITY} (2001), Chapter Three.
might rise in status solely by developing a pleasing image -- marked a new chapter in the American rags to riches story. Stars understood the relationship between image and success, and their life stories were object lessons in the importance of appearances and first impressions. The public followed with rapt attention the attempts of celebrities to invent and reinvent themselves and to perfect their public images, and the efforts of an organized and aggressive industry of counterimages – tabloids, gossip columns, and scandal sheets -- to deconstruct star identities by committing "invasions of privacy." The celebrity’s engagement in an “information game” -- “a potentially infinite cycle of concealment, discovery, false revelation, and discovery,” in Erving Goffman’s words -- was said to represent the struggle, writ large, that every person would wage in her own efforts to create and perfect her public persona.

In this era we can see the beginnings of a “consciousness of self-construction,” to use sociologist Kenneth Gergen’s term, in which the idea of a stable self weakened and gave way to “strategic manipulation.” The individual “increasingly and distressingly” found himself playing different roles to “achieve social gains.” By the 1920s, the idea of a “discontinuous self” was beginning to be discussed. In his Principles of Psychology, William James had written that a “man has as many social selves as there are individuals who recognize him and carry an image of him in their mind.” Even if many of these impressions overlapped, “he has as many different social selves are there are distinct groups of persons about whose opinion he cares.” Social psychologist Charles Horton Cooley coined the concept of the “looking glass self” – the notion that the self is the product of an interaction between how one saw oneself and how others saw her. Through interaction with others, through our consciousness of others’ reactions to us, we develop a sense of who we are.

148 GOFFMAN, supra at 13. Though far removed from the high stakes world of celebrity glamour, average Americans, with their own minor dramas of concealment and exposure, found in these star stories not only great fascination but instructive value. Sociological and anecdotal evidence suggests that fans used these stories of identity creation, destruction, and recovery as guidance in their own individual projects of fashioning a positive image and reputation. BARBAS, MOVIE CRAYZY, Chapter Seven. See also ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN: A STUDY IN MODERN AMERICAN CULTURE (1927) (discussing the influence of the movies on youth in the 1920s).
150 LEARS, supra at 36.
151 Quoted in LEARS, supra at 37.
152 CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER, 183-4 (1902).
identity is a social construction assembled out of the various impressions one made on others would become a major theme in twentieth-century sociology and social psychology.\textsuperscript{153}

This fragmentation of the self and the superficial and “discontinuous” nature of personal identity should not be overstated. Enduring communities, familial bonds, and religious institutions continued to provide strong foundations of identity for many individuals. Particularly in traditional communities, where personal relationships were reliable, continuous, and face-to-face, a firm sense of identity was broadly supported.\textsuperscript{154} Most Americans undoubtedly conceived of themselves as more than merely assemblages of social facades and “stage effects.”\textsuperscript{155} The uprooted and transient nature of an increasingly mobile urban society, and the imperatives and faiths of modern consumer culture, nonetheless encouraged people to view themselves less in terms of enduring relationships, stable qualities, and moral visions, and more in terms of the various images one strategically created, manipulated, and projected to others. The self was coming to be regarded as more malleable and unstable, and more thoroughly a matter of individual control and design than in the past. By the end of the first half of the 20\textsuperscript{th} century, the project of constructing and presenting a public image and identity had become more complex, burdensome, and fraught with anxieties than in any previous generation.

The upshot of these developments was not only an increased consciousness of image, but also a feeling of entitlement to one’s image. The more that a desirable image came to be regarded as essential to social status and advancement, and the more one’s appearance before others seen as coextensive with one’s identity, the deeper the sense of a right to control and manage one’s public image. In a culture where image was freighted with possibility and meaning, and regarded as inextricably intertwined with one’s self and public persona, depriving a person of control over her public image was understood as an indignity that could be potentially severe.

\textit{B. The Tort Law of Image and the Personal Image Lawsuit}

Between 1920 and 1950, existing areas of tort law expanded and new torts were created to protect personal image and the perceived right to control one’s image. In this period a majority of states recognized the tort right to privacy, understood as a right to avoid undesirable and “unwarranted publicity.”\textsuperscript{156} At the same time, courts stretched the limits of

\begin{footnotesize}
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\item \textsuperscript{153} \textsc{Lears}, \textit{supra} at 35.
\item \textsuperscript{154} \textsc{Gergen}, \textit{supra} at 147.
\item \textsuperscript{155} \textsc{Lears}, \textit{supra} at 34.
\item \textsuperscript{156} \textsc{Sidis v. F-R Pub. Corp.}, 34 F. Supp. 19, 21 (1938).
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The Laws of Image
defamation doctrine to provide redress to plaintiffs who had experienced emotional distress when presented before the public in an upsetting or unfavorable manner, even though not injurious to one’s reputation. A new tort action compensated individuals for emotional distress caused by interference with their images that was severe and intentionally inflicted. A “right of publicity” was created to protect the right to control the commercial exploitation of one’s image and to reap the profits from such exploitation.

This expansion of image law was both a cause and consequence of an increasing number of image-based lawsuits. The growth of the mass media, and popular journalism’s insatiable hunger for personal images and stories produced predictable casualties: embarrassing representations, hurt feelings, tarnished reputations. As victims of unfavorable media depictions resorted to the law to vindicate their public images and their feelings about their images, the personal image lawsuit became a phenomenon of American legal culture.

1. Privacy

By 1940, more than half the states recognized a tort right to privacy.157 As lawyer Louis Nizer observed that year, “in recent years the courts which have recognized the right of privacy for the first time have not felt obliged to indulge in lengthy apologia. This is the final stage in the acceptance of any new legal doctrine.”158 Courts concerned with the proliferation of the mass media and its potentially damaging effects on dignity and reputation “continuously look[ed] for ways to give individuals more legal control of public presentations of their lives,” according to legal scholar Diane Zimmerman.159 While they may not have intended to fashion a body of privacy law, the absence of alternative routes to compensate victims of media misrepresentation led them to expand and develop the privacy tort.

Compared to the earlier period, there were fewer “invasion of privacy” cases brought over the unauthorized use of portraits in advertisements. Advertisers were now employing professional models rather than purchasing images on the open market, and with the culture’s embrace of celebrity and consumerism, it was no longer shameful but acceptable and perhaps even prestigious to have one’s image used in a

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158 Id.
commercial context. A reflection of the news and entertainment media’s relentless focus on personalities and private lives, the real action in privacy litigation in this period instead involved photographs and personal information in various news and feature publications. In several cases, the media were alleged to have invaded privacy by publishing especially personal or private material, such as information about a medical condition or depictions of a person’s body in a state of illness. Suits involving such intimate matters were generally successful. In Barber v. Time (1947), the Missouri Supreme Court held that a woman had a cause of action for invasion of privacy when a photograph of her in a hospital room receiving treatment was published in Time magazine. Courts also held that legally cognizable invasions of privacy had occurred when the news media published the details of horrific accidents and crimes.

The majority of privacy cases did not involve items that were particularly personal, however, but rather situations where an individual had been presented to the public in a way that she found humiliating, misrepresentative, or otherwise objectionable. In some cases, the challenged depiction was not even unflattering; it simply contradicted the way the plaintiff wanted to be known to others. No exposure of private life had occurred. In these cases, the law of “privacy” had nothing to do with privacy but was instead about protecting individuals from unflattering associations and uncomfortable publicity.

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160 Madow, supra at 157; Armstrong, supra at 459.
161 Not all privacy cases involved publications. Courts were also developing a tort right of privacy against unwanted intrusions into one’s personal physical space. This included a right to be free from ‘intrusions’ such as eavesdropping and wiretapping. See Prosser, Privacy, at 389-392; Leon Green, The Right of Privacy, 27 ILL. L. REV. 237, 253 (1937).
162 Compared to the Victorian era, the domain of the “private” had diminished. Once seen as off-limits to public view, the selective display of one’s feelings and desires was now encouraged and validated. There was also a more relaxed attitude towards the public discussion of romantic matters and family affairs. There were still, of course, aspects of life that were generally regarded as too intimate for public display -- in particular, matters bodily and sexual. Samantha Barbas, The Death of the Public Disclosure Tort, 22 YALE J. L. & HUMAN. 171 (2010).
164 Barber v. Time, 159 S.W. 2d 291, 295 (Mo. 1942).
166 Many of these cases fell into the category that William Prosser would later describe as “false light” privacy. See William L. Prosser, Privacy, 48 CAL. L. REV. 383, 398 (1960).
167 Id. at 398-401.
privacy was a right not to have one’s identity depicted in a manner that clashed with one’s own self-image, “under circumstances which are complimentary as well as those which are critical.”

The 1947 case *Cason v. Baskin* is illustrative. *Cason* involved a privacy claim brought against the popular author Marjorie Kinnan Rawlings by a woman who was the inspiration for a character in her book *Cross Creek*. The portrayal of Cason was on the whole favorable, although in one part of the book Rawlings described her as an “ageless spinster resembling an angry and efficient canary” and noted that she used profanity. The plaintiff, who sought damages of 100,000 dollars, did not claim that these comments were false, only that they intruded upon her privacy – “destroyed her peace of mind” and “outrage[d] the finer sentiments of her nature” – by presenting her before a mass audience in a way that she found unfavorable. The Florida Supreme Court believed that the author had portrayed Cason, on the whole, as a “fine and attractive personality” but held nonetheless that the woman stated a valid privacy claim. It suggested that her privacy had been invaded because her personal qualities, though hardly concealed or “private,” were offered up to a mass public in a way she had never intended or desired.

A similar claim was made in *Molony v. Boy Comics*, involving an assistant pharmacist’s mate in the Coast Guard whose activities saving individuals from a plane crash were depicted in comic book style. The comic heroized him. The plaintiff nonetheless alleged that the portrayal contained minor inaccuracies and depicted him as somewhat more effeminate than he would have liked. As such, it contradicted his own self-image, injured his sensibilities, and invaded his privacy. In *Binns v. Vitagraph*, a radio operator involved in a shipwreck successfully sued for invasion of privacy over a depiction of him in a short movie, even though the film flattered him and made him out to be the hero of the event.

Several privacy cases involved individuals who appeared in public

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169 155 Fla. 198, 20 So. 2d. 243 (1944); second appeal 159 Fla. 31, 30 So.2d. 635 (1947).
170 155 Fla. at 202.
171 155 Fla. at 202.
172 Because the depiction was benign, the court awarded damages only in the amount of six cents. 159 Fla. at 41. For an interesting account of this case, see PATRICIA NASSIF ACTON, INVASION OF PRIVACY: THE CROSS CREEK TRIAL OF MARJORIE KINNAN RAWLINGS (1988).
174 98 N.Y.S. 2d. at 124.
175 Binns v. Vitagraph Co. of Am., 210 N.Y. 51, 52 (N.Y. 1913). The court held that the depiction, because it was semi-fictional, was for the purpose of “trade” and therefore actionable under the New York privacy statute. 210 N.Y. at 58.
places and whose pictures were taken and subsequently displayed in a newspaper or film. Embarrassed to have been publicized, or because their photos were presented in what they considered a disagreeable context, they brought claims for “invasion of privacy.” Blumenthal v. Picture Classics involved a woman, a bread vendor on the street, who was filmed and depicted in a newsreel in a manner she claimed was humiliating. The court agreed that an actionable invasion of “privacy” had occurred, even though the woman had been out in public.  

In 1937, a woman claimed that unauthorized newsreel footage taken of her in an exercise course for overweight women was an invasion of privacy because the footage was unauthorized and embarrassing. In Gill v. Hearst Publishing, a married couple that had been photographed embracing at an outdoor farmers’ market, and the picture used to illustrate an article in Harper’s Bazaar magazine about “love at first sight,” brought a lawsuit against the magazine, alleging that the picture invaded their privacy because it was “uncomplimentary.”

Another twist on this genre involved people’s attempts to use privacy law to conceal their pasts. The plaintiff in the 1931 case Melvin v. Reid was a former prostitute who had been tried for murder and acquitted, but who had been rehabilitated, had married, and had achieved a place in respectable society. A movie was produced based on the story of her life, using her true maiden name. She alleged that the presentation of facts about her earlier days of ill-repute, much of it a matter of public record, tarnished the upstanding new image she had worked hard to create and was thus an invasion of privacy. The California Supreme Court agreed.

In 1949, a professional boxer who had retired from the ring to pursue a life of anonymity sued NBC over a radio broadcast in which Groucho Marx had discussed his boxing career. The former pugilist argued that this interference with his present public image — effectively, an image of “no image” — was an unwarranted invasion of privacy.

The judicial response to these “undesirable representation” cases was mixed. In a few reported cases in the 1930s and 40s, courts noted the privacy tort’s potentially chilling effect on publishing and suggested that such limitations on publication were an unconstitutional violation of

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179 Melvin v. Reid was the first case in which California recognized a right to privacy under the state constitution. Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931).
180 As a professional boxer he had permanently waived his right to privacy and “could not at his will and whim withdraw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself in the public eye.” Cohen v. Marx, 94 Cal. App. 2d 704 (1949).
freedom of the press. These courts fashioned a broad “newsworthiness” privilege that exempted from liability a wide range of publications on public officials and public affairs, on the theory that a right of privacy that covered “news items and articles of general public interest, educational and informative in character” implicated the rights of a “free press.”181 This privilege for “matters of public interest” or “newsworthy” material had been presaged in “The Right to Privacy,” although the modern version extended far beyond what had been envisioned by Warren and Brandeis. Under the most expansive reading of the privilege offered by a few courts in the 1930s and 40s, only depictions of matters of public interest that were truly offensive -- that caused severe “mental suffering, shame, or humiliation to a person of ordinary sensibilities” -- would be actionable as invasions of privacy.182 In a famous 1940 case, the Second Circuit used this rationale to reject liability for a newsworthy publication that was embarrassing but offensive only to the hypersensitive subject.183

Many of the “undesirable representation” suits were nonetheless successful. Courts permitted a cause of action for invasion of privacy based on publicity that had not revealed material that was “private,” but that was undesirable to the subject of publicity, even if not objectively embarrassing or offensive.184 In *Strickler v. National Broadcasting Co.*, a pilot in an airplane emergency was depicted in a dramatized television reenactment of the event. He alleged that the portrayal, which inaccurately showed him out of uniform, praying, and smoking cigarettes, placed him in a “false position” and caused him humiliation and suffering.185 A federal district court in California held that he had a cause of action for invasion of privacy.186

182 Cason, 20 So. 2d. at 249. See Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940) (noting that a cause of action for invasion of privacy may be warranted when “revelations [were] so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.”) Florida and New York did not have an offensiveness standard. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 207 (1954).
186 167 F. Supp. at 71. See also Sinclair v. Postal Tel. & Cable Co., which involved a doctored photograph that appeared in an advertisement that falsely showed an actor writing a telegram to his fans announcing the debut of his film. The court held that the portrayal put him in an “undignified light” and was an actionable assault to the actor’s privacy,
invasion of privacy over a publication in the Saturday Evening Post that featured her picture alongside an article that was critical of cab drivers and accused them of cheating, but that did not explicitly name or refer to her.\footnote{Peay v. Curtis, 78 F. Supp. 305 (D.D.C. 1948).}

The court determined that the depiction was an actionable invasion of privacy. It reached the astonishingly broad conclusion that the unauthorized publication of a photograph of a person who was not a public figure was a violation of her privacy right, even if the person was in a public place.\footnote{Id. In Barber v. Time, the court noted that damages for invasion of privacy would be warranted because the press had overstepped its “constitutional rights” and “overlook[ed] its obligations to others.” 159 S.W. 2d at 295.}

When the press engaged in “undue and undesirable publicity, such as is involved in the circulation of [one’s] likeness without permission,” it abused its freedom.\footnote{Robert Rabin, Emotional Distress in Tort Law: Themes of Constraint, 44 Wake Forest L. Rev. 1197 (2009).}

It is hard not to regard such claims as petty. There is no evidence, however, that they were insincere or duplicitous. The men and women presented in an inaccurate and perhaps even ridiculous manner in various newsreels, comic strips, and articles may well have been deeply hurt and perhaps even horrified. This sense of outrage, if it did exist, is also a testament to the image consciousness of the time. It is only in a culture where individuals feel an entitlement to their images that such representations, even if objectively benign, will be experienced as serious injuries to one’s dignity and feelings.

2. The law of feelings

The flourishing of tort privacy in this period was a product not only of the culture of images but also a culture of feeling. As discussed, the foundational assumption of the privacy tort -- that injuries to one’s image and one’s feelings about one’s image were worthy of redress and compensation -- had been novel and largely disfavored at the time of Warren and Brandeis. The common law had traditionally resisted compensation for emotional injuries unconnected to the violation of other established rights; courts cited difficulties of proof, the possibility of spurious or insincere claims, and the potential unleashing of a flood of litigation.\footnote{Magruder, supra at 1035.} There was a sense that emotional harms were not significant enough to warrant legal recognition and were better dealt with by “instruments of social control other than the law.”\footnote{“dignity,” and “civil rights.” 72 N.Y.S. 2d. 841, 842 (1935).} By the 1950s, much of this resistance had dissipated.
This movement towards greater legal recognition of the emotions had several origins. One was the continued effort by legal realist scholars to further the Warren and Brandeis argument that the common law should recognize emotional integrity as part of a broader constellation of dignitary and “personality” rights. In 1915, Roscoe Pound argued for “rights of personality,” encompassing both physical and emotional interests.\textsuperscript{192} The torts theorist Leon Green in 1936 advocated legal protection for aspects of “personality” including one’s name, emotions, and personal history.\textsuperscript{193} Both Green and Pound had regarded a right to one’s image as an aspect of one’s personality rights; as Green wrote, one’s likeness, name, and other personal attributes could not “be exposed or used by others without causing acute mental and emotional suffering.”\textsuperscript{194}

This view of emotional injuries as legitimate and serious had increasing purchase among both the legal community and the lay public. The professionalization of psychology and the advent of the behavioral sciences had produced a new appreciation of the psychic and emotional aspects of daily life.\textsuperscript{195} The condition of one’s feelings and one’s psyche was coming to be regarded as not merely a minor, intangible interest but as having significant, measurable behavioral and even physical consequences. At the time, this may have been the most convincing aspect of the argument for a law of feelings -- the perceived connection between emotional and bodily harm. A 1922 writer in the \textit{Michigan Law Review}, noting the discoveries of “medical men and psychologists” about “emotion and its effect on the human body,” observed that “emotion as a purely mental thing does not exist.”\textsuperscript{196} As Pound had written, one’s feelings and relationships were “as much a part of [one’s] personality” as his body.\textsuperscript{197}

This recognition of both the independent significance of the emotions and the mind-body connection gave rise to another branch of the law of image, the freestanding tort of intentional infliction of emotional distress.\textsuperscript{198} By 1936, the torts scholar Calvert Magruder could assert that

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\item \textsuperscript{192} Roscoe Pound, \textit{Interests of Personality}, 28 HARV. L. REV. 343, 363-64 (1915).
\item \textsuperscript{193} Green, supra at 460. Green considered one’s “privacy” to be an aspect of one’s personality.
\item \textsuperscript{194} Fowler Harper, \textit{A Re-Examination of the Basis of Liability for Emotional Distress}, 1938 WISC. L. REV. 426, 458 (1938)
\item \textsuperscript{195} G. EDWARD WHITE, TORT LAW IN AMERICA, 103.
\item \textsuperscript{196} \textit{Emotional Disturbance as Legal Damage}, 20 MICH. L. REV. 497, 497-8 (1922)
\item \textsuperscript{197} “The mind of an individual, his feelings and mental processes, are as much a part of a person as his observable physical members. An injury, therefore, which affects the sensibilities is equally an injury to the person as an injury to the body would be.” Reed v. Real Detective Pub. Co., 63 Ariz. 294, 306 (Ariz. 1945).
\item \textsuperscript{198} See Magruder, supra; Prosser, \textit{Intentional Infliction of Mental Suffering: A New Tort}, 37 MICH. L. REV. 874 (1938).
\end{itemize}
“no longer is it even approximately true that the law does not pretend to redress mental pain and anguish when the unlawful act complained of causes that alone.”\textsuperscript{199} The 1934 Restatement of Torts had taken the position that there was no recovery for emotional injury even when intentionally inflicted; by 1948, it had reversed its position and stated that one could recover for such injuries.\textsuperscript{200} The emotional distress tort had obvious overlaps with the privacy tort; claims for invasion of one’s privacy interests were often brought under the emotional distress tort, and the privacy tort protected, in its own right, as William Prosser observed in 1935, the “right to be free from the intentional infliction of mental suffering.”\textsuperscript{201}

The intentional infliction of emotional distress tort had been recognized in cases where defendants had put plaintiffs in fear of their safety or another person’s safety, as when the plaintiff witnessed the defendant’s willful attack on a third person.\textsuperscript{202} Cases had also been brought over severe verbal assaults, such as threats of arrest or bodily injury, or acts that led to extreme embarrassment, as when a person was made a victim of a humiliating practical joke carried out before the public.\textsuperscript{203} In a few cases, plaintiffs brought emotional distress claims against newspapers for falsely reporting a family member’s death. In 1921, a newspaper was sued by a woman whose son’s photograph had been mistakenly published with a report of the death of another person having the same name.\textsuperscript{204} The essence of the harm in these cases was akin to shock or fright.\textsuperscript{205}

Emotional distress claims would eventually be brought over publications alleged to be harmful to one’s image. In many such cases, the publication was neither false nor invasive of privacy, yet plaintiffs claimed to be mortified and outraged because they had been humiliated and their appearance before others severely tarnished. These sorts of claims were largely a phenomenon of the post-World War II era and will be discussed later. Their origins can be traced to the first half of the century and the.

\textsuperscript{199} Magruder, supra at 1033.
\textsuperscript{201} Prosser, supra at 877; see also Wade, Tort Liability for Abusive and Insulting Language at 77 (noting that privacy interests “may be invaded in a number of different ways, the most common is by ways that induce emotional distress.”)
\textsuperscript{202} Magruder, supra at 1042.
\textsuperscript{203} See Prosser, supra at 881.
\textsuperscript{204} Herrick v. Evening Express, 120 Me. 138, 113 A. 16 (1921). Curry v. Journal Pub., 41 N.M. 318, 68 P. 2d 168 (1937). These claims were for negligent, not intentional infliction of emotional distress and were rejected on the grounds that the law did not recognize a cause of action for emotional harms negligently inflicted.
culture’s heightened appreciation of both outward appearances and the inner life; images, feelings, and the perceived intimate relation between the two.

3. Libel Law in the Age of Image

The same influences that led to the expansion of privacy law also contributed to the transformation of the law and culture of libel. A byproduct of the proliferation of the mass media, libel litigation increased substantially in the early 20th century, as an array of claimants, ranging from political officials to the proverbial man on the street, brought claims against the press. The risk of multiple libel suits had come to be regarded as the inevitable price of running a publishing enterprise, and publishers began to invest in defensive measures such as libel insurance, prepublication review, and the retention of libel lawyers. Fueling publishers’ fears of large judgments against them were not only the zeal with which libel claims were often pursued, but courts’ apparent sympathies towards plaintiffs. In the interwar period, courts were expanding the definition of a defamatory publication and the concept of reputational harms.

Historically, to be libeled was to have one’s character or morals attacked, or to otherwise be subjected to “scorn... hatred...[or] contempt” in a way that seriously impaired the way others viewed her and were likely to treat her. A publication “might be unpleasant; it may subject him to...banter from those who knew him, even to the extent of affecting his feelings, but this in itself is not enough,” noted a New York appeals court in 1912, rejecting a claim that a false report of the plaintiff’s death was libelous. Yet by the 1930s, courts were beginning to expand the concept of reputational injury to include situations where a statement did not cast aspersions on a person’s character or lower his standing before others, but that nonetheless subjected him to shame and mental distress. In 1935, Magruder noted libel cases where plaintiffs had won compensation not for an invasion of one’s interest in reputation but for “the
sense of outrage and chagrin that the defendant should have made an attack upon his reputation.” Libel law was turning its focus from external, interpersonal relations inward, to the realm of one’s self-perception and feelings about one’s public image.

Thus it was that in 1926 a court held that a woman had a cause of action for libel when a newspaper article said that she had been served with process while sitting in a bathtub -- an accusation that did not “impute immoral conduct” or likely damage her reputation, but nonetheless embarrassed her. In Zbyszko v. New York American, from 1930, a New York appeals court held that a newspaper article about evolution featuring the name and picture of the plaintiff, a wrestler, and the words “the wrestler, not fundamentally different from the gorilla in physique” was potentially libelous. The depiction was not false, and it probably did not injure the wrestler’s professional repute, although it was distressing to him. Van Wiginton v. Pulitzer was a case of mistaken identities in which a newspaper published the plaintiff’s picture alongside a story about a young girl who had tried to save her father from the gallows. Damages were allowed for libel although the publication was largely favorable and imputed nothing disparaging to her character. As the Massachusetts Supreme Court noted in 1940, libel law had become a potential vehicle to reach certain “indecent violations of privacy.” In other words, plaintiffs complaining about unfavorable and upsetting portrayals that before would not have been considered defamatory could now find redress not only in the law of privacy but also potentially through a cause of action for libel.

The key case in this trend was the famous Second Circuit case Burton v. Crowell Publishing Co., from 1936, for which Judge Learned Hand wrote the opinion. The defendant, the Camel cigarette company, published a photograph of the plaintiff, a famous jockey, in riding costume holding in front of him a saddle and girth. The picture was an advertising endorsement for which the jockey had been paid and had willingly posed. The plaintiff alleged that the way the picture was shot made it appear that the objects he was holding were in fact his genitalia and that he “was guilty of indecent exposure.” The Second Circuit overturned the lower court and held that he had a cause of action for libel because the publication embarrassed him and made him the subject of ridicule.

212 Magruder, supra at 1055.
218 Magruder, supra at 1056.
219 82 F. 2d at 156.
As the Harvard Law Review observed, Burton v. Crowell was the first major decision that held that “unintentionally causing ridicule of the plaintiff” was libelous per se.\textsuperscript{220} Many legal critics observed not only what they saw as the hypersensitivity of the plaintiff, but the absence of any real harm to his reputation. As one writer commented, the real injury was to the “plaintiff’s feelings, on account of the mortification he suffered and irritation at the good natured joshing of his friends. The laughter at his expense was not on account of anything in the publication tending to lower him in the esteem of others.”\textsuperscript{221} The decision extended “the law of libel to a situation where the plaintiff’s reputation is not impaired in the slightest.”\textsuperscript{222} Burton was widely acknowledged but not broadly adopted at the time. The majority position remained that “the injury to feelings which the law of defamation recognizes is not the suffering of the making of the charge but the suffering which is caused by other people’s conduct towards him in consequence of it.”\textsuperscript{223} The decision nonetheless heralded the movement in the postwar era towards the extension of libel beyond the protection of “reputation,” in the sense of the opinions of others, to a broader “protection against emotionally embarrassing situations.”\textsuperscript{224} By the mid-1950s, courts were extending defamation law to cover situations in which there was little if any injury to one’s standing before others and were compensating plaintiffs solely for emotional distress.\textsuperscript{225} They were particularly likely to do so in jurisdictions where the privacy and emotional distress torts were not recognized.\textsuperscript{226} Defamation and privacy had so overlapped, legal commentators observed, that that the majority of defamation actions could be brought for invasion of the right of privacy, and vice versa.\textsuperscript{227} No longer was it entirely true that “the fundamental

\textsuperscript{220} Recent Cases, 49 Harv. L. Rev. 841 (1936).
\textsuperscript{221} Libel—Optical Illusion, 9 Miss. L. J. 250, 251 (1936).
\textsuperscript{222} Id. A comment in the Mississippi Law Journal noted that a claim for “violation of the right of privacy,” insofar as it afforded “legal protection of the sensibilities,” would have been more consistent with the “true nature of the plaintiff’s injury,” although a privacy claim probably would not have been successful since the plaintiff gave his consent to be photographed.
\textsuperscript{223} Kelly v. Loew’s, 76 F. Supp. 473, 488 (1948) (citing Wigmore, Evidence, Rev. ed. 704 (1940)). As the Missouri Supreme Court had explained, holding that a newspaper column calling a law enforcement officer “rude, belligerent, and unfair” was not defamatory merely because it subjected him to ridicule, “a communication is not defamatory solely because it exposes [one] to jests or injured personal feelings.” Coots v. Payton, 365 Mo. 180, 188 (1955).
\textsuperscript{224} Libel—Optical Illusion at 251.
\textsuperscript{226} Id.
\textsuperscript{227} Prosser, Privacy, at 401; Wade, supra at 1125 (“the action for invasion of the right of privacy may come to supplant the action for defamation’’); Kalven, Privacy in Tort Law
difference between the right to privacy and .... defamation is that the former directly concerns one’s peace of mind, while the latter concerns primarily one’s reputation.”

In providing compensation for the plaintiff’s subjective distress over an unwanted and unfavorable portrayal, regardless of its effect on third parties, the tort actions for libel and privacy were converging.

4. The “right of publicity”

The 1940s and 50s saw the beginnings of another innovation in the tort law of image, one that was entirely novel and that would eventually occupy a significant role in the body of American image rights. This was the “right of publicity,” an offshoot of tort privacy, which extended the right to control one’s image to include the right to reap full economic value from the commercial exploitation of one’s image -- one’s photograph, likeness, or other recognizable aspects of one’s persona or identity. Unlike the other image torts, the protected interest was pecuniary rather than dignitary. Its recognition was an apt reflection of the new directions that modern image-consciousness was taking. By the mid-twentieth century, both popular and judicial sentiment supported the idea of legal compensation for the many different kinds of harm that could be caused by loss of control over one’s image -- to one’s feelings, dignity, and pocketbook.

At the turn of the century, the idea of a legally protected right to commercially exploit one’s name and likeness had been disfavored. It went against the prevailing view of one’s image, particularly one’s photographic image, as an expression of the inner soul or “personality” that should not be commodified. Thirty or forty years later, the public was no longer...
uncomfortable with the idea of profiting from their images and identities. Movie stars were licensing their names to advertisers, and licensing companies had been created to market the names and images of celebrities.\footnote{Madow, supra at 166.} In a celebrity culture, where fame and public exposure were regarded as the pinnacle of success, selling one’s image for profit was no longer viewed “as quasi-illicit.”\footnote{Armstrong, supra at 459.} The ability to commercially exploit one’s persona was a sign that one had “made it.”

The law nonetheless retained the Victorian anti-commodification ethos for many years after the public had abandoned it. In the 1920s and 30s, lacking avenues of legal recourse outside the context of a breach of contract, celebrities seeking compensation for the unauthorized commercial appropriation of their names and likenesses brought cases under the “right of privacy” claiming dignitary harms, even though their true interests may have been pecuniary.\footnote{See Nimmer, supra at 203-04. In Martin v. F.I.Y Theater Co, the plaintiff was a respected film actress whose picture had been displayed in advertising in front of a local burlesque house without her consent. The court sustained the motion to dismiss, noting that “any person following the theatrical business for a life’s work has no such right of privacy.” Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (Cuyahoga County Ct. Com. Pl. 1938) (“the right of privacy does not exist where the person has become prominent, notorious, or well known so that by his very vocation or conduct he has dedicated his life to some continued contact with the public and thereby has waived his right of privacy; persons who expose themselves to public view for hire cannot expect to have the same privacy as the meek, plodding, stay-at-home citizens.”) See also Restatement (First) of Torts §867 cmt. c (1939); O’Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941).} These attempts were generally unsuccessful. Courts reasoned that because self-exposure was the basis of celebrity, stars could not claim to be offended by additional publicity. They had, in effect, waived their right to privacy.\footnote{See, e.g., Fisher v. Rosenberg, 178 Misc. 370, 371 (Sup. Ct. 1940). The plaintiff was a professional dancer who had his photo taken in two dancing poses. The defendant used this photo in his advertisement for shoes. The court held that the dancer would be awarded compensatory damages only for hurt feelings. See also Miller v. Madison Square Garden, 28 N.Y.S. 2d 811 (Sup. Ct. 1941).} The New York privacy statute offered protection against unauthorized commercial uses of the persona but damages were awarded for dignitary harm, not lost profits. If the plaintiff could not show a use of the image that was offensive, that caused hurt feelings, he would not succeed in recovering any compensation.\footnote{See, e.g., Fisher v. Rosenberg, 178 Misc. 370, 371 (Sup. Ct. 1940). The plaintiff was a professional dancer who had his photo taken in two dancing poses. The defendant used this photo in his advertisement for shoes. The court held that the dancer would be awarded compensatory damages only for hurt feelings. See also Miller v. Madison Square Garden, 28 N.Y.S. 2d 811 (Sup. Ct. 1941).} Yet as celebrity culture became deeply entrenched, and as both celebrities and noncelebrities brought suit alleging economic loss from unauthorized uses of their names and pictures, courts began to acknowledge

\footnote{232 Madow, supra at 166.}
\footnote{233 Armstrong, supra at 459.}
\footnote{234 Madow, supra at 166-67; Nimmer, supra at 203-04.}
\footnote{235 See Nimmer, supra at 203-04. In Martin v. F.I.Y Theater Co, the plaintiff was a respected film actress whose picture had been displayed in advertising in front of a local burlesque house without her consent. The court sustained the motion to dismiss, noting that “any person following the theatrical business for a life’s work has no such right of privacy.” Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (Cuyahoga County Ct. Com. Pl. 1938) (“the right of privacy does not exist where the person has become prominent, notorious, or well known so that by his very vocation or conduct he has dedicated his life to some continued contact with the public and thereby has waived his right of privacy; persons who expose themselves to public view for hire cannot expect to have the same privacy as the meek, plodding, stay-at-home citizens.”) See also Restatement (First) of Torts §867 cmt. c (1939); O’Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941).}
\footnote{236 See, e.g., Fisher v. Rosenberg, 178 Misc. 370, 371 (Sup. Ct. 1940). The plaintiff was a professional dancer who had his photo taken in two dancing poses. The defendant used this photo in his advertisement for shoes. The court held that the dancer would be awarded compensatory damages only for hurt feelings. See also Miller v. Madison Square Garden, 28 N.Y.S. 2d 811 (Sup. Ct. 1941).}
more frankly the commercial value of image. They nonetheless continued to reject the idea of making the persona into a commodity. It was not until the 1950s that a federal appeals court explicitly recognized the right of a person to protect the publicity value of his persona. In *Haelan Laboratories, Inc. v. Topps Chewing Gum*, from 1953, the Second Circuit noted that in addition to a right of privacy, a person had a “right of publicity” in his photograph, “for it is common knowledge that many prominent persons … far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements.” By the mid-1950s, Melville Nimmer observed, the “right of each person to control and profit from the publicity value” of his persona had emerged as a legally cognizable right. The “right of publicity” was sometimes described as a property right, but more commonly as an aspect of the tort “right to privacy.”

With the recognition of the right of publicity, the foundations of the modern tort law of image had been established. They rested on what could be described as a frank acceptance of the significance of image to personal identity, commercial and social relations, and public life. Gone was the fiction that “privacy” was primarily about protecting “a right to be let alone,” or that plaintiffs brought libel claims primarily to vindicate their good names in the community, or that the principal reaction to having one’s image used without consent was embarrassment and shame. What plaintiffs seemed to want, and were in many cases getting, was a broad right to

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237 See Continental Optical Co. v. Reed, 119 Ind. App. 643, 649 (1949) (“modern methods of advertising and publicity have accentuated such need to the extent that, in every state that recognizes the doctrine, the unauthorized use of photographs of a person for commercial purposes, as a general rule, is held to be an invasion of his right to privacy.”) See also Nimmer, supra at 219-22, citing cases where a right of publicity was recognized but was not the grounds on which the decision was based. Uproar Co. v. N.B.C., 8 F. Supp. 358, 361 (D. Mass 1934); Madison Square Corp. v. Universal Pictures, 255 App. Div. 459 (1938); Pallas v. Crowley-Milner & Co, 334 Mich. 282, 285 (noting plaintiff’s property right in the appearance of her face and features.)

238 See Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F. 2d. 763, 766 (noting that “fame is not merchandise.”); Madow, supra at 170-1.

239 Haelan Laboratories, Inc. v. Topps Chewing Gum, 202 F. 2d. 866, 868 (2nd Cir. 1953); see also Harold R. Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U. L. REV. 553, 570 (1960).

240 Nimmer, supra at 204.

241 In 1960, William Prosser would describe this as the “appropriation” tort, which he described as a proprietary interest “in the exclusive use of the plaintiff’s name and likeness as an aspect of his identity.” See Prosser, *Privacy*, at 406. See also Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 313-4 (2011) (noting the confusion of courts post-*Haelan* as to whether the right of publicity was a “tort right” or a property right.)
control one’s image, to construct and exploit it however one chose.

5. The Laws of Image and Counterimage

In the interwar period, courts were beginning to develop and implement civil libertarian theories of the First Amendment. In so doing, they rejected an earlier, state-deferential jurisprudence of freedom of speech and press that had upheld limitations on expression in the interest of maintaining public order and state-imposed moral standards.\(^{242}\) This liberalization of free speech law led to a discussion of the potential conflict between the First Amendment and the image torts.\(^ {243}\)

We have seen this dialogue in the context of the privacy tort, which led courts to fashion a broad “newsworthiness” or “public interest” privilege. In libel law, a conditional privilege of fair comment on “matters of public concern” was similarly being used to limit judgments against the press for defamatory publications involving public figures.\(^ {244}\) The privilege, eventually constitutionalized in *New York Times v. Sullivan* in 1964,\(^ {245}\) prohibited a public official from recovering damages for defamatory statements about his public activities unless the statement was made with reckless disregard of the truth. The privilege covered publications about the conduct and characteristics of public officials that were related to their public duties, although courts sometimes extended it -- much as they did privacy’s “newsworthiness” privilege -- to cover gossip and human interest publications that discussed items “of mere public curiosity” if they could be construed as “matters of public concern.”\(^ {246}\)

The image society was pushing the law in two directions. In a culture where personal identities and social relationships were bound up with images and representations, the right to control one’s public persona -- which included a right to be free from false, damaging, or otherwise unauthorized associations -- was being described as essential to self-definition, self-determination, and the integrity of one’s personality.\(^ {247}\) Libel and privacy law took cognizance of this interest. At the same time, when media images had become central to politics and social life, courts recognized the right of publishers and the public to make and circulate


\(^{244}\) David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II* 42 Colum. L. Rev. 1282, 1288 (1942); John Hallen, *Fair Comment*, 8 Tex. L. Rev. 41 (1929).


\(^{246}\) Developments in the Law of Defamation at 924-26.

\(^{247}\) Nizer, *supra* at 360; Green, *The Right of Privacy*; Kacedan, *supra*. 
representations of individuals, both public figures and private citizens. This freedom to image was being described as the essence of constitutional freedom of speech.

In a series of cases in the 1930s and 40s, the Supreme Court suggested that it would view state actions restricting or burdening speech with heightened scrutiny because of the significance of free expression to the democratic process. Because free expression was “the matrix, the indispensable condition, of nearly every . . . form of freedom,” freedom of speech occupied a “preferred position” in the scheme of constitutional liberties, and state actions restricting speech could not stand unless justified by a compelling government interest beyond mere disagreement with the views espoused. With the exception of material that posed a “clear and present danger” of imminent violence, prohibitions or impairments of speech on “matters of public concern” on the basis of disfavored content or viewpoints were presumptively unconstitutional.

Freedom of the press meant not only liberty to publish, but also the right of the public to have access to a broad range of information about public events and civic affairs. The Court recognized the significance of the mass media -- radio, film, and mass market print publications -- as conduits for the dissemination of information to the mass public. The people’s ability to acquire news and information through the media of mass communications was being described as the basis of civic discourse, “public discussion” and participatory democracy. Laws that censored or limited publications for no reason other than disagreement or displeasure with their content interfered with the public’s right to make independent decisions about cultural and media consumption and to establish its own social and moral standards, and were an unconstitutional censorship of the press.

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250 On the “preferred position” theory on the Court in this era, see Feldman, supra at 330-2.
251 Thornhill v. Alabama, 310 U.S. 88, 97, 102 (1940).
253 Associated Press at 20 (1945) (“a free press is a condition of a free society”); Grosjean v. American Press, 297 U.S. 233, 243 (1936) (freedom of the press “goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests.”)
254 “Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, . . . varies . . . from one generation to another. . . . [A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system.” Hannegan v. Esquire, 327 U.S. 146, 157–58 (1946);
Thus, while recognizing the importance of the individual’s control over her public image, courts and commentators noted the critical democratic significance of the freedom to freely depict, discuss, and criticize people and public affairs. Explicitly and implicitly, the legal community acknowledged that First Amendment rights and the image torts were in tension. The response of the courts was at once to expand privacy and libel -- to enlarge the understanding of cognizable harms, of what was ‘private’ or ‘defamatory’--and at the same time to limit the scope of those forms of action through various defenses and privileges. The period immediately before and after the Second World War was a significant one in the development of First Amendment law and image rights; the tensions and ambiguities of modern expressive freedom led image law and free speech law to advance substantially at the same time.

III. The Triumph of the Image in Postwar America

Indeed, it is one of the significant and often overlooked contradictions in the history of free expression that the image torts increased their reach and scope in the era of the Warren Court’s expansion of expressive liberties and New York Times v. Sullivan. In the post-World War II era, new media technologies and a broader national audience for media images, an aggressive consumer culture, a pervasive ethos of possessive individualism, and the perceived convergence of personal image and personal identity created an environment favorable to the further development of the law of image, and what has been described as a personal image “litigation explosion.” The law of image evolved to accommodate the complex emotional, psychic, and economic dimensions of personal appearance and identity in what was being described as a culture of surfaces and an “age of images.”

1. The Other Directed Personality

In 1950, the publication of the book The Lonely Crowd marked a milestone in the history of the self and the image society. Sociologist David Riesman wrote of the rise of a new modal personality type that was...
emerging as an “influential minority” in the United States— the “other directed” personality. While the “inner-directed” person of the 19th century had been guided by an “inner gyroscope” of belief, tradition, and morals, the other-directed person looked to his “peers for response and guidance, or to their generalized reflection in the mass media.” Without a stable inner core or internal direction, he continually reinvented himself in an effort to please others, aspiring to social approval, psychological comfort, and status and material success.

Riesman’s book hit a nerve, and it sparked an outpouring of commentary and discussion. It seemed to confirm fears of a superficial society, the demise of public morals, and the triumph of the ethos of celebrity, conformity, and salesmanship. The notion of the unstable, ungrounded, infinitely malleable self, motivated by the pursuit of peer approval and material gain, was echoed in a number of other popular and academic works at the time. William Whyte wrote of the “organization man,” Erich Fromm talked about a “market oriented personality,” Vance Packard described a nation of “status seekers,” and Erving Goffman described social interaction as a series of elaborate choreographies of deception and self-interest. As historian and cultural critic Daniel Boorstin wrote in 1962, “before the age of images, it was common to think of a conventional person as one who strove for an ideal of decency or respectability.” Now one tried to “fit into the images found vividly all around him.” “The language of images is everywhere. Everywhere it has replaced the language of ideals.”

The growth of the service industries and an aggressive consumer ethos heightened the emphasis on pleasing images and first impressions. The expansion of the white-collar sector created conditions under which labor power took the form of personality rather than strength or intelligence,

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258 David Riesman, Psychological Types and National Character, 5 AM. Q. 323, 335 (Winter 1953).
260 Riesman, Psychological Types and National Character at 335.
261 Riesman.
262 See Todd Gitlin, introduction to THE LONELY CROWD (rev. ed. 2001), xi, noting the importance of the book in “providing names for what … were nothing more than hunches or diffuse sentiments. A serious book comes out, crystallizes a fear, a knack, or a hope into a big idea, a sweeping interpretation of reality that strikes a collective nerve in a large general public.”
263 See WILLIAM WHYTE, THE ORGANIZATION MAN (1956); ERICH FROMM, ESCAPE FROM FREEDOM (1941), VANCE PACKARD, THE STATUS SEEKERS (1959), GOFFMAN, supra.
264 See BOORSTIN, supra at 192.
265 Id. at 183 (“in discussing ourselves, our communities, our corporations, our nation, our leaders, ourselves, we talk in the language of images.”)
and the service occupations placed on their participants intense requirements for managed self-presentation – in Goffman’s words, that “one give a perfectly homogeneous performance at every appointed time.”

Advancement in the so-called corporate “rat race” was criticized as being little more than a series of superficial postures, bluffs, and confidence games. “The upwardly mobile organization man,” Christopher Lasch observed, “advances through the corporate ranks not by serving the organization but by convincing his associates that he has the attributes of a winner.”

The guiding theme of modern advertising was that everyone and everything had an image that could be sold to anyone if presented convincingly enough. As Boorstin noted, it was becoming a matter of faith that the right image could “elect a President or sell an automobile, a religion, a cigarette, or a suit of clothes.” Politicians’ increasing use of advertising techniques to generate popular support led Time magazine in 1960 to dub that election cycle “The Year of the Image.” “When we talk about ourselves,” Boorstin wrote, “we talk about our images.” Ads encouraged consumers to view themselves with the critical gaze of spectators, as “performer[s] under the constant scrutiny of friends and strangers,” and to engage in self-appraisal and monitoring to reassure themselves of their “capacity to captivate or impress others.”

No development was more responsible for this apparent objectification of self than the introduction and cultural penetration of television. With its ubiquitous sitcoms and reality shows, television reinforced the intertwining of performance and real life and the idea of pleasing personal images as a source of success and approval. It trained Americans, from the youngest age, to be spectators and consumers of images. It also entrenched the culture and ethos of celebrity more deeply into the fabric of American life. In the postwar era, celebrity culture flourished, and it spread beyond

266 Goffman, supra at 56.
267 An article in the Saturday Evening Post in the 1940s equated corporate success with being an “alibi artist.” This increasingly common type believed that “it was crucially important to know the right people,” to impress others, and to “put up a good front rather than having real ability.” Donald A. Laird, Are You an Alibi Artist?, SAT. EVE. POST 80 (Jan. 10, 1943).
268 LASCH, supra at 61.
269 BOORSTIN, supra at 183.
270 BOORSTIN, supra at 204 (“More important than what we think of the presidential candidate is what we think of his public image.”)
271 Boorstin
272 LASCH, supra at 9.
273 Id. at 92.
the realm of entertainment to virtually every other area of life, including politics, science, and academics. More than ever, the essence of fame and celebrity was style rather than substance. Whereas fame in earlier times had been tied to one’s achievements, modern celebrity rewarded those who projected a pleasing image and personality. Celebrities remained role models of self-presentation, and celebrity images, like other fragments of popular culture, were the inspiration and raw material from which many Americans constructed their own public identities and self-performances.

“The first art work,” Norman Mailer observed, is “the shaping of [one’s] own personality.”

2. My Image, Myself

Many of these developments should be familiar to us, with their origins in the prewar period. There were, however, significant new trends that heightened the culture’s emphasis on personal image and image management. The postwar era saw the rise of what has been described as a “therapeutic culture” -- the popularization of psychology, particularly psychotherapeutic models, and psychological themes and concepts in mass culture. One effect of this was to enshrine an ideal of psychological perfectionism in popular thought. The basic idea was that the self was “broken” and that it needed to be reconstructed to achieve proper functioning. There was a particular obsession with diagnosis and rehabilitation, driven by the faith that psychic wholeness could be achieved.

With this cultural sensitivity to the emotions and to psychic injuries, the slights and insults of everyday life were increasingly categorized as assaults to the self and the psyche that produced deep and lasting pathologies. Sociologists described an increase in the number of people who identified a “psychogenic cause” for forms of personal discomfort and

275 See generally Boorstin, supra.
276 Leo Lowenthal, The Triumph of Mass Idols, in Literature, Popular Culture, and Society 130 (1961); Lasch, supra at 59-60.
277 Lasch, supra at 91 (“To the performing self, the only reality is the identity he can construct out of the materials furnished by advertising and mass culture, themes of popular film and fiction, and fragments torn from a vast range of cultural traditions.”)
dissatisfaction.\textsuperscript{281} Not only were mental health and illness reconceptualized, but happiness was more frequently defined in terms of psychological well-being.\textsuperscript{282} As one historian has written, there was a “growing sense that social, economic, and physical problems are rooted within the psyche,” along with “rising expectations accompanying the belief that authenticity, emotional fulfillment, and self-actualization are preconditions for individual well-being.”\textsuperscript{283}

Essential to a healthy and functioning psyche, it was said, was the ability to express one’s inner self in one’s behavior and outward appearance. Self-expression was the antithesis of self-repression, which under the influence of the counterculture became associated with all things traditional, including the nuclear family, established religion, and the authority of the state. Hence the relative freedom with which people aired their thoughts, feelings, and desires before others, in talk shows, confessional writings, and in everyday conversation. With sexual and family matters no longer considered exclusively “private” and off-limits to public discussion, and emotional life freighted with new importance and meaning, we became a “tell all” society.\textsuperscript{284} By the 1970s, the ability to “express oneself,” free from the repressive constraints of traditional moralism, had come to be associated with the ideals of freedom and personal choice.\textsuperscript{285}

At some level, this self-expression ideal might appear to be a rejection of the formalities of self-presentation, self-monitoring, and self-manipulation that were central to the cultures of celebrity and consumption, and the demands of modern bureaucracies, with their call for a standardized self and managed emotions. Yet it would also in many ways place greater demands on self-presentation. The essence of expressive freedom was self-determination and the prerogative to shape one’s own public identity. It was not to abandon control over self-presentation, but rather to exert it, fully, freely and without hindrance. While the counterculture of this time may have widened the range of socially acceptable appearances and identities, the ideal of the expressive self nonetheless prized image management and the freedom to script one’s own public performance. Despite the rhetoric of personal liberation and an ethos of “let it all hang out,” there is every indication that Americans have become steadily more attentive to, and possessive of, their public images and appearances.

\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id.
\textsuperscript{284} LASCH, supra at 16-17.
America had become a “republic of choice,” to use Lawrence Friedman’s term, one where “freedom” meant “being left alone by others, not having other people’s values, ideas, or styles of life forced upon one, being free of arbitrary authority in work, family, and political life.” The prerogative “to ‘be oneself’ [and] to choose oneself” was “placed in a special and privileged position.” Freedom of choice encompassed a right to freely select one’s activities, beliefs, and very identity from a variety of competing possibilities and options. The belief in the malleability of identity became more pervasive and deeply rooted as the erosion of strong interpersonal ties and social commitments hastened the decentering and destabilization of the self. An increasingly mobile population, broad access to differing ideas and worldviews, a wider range of personal relationships, and the decline of religious authority created the conditions where personal identity could be seen as fluid and subject to endless redesign. As the cast of significant others in one’s life became increasingly dispersed and variegated, and as cultural authorities lost their credibility, confidence faded in the “traditional concept of a bounded, integral self.” The widespread discussion of an “identity crisis” besieging modern Americans beginning in the 1960s revealed the prevailing belief that personal identity was unstable, shifting, elusive, and problematic, something that must be constantly created and recreated, manipulated and revised. By the latter 20th century, the modal self, according to sociologists and critics, had become a “pastiche personality,” “a social chameleon, constantly borrowing bits and pieces of identity from whatever sources are available and constructing them as useful or desirable in a given situation.”

As the self came to be seen in terms of impressions and images – as

286 See BELLAH, et. al., supra at 23.
287 FRIEDMAN, supra at 3.
288 FRIEDMAN, supra at 96, 184.
289 Kenneth Gergen, The Self In the Age of Information, 23 WASH Q. (2000). In a society where we engage in a wide range of relationships in numerous and contrasting sites, where the composition of the workplace is in continuous flux, where markers of identity, from religious and political affiliation to sexual orientation, are seen as changeable and a matter of personal choice, we have become “protean being[s] capable of moving facilely across a sea of complex conditions.”
290 Id.
292 GERGEN, THE SATURATED SELF at 150
293 Id. at 49. In a postmodern world, “one’s identity is continuously emergent, re-formed, and re-directed as one moves through the sea of ever-changing relationships.” Id. at 139.
a collection of roles and performances, constructed and reconstructed in multiple contexts. -- attacks on one’s ability to create his desired public image were regarded as assaults to personal autonomy and psychic integrity. And in a world of television, tabloid journalism, and a profusion of pictures in the visual environment, threats to personal image were everywhere. Popular journalism, seeking to whet the dulled appetites of an increasingly jaded and desensitized public, embarked on more sensationalistic and extreme depictions of individuals that were embarrassing and highly personal. As in the past, this included portrayals not only of celebrities and public figures but ordinary people unwittingly caught in the media spotlight. The more intense the public’s hunger for images and information about people, and the more sophisticated and complex the machineries of image-making, the more profound the possibilities for the tarnishing and fatal destabilization of one’s public persona.

2. The Attack on Image and the Legal Counterattack
   Between the time William Prosser wrote his first torts treatise in the 1940s and the 1970s, the number of privacy cases “escalated...even beyond his control.” Reported cases involving defamation, invasion of privacy, or emotional distress increased threefold in the 1970s, despite increasing free speech limitations on those torts. Popular culture registered a “fascination with libel and privacy suits.” Driven by their “devotion” to personal image and “seriousness about the inner self,” in the words of libel scholar Rodney Smolla, those who felt that their reputations had been assaulted or their privacy invaded by the media appeared to be resorting increasingly to litigation.

1. Privacy
   Sensitivity to emotional and psychological injuries and a sense of

294 The conception of performing a social role had become “second nature and an integral part of our personality.” Goffman, supra at 30.
295 See Mead, supra at 60 for studies of popular sentiment against media sensationalism in the 1960s.
296 See Wilbur Schramm, Responsibility in Mass Communications 169 (1967).
297 White, supra at 175.
298 Mead, supra at 33.
300 Smolla, supra at 8.
301 Id.
302 Id.
“rights-consciousness” led to increasing concerns with personal privacy and perceived threats to privacy. In Griswold v. Connecticut (1965), the Supreme Court described privacy as a right to make decisions about intimate life free from governmental interference, and it described privacy as a value protected by the “penumbras and emanations” of various guarantees in the Bill of Rights. Despite increasing legal and constitutional protections for privacy, privacy was regarded as being deeply imperiled by a variety of modern technologies and institutions, with the most threatening the mass media and the state.

These concerns with privacy, and increasing litigation in the area of tort privacy, led William Prosser to write his famous 1960 law review article Privacy. Prosser identified four distinct interests that had been protected by the privacy tort, and on this basis divided the privacy tort into four separate torts. The first, “intrusion upon the plaintiff’s seclusion or solitude,” concerned physical invasions of private space. The other three, which we have seen, implicated public image. Prosser described a “public disclosure of embarrassing private facts” tort; a “false light” tort, which involved “publicity which places the plaintiff in a false light before the public eye”; and an “appropriation” tort, which he described as a proprietary interest “in the exclusive use of the plaintiff’s name and likeness as an aspect of his identity.”

Prosser’s article had impact. The scholarly imprimatur legitimized the privacy tort and hastened its recognition in a number of states. Prosser’s typology would lead to the establishment in some states of four distinct causes of action in tort, under the general rubric of privacy. Two of Prosser’s four branches, appropriation and false light, developed substantially beginning in the 1960s. The rise of these torts reveals much about the nature of popular concerns with identity and image in this era, and courts’ willingness to shape the law to accommodate the values and priorities of the image society.

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304 FRIEDMAN, supra at 181.
306 See generally WESTIN, supra.
307 Prosser, Privacy, at 389.
a. False light

The most significant growth in tort privacy law came in the area that Prosser called “false light” privacy. In false light cases, one claimed an “invasion of privacy” when he was publicly presented in a context that was false or misleading and offensive. The false light action differed from the “public disclosure of private facts” branch of the privacy tort, in which the material presented was both humiliating and intimate. In a false light case, the facts disclosed need not be secret or “private” at all. Damages could be awarded for the emotional distress that came from being depicted in a manner that was embarrassing, misrepresentative, or otherwise unfavorable to the subject of the representation, even if benign or flattering in the eyes of others.

The 1950s and 60s saw a marked increase in false light cases, at a rate that far outpaced the “public disclosure” privacy cases. The “false light” route to recovery was desirable for plaintiffs because it did not require that the statement be disparaging or harm one’s reputation, and compensation for emotional harms could be awarded without proof of special damages, as was the rule in certain classes of libel cases. As Prosser noted, because of its broad scope, false light had “no doubt [had] succeeded in affording a … remedy in a good many instances not covered by [defamation].” The tort’s expansive reach spurred a range of image-based claims from the serious to the “shabby and exploitative,” in the words of Harry Kalven, Jr. One false light plaintiff claimed that a photograph of his home published in a newspaper accompanied by caption referring to the home as a “bit weatherworn and unkempt” depicted him in a false light and was thus

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309 Prosser, Privacy, at 389.
311 Tom Gerety, Redefining Privacy, HARV. C.R.-C.L. L. REV. 233, 258 (1977) (noting that in most of the false light cases, no private dimension of personality was involved).
312 Prosser, supra at 398-401; Zimmerman, supra at 372 (noting the willingness of courts to grant recovery for false but “frankly complimentary portrayals”); BRUCE W. SANFORD, LIBEL AND PRIVACY, 569 (2d. ed. Supp. 1999) (“Ostensibly, the tort purports to allow recovery for misrepresentations and inaccuracies that do not rise to the level of libel or slander.”)
313 Wade, supra at 1095-1100; Zimmerman, supra at 366.
314 According to the Restatement (Second) of Torts, a publication could be offensive -- “highly objectionable” -- without being defamatory. RESTATEMENT (SECOND) OF TORTS, 652E (1977). Gary Schwartz described the focus of the tort as “false statements that are highly offensive even though nondisparaging.” Explaining and Justifying a Limited Tort of False Light Invasion of Privacy, 41 CASE W. RES. L. REV. 885, 900 (1990).
315 Prosser, Libel Per Quod, at 840.
316 Prosser, Privacy at 401.
317 Kalven, supra at 338.
an invasion of privacy. A stripper brought suit for false light when she was described in a newspaper under the stage name “Dawn Darling,” rather than her real stage name, “Charming Charmaine De Aire.” Another noted case involved plaintiffs, youths backpacking in Europe, who sued under false light when *Time* magazine described them as “disenchanted” young nomads.

To be actionable, the “falsity” of a false light representation had to be offensive to the reasonable person. Offensiveness was a vague and elusive term. In its most expansive interpretation, an offensive publication was one that made its subject uncomfortable. In *Cantrell v Forest City Publishing*, the Supreme Court upheld a jury verdict awarding damages for false light invasion of privacy for a publication that asserted that a recently widowed mother was living in poverty as a result of her husband’s death in a construction accident. The portrayal was not inaccurate and did not defame her, but it caused her distress by publicizing her and subjecting her to sympathy she did not want, making the family an “object of pity and ridicule.” In *Time, Inc. v. Hill*, the Court held that an inaccurate depiction of a family held hostage in its home by attackers could be actionable as an invasion of privacy, even though it portrayed the family in a manner that was favorable and heroic.

The false light tort was initially met with much acclaim by the courts and the legal academy. Many believed it would offer the protection for the image and the emotions that libel law had proven inadequate to provide. Edward Bloustein believed that the development of “false light,” with its protection of individual “dignity,” “may provide a valuable avenue or development for the law of defamation.” False light privacy and defamation, predicted one writer, would converge to create “a single, integrated system of protecting plaintiff’s peace of mind against acts of the defendant intended to disturb it.” At the same time, there were concerns

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321 See Prosser, *supra* at 400; Schwartz, *supra* at 887.
322 Zimmerman, *supra* at 374 (noting the “inherent vagueness of the concept.”)
324 Time, Inc. v. Hill, 385 U.S. 374 (1967). Technically, the case was not a privacy tort case; the Hills sued under the New York privacy statute. New York privacy case law had considered false depictions to be actionable as a form of “trade” publication. However, *Time, Inc. v. Hill* is regarded as a “false light” case, and its holding would henceforth be applied to false light actions. See Zimmerman, *supra* at 383-388.
325 Zimmerman, *supra* at 366.
326 Bloustein, *supra* at 993.
327 Wade, *supra* at 1022 (“the law of privacy …offers a splendid opportunity for reform of the traditional law regarding the actionability of language which harms an
with false light’s implications for freedom of speech and press; critics attacked the vague offensiveness standard, the fact that recovery could be obtained without a showing of any real injury,\textsuperscript{328} and that false light lacked the many of the common law safeguards that had balanced defamation law with freedom of speech, such as the defense of truth.\textsuperscript{329} Prosser feared that false light was “swallowing up” defamation, at the expense of freedom of speech and press.\textsuperscript{330} “If the statement is not offensive enough to the reasonable man to be defamatory,” Kalven asked in 1966, “how would it be an invasion of privacy?”\textsuperscript{331} In 1967, Time, Inc. v. Hill imported the New York Times v. Sullivan\textsuperscript{332} actual malice standard to the false light privacy domain, but the tort remained problematic to many from a First Amendment perspective. There was a movement against false light beginning in the 1980s, leading to its rejection in several states.\textsuperscript{333}

The false light tort is nonetheless very much alive.\textsuperscript{334} It persists as the expression of the deeply rooted belief that there is something objectionable and potentially injurious about being publicized in a way that clashes with one’s own self-image, and that all should have a right to “choose those portions of the individual which are to be made public” as a matter of “human dignity and independence.”\textsuperscript{335} The false light tort was necessary

\textsuperscript{328} Schwartz, \textit{supra} at 890; Gerety, \textit{supra} at 759 (noting that false light cases often presented “trivialized …and even extortionate claims for recovery in cases where little or no harm was done”); James Treece, \textit{Commercial Exploitation of Names, Likeness, and Personal Histories}, 51 \textit{TEX. L. REV.} 637, 658 (1973).

\textsuperscript{329} See Prosser, \textit{supra} at 422; Deckle McLean, \textit{False Light Privacy}, 19 \textit{COMM. & THE LAW} 63, 75 (1997).

\textsuperscript{330} \textit{Id.} at 401 (“What about the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims?”)

\textsuperscript{331} Kalven, \textit{supra} at 339. “The lack of legal profile for the tort makes any unconsented reference to the plaintiff look colorable,” he noted, observing that the greatest “achievement” of the tort may have been to breed nuisance claims. \textit{Id.} at 338.

\textsuperscript{332} Henceforth, plaintiffs in false light cases must show that the challenged statement was false and made with reckless disregard of the truth. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

\textsuperscript{333} See Zimmerman, \textit{supra} at 368-9; Note, Nathan Ray, \textit{Let there Be Light: Resisting the Growing Trend Against an Important Tort}, 84 \textit{MINN. L. REV.} 713, 723 (2000).

\textsuperscript{334} Most states recognize the false light tort; Minnesota, Colorado, and Florida do not. The Ohio Supreme Court, recognizing false light in 2007, suggested that the tort was essential to “protect the innocent” from rampant media exploitation and misrepresentation. Welling v. Weinfield, 113 Ohio St. 3d. 464, 473 (2007).

False light privacy cases increased almost four times between 1975 and 1981, and the false light tort was mentioned in cases 47 times more often in the 1990s than in the 1960s.

\textsuperscript{335} Daniel E. Wanat, \textit{Falsehoods, The Right of Privacy, and Constitutional Privilege}, 8
protection against the “distortion of self-image” caused by an inaccurate or undesirable depiction, which “impinged on a person’s individuality.”\footnote{Id. at 897.} In a false light action, “the defendant’s falsehood brings about a mismatch or conflict between the plaintiff’s actual identity and his identity in the minds of others, a conflict that itself can be offensive or disorienting,” observed Gary Schwartz.\footnote{Schwartz, supra at 898. For a counterargument, see Gerety, supra at 259-260 (noting that our selves also extend into a public world, and injuries to the public self should not be a legally cognizable assault upon our private selves.)}

By depicting a person in a way that veered sharply from her own self-image, false light statements “impugned or confounded the individual’s identity in society” and imperiled “his sense of self.”\footnote{Id. at 897.}

**b. Appropriation**

In the immediate postwar era, as we have seen, courts began to recognize the appropriation branch of the privacy tort, described in some states as a “right of publicity.”\footnote{See Nimmer, supra at 221.} As the Supreme Court defined it in *Zacchini v. Scripps-Howard Broadcasting*, the right of publicity was a broad right to “personal control over commercial exploitation of [one’s] personality.”\footnote{433 U.S. 562, 569 (1977).} It was also described as a right to control the uses of one’s “identity.”\footnote{Uhlander v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (noting the right’s protection of celebrity “identity.”)} By the 1970s, it was well-established that individuals, both celebrities and noncelebrities, had a right to control the economic value of their images and to recover lost profits from the unauthorized commercial use of their images.\footnote{Peter L. Felcher and Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People in the Media*, 88 YALE L. J. 1577, 1589 (1978); Don R. Pember and Dwight L. Teeter, Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 87 (1974).} The number of right of publicity cases brought during the 1980s tripled that of two decades earlier, and several states passed anti-appropriation statutes.\footnote{See Bartholomew, supra at 316.}

In many jurisdictions, the right of publicity was regarded as a right of property rather than a right of privacy, although some treated it as an aspect of privacy -- a dignitary right with property-like aspects.\footnote{Id. at 314, 317.} This hybrid basis of the right of publicity was an apt reflection of popular conceptions of personal image at the time. To lose control of one’s image was regarded as a dignitary affront, yet with one’s public image seen as a conscious and self-willed creation, it also represented the loss of something
tangible and material. An oft-cited justification for a right to recover the economic value of one’s image was that a person had expended labor in its creation.\textsuperscript{345} While the right of publicity had been initially construed as protection for one’s photograph, name, and likeness, it was expanded to cover a variety of personal attributes, such as one’s voice, gestures, and manner of dress. Thus it was that Jackie Kennedy Onassis persuaded a court to block look-alike images of her in advertisements; the estate of Elvis Presley convinced a court to ban Elvis impersonators, and Bette Midler recovered for an imitation of her voice in a commercial.\textsuperscript{346} Such was the logic of the image culture: any invocation or use of an individual’s looks or persona, however superficial or contrived that persona might be, constituted the exploitation of one’s “identity.”\textsuperscript{347}

Most right of publicity claims were brought by celebrities, whose images had obvious and usually quantifiable value.\textsuperscript{348} The right of publicity was not limited to celebrities, however -- a person had a right of publicity in her image if it had any conceivable commercial value. By the 1970s, noncelebrities increasingly brought lawsuits to recover the economic value of their images.\textsuperscript{349} As advertisers and publishers, in their quest for images, continued to make use of the faces, figures, and features of average people, individuals of all backgrounds came to realize the profit-generating potential of their images, however humble they might be. In 1967, a recently returned veteran whose picture had been used in a real estate ad without his consent successfully sued to recover the commercial value of his image.\textsuperscript{350} A court held that a construction worker had stated a valid claim for appropriation when footage of him installing tile was used in a television commercial.\textsuperscript{351} A woman brought suit for the value of her nude silhouette when a photographer took a picture of her when she was bathing

\textsuperscript{345} Madow, \textit{supra} at 175; \textit{see generally} Nimmer, \textit{supra} at 216; Uhlander v. Henricksen, 316 F. Supp. 1277, 1282 (a celebrity’s “identity, embodied in his name, likeness, statistics, and other characteristics, is the fruit of his labors and a kind of property.”)
\textsuperscript{347} \textit{Id.} at 314-15.
\textsuperscript{348} Felcher and Rubin, \textit{supra} at 1590.
\textsuperscript{350} Canessa, 97 N.J. Super. at 327.
naked in a stream with her child; the picture was subsequently used in an ad.\textsuperscript{352} Without embarrassment or moral hesitation, ordinary men and women asserted that they had a right to control their images that included extracting from them maximum value.

The First Amendment implications of the right of publicity were debated, and free speech limitations were placed on the right, to prevent it from impairing the circulation of “news” or information on “matters of public concern.”\textsuperscript{353} Within the legal academy, the labor theory of identity came under attack; scholars questioned whether a celebrity image truly reflected the effort of the star or the interpretive work of audiences who ascribed meaning to it.\textsuperscript{354} In the realm of popular thought, this postmodern theory of image appears to have had little impact; in a culture of choice and individualism, it was widely believed that one was solely responsible for the creation of one’s image, and that one should therefore control all uses of it.\textsuperscript{355} Unlike the image torts that protected dignitary and emotional interests, which were plagued by ongoing doubts about spurious claims, the right to commercially exploit one’s image was virtually unquestioned. If there was any certainty in privacy law, two privacy scholars noted in 1974, it was in the area of appropriation.\textsuperscript{356}

2. Infliction of Emotional Distress

By the 1960s, in most states, intentional infliction of severe emotional distress had been recognized as an independent tort.\textsuperscript{357} To

\textsuperscript{354} See generally Madow, supra.
\textsuperscript{355} As Robert Bellah has observed, Americans’ tendency to think of reputation in individualistic terms is rootted in our cultural emphasis on the autonomy, independence, and achievement of individuals. Bellah, The Meaning of Reputation in American Society, 74 CAL. L. REV. 743, 743 (1986).
\textsuperscript{356} See Pember and Teeter, supra at 87.

The recognition of the tort in a majority of the states, and the increase in claims for both intentional and negligent infliction of emotional distress can be attributed to an overall expansion of tort liability in this period. See Gary Schwartz, The Beginning and the Possible End of the Rise of American Tort Law, 26 GA L. REV. 601, 601 (1992). It was also a function of the culture’s “respect for emotional well-being” and its appreciation of the seriousness of emotional injuries, both in their own right and as sources of physical harm. See Robert Rabin, Emotional Distress in Tort Law: Themes of Constraint, 44 WAKE FOREST L. REV. 1197, 1198 (2009).
recover damages for intentional infliction of emotional distress, a plaintiff must prove that the defendant’s conduct was extreme and outrageous, that the defendant acted intentionally or recklessly, that the defendant’s conduct caused emotional distress, and that the distress was severe.  

A cause of action could occur where emotional disturbance resulted from upsetting or insulting language “including threats, false statements, and language that was insulting, humiliating, scandalous, violent, or abusive.”  

The emotional disturbance need not cause a physical reaction, but it had to be serious enough to cause physical consequences, even if they did not actually ensue.  

Emotional distress cases began to be brought against the media, part of a broader wave of anti-press litigation. In some emotional distress cases brought over upsetting publications, the alleged harm was shock or fright, as when a newspaper falsely reported a death or startling medical diagnosis of which the plaintiff was unaware.  

A number of emotional distress cases against the media involved image-based harms. As with false light privacy, the plaintiff claimed to have been injured when presented before the public in a way that was humiliating, misrepresentative, or insulting. In these cases, the emotional distress tort was often used as a “gap filler” in the law of image, a route to compensation when the requirements of privacy and defamation could not be met, or as an additional source of recovery to be combined with privacy and libel. The tort came of age when a panel of the U.S. Court of Appeals for the Second Circuit affirmed a $200,000 judgment for Reverend Jerry Falwell for intentional infliction of emotional distress over the publication of an “ad parody” in Hustler magazine imputing to him egregious sexual conduct. It was ultimately reversed by the U.S. Supreme Court in a decision that applied the actual malice requirement to the emotional distress tort when it involved public officials and public figures.

Though some of the challenged depictions could be seen as

358 RESTATEMENT (SECOND) OF TORTS, 46 (1).
360 Magruder, supra at 1058.
361 See Drechsel, Intentional Infliction, at 361; Drechsel, Negligent Infliction, at 890. See also Jonathan L. Entin, Privacy, Emotional Distress, and the Limits of Libel Law Reform, 38 MERCER L. REV. 835, 853.
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legitimately offensive, as when a newspaper falsely depicted the plaintiff as a prostitute,366 others were unlikely to be viewed by the public as either particularly thoughtless or insensitive.367 A woman sued a paper over emotional distress when it printed a photograph that made her appear stout.368 A man brought an emotional distress claim over a five second film clip that depicted him and his female co-worker holding hands on a public street.369 In one case, intentional infliction of emotional distress was alleged when a newspaper graphically described efforts to save the plaintiff’s wife’s life in an emergency room.370 One claim resulted from plaintiffs being described as litigious in a newspaper article.371 As one legal scholar observed, many of the portrayals at issue in emotional distress cases against the media were “clearly not intrusive, false, or defamatory” but were nonetheless disturbing “to the specific individuals involved.”372 The willingness of courts and juries to award damages in such cases despite First Amendment limitations indicates that the public regards such harms to one’s image and one’s feelings about one’s image as legitimate and “real.”373

3. Libel

The entrance of television into the news and entertainment fields and the rise of investigative journalism and tabloid journalism in the 1950s and 60s led to heightened media sensationalism, which attracted audiences and at the same time produced a popular backlash.374 There was an observable animus against the press and a widespread feeling that it was abusing its freedom by invading privacy and playing havoc with the reputations and images of both public and private figures.375 One

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367 Drechsel, Intentional Infliction at 356.
372 See Drechsel, Intentional Infliction, at 361.
373 See Ross v. Burns, 612 F. 2d. 271 (6th Cir. 1980); Falwell v. Flynn, 797 F. 2d. 1270 (4th Cir. 1986); Cape Publication v. Bridges, 423 So. 2d. 426 (Fla. Dist. Ct. App. 1982).
374 See e.g., John Morton, Feeling Readers’ Tabloid Appetites, AM. JOURNALISM REV., Sept. 1994;
375 ROSENBERG, supra at 247; Mead, infra at 60; Ignaz Rothenberg, Invasion of
consequence was a marked increase in libel suits and damage awards in cases against the press. Commentators observed the “vicarious satisfaction” of juries “in helping a libel case plaintiff to the pot of gold at the end of the rainbow,” particularly when the defendant was a major media outlet.

To many, libel law was not enough. Critics alleged that the complexities of libel doctrine, bogged down in the technicalities of the legal concept of “reputation,” made libel inadequate to redress the potential harms to the psyche and feelings caused by media misrepresentations. In 1962, Walter Probert argued that defamation should be reconceived a “personality tort,” one that focused less on injury to “reputation” than on harm to one’s self-image and emotions. The victims of defamatory statements suffered, even more than injury to their relationships, hurt feelings, low self-esteem, and “psychiatric concerns.” Such factors,” he wrote, “should weigh just as heavily psychologically with the decisionmaker as does the inference of likelihood of harm to reputation.” In the vein of Burton v. Crowell, courts continued to expand the definition of a defamatory publication to include representations that were not harmful to a person’s external social relations but that were nonetheless injurious to his feelings about his image. In 1964, Edward Bloustein noted an “increasing tendency” in the law of defamation to go “beyond the traditional reaches” of the protection of reputation to include the “personal humiliation and degradation” that came from unfavorable media depictions. Harry Kalven, Jr. observed that courts were “assimilat[ing] defamation cases to privacy.” The law moved even more squarely in that direction in the two decades following New York Times v. Sullivan in 1964. Sullivan, which grew out of reporting on the civil rights movement, expressed the countervailing movement of the image society -- towards greater freedom to

Privacy in the Codes of Journalists, NIEMAN REP., Oct. 1959, at 5 (“public opinion, in growing degree, angrily reacts to the invasion of privacy by journalists.”)

ROSENBERG, supra at 247 (noting the “sudden inflation” in jury awards in the 1950s.)

Id.

Walter Probert, Defamation, A Camouflage of Psychic Interests: The Beginning of A Behavioral Analysis, 15 VAND. L. REV. 1173, 1182 (1961) (“it is an acceptable psychological notion that the individual’s self-image is largely a reflection of the way he sees others reacting to him.”)

Id. at 1176.


make and circulate images, more expansive rights of speech and press. While the postwar era saw the growth of the image torts, it also witnessed a movement in favor of expressive freedom, both in formal law and in cultural attitudes more generally. The guiding faith of the counterculture had been the importance of free expression to participatory democracy, and Sullivan celebrated the virtues of “uninhibited, robust, and wide open” public discourse, including representations of authorities and public officials that were caustic and even false. \(^{383}\) After Sullivan, which constitutionalized libel law, all public figure libel plaintiffs must prove that the offending statement was actually false as a precondition to recovery, and that it was published with reckless disregard of the truth. \(^{384}\) The Supreme Court would later extend the Sullivan First Amendment requirements to libel cases involving private figure plaintiffs, who were required to show that the material was false and published at least negligently. \(^{385}\)

Contrary to what is often assumed, Sullivan and its progeny did not dissuade libel suits and large judgments against the press. \(^{386}\) Cultural attitudes may have had a stronger influence on the direction of the law than formal doctrinal changes; the image-consciousness sensibility propelled an increasing number of libel suits in the 1970s and 80s and greater jury sympathy towards libel plaintiffs, Sullivan notwithstanding. \(^{387}\) It is possible that New York Times v. Sullivan was itself responsible for an increase in libel litigation and damage awards. Public dissatisfaction with the media and the feeling that publishers were acquiring too many First Amendment freedoms may have contributed to the rise of the libel “megaverdict,” a judgment of more than one million dollars beginning in the 1970s. \(^{388}\)

As a doctrinal matter, Sullivan intensified libel law’s focus on self-image and emotional harms. The common law’s focus had been on reputational injuries; proof of reputational harm had been a precondition for recovery for emotional harm, although courts began to veer from that rule

\(^{384}\) Sullivan, 376 U.S. at 283 (1964).
\(^{386}\) Sack and Tofel at 610-11; Smolla at 4, 6, 21. But see David Logan, Libel Law in the Trenches, 87 VA. L. REV. 203 (noting that media defendants won pretrial dismissal in nearly 77 percent of the defamation cases between 1966 and 1980).
\(^{388}\) See SMOLLA, supra at 9; Sack and Tofel, supra at 610 (noting reaction against the “overprotection” of the media and “mind-boggling” damage awards in the 1980s). For a critique of excessive press freedoms and the need for restraint, see Arthur Miller, Press Versus Privacy, 16 GONZ. L. REV. 843, 849-50 (1981).
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beginning in the 1930s, as discussed. The Sullivan line of cases moved the focus of the tort further away from the protection of the individual’s reputation and more towards the falsity of the statement and the individual’s ensuing emotional distress. In Gertz v. Robert Welch (1974), in which the court added further First Amendment limitations to the defamation action, the Supreme Court held that compensatory damages in libel cases, including damages for emotional harm, could be awarded without demonstrating any injury to reputation. The plaintiff could simply show “personal humiliation and mental anguish and suffering.”

Libel law, as the other image torts, became a means to vindicate perceived slights to one’s image regardless of the actual impact on public opinion. The focus of the action, in many cases, is the “decline in self-reputation” suffered by the plaintiff. The bulk of the money paid out in damage awards in defamation suits goes to “compensate for psychic injury, rather than any objectively verifiable damage to one’s reputation.” As Randall Bezanson has noted, reputation has come to mean freedom from emotional distress caused by a false depiction, and harm occurs from “being the subject of a false representation which the subject feels strongly enough about to sue.”

CONCLUSION

The rise of tort image law and litigation was not only a function of taking images seriously. It was also a product of the legalization of image, in the sense that Americans came to regard their public images and the construction of their images as proper matters for legal intervention and supervision. This was part of a larger movement towards the penetration of the law into virtually all areas of public and especially private life. Over the 20th century, the law made its presence known in a variety of domains...

389 Bezanson, supra at 545.
390 Id. at 543 (“The common law tort was extrinsic in nature and focused principally on reputation in the community. Today the tort is largely intrinsic, with the dominant focus on falsity and the individual’s resulting emotional harm.”)
393 SMOLLA, supra at 24.
394 Bezanson, supra at 555.
395 Bezanson and Murchison, supra at 216.
previously untouched by it, including the intimate, familiar, intangible, and personal. Domestic relations, sexual life, and the problems and complexities of the emotions and the psyche came to be viewed as legal affairs; rather than traditional social institutions, the legal system was coming to be regarded as the proper outlet for a range of personal grievances. By the latter part of the century, there was a tendency to understand individual “problems and social troubles” in terms of “legal rights and obligations,” and fewer “zones” of legal immunity and barriers to litigation. One byproduct of the legalization of everyday life, as Lawrence Friedman has written, was a “general expectation of justice.” “As an aspect of twentieth century legal culture, people have come to expect justice -- in the form of compensation or reparation -- whenever they suffer harm or calamity which is not their fault.” This expectation, I have suggested, extended to the realm of image.

In this article I have made claims about the significance of personal image, broadly defined, in American society, and the role of images in social relations and views of the modern self. I have defined image as a representation of self that overlaps with reputation, yet is distinct from it. Reputation is a form of social appraisal that is generally based on interpersonal contact and perceptions accrued over time; images are transient, superficial, and impressionistic. We have been -- and still are -- concerned with our reputations, but we have also learned to see ourselves in terms of images. We are concerned not only with how we appear before the public, but perhaps even more, how we feel about our images, and whether our public images match our idealized self-images.

In the twentieth century, the image industries, an intense individualism in popular thought and culture, the perceived congruence of image and identity, and threats to personal image from the mass media led Americans to place increasing emphasis on their images and to cultivate a particular possessiveness towards them. The legal expression of this sensibility was the image torts. I have correlated image-consciousness in modern American culture with the evolution of a series of tort actions to protect the perceived right to control one’s image and to the phenomenon of the personal image lawsuit. Throughout, I have tried to stress the particularly democratic nature of American image rights. Unlike many European countries, where concerns with public image have traditionally

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397 Friedman, Republic of Choice at 15.
399 Id. at 22.
400 Lawrence Friedman, Litigation and its Discontents, 40 Mercer L. Rev. 973, 986 (1989)
been a preoccupation of the elite, Americans of all backgrounds have long expressed an interest in controlling their images, to which the law has responded.\textsuperscript{401} The average person’s image-consciousness may be a consequence, in part, of the relatively fluid class structure in this country; in a culture that has held out the possibility of social advance through self-transformation, particularly through changes in external conduct and appearance, for every person, regardless of station, personal image is seen as really worth something.

The focus of this work has been the impact of culture on formal law, but the opposite influence is also worth considering. Judicial and legislative recognition of a right to one’s image likely validated such a right, not only as a matter of law but also as a matter of popular faith. In deciding whether or not to grant recovery for libels or invasions of privacy, courts and juries envisioned a “reasonable person” with respect to image. This modal self was often construed as a highly image-conscious being: intently concerned with his public appearance and reputation and likely to be hurt, perhaps quite severely, by false or undesirable depictions. The law affirmed the image-conscious sensibility, and in this way helped shape individuals’ conceptions of personal identity and the texture of modern social relations.

The story I have told is one of steadily increasing legal protections for personal image, and at the same time, substantial resistance to that movement. The rise of the image society led to a possessiveness towards personal image and also to the liberation of images—a proliferation of images in the public sphere. Freedom of speech has been understood as \textit{the freedom to image} -- to circulate representations of individuals and ideas that are upsetting, shocking, controversial, and humiliating. The dominant narrative in the legal scholarship has been the story of the “triumph” of the First Amendment over the right to control one’s own public image.\textsuperscript{402} What is less often acknowledged, and what I have tried to account for, is how the reach and scope of the image torts have continued to expand despite—or perhaps even because of—those free speech limitations.

The digital age has initiated a new chapter in the history of personal image and the law, one that continues to register many of the themes and influences of earlier times but that is also distinct. The internet has flooded the world with images and created a social universe structured around relationships mediated by superficial impressions and contacts. Our identities are increasingly a function of the images and personae we present online. The faceless and often anonymous quality of online interaction permits us to create multiple “selves”—a Facebook self, a professional identity, and so on—leading the to further fragmentation of personal

\textsuperscript{401} See Whitman, \textit{supra} at 1166-67.
\textsuperscript{402} See note 7, \textit{supra}.
identity and social experience. As the outcry around online privacy suggests, we perceive a legal right -- a “privacy” right -- to maintain these various digital selves, however ephemeral and superficial they might be. We are not hesitant to use the web to create and disseminate images to an unprecedented mass audience, and if the steady stream of defamation and privacy lawsuits related to internet activities are any indication, we are equally unhesitant to mobilize the law when the internet’s image-making properties are turned against us.

What I have said in this article has not been intended as a critique of Americans as unnecessarily sensitive, superficial, or litigious, though this may sometimes be the case. I have not meant to trivialize or minimize the emotional and psychic harms that can be caused by humiliating public representations of individuals, particularly when they are circulated through the channels of mass communications. The point of this work is not to say whether image-consciousness is good or bad. It is merely to point out that it exists, that it has been present in our legal and social traditions for quite some time now. The values of the image society have permeated the law, and there appears to be no turning back.

Critics and legal scholars have decried many data collection and distribution practices as violations of personal privacy and the right to one’s image. For example, in 2006, there was an outcry when Facebook introduced a “news feed” service in which an individual’s Facebook activities were broadcast to all of his or her Facebook friends. This was said to be an “invasion of privacy” because members wanted to limit their personal information to a selected group of friends, and the “news feed” dispersed it to a larger, unwanted audience. Tracy Samantha Schmidt, Inside the Backlash Against Facebook, Time.com, Sept. 6, 2006. Similarly, employers’ surveillance of applicants’ Facebook pages when making hiring decisions has been attacked as an invasion of privacy; critics argue that one should be able to maintain a professional identity that is distinct from one’s informal social identities. Jeffrey Rosen, The Web Means the End of Forgetting, N.Y. TIMES, Jul. 21, 2010.

For a compendium of defamation, invasion of privacy, and emotional distress cases related to internet-based activities cases, see the database maintained by the Citizen Media Law project, http://www.citmedialaw.org/database. See also David S. Ardia, Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law, 45 HARV. C.R.-C.L. L. REV. 261 (2010).